UNITED STATES REPORTS

VOLUME 481

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1986

APRIL 6 THROUGH MAY 29, 1987

TOGETHER WITH OPINION OF INDIVIDUAL JUSTICE IN CHAMBERS

FRANK D. WAGNER

REPORTER OF DECISIONS

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1990

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

PENNZOIL CO. *v.* TEXACO INC.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 85–1798. Argued January 12, 1987—Decided April 6, 1987

Under Texas law, a judgment creditor can secure and execute a lien on a judgment debtor's property unless the debtor files a supersedeas bond in at least the amount of the judgment, interest, and costs. Appellant obtained a jury verdict of $10.53 billion in its Texas state-court suit alleging that appellee tortiously had induced a third oil company to breach a contract to sell its shares to appellant. Because it was clear that appellee would not be able to post a bond in the necessary amount, the verdict had substantial adverse effects on appellee's business and financial situation. Accordingly, even before the trial court entered judgment on the verdict, appellee filed suit in Federal District Court alleging that the Texas proceedings violated its rights under the Federal Constitution and various federal statutes. Appellee did not present these claims to the state court. Appellant argued, *inter alia*, that the Federal District Court should abstain from hearing the case under the doctrine of *Younger* v. *Harris*, 401 U. S. 37. The District Court rejected this contention, and, concluding that appellee's constitutional claims had "a very clear probability of success," issued a preliminary injunction barring any action to enforce the state court's judgment, which had now been entered. The Court of Appeals affirmed, holding, *inter alia*, that *Younger* abstention was unnecessary because the state interests at stake differed in both kind and degree from those present in the cases in which this Court has held that *Younger* applied, and because Texas had failed to

provide adequate procedures for adjudication of appellee's federal claims.

Held: The lower federal courts should have abstained under the principles of federalism enunciated in *Younger*. Pp. 10–18.

(a) *Younger* abstention helps to avoid unwarranted determination of federal constitutional questions. Here, because appellee chose not to present its constitutional claims to the Texas courts, it is impossible to determine whether the governing Texas statutes and procedural rules actually involved those claims. Moreover, the Texas Constitution contains an "open courts" provision that appears to address appellee's claims more specifically than does the Federal Constitution. Thus, it is entirely possible that the Texas courts would have resolved this case on state statutory or constitutional grounds, without reaching appellee's federal constitutional questions. Pp. 10–12.

(b) *Younger* abstention is mandated if the State's interests in the proceedings are so important that exercise of the federal judicial power would disregard the comity extended between the States and the National Government. Here, the argument that the exercise of the District Court's power did not implicate a "vital" or "important" state interest misreads this Court's precedents, which repeatedly have recognized that the States have important interests in administering certain aspects of their judicial systems. These include enforcing the orders and judgments of the States' courts. Federal injunctions in such cases would interfere with the execution of state judgments on grounds that challenge the very process by which those judgments were obtained. So long as such challenges relate to pending state proceedings, proper respect for the ability of state courts to resolve federal questions presented in state court litigation mandates that the federal court stay its hand. Pp. 12–14.

(c) The argument that *Younger* abstention was inappropriate because no Texas court could have heard appellee's constitutional claims within the limited time available fails because appellee has not satisfied its burden of showing that state procedural law barred presentation of its claims. When, as here, a litigant has made no effort in state court to present his claims, a federal court should assume that state procedures will afford an adequate remedy, in the absence of unambiguous authority to the contrary. Pp. 14–18.

784 F. 2d 1133, reversed and remanded.

POWELL, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, O'CONNOR, and SCALIA, JJ., joined. SCALIA, J., filed a concurring opinion, in which O'CONNOR, J., joined, *post*, p. 18. BRENNAN, J., filed an opinion concurring in the judgment, in which MARSHALL,

J., joined, *post*, p. 18. MARSHALL, J., filed an opinion concurring in the judgment, *post*, p. 23. BLACKMUN, J., filed an opinion concurring in the judgment, *post*, p. 27. STEVENS, J., filed an opinion concurring in the judgment, in which MARSHALL, J., joined, *post*, p. 29.

Laurence H. Tribe argued the cause for appellant. With him on the briefs were *John L. Jeffers*, *G. Irvin Terrell*, *Paul M. Bator*, *Douglas A. Poe*, *Kenneth S. Geller*, *W. James Kronzer*, *Joseph D. Jamail*, *Harry M. Reasoner*, *Simon H. Rifkind*, *Arthur L. Liman*, and *Mark A. Belnick*.

David Boies argued the cause for appellee. With him on the brief were *Thomas D. Barr*, *Francis P. Barron*, *Paul J. Curran*, *Milton J. Schubin*, *Randolph S. Sherman*, *Ira S. Sacks*, *Charles Alan Wright*, and *William F. Baxter*.*

JUSTICE POWELL delivered the opinion of the Court.

The principal issue in this case is whether a federal district court lawfully may enjoin a plaintiff who has prevailed in a trial in state court from executing the judgment in its favor pending appeal of that judgment to a state appellate court.

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*Briefs of *amici curiae* urging affirmance were filed for the State of Alabama et al. by *Robert T. Stephan*, Attorney General of Kansas, *Wayne E. Hundley*, First Deputy Attorney General, *Charles A. Graddick*, Attorney General of Alabama, *Charles M. Oberly III*, Attorney General of Delaware, *Jim Smith*, Attorney General of Florida, *William J. Guste, Jr.*, Attorney General of Louisiana, *Hubert H. Humphrey III*, Attorney General of Minnesota, *William L. Webster*, Attorney General of Missouri, *Ted Schwinden*, Attorney General of Montana, *Toney Anaya*, Attorney General of New Mexico, *Robert Abrams*, Attorney General of New York, *Michael Turpen*, Attorney General of Oklahoma, *Kenneth O. Eikenberry*, Attorney General of Washington, and *Archie G. McClintock*, Attorney General of Wyoming; for the State of Alaska by *Harold M. Brown*, Attorney General, and *Ronald W. Lorensen*, Deputy Attorney General; for the American Federation of Labor and Congress of Industrial Organizations et al. by *John W. McKendree*, *Laurence Gold*, and *George Kaufmann;* for the Business Council of New York State, Inc., et al. by *John Carter Rice*, *Gregg R. Potvin*, and *John W. McKendree;* and for the National Association for the Advancement of Colored People by *David S. Tatel*, *Allen R. Snyder*, *Walter A. Smith, Jr.*, and *Grover G. Hankins*.

I

Getty Oil Co. and appellant Pennzoil Co. negotiated an agreement under which Pennzoil was to purchase about three-sevenths of Getty's outstanding shares for $110 a share. Appellee Texaco Inc. eventually purchased the shares for $128 a share. On February 8, 1984, Pennzoil filed a complaint against Texaco in the Harris County District Court, a state court located in Houston, Texas, the site of Pennzoil's corporate headquarters. The complaint alleged that Texaco tortiously had induced Getty to breach a contract to sell its shares to Pennzoil; Pennzoil sought actual damages of $7.53 billion and punitive damages in the same amount. On November 19, 1985, a jury returned a verdict in favor of Pennzoil, finding actual damages of $7.53 billion and punitive damages of $3 billion. The parties anticipated that the judgment, including prejudgment interest, would exceed $11 billion.

Although the parties disagree about the details, it was clear that the expected judgment would give Pennzoil significant rights under Texas law. By recording an abstract of a judgment in the real property records of any of the 254 counties in Texas, a judgment creditor can secure a lien on all of a judgment debtor's real property located in that county. See Tex. Prop. Code Ann. §§ 52.001–52.006 (1984). If a judgment creditor wishes to have the judgment enforced by state officials so that it can take possession of any of the debtor's assets, it may secure a writ of execution from the clerk of the court that issued the judgment. See Tex. Rule Civ. Proc. 627.[1] Rule 627 provides that such a writ usually can be obtained "after the expiration of thirty days from the time a

[1] A writ of execution is "[a]ddressed to any sheriff or constable in the State of Texas [and] enables the official to levy on a debtor's nonexempt real and personal property, within the official's county." 5 W. Dorsaneo, Texas Litigation Guide § 132.02[1], p. 132–7 (1986).

final judgment is signed."[2] But the judgment debtor "may suspend the execution of the judgment by filing a good and sufficient bond to be approved by the clerk." Rule 364(a). See Rule 368.[3] For a money judgment, "the amount of the bond . . . shall be at least the amount of the judgment, interest, and costs." Rule 364(b).[4]

Even before the trial court entered judgment, the jury's verdict cast a serious cloud on Texaco's financial situation. The amount of the bond required by Rule 364(b) would have been more than $13 billion. It is clear that Texaco would not have been able to post such a bond. Accordingly, "the business and financial community concluded that Pennzoil would be able, under the lien and bond provisions of Texas law, to commence enforcement of any judgment entered on the verdict before Texaco's appeals had been resolved." App. to Juris. Statement A87 (District Court's Supplemental Finding of Fact 40, Jan. 10, 1986). The effects on Texaco were substantial: the price of its stock dropped markedly; it had difficulty obtaining credit; the rating of its bonds was lowered; and its trade creditors refused to sell it crude oil on customary terms. *Id.*, at A90–A98 (District Court's Supplemental Findings of Fact 49–70).

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[2] If the judgment debtor files a motion for new trial, the clerk cannot issue a writ of execution until the motion for new trial is denied or overruled by operation of law. Rule 627. If a trial judge does not act on a motion for new trial, it is deemed to be overruled by operation of law 75 days after the judgment originally was signed. Rule 329b(c).

[3] Filing a supersedeas bond would not prevent Pennzoil from securing judgment liens against Texaco's real property. See Tex. Prop. Code Ann. § 52.002 (1984) (directing clerk to issue an abstract of the judgment "[o]n application of a person in whose favor a judgment is rendered"; no exception for superseded judgments); *Thulemeyer* v. *Jones*, 37 Tex. 560, 571 (1872). The bond's only effect would be to prevent Pennzoil from executing the judgment and obtaining Texaco's property.

[4] A judgment debtor also may suspend execution by filing "cash or other negotiable obligation of the government of the United States of America or any agency thereof, or with leave of court, . . . a negotiable obligation of any bank . . . in the amount fixed for the surety bond." Rule 14c.

Texaco did not argue to the trial court that the judgment, or execution of the judgment, conflicted with federal law. Rather, on December 10, 1985—before the Texas court entered judgment[5]—Texaco filed this action in the United States District Court for the Southern District of New York in White Plains, New York, the site of Texaco's corporate headquarters. Texaco alleged that the Texas proceedings violated rights secured to Texaco by the Constitution and various federal statutes.[6] It asked the District Court to enjoin Pennzoil from taking any action to enforce the judgment. Pennzoil's response, and basic position, was that the District Court could not hear the case. First, it argued that the Anti-Injunction Act, 28 U. S. C. § 2283, barred issuance of an injunction. It further contended that the court should ab-

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[5] Later the same day, the Texas court entered a judgment against Texaco for $11,120,976,110.83, including prejudgment interest of approximately $600 million. During the pendency of the federal action—that now concerns only the validity of the Texas judgment enforcement procedures—the state-court action on the merits has proceeded. Texaco filed a motion for new trial, that was deemed denied by operation of law under Rule 329b(c). See n. 2, *supra*. Subsequently, Texaco appealed the judgment to the Texas Court of Appeals, challenging the judgment on a variety of state and federal grounds. The Texas Court of Appeals rendered a decision on that appeal on February 12, 1987. That decision affirmed the trial court's judgment in most respects, but remitted $2 billion of the punitive damages award, reducing the principal of the judgment to $8.53 billion.

So far as we know, Texaco has never presented to the Texas courts the challenges it makes in this case against the bond and lien provisions under federal law. Three days after it filed its federal lawsuit, Texaco did ask the Texas trial court informally for a hearing concerning possible modification of the judgment under Texas law. That request eventually was denied, because it failed to comply with Texas procedural rules.

[6] Texaco claimed that the judgment itself conflicted with the Full Faith and Credit Clause, the Commerce Clause, the Williams Act, and the Securities Exchange Act of 1934. Texaco also argued that application of the Texas bond and lien provisions would violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Federal Constitution.

stain under the doctrine of *Younger* v. *Harris*, 401 U. S. 37 (1971). Third, it argued that the suit was in effect an appeal from the Texas trial court and that the District Court had no jurisdiction under the principles of *Rooker* v. *Fidelity Trust Co.*, 263 U. S. 413 (1923), and *District of Columbia Court of Appeals* v. *Feldman*, 460 U. S. 462 (1983).

The District Court rejected all of these arguments. 626 F. Supp. 250 (1986). It found the Anti-Injunction Act inapplicable because Texaco's complaint rested on 42 U. S. C. § 1983. See *Mitchum* v. *Foster*, 407 U. S. 225 (1972) (holding that § 1983 falls within the exceptions to the Anti-Injunction Act). It found *Younger* abstention unwarranted because it did not believe issuance of an injunction would "interfere with a state official's pursuit of a fundamental state interest." 626 F. Supp., at 260. As to the *Rooker-Feldman* doctrine, the court noted only that it was not "attempting to sit as a final or intermediate appellate state court as to the merits of the Texas action. . . . Our only intention is to assure Texaco its constitutional right to raise claims that we view as having a good chance of success." *Id.*, at 254 (citation and footnote omitted).

The District Court justified its decision to grant injunctive relief by evaluating the prospects of Texaco's succeeding in its appeal in the Texas state courts. It considered the merits of the various challenges Texaco had made before the Texas Court of Appeals and concluded that these challenges "present generally fair grounds for litigation." *Ibid.* It then evaluated the constitutionality of the Texas lien and bond requirements by applying the test articulated in *Mathews* v. *Eldridge*, 424 U. S. 319 (1976). It concluded that application of the lien and bond provisions effectively would deny Texaco a right to appeal. It thought that the private interests and the State's interests favored protecting Texaco's right to appeal. Relying on its view of the merits of the state-court appeal, the court found the risk of erroneous deprivation "quite severe." 626 F. Supp., at 257. Finally,

it viewed the administrative burden on the State as "slight." *Ibid.* In light of these factors, the District Court concluded that Texaco's constitutional claims had "a very clear probability of success." *Id.*, at 258. Accordingly, the court issued a preliminary injunction.[7]

On appeal, the Court of Appeals for the Second Circuit affirmed. 784 F. 2d 1133 (1986). It first addressed the *Rooker-Feldman* doctrine and rejected the portion of the District Court's opinion that evaluated the merits of the state-court judgment. It held, however, that the doctrine did not completely bar the District Court's jurisdiction. It concluded that the due process and equal protection claims, not presented by Texaco to the Texas courts, were within the District Court's jurisdiction because they were not "'inextricably intertwined'" with the state-court action. *Id.*, at 1144 (quoting *District of Columbia Court of Appeals* v. *Feldman*, *supra*, at 483, n. 16).

Next, the court considered whether Texaco had stated a claim under § 1983. The question was whether Texaco's complaint sought to redress action taken "under color of" state law, 42 U. S. C. § 1983. The court noted that "Pennz-

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[7] The operative portion of the injunction provided:

"[I]t is hereby . . . ORDERED that defendant, Pennzoil Company, its employees, agents, attorneys and servants, and all persons in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, are jointly and severally enjoined and restrained, pending the trial and ultimate disposition of this action, or the further order of this Court, from taking any action of any kind whatsoever to enforce or attempt to enforce the Judgment entered in an action in the District Court for the 151st Judicial District of Texas entitled *Pennzoil Company* v. *Texaco Inc.*, including, without limitation, attempting to obtain or file any judgment lien or abstract of judgment related to said Judgment (pursuant to Tex. Prop. Code Ann. §§ 52.001, *et seq.*, or otherwise), or initiating or commencing steps to execute on said Judgment . . . ." App. to Juris. Statement A52–A53.

The order also required Texaco to post a bond of $1 billion to secure the grant of the preliminary injunction. *Id.*, at A53.

oil would have to act jointly with state agents by calling on state officials to attach and seize Texaco's assets." 784 F. 2d, at 1145. Relying on its reading of *Lugar* v. *Edmondson Oil Co.*, 457 U. S. 922 (1982), the court concluded that the enjoined action would have been taken under color of state law, and thus that Texaco had stated a claim under § 1983. 784 F. 2d, at 1145–1147. Because § 1983 is an exception to the Anti-Injunction Act, see *Mitchum* v. *Foster*, *supra*, the court also found that the Anti-Injunction Act did not prevent the District Court from granting the relief sought by Texaco.

Finally, the court held that abstention was unnecessary. First, it addressed *Pullman* abstention, see *Railroad Comm'n of Texas* v. *Pullman Co.*, 312 U. S. 496 (1941). It rejected that ground of abstention, holding that "the mere possibility that the Texas courts would find Rule 364 [concerning the supersedeas bond requirements] unconstitutional as applied does not call for *Pullman* abstention." 784 F. 2d, at 1149. Next, it rejected *Younger* abstention. It thought that "[t]he state interests at stake in this proceeding differ in both kind and degree from those present in the six cases in which the Supreme Court held that *Younger* applied." *Ibid.* Moreover, it thought that Texas had failed to "provide adequate procedures for adjudication of Texaco's federal claims." *Id.*, at 1150. Turning to the merits, it agreed with the District Court that Texaco had established a likelihood of success on its constitutional claims and that the balance of hardships favored Texaco. Accordingly, it affirmed the grant of injunctive relief.[8]

Pennzoil filed a jurisdictional statement in this Court. We noted probable jurisdiction under 28 U. S. C. § 1254(2). 477 U. S. 903 (1986). We reverse.

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[8] Although the District Court had entered only a preliminary injunction, the Court of Appeals concluded that the record was sufficiently undisputed to justify entering a permanent injunction. Thus, it did not remand the case to the District Court for further proceedings on the merits. 784 F. 2d 1133, 1156 (1986).

II

The courts below should have abstained under the principles of federalism enunciated in *Younger* v. *Harris*, 401 U. S. 37 (1971). Both the District Court and the Court of Appeals failed to recognize the significant interests harmed by their unprecedented intrusion into the Texas judicial system. Similarly, neither of those courts applied the appropriate standard in determining whether adequate relief was available in the Texas courts.

A

The first ground for the *Younger* decision was "the basic doctrine of equity jurisprudence that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law." *Id.*, at 43. The Court also offered a second explanation for its decision:

> "This underlying reason . . . is reinforced by an even more vital consideration, the notion of 'comity,' that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. . . . The concept does not mean blind deference to 'States' Rights' any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." *Id.*, at 44.

This concern mandates application of *Younger* abstention not only when the pending state proceedings are criminal, but also when certain civil proceedings are pending, if the State's interests in the proceeding are so important that exercise of the federal judicial power would disregard the comity between the States and the National Government. *E. g.*, *Huffman* v. *Pursue, Ltd.*, 420 U. S. 592, 603–605 (1975).

Another important reason for abstention is to avoid unwarranted determination of federal constitutional questions. When federal courts interpret state statutes in a way that raises federal constitutional questions, "a constitutional determination is predicated on a reading of the statute that is not binding on state courts and may be discredited at any time—thus essentially rendering the federal-court decision advisory and the litigation underlying it meaningless." *Moore* v. *Sims*, 442 U. S. 415, 428 (1979). See *Trainor* v. *Hernandez*, 431 U. S. 434, 445 (1977).[9] This concern has special significance in this case. Because Texaco chose not to present to the Texas courts the constitutional claims asserted in this case, it is impossible to be certain that the governing Texas statutes and procedural rules actually raise these claims. Moreover, the Texas Constitution contains an

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[9] In some cases, the probability that any federal adjudication would be effectively advisory is so great that this concern alone is sufficient to justify abstention, even if there are no pending state proceedings in which the question could be raised. See *Railroad Comm'n of Texas* v. *Pullman Co.*, 312 U. S. 496 (1941). Because appellant has not argued in this Court that *Pullman* abstention is proper, we decline to address JUSTICE BLACKMUN's conclusion that *Pullman* abstention is the appropriate disposition of this case. We merely note that considerations similar to those that mandate *Pullman* abstention are relevant to a court's decision whether to abstain under *Younger*. Cf. *Moore* v. *Sims*, 442 U. S. 415, 428 (1979). The various types of abstention are not rigid pigeonholes into which federal courts must try to fit cases. Rather, they reflect a complex of considerations designed to soften the tensions inherent in a system that contemplates parallel judicial processes.

"open courts" provision, Art. I, § 13,[10] that appears to address Texaco's claims more specifically than the Due Process Clause of the Fourteenth Amendment. Thus, when this case was filed in federal court, it was entirely possible that the Texas courts would have resolved this case on state statutory or constitutional grounds, without reaching the federal constitutional questions Texaco raises in this case.[11] As we have noted, *Younger* abstention in situations like this "offers the opportunity for narrowing constructions that might obviate the constitutional problem and intelligently mediate federal constitutional concerns and state interests." *Moore* v. *Sims*, *supra*, at 429–430.

Texaco's principal argument against *Younger* abstention is that exercise of the District Court's power did not implicate a "vital" or "important" state interest. Brief for Appellee 24–32. This argument reflects a misreading of our precedents. This Court repeatedly has recognized that the States have important interests in administering certain aspects of

[10] Article I, § 13, provides: "All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law."

[11] See *LeCroy* v. *Hanlon*, 713 S. W. 2d 335, 340–341 (Tex. 1986) ("The open courts provision must have been intended to provide rights in addition to those in the due process provision or the former would be surplusage. Furthermore, the due process provision's general guarantees contrast with the open courts provision's specific guarantee of a right of access to the courts"); *id.*, at 338 (noting that the Texas Supreme Court "has been in the mainstream" of the movement of "state courts . . . to look to their own constitutions to protect individual rights") (citing, *inter alia*, Brennan, State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489 (1977)). See also *Dillingham* v. *Putnam*, 109 Tex. 1, 14 S. W. 303 (1890) (invalidating a previous supersedeas bond statute because it effectively prevented certain parties from securing an appeal).

The relevance of the open courts provision to this case is not limited to its indication that the Texas courts may well accept Texaco's challenge on state constitutional grounds, obviating the need for consideration of the federal constitutional questions. As we explain *infra*, at 15–16, this provision also undercuts Texaco's claim that no Texas court was open to hear its constitutional claims.

their judicial systems. *E. g.*, *Trainor* v. *Hernandez*, *supra*, at 441; *Middlesex County Ethics Comm.* v. *Garden State Bar Assn.*, 457 U. S. 423, 432 (1982). In *Juidice* v. *Vail*, 430 U. S. 327 (1977), we held that a federal court should have abstained from adjudicating a challenge to a State's contempt process. The Court's reasoning in that case informs our decision today:

> "A State's interest in the contempt process, through which it vindicates the regular operation of its judicial system, so long as that system itself affords the opportunity to pursue federal claims within it, is surely an important interest. Perhaps it is not quite as important as is the State's interest in the enforcement of its criminal laws, *Younger*, *supra*, or even its interest in the maintenance of a quasi-criminal proceeding such as was involved in *Huffman*, *supra*. But we think it is of sufficiently great import to require application of the principles of those cases." *Id.*, at 335.

Our comments on why the contempt power was sufficiently important to justify abstention also are illuminating: "Contempt in these cases, serves, of course, to vindicate and preserve the private interests of competing litigants, . . . but its purpose is by no means spent upon purely private concerns. It stands in aid of the authority of the judicial system, so that its orders and judgments are not rendered nugatory." *Id.*, at 336, n. 12 (citations omitted).

The reasoning of *Juidice* controls here. That case rests on the importance to the States of enforcing the orders and judgments of their courts. There is little difference between the State's interest in forcing persons to transfer property in response to a court's judgment and in forcing persons to respond to the court's process on pain of contempt. Both *Juidice* and this case involve challenges to the processes by which the State compels compliance with the judgments of its

courts.[12] Not only would federal injunctions in such cases interfere with the execution of state judgments, but they would do so on grounds that challenge the very process by which those judgments were obtained. So long as those challenges relate to pending state proceedings, proper respect for the ability of state courts to resolve federal questions presented in state-court litigation mandates that the federal court stay its hand.[13]

B

Texaco also argues that *Younger* abstention was inappropriate because no Texas court could have heard Texaco's constitutional claims within the limited time available to Texaco. But the burden on this point rests on the federal plaintiff to show "that state procedural law barred presentation of [its] claims." *Moore* v. *Sims*, 442 U. S., at 432. See *Younger* v. *Harris*, 401 U. S., at 45 ("'The accused should first set up and rely upon his defense in the state courts, even though this involves a challenge of the validity of some statute, unless it plainly appears that this course would not afford

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[12] Thus, contrary to JUSTICE STEVENS' suggestion, the State of Texas has an interest in this proceeding "that goes beyond its interest as adjudicator of wholly private disputes." *Post*, at 30, n. 2. Our opinion does not hold that *Younger* abstention is always appropriate whenever a civil proceeding is pending in a state court. Rather, as in *Juidice*, we rely on the State's interest in protecting "the authority of the judicial system, so that its orders and judgments are not rendered nugatory," 430 U. S., at 336, n. 12 (citations omitted).

[13] Texaco also suggests that abstention is unwarranted because of the absence of a state judicial proceeding with respect to which the Federal District Court should have abstained. Texaco argues that "the Texas judiciary plays no role" in execution of judgments. Brief for Appellee 25. We reject this assertion. There is at least one pending judicial proceeding in the state courts; the lawsuit out of which Texaco's constitutional claims arose is now pending before a Texas Court of Appeals in Houston, Texas. As we explain *infra* this page and 15–17, we are not convinced that Texaco could not have secured judicial relief in those proceedings.

adequate protection'") (quoting *Fenner* v. *Boykin*, 271 U. S. 240, 244 (1926)).

Moreover, denigrations of the procedural protections afforded by Texas law hardly come from Texaco with good grace, as it apparently made no effort under Texas law to secure the relief sought in this case. Cf. *Middlesex County Ethics Comm.* v. *Garden State Bar Assn.*, *supra*, at 435 (rejecting on similar grounds an assertion about the inhospitability of state procedures to federal claims). Article VI of the United States Constitution declares that "the Judges in every State shall be bound" by the Federal Constitution, laws, and treaties. We cannot assume that state judges will interpret ambiguities in state procedural law to bar presentation of federal claims. Cf. *Ohio Civil Rights Comm'n* v. *Dayton Christian Schools, Inc.*, 477 U. S. 619, 629 (1986) (assuming that a state administrative commission would "construe its own statutory mandate in the light of federal constitutional principles"). Accordingly, when a litigant has not attempted to present his federal claims in related state-court proceedings, a federal court should assume that state procedures will afford an adequate remedy, in the absence of unambiguous authority to the contrary.

The "open courts" provision of the Texas Constitution, Article I, § 13, see nn. 10, 11, *supra*, has considerable relevance here. This provision has appeared in each of Texas' six Constitutions, dating back to the Constitution of the Republic of Texas in 1836. See *LeCroy* v. *Hanlon*, 713 S. W. 2d 335, 339, and n. 4 (Tex. 1986). According to the Texas Supreme Court, the provision "guarantees all litigants . . . the right to their day in court." *Id.*, at 341. "The common thread of [the Texas Supreme Court's] decisions construing the open courts provision is that the legislature has no power to make a remedy by due course of law contingent on an impossible condition." *Nelson* v. *Krusen*, 678 S. W. 2d 918, 921 (Tex. 1984). In light of this demonstrable and long-standing commitment of the Texas Supreme Court to provide

access to the state courts, we are reluctant to conclude that Texas courts would have construed state procedural rules to deny Texaco an effective opportunity to raise its constitutional claims.

Against this background, Texaco's submission that the Texas courts were incapable of hearing its constitutional claims is plainly insufficient. Both of the courts below found that the Texas trial court had the power to consider constitutional challenges to the enforcement provisions.[14] The Texas Attorney General filed a brief in the proceedings below, arguing that such relief was available in the Texas courts. See Brief for Intervenor-Appellant in Nos. 86–7046, 86–7052 (CA2), pp. 32–33. Texaco has cited no statute or case clearly indicating that Texas courts lack such power.[15] Accordingly, Texaco has failed to meet its burden on this point.[16]

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[14] See 784 F. 2d, at 1139; App. to Juris. Statement A104 (District Court's Supplemental Finding of Fact 94).

[15] Texaco relies on the language of Texas Rule of Civil Procedure 364, that lists no exceptions to the requirement that an appellant file a bond to suspend execution of a money judgment pending appeal. Texaco also relies on cases noting that Rule 364 requires appellants to post bond in the full amount of the judgment. *E. g., Kennesaw Life & Accident Insurance Co.* v. *Streetman*, 644 S. W. 2d 915, 916–917 (Tex. App. 1983) (writ refused n.r.e.). But these cases do not involve claims that the requirements of Rule 364 violate other statutes or the Federal Constitution. Thus, they have "absolutely nothing to say with respect to" Texaco's claims that Rule 364 violates the Federal Constitution. See *Huffman* v. *Pursue, Ltd.*, 420 U. S. 592, 610 (1975).

Also, the language of Rule 364 suggests that a trial court could suspend the bond requirement if it concluded that application of the bond requirement would violate the Federal Constitution. Rule 364(a) provides: "*Unless otherwise provided by law* or these rules, an appellant may suspend the execution of the judgment by a good and sufficient bond" (emphasis added). Texaco has failed to demonstrate that Texas courts would not construe the phrase "otherwise provided by law" to encompass claims made under the Federal Constitution. We cannot assume that Texas courts would refuse to construe the Rule, or to apply their inherent powers, to provide a forum to adjudicate substantial federal constitutional claims.

[16] We recognize that the trial court no longer has jurisdiction over the case. See Tex. Rule Civ. Proc. 329b(e); n. 5, *supra*. Thus, relief is no

In sum, the lower courts should have deferred on principles of comity to the pending state proceedings. They erred in accepting Texaco's assertions as to the inadequacies of Texas procedure to provide effective relief. It is true that this case presents an unusual fact situation, never before addressed by the Texas courts, and that Texaco urgently desired prompt relief. But we cannot say that those courts, when this suit was filed, would have been any less inclined than a federal court to address and decide the federal constitutional claims. Because Texaco apparently did not give the Texas courts an opportunity to adjudicate its constitutional claims, and because Texaco cannot demonstrate that the Texas courts were not then open to adjudicate its claims, there is no basis for concluding that the Texas law and procedures were so deficient that *Younger* abstention is inappropriate. Accordingly, we conclude that the District Court should have abstained.

III

In this opinion, we have addressed the situation that existed on the morning of December 10, 1985, when this case was filed in the United States District Court for the Southern District of New York. We recognize that much has transpired in the Texas courts since then. Later that day, the Texas trial court entered judgment. See n. 5, *supra*. On February 12 of this year, the Texas Court of Appeals substantially affirmed the judgment. See *ibid.* We are not unmindful of the unique importance to Texaco of having its challenges to that judgment authoritatively considered and resolved. We of course express no opinion on the merits of

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longer available to Texaco from the trial court. But Texaco cannot escape *Younger* abstention by failing to assert its state remedies in a timely manner. See *Huffman* v. *Pursue, Ltd.*, *supra*, at 607–609. In any event, the Texas Supreme Court and the Texas Court of Appeals arguably have the authority to suspend the supersedeas requirement to protect their appellate jurisdiction. See *Pace* v. *McEwen*, 604 S. W. 2d 231, 233 (Tex. Civ. App. 1980) (no writ) (suggesting that a Texas Court of Appeals has such authority).

those challenges. Similarly, we express no opinion on the claims Texaco has raised in this case against the Texas bond and lien provisions, nor on the possibility that Texaco now could raise these claims in the Texas courts, see n. 16, *supra*. Today we decide only that it was inappropriate for the District Court to entertain these claims. If, and when, the Texas courts render a final decision on any federal issue presented by this litigation, review may be sought in this Court in the customary manner.

IV

The judgment of the Court of Appeals is reversed. The case is remanded to the District Court with instructions to vacate its order and dismiss the complaint. The judgment of this Court shall issue forthwith.

It is so ordered.

JUSTICE SCALIA, with whom JUSTICE O'CONNOR joins, concurring.

I join the opinion of the Court. I write separately only to indicate that I do not believe that the so-called *Rooker-Feldman* doctrine deprives the Court of jurisdiction to decide Texaco's challenge to the constitutionality of the Texas stay and lien provisions. In resolving that challenge, the Court need not decide any issue either actually litigated in the Texas courts or inextricably intertwined with issues so litigated. Under these circumstances, I see no jurisdictional bar to the Court's decision in this case.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, concurring in the judgment.

Texaco's claim that the Texas bond and lien provisions violate the Fourteenth Amendment is without merit. While Texaco cannot, consistent with due process and equal protection, be arbitrarily denied the right to a meaningful opportunity to be heard on appeal, this right can be adequately vindicated even if Texaco were forced to file for bankruptcy.

I believe that the Court should have confronted the merits of this case. I wholeheartedly concur with JUSTICE STEVENS' conclusion that a creditor's invocation of a State's postjudgment collection procedures constitutes action under color of state law within the meaning of 42 U. S. C. § 1983. *Post*, at 30, n. 1.

I also agree with his conclusion that the District Court was not required to abstain under the principles enunciated in *Younger* v. *Harris*, 401 U. S. 37 (1971). *Post*, at 30, n. 2. I adhere to my view that *Younger* is, in general, inapplicable to civil proceedings, especially when a plaintiff brings a § 1983 action alleging violation of federal constitutional rights. See *Huffman* v. *Pursue, Ltd.*, 420 U. S. 592, 613 (1975) (BRENNAN, J., dissenting) (*Younger* held "that federal courts should not interfere with pending state *criminal* proceedings, except under extraordinary circumstances" (emphasis in original)); *Juidice* v. *Vail*, 430 U. S. 327, 342 (1977) (BRENNAN, J., dissenting) ("In congressional contemplation, the pendency of state civil proceedings was to be wholly irrelevant. 'The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights'") (quoting *Mitchum* v. *Foster*, 407 U. S. 225, 242 (1972)).

The State's interest in this case is negligible. The State of Texas—not a party in this appeal—expressly represented to the Court of Appeals that it "has no interest in the outcome of the state-court adjudication underlying this cause," except in its fair adjudication. 784 F. 2d 1133, 1150 (CA2 1986); Brief for Intervenor-Appellant in Nos. 86–7046, 86–7052, p. 2. The Court identifies the State's interest as enforcing "'the authority of the judicial system, so that its orders and judgments are not rendered nugatory.'" *Ante*, at 13 (quoting *Juidice* v. *Vail*, *supra*, at 336, n. 12). Yet, the District Court found that "Pennzoil has publicly admitted that Texaco's assets are sufficient to satisfy the Judgment even without liens or a bond." App. to Juris. Statement A116

(supplemental findings of fact by District Court). "Thus Pennzoil's interest in protecting the full amount of its judgment during the appellate process is reasonably secured by the substantial excess of Texaco's net worth over the amount of Pennzoil's judgment." 784 F. 2d, at 1155.

Indeed, the interest in enforcing the bond and lien requirement is privately held by Pennzoil, not by the State of Texas. The Court of Appeals correctly stated that this "is a suit between two private parties stemming from the defendant's alleged tortious interference with the plaintiff's contract with a third private party." 784 F. 2d, at 1150. Pennzoil was free to waive the bond and lien requirements under Texas law, without asking the State of Texas for permission. See *Yandell* v. *Tarrant State Bank*, 538 S. W. 2d 684, 687 (Tex. Civ. App. 1976); *United Benefit Fire Insurance Co.* v. *Metropolitan Plumbing Co.*, 363 S. W. 2d 843, 847 (Tex. Civ. App. 1962). "Since Texas law directs state officials to do Pennzoil's bidding in executing the judgment, it is the decision of Pennzoil, not that of the state judiciary, to utilize state agents to undertake the collection process, and the state officials can act only upon Pennzoil's unilateral determination." 784 F. 2d, at 1147. The State's decision to grant private parties unilateral power to invoke, or not invoke, the State's bond and lien provisions demonstrates that the State has no independent interest in the enforcement of those provisions.

Texaco filed this § 1983 suit claiming only violations of *federal* statutory and constitutional law. In enacting § 1983, Congress "created a specific and unique remedy, enforceable in a federal court of equity, that could be frustrated if the federal court were not empowered to enjoin a state court proceeding." *Mitchum* v. *Foster*, *supra*, at 237. Today the Court holds that this § 1983 suit should be filed instead in Texas courts, offering to Texaco the unsolicited advice to bring its claims under the "open courts" provision of the Texas Constitution. This "'blind deference to "States' Rights"'" hardly shows "'sensitivity to the legitimate inter-

ests of *both* State *and National* Governments.'" *Ante*, at 10 (quoting *Younger* v. *Harris*, *supra*, at 44) (emphasis added).*

Furthermore, I reject Pennzoil's contention that *District of Columbia Court of Appeals* v. *Feldman*, 460 U. S. 462 (1983), and *Rooker* v. *Fidelity Trust Co.*, 263 U. S. 413 (1923), forbid collateral review in this instance. In *Rooker* and *Feldman*, the Court held that lower federal courts lack jurisdiction to engage in appellate review of state-court determinations. In this case, however, Texaco filed the § 1983 action only to protect its federal constitutional right to a meaningful opportunity for appellate review, not to challenge the merits of the Texas suit. Texaco's federal action seeking a stay of judgment pending appeal is therefore an action "'separable from and collateral to'" the merits of the state-court judgment. *National Socialist Party* v. *Skokie*, 432 U. S. 43, 44 (1977) (quoting *Cohen* v. *Beneficial Loan Corp.* 337 U. S. 541, 546 (1949)).

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*Although the Court's opinion is based on a rather diffuse rationale, I read the opinion as narrowly limited by the unique factual circumstances of the case. The Court is responding to "an unusual fact situation, never before addressed by the Texas courts," *ante*, at 17, or by this Court. The Court bases its holding on several interdependent considerations. First, the Court acknowledges that today's extension of the *Younger* doctrine applies only "when certain civil proceedings are pending, if the State's interests in the proceeding are so important that exercise of the federal judicial power would disregard the comity between the States and the National Government." *Ante*, at 11. Second, the Court emphasizes that in this instance "it is impossible to be certain that the governing Texas statutes and procedural rules actually raise [Texaco's] claims," and that the Texas Constitution contains an "open courts" provision "that appears to address Texaco's claims more specifically" than the Federal Constitution. *Ante*, at 11–12. Third, the Court heavily relies on the State's particular interest in enforcing bond and lien requirements to prevent state-court judgments, which have been already pronounced, from being rendered "nugatory." *Ante*, at 13. The unique and extraordinary circumstances of this case should limit its influence in determining the outer limits of the *Younger* doctrine.

While I agree with JUSTICE STEVENS that Texaco's claim is "plainly without merit," *post*, at 29, my reasons for so concluding are different. Since Texas has created an appeal as of right from the trial court's judgment, it cannot infringe on this right to appeal in a manner inconsistent with due process or equal protection. See *Evitts* v. *Lucey*, 469 U. S. 387, 393 (1985). While "a cost requirement, valid on its face, may offend due process because it operates to foreclose a particular party's opportunity to be heard," *Boddie* v. *Connecticut*, 401 U. S. 371, 380 (1971), in this case, Texaco clearly could exercise its right to appeal in order to protect its corporate interests even if it were forced to file for bankruptcy under Chapter 11. 11 U. S. C. § 362. Texaco, or its successor in interest, could go forward with the appeal, and if it did prevail on its appeal in Texas courts, the bankruptcy proceedings could be terminated. § 1112. Texaco simply fails to show how the initiation of corporate reorganization activities would prevent it from obtaining meaningful appellate review.

I reach this conclusion on the narrow facts before us. Thus, this case is different from the more troublesome situation where a particular corporate litigant has such special attributes as an organization that a trustee in bankruptcy, in its stead, could not effectively advance the organization's interests on an appeal. Moreover, the underlying issues in this case—arising out of a commercial contract dispute—do not involve fundamental constitutional rights. See, *e. g.*, *Henry* v. *First National Bank of Clarksdale*, 595 F. 2d 291, 299–300 (CA5 1979) (bankruptcy of NAACP would make state appellate review of First Amendment claims "so difficult" to obtain that federal injunction justified), cert. denied *sub nom. Claiborne Hardware Co.* v. *Henry*, 444 U. S. 1074 (1980).

Given the particular facts of this case, I would reverse the judgment of the Court of Appeals and remand the case with instructions to dismiss the complaint.

JUSTICE MARSHALL, concurring in the judgment.

While I join in the Court's disposition of this case, I cannot join in its reasoning. The Court addresses the propriety of abstention under the doctrine of *Younger* v. *Harris*, 401 U. S. 37 (1971). There is no occasion to decide if abstention would have been proper unless the District Court had jurisdiction. Were I to reach the merits I would reverse for the reasons stated in the concurring opinions of JUSTICES BRENNAN and STEVENS, in which I join. But I can find no basis for the District Court's unwarranted assumption of jurisdiction over the subject matter of this lawsuit, and upon that ground alone I would reverse the decision below.

Appellee Texaco, a Delaware corporation with its principal place of business in New York, was sued in the Texas state courts by appellant Pennzoil, a Delaware corporation with its principal place of business in Texas. Because there was no diversity of citizenship, Texaco could not remove Pennzoil's action to Federal District Court, and the action was tried in the state court. After the adverse jury verdict, Texaco filed a complaint in the United States District Court for the Southern District of New York seeking to enjoin the execution of the Texas judgment, which was not yet final at the time the federal complaint was filed. Texaco filed its federal action without seeking relief from the bonding requirement in any Texas court. The Federal District Court in which Texaco filed sits in another State, more than halfway across the country from the locale in which the case was tried, in which the appeal would take place, and in which the judgment would be executed. Even if Texaco had possessed the power of removal on diversity grounds, it still would not have been entitled to proceed in the forum to which it brought its request for post-trial relief.

Counsel for Texaco suggested at oral argument that venue was proper in the Southern District of New York because Texaco's corporate headquarters is located in that District, and it was there that a Chapter 11 petition would be filed

should Texaco decide to take that step as a result of the adverse Texas judgment. Tr. of Oral Arg. 28, 29–30. Venue in actions not solely predicated upon diversity of citizenship is governed by 28 U. S. C. § 1391(b), which provides that venue is proper "only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law." As we have said, "it is absolutely clear that Congress did not intend to provide for venue at the residence of the plaintiff or to give that party an unfettered choice among a host of different districts." *Leroy* v. *Great Western United Corp.*, 443 U. S. 173, 185 (1979). Texaco has offered no authority in support of its novel proposition that the situs of plaintiff's potential Chapter 11 petition is a factor to be considered in the determination of venue in a federal civil rights action.

The District Court found that venue was proper in the Southern District of New York on the ground that "[t]he claims arose in this District." 626 F. Supp. 250, 252 (1986). The District Court did not explain how Texaco's claims, which challenged a Texas state-law bonding provision limiting Texaco's opportunity to stay execution of a Texas judgment against property located in Texas, could be said to arise in the Southern District of New York. Pennzoil's failure to move to dismiss for lack of venue, and to contest the District Court's venue determination in the Court of Appeals, precludes any disposition on that ground here, but the clear absence of venue in the District Court further strengthens the odor of impermissible forum shopping which pervades this case.

But no matter in which federal court Texaco's complaint was filed, jurisdiction to hear the case would have been lacking. It is a well-settled principle that federal appellate review of judgments rendered by state courts can only occur in this Court, on appeal or by writ of certiorari. See *District of Columbia Court of Appeals* v. *Feldman*, 460 U. S. 462, 482 (1983); *Rooker* v. *Fidelity Trust Co.*, 263 U. S. 413, 416

(1923); see also *Atlantic Coast Line R. Co.* v. *Locomotive Engineers*, 398 U. S. 281, 296 (1970). Both the Court of Appeals and appellee here recognize the relevance of this rule. See 784 F. 2d 1133, 1141–1142 (CA2 1986); Brief for Appellee 44. It is said, however, that this principle applies only to review of the substance of state judgments, and that the federal action now before us involved solely a constitutional challenge to procedures for enforcement of the state judgment, totally apart from the merits of the state-court action itself. *Id.*, at 45–46; 784 F. 2d, at 1144–1145. In the circumstances of the present case I find this asserted distinction completely unconvincing.

As we have said, "[i]f the constitutional claims presented to a United States district court are inextricably intertwined" with the merits of a judgment rendered in state court, "then the district court is in essence being called upon to review the state-court decision. This the district court may not do." *District of Columbia Court of Appeals* v. *Feldman*, *supra*, at 483–484, n. 16. While the question whether a federal constitutional challenge is inextricably intertwined with the merits of a state-court judgment may sometimes be difficult to answer, it is apparent, as a first step, that the federal claim is inextricably intertwined with the state-court judgment if the federal claim succeeds only to the extent that the state court wrongly decided the issues before it. Where federal relief can only be predicated upon a conviction that the state court was wrong, it is difficult to conceive the federal proceeding as, in substance, anything other than a prohibited appeal of the state-court judgment.

The opinions of the District Court and the Court of Appeals in this case illustrate this problem. As the Court of Appeals noted, "[m]any of the judge's conclusions [in the District Court] with respect to the merits of the Texas action, despite his lip-service disclaimer, constitute what amounts to an impermissible appellate review of issues that have already been adjudicated by the Texas trial court." 784 F. 2d, at 1143.

In determining whether Texaco had alleged the prospect of irreparable harm sufficient to support the issuance of an injunction, the Court of Appeals, in turn, found itself addressing the merits of Texaco's appeal in the Texas state courts:

> "Only if Texaco's appeal were patently frivolous would we be justified in holding that any threatened harm to it from effective denial of its right of appeal could be labelled inconsequential. The issue before us, therefore, is not whether Texaco should have prevailed on the merits in the Texas action but whether its Texas appeal presents non-frivolous issues for resolution." *Id.*, at 1153.

But the courts below, by asking whether Texaco was frivolous in asserting that the trial court erred or whether Texaco should have prevailed in the Texas trial court, undertook a review of the merits of judgments rendered by a state court. As the Court of Appeals recognized, the issuance of an injunction depended upon the finding that Texaco had significant claims to assert in its state-court appeal. Because determination of Texaco's claim for an injunction *necessarily* involved some review of the merits of its state appeal, Texaco's constitutional claims were inextricably intertwined with the merits of the Texas judgment, and thus the District Court lacked jurisdiction over Texaco's complaint in the first instance.

As Justice Holmes observed: "Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment." *Northern Securities Co.* v. *United States*, 193 U. S. 197, 400 (1904) (dissenting opinion). The history of this lawsuit demonstrates that great sums of money, like great cases, make bad law. Because a wealthy business corporation has been ordered to pay damages in an amount hitherto unprecedented, and finds its continued survival in doubt, we and the

courts below have been presented with arguments of great sophistication and complexity, all concerned with a case which under clearly applicable principles should never have been in the federal courts at all. The Court's opinion, which addresses in sweeping terms one of these questions, is the result of what Justice Holmes called "a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend." *Id.*, at 401.

Had the sole proprietor of a small Texas grocery sued in the Southern District of New York to enjoin the enforcement of the Texas bonding provision in order to facilitate appeal in Texas from a state-court judgment in the amount of $10,000, the result below would surely have been different, even if inability to meet the bonding requirement and to stay execution of judgment meant dissolution of the business and displacement of employees. The principles which would have governed with $10,000 at stake should also govern when thousands have become billions. That is the essence of equal justice under law. I concur in the judgment of the Court.

JUSTICE BLACKMUN, concurring in the judgment.

I, too, conclude, as do JUSTICE BRENNAN and JUSTICE STEVENS, that a creditor's invocation of a State's post-judgment collection procedures constitutes action under color of state law within the reach of 42 U. S. C. § 1983. See *Lugar* v. *Edmondson Oil Co.*, 457 U. S. 922 (1982), where I joined the majority opinion. I also agree with them that the District Court was correct in not abstaining under the principles enunciated in *Younger* v. *Harris*, 401 U. S. 37 (1971). See *ante*, at 19–21 and n. (BRENNAN, J., concurring in judgment); *post*, at 30, n. 2 (STEVENS, J., concurring in judgment). In my view, to rule otherwise would expand the *Younger* doctrine to an unprecedented extent and would effectively allow the invocation of *Younger* abstention whenever any state proceeding is ongoing, no matter how attenuated the State's interests are in that proceeding and no

matter what abuses the federal plaintiff might be sustaining. See *Trainor* v. *Hernandez*, 431 U. S. 434, 448 (1977) (concurring opinion). In addition, for the reasons given by JUSTICE BRENNAN, see *ante*, at 21 (concurring in judgment), I believe that federal collateral review is not barred by the principles announced in *District of Columbia Court of Appeals* v. *Feldman*, 460 U. S. 462 (1983), and *Rooker* v. *Fidelity Trust Co.*, 263 U. S. 413 (1923).

I, however, refrain from joining the opinion of either JUSTICE BRENNAN or JUSTICE STEVENS when they would hold, as JUSTICE STEVENS does, that no due process violation in this context is possible or, as JUSTICE BRENNAN does, that room must be left for some constitutional violations in post-judgment procedures, but only when the organization seeking the appeal has "special attributes as an organization" or when the underlying dispute involves "fundamental constitutional rights." *Ante*, at 22 (BRENNAN, J., concurring in judgment). Those conclusions, I fear, suffer somewhat from contortions due to attempts to show that a due process violation *in this case* is not possible or is hardly possible.* Thus, I would not disturb the Court of Appeals' conclusion that Texaco's due process claim raised a "fair groun[d] for litigation" because "an inflexible requirement for impressment of a lien and denial of a stay of execution unless a supersedeas bond in the full amount of the judgment is posted can in some circumstances be irrational, unnecessary, and self-defeating,

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*In particular, the suggestion that Texaco could enter a Chapter 11 proceeding, pursue its appeal, and then reemerge from this proceeding to continue "business as usual" strikes me as somewhat at odds with the reality of the corporate reorganization that might occur in bankruptcy, especially on the facts of this case. Moreover, while there has been some discussion about a "special law" for multibillion-dollar corporations, I would have thought that our proper concern is with constitutional violations, not with our sympathy, or lack thereof, for a particular litigant. It might also be useful to point out an obvious, but overlooked, fact: Pennzoil, too, is not a corner grocery store.

amounting to a confiscation of the judgment debtor's property without due process." 784 F. 2d 1133, 1154 (CA2 1986).

I conclude instead that this case presents an example of the "narrowly limited 'special circumstances,'" *Zwickler* v. *Koota*, 389 U. S. 241, 248 (1967), quoting *Propper* v. *Clark*, 337 U. S. 472, 492 (1949), where the District Court should have abstained under the principles announced in *Railroad Comm'n of Texas* v. *Pullman Co.*, 312 U. S. 496 (1941). Although the *Pullman* issue was not pressed before us (but see Brief for Appellant 42–43), it was considered by the Court of Appeals and rejected. 784 F. 2d, at 1148–1149. In particular, the court determined that "there [was] nothing unclear or uncertain about the Texas lien and bond provisions" and that abstention was not demanded when there was only a "mere possibility" that the Texas courts would find such provisions unconstitutional. *Ibid.* I disagree. If the extensive briefing by the parties on the numerous Texas statutes and constitutional provisions at issue here suggests anything, see Brief for Appellant 23–32 and accompanying notes; Brief for Appellee 32–44 and accompanying notes; Reply Brief for Appellant 3–11 and accompanying notes, it is that on the unique facts of *this* case "unsettled questions of state law must be resolved before a substantial federal constitutional question can be decided," *Hawaii Housing Authority* v. *Midkiff*, 467 U. S. 229, 236 (1984), because "the state courts may interpret [the] challenged state statute[s] so as to eliminate, or at least to alter materially, the constitutional question presented." *Ohio Bureau of Employment Services* v. *Hodory*, 431 U. S. 471, 477 (1977); see also *ante*, at 11–12, and n. 11. The possibility of such a state-law resolution of this dispute seems to me still to exist.

JUSTICE STEVENS, with whom JUSTICE MARSHALL joins, concurring in the judgment.

In my opinion Texaco's claim that the Texas judgment lien and supersedeas bond provisions violate the Fourteenth Amendment is plainly without merit. The injunction against

enforcement of those provisions must therefore be dissolved. I rest my analysis on this ground because I cannot agree with the grounds upon which the Court disposes of the case. In my view the District Court and the Court of Appeals were correct to hold that a creditor's invocation of a State's post-judgment collection procedures constitutes action "under color of" state law within the meaning of 42 U. S. C. § 1983,[1] and that there is no basis for abstention in this case.[2]

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[1] See *Lugar* v. *Edmondson Oil Co.*, 457 U. S. 922 (1982), and cases cited at 932–933. In *Lugar*, the Court explained that "a private party's joint participation with state officials in the seizure of disputed property is sufficient to characterize that party as a 'state actor' for purposes of the Fourteenth Amendment." *Id.*, at 941. We reached this conclusion based on the rule that a person "may fairly be said to be a state actor . . . because he is a state official, because he acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State." *Id.*, at 937. This reasoning allows no distinction between a litigant's prejudgment and postjudgment involvement.

[2] As the Court of Appeals explained: "The state interests at stake in this proceeding differ in both kind and degree" from the cases in which the Court has held *Younger* abstention appropriate. 784 F. 2d 1133, 1149 (CA2 1986). As JUSTICE BRENNAN's analysis points out, *ante*, at 19–21, the issue whether "proceedings implicate important state interests" is quite distinct from the question whether there is an ongoing proceeding. See *Middlesex County Ethics Comm.* v. *Garden State Bar Assn.*, 457 U. S. 423, 432 (1982). Although we have often wrestled with deciding whether a particular exercise of state enforcement power implicates an "important state interest," see *Younger* v. *Harris*, 401 U. S. 37 (1971) (criminal statute); *Huffman* v. *Pursue, Ltd.*, 420 U. S. 592 (1975) (obscenity regulation); *Juidice* v. *Vail*, 430 U. S. 327 (1977) (contempt proceedings); *Trainor* v. *Hernandez*, 431 U. S. 434 (1977) (welfare fraud action); *Moore* v. *Sims*, 442 U. S. 415 (1979) (child abuse regulation); *Middlesex County Ethics Comm.*, *supra*, (bar disciplinary proceedings); *Ohio Civil Rights Comm.* v. *Dayton Christian Schools, Inc.*, 477 U. S. 619 (1986) (antidiscrimination laws), we have invariably required that the State have a *substantive* interest in the ongoing proceeding, an interest that goes beyond its interest as adjudicator of wholly private disputes. By abandoning this critical limitation, the Court cuts the *Younger* doctrine adrift from its original doctrinal moorings which dealt with the States' interest in enforcing their criminal laws, and the federal courts' longstanding reluctance to interfere with such proceedings. See *Huffman*, *supra*, at 604.

The Court of Appeals upheld the injunction based on its conclusion that Texaco has a substantial chance of success on the merits of its federal constitutional challenge to the Texas postjudgment procedures. The court properly held[3] (and Texaco does not contest this conclusion) that Texaco's claims arising out of the jury trial itself could not support the injunction, because those claims are appealable only through the Texas courts. See 784 F. 2d 1133, 1143–1145 (CA2 1986). Thus, the injunction must stand or fall on Texaco's argument that the Federal Constitution requires Texas to grant a stay of the judgment pending appeal without requiring a bond.

Pennzoil argues that Texaco's challenge fails because States are under no constitutional duty to provide for civil appeals. Our precedents do tend to support this proposition.[4]

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[3] For the reasons stated by JUSTICE BRENNAN, *ante*, at 21, and JUSTICE SCALIA, *ante*, at 18, I do not believe that the doctrine described in *District of Columbia Court of Appeals* v. *Feldman*, 460 U. S. 462 (1983), and *Rooker* v. *Fidelity Trust Co.*, 263 U. S. 413 (1923), bars the federal courts from considering Texaco's claims. See generally *Feldman*, *supra*, at 490 (STEVENS, J., dissenting).

[4] In *Marine Cooks and Stewards* v. *Arnold*, 348 U. S. 37, 42–43 (1954), the Court stated:

"Here the petitioner has had its day in court. The dismissal has cut off only a statutory right of review after a full trial by judge and jury.

. . . . . .

"While a statutory review is important and must be exercised without discrimination, such a review is not a requirement of due process. *District of Columbia* v. *Clawans*, 300 U. S. 617, 627; *Ohio* v. *Akron Park District*, 281 U. S. 74, 80; *Reetz* v. *Michigan*, 188 U. S. 505, 508; *McKane* v. *Durston*, 153 U. S. 684, 687–688."

Similarly, the Court has explained:

"An appeal from a judgment of conviction is not a matter of absolute right, independently of constitutional or statutory provisions allowing such appeal. A review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, was not at common law and is not now a necessary element of due process of law. It is wholly within the discretion of the State to allow or not to allow such a review. A citation of authorities upon the point is unnecessary." *McKane* v. *Durston*, 153 U. S. 684, 687 (1894).

See also *Ortwein* v. *Schwab*, 410 U. S. 656, 660 (1973) *(per curiam)*.

But it is unnecessary to rely on that broad argument in order to reject Texaco's constitutional attack. Texaco does not claim that the Texas procedures make it *impossible* for it to take an appeal in this case. The Texas rules do not require a bond or security in order to take an appeal; the rules require a bond or security only in order to obtain a stay of the judgment pending appeal. To be sure, neither of Texaco's options under the rules is very attractive. On the one hand, if Texaco does not obtain a stay, Pennzoil can immediately begin executing on its judgment, even while Texaco's appeal is pending. On the other hand, for Texaco to post the security required for a stay would, as the District Court found, seriously impair Texaco's ability to conduct its normal business operations and could even force the corporation into bankruptcy.[5] Neither of these consequences, however, would necessarily prevent Texaco, or its successor in interest—possibly a bankruptcy trustee—from going forward with the appeal.[6] It is certainly wrong to denigrate the seriousness of these effects. But it is similarly wrong to approach this case as one involving an absolute deprivation of the opportunity to appeal.

Thus, the real question is whether Texas is constitutionally required to suspend the execution of money judgments without the posting of a bond or security. The proposition that stays of execution are available as a matter of federal constitutional right was rejected long ago. In *Louisville & Nashville R. Co.* v. *Stewart*, 241 U. S. 261 (1916), Justice Holmes

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[5] The Court of Appeals stated that Texaco has "a liquidation value of $22 billion and a net worth of about $23 billion." 784 F. 2d, at 1152; see also *id.*, at 1155; Brief for Appellee 6. As the Court points out, the judgment against Texaco, including prejudgment interest, totaled approximately $11 billion. *Ante*, at 4.

[6] Of course, if Texaco were forced to file for bankruptcy under Chapter 11, the claims of judgment creditors would be automatically stayed. See 11 U. S. C. § 362. If Texaco were then to prevail on its appeal from the Texas judgment, the bankruptcy court could dismiss the reorganization proceeding. 11 U. S. C. § 1112.

explained for a unanimous Court that a State is not bound, by reason of providing an appellate process, also "to provide for a suspension of the judgment" during the appeal. *Id.*, at 263. It is clear that the States' strong concern in protecting appellees' right to recover on judgments amply justifies the bond or security requirements that are currently so prevalent across the country.[7]

Texaco nonetheless argues that once Texas has decided to grant stays of executions to some appellants, it cannot deny stays to others on arbitrary grounds. See *Lindsey* v. *Normet*, 405 U. S. 56, 77 (1972) (opportunity for appeal "cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause"). In this case, Texaco claims that denial of a stay pending a bond or posting of security was arbitrary because (1) it is impossible for it to secure a bond for the amount required by Rule 364 of the Texas Rules of Civil Procedure; (2) posting security under Rule 14c would have a devastating effect on its financial position; and (3) neither a bond nor security is really necessary because Texaco's vast resources provide ample assurance that Pennzoil will be able to collect its judgment in full after the appellate process has run its course. See Brief for Appellee 11.

I agree that it might be wise policy for Texas to grant an exception from the strict application of its rules when an appellant can satisfy these three factors. But the refusal to do so is certainly not arbitrary in the constitutional sense. A provision for such exemptions would require the State to establish rules and to hold individualized hearings whenever relevant allegations are made. Texas surely has a rational

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[7] See R. Lynn, Appellate Litigation 385 (1985) (collecting provisions on requirements to obtain stay of execution pending appeal). A judgment creditor's interest in the judgment can be adversely affected during the appelate process in a variety of ways. For example, the debtor may purposely dissipate its assets, or subsequent secured creditors may attach the debtor's property.

basis for adopting a consistent rule refusing to stay the execution of money judgments pending appeal, unless a sufficient bond or security is posted.[8]

Admittedly, Texaco makes a sympathetic argument, particularly when it describes the potential adverse impact of this litigation on its employees, its suppliers, and the community at large. But the exceptional magnitude of those consequences is the product of the vast size of Texaco itself—it is described as the fifth largest corporation in the United States—and the immensity of the transaction that gave rise to this unusual litigation. The character of harm that may flow from this litigation is not different from that suffered by other defeated litigants, their families, their employees, and their customers. The price of evenhanded administration of justice is especially high in some cases, but our duty to deal equally with the rich and the poor does not admit of a special exemption for multibillion-dollar corporations or transactions.

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[8] "In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78 [(1911)]." *Dandridge* v. *Williams*, 397 U. S. 471, 485 (1970).

Cf. *Johnson* v. *Louisiana*, 406 U. S. 356, 364 (1972) (State acted rationally in attempting to "'facilitate, expedite, and reduce expense in the administration of criminal justice'" (citation omitted)).

Syllabus

WEST *v.* CONRAIL ET AL.

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

No. 85–1804. Argued February 25, 1987—Decided April 6, 1987

In enacting the federal labor relations statutes, Congress did not include a statute of limitations expressly applicable to claims against unions for breach of their duty of fair representation. Thus, in *DelCostello* v. *Teamsters*, 462 U. S. 151, this Court "borrowed" from § 10(b) of the National Labor Relations Act its 6-month statute of limitations period for use in "hybrid" suits that combine unfair labor practice claims with duty of fair representation claims. Section 10(b) provides that no complaint may issue based on an unfair labor practice that occurred more than six months prior to the filing of a charge and the service of a copy thereof on the person against whom the charge is made. Although petitioner's complaint in his hybrid suit against respondents—his employer, his union, and his union representative—was filed less than six months after the § 10(b) statute of limitations began to run, the District Court granted summary judgment to respondents because the summonses and complaints were not mailed nor service acknowledgments made until after the 6-month period. The Court of Appeals affirmed, holding that, under *DelCostello*, § 10(b) requires in hybrid suits that both the filing and service of the complaint be made within the 6-month period.

Held: The action was timely commenced because the complaint was filed within the 6-month period. When the underlying cause of action is based on federal law and the absence of an express federal statute of limitations makes it necessary for a federal court to borrow a limitations period from another statute, the action is not barred if it has been "commenced" within the borrowed time period by the filing of a complaint with the court in compliance with Rule 3 of the Federal Rules of Civil Procedure. The mere act of borrowing a statute of limitations to apply to a federal cause of action does not require that that statute's service provisions also be adopted, since Rules 4(a) and (j) of the Federal Rules of Civil Procedure normally require the plaintiff to serve the summons and a copy of the complaint within 120 days. When borrowing a statute of limitations for a federal cause of action, this Court borrows no more than is necessary to fill a gap left by Congress. *DelCostello* simply borrowed § 10(b)'s limitations period, and did not substitute § 10(b) for the Federal Rules. Pp. 38–40.

780 F. 2d 361, reversed and remanded.

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

Paul Alan Levy argued the cause for petitioner. With him on the briefs were *Alan B. Morrison* and *Arthur L. Fox II*.

Laurence Gold argued the cause for respondents. With him on the brief for respondents Brotherhood of Maintenance of Way Employes, Local 2906, et al. were *William J. Birney*, *William G. Mahoney*, and *David Silberman*. *W. Cary Edwards*, Attorney General of New Jersey, *James J. Ciancia*, Assistant Attorney General, and *Jeffrey Burstein*, Deputy Attorney General, filed a brief for respondent New Jersey Transit Corp. *Lucy S. L. Amerman*, *John B. Rossi, Jr.*, and *Bruce B. Wilson* filed a brief for respondent Consolidated Rail Corporation.

JUSTICE STEVENS delivered the opinion of the Court.

Petitioner Thomas West brought a "hybrid" suit against his employer, his union, and his union representative under the Railway Labor Act. He alleged that the employer had breached the collective-bargaining agreement and that the union and its representative had breached their duty of fair representation. The parties agree, for the purpose of our review of the Court of Appeals' judgment, that petitioner's cause of action accrued on March 25, 1984, the date petitioner learned of the alleged breach of the union's duty of fair representation. His complaint was filed on September 24, 1984, less than six months after the statute of limitations began to run. The summonses and complaints were mailed to respondents on October 10, 1984. Respondents acknowledged service of the complaint on dates ranging from October 12, 1984, through November 1, 1984. Thus, both the date on which the complaints were mailed and the date when the first acknowledgment of service was made were more than six months after the statute began to run.

Because service was not effected within the 6-month period prescribed in § 10(b) of the National Labor Relations Act,[1]

[1] Section 10(b) of the National Labor Relations Act, 49 Stat. 453, as amended, 29 U. S. C. § 160(b), provides:

the District Court granted respondents' motion for summary judgment. App. to Pet. for Cert. 15a. The Court of Appeals for the Third Circuit affirmed. 780 F. 2d 361 (1986). We granted certiorari, 478 U. S. 1004 (1986), because the Third Circuit's decision is at odds with a decision of the Court of Appeals for the Sixth Circuit, *Macon* v. *ITT Continental Baking Co.*, 779 F. 2d 1166 (1985), cert. pending, No. 85–1400.

Congress did not enact a federal statute of limitations that is expressly applicable to federal duty of fair representation claims. In *DelCostello* v. *Teamsters*, 462 U. S. 151 (1983), we filled that gap in federal law by deciding that the 6-month period prescribed in § 10(b) should be applied to hybrid claims under § 301 of the Labor Management Relations Act, 1947, 29

"Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That *no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made*, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of title 28." (Emphasis added.)

U. S. C. § 185.[2] Section 10(b) authorizes the National Labor Relations Board (NLRB) to issue a complaint when a charging party asserts that an employer or a union has engaged in an unfair labor practice. The statute does not impose any time limit on the issuance of such a complaint, but it does provide that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made . . . ." See n. 1, *supra*.[3] Given our holding in *DelCostello*, the Court of Appeals read this statutory language to require in hybrid suits of this kind that both the filing and the service of the complaint be made within the 6-month period of limitations. We did not, however, intend that result.

The only gap in federal law that we intended to fill in *DelCostello* was the appropriate limitations period. We did not intend to replace any part of the Federal Rules of Civil Procedure with any part of § 10(b) of the National Labor Relations Act. Rule 3 of the Federal Rules of Civil Procedure provides that a civil action is commenced by filing a complaint with the court, and Rule 4 governs the procedure for effecting service and the period within which service must be made. The clerk of the district court must "forthwith issue a

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[2] Although *DelCostello* and the Sixth Circuit's opinion in *Macon* v. *ITT Continental Baking Co.*, 779 F. 2d 1166 (1985), both involved a hybrid action brought under § 301 of the Labor Management Relations Act, 1947, 29 U. S. C. § 185, rather than a hybrid action brought under the Railway Labor Act, the parties agree that § 10(b) provides the applicable statute of limitations in this case. We find no reason to distinguish the Labor Management Relations Act, 1947, from the Railway Labor Act for the limited purpose of determining whether service must be effected within the limitations period.

[3] Under § 10(b), the employee's charge is timely if a copy is served personally or mailed within the limitations period. See 29 CFR § 102.113(a) (1986). The complaint in an unfair labor practice proceeding is filed by the General Counsel after he or she has investigated the employee's charge. See 29 U. S. C. § 153(d).

summons and deliver the summons to the plaintiff or the plaintiff's attorney, who shall be responsible for prompt service of the summons and a copy of the complaint." Fed. Rule Civ. Proc. 4(a). Service must normally be made within 120 days. See Rule 4(j). Although we have not expressly so held before, we now hold that when the underlying cause of action is based on federal law and the absence of an express federal statute of limitations makes it necessary to borrow a limitations period from another statute, the action is not barred if it has been "commenced" in compliance with Rule 3 within the borrowed period.[4] See 4 C. Wright & A. Miller, Federal Practice and Procedure § 1056 (1969). We decline respondents' invitation to require that when a federal court borrows a statute of limitations to apply to a federal cause of action, the statute of limitation's provisions for service must necessarily also be followed, even when the borrowed statute is to be applied in a context somewhat different from the one in which those procedural rules originated.[5]

Inevitably our resolution of cases or controversies requires us to close interstices in federal law from time to time, but when it is necessary for us to borrow a statute of limitations for a federal cause of action, we borrow no more than neces-

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[4] When the underlying cause of action is based on state law, and federal jurisdiction is based on diversity of citizenship, state law not only provides the appropriate period of limitations but also determines whether service must be effected within that period. *Walker* v. *Armco Steel Corp.*, 446 U. S. 740, 752–753 (1980). Respect for the State's substantive decision that actual service is a component of the policies underlying the statute of limitations requires that the service rule in a diversity suit "be considered part and parcel of the statute of limitations." *Id.*, at 752 (footnote omitted). This requirement, naturally, does not apply to federal-question cases. Indeed, *Walker* expressly declined to "address the role of Rule 3 as a tolling provision for a statute of limitations, whether set by federal law or borrowed from state law, if the cause of action is based on federal law." *Id.*, at 751, n. 11.

[5] Our holding that the statute of limitations was tolled when the complaint was filed eliminates the potential difficulty of determining the actual dates on which service of the complaint was made on the various defendants.

sary.[6] Here, because of the availability of Rule 3, there is no lacuna as to whether the action was brought within the borrowed limitations period.[7]

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.

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[6] In some cases, the determination of the length of the borrowed period may require examination of the tolling rules that are followed in the jurisdiction from which the statute of limitations is borrowed. See, *e. g.*, *Wilson* v. *Garcia*, 471 U. S. 261, 269 (1985) (suggesting that length of limitations period and "closely related questions of tolling and application" are governed by state law in action brought under 42 U. S. C. § 1983); *Chardon* v. *Fumero Soto*, 462 U. S. 650, 661–662 (1983) (§ 1988 requires borrowing Puerto Rico's statute of limitations and its rule that, after tolling ends, the statute of limitations begins to run anew in § 1983 action); *Board of Regents, Univ. of N. Y.* v. *Tomanio*, 446 U. S. 478, 484–485 (1980) (§ 1988 requires federal courts in § 1983 actions to refer to state statute of limitations and coordinate tolling rules unless state law is inconsistent with federal law). The governing principle is that we borrow only what is necessary to fill the gap left by Congress.

[7] Respondents also argue that § 10(b)'s service requirement must be adopted in order to assure that defendants receive prompt notice of suit against them. The requirement of timely service in Rule 4(j) satisfies this need without recourse to the service requirement of § 10(b). While it is possible that a defendant will not be served with the complaint until 10 months after the cause of action accrues, this result is not inconsistent with our adoption of a 6-month statute of limitations for breach of contract/breach of duty of fair representation claims. See *DelCostello* v. *Teamsters*, 462 U. S. 151 (1983). The administrative scheme for unfair labor practices only requires that the *charge* be filed and served within six months of the date the cause of action accrued. The defendant does not receive the complaint, if any, until the General Counsel has investigated the charge and decided to proceed. Under both the administrative procedure for unfair labor practices and the judicial procedure for hybrid claims, the statute of limitations and the tolling provisions extinguish stale claims; they guarantee that the defendant is not subject to suit for conduct that occurred more than six months before the complaining party initiates appropriate legal process, by filing either a charge with the NLRB or a complaint in federal court.

PILOT LIFE INSURANCE CO. *v.* DEDEAUX

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

No. 85–1043. Argued January 21, 1987—Decided April 6, 1987

The "pre-emption clause" (§ 514(a)) of the Employee Retirement Income Security Act of 1974 (ERISA) provides that ERISA supersedes all state laws insofar as they "relate to any employee benefit plan," but ERISA's "saving clause" (§ 514(b)(2)(A)) excepts from the pre-emption clause any state law that "regulates insurance." ERISA's "deemer clause" (§ 514(b)(2)(B)) provides that no employee benefit plan shall be deemed to be an insurance company for purposes of any state law "purporting to regulate insurance." On the basis of a work-related injury occurring in Mississippi in 1975, respondent began receiving permanent disability benefits under his employer's ERISA-regulated welfare benefit plan, under which claims were handled by petitioner, the employer's insurer. However, after two years petitioner terminated respondent's benefits, and during the following three years his benefits were reinstated and terminated by petitioner several times. Respondent ultimately instituted a diversity action against petitioner in Federal District Court, alleging tort and breach of contract claims under Mississippi common law for petitioner's failure to pay benefits under the insurance policy. The court granted summary judgment for petitioner, finding that respondent's common law claims were pre-empted by ERISA. The Court of Appeals reversed.

Held: ERISA pre-empts respondent's suit under state common law for alleged improper processing of his claim for benefits under the ERISA-regulated benefit plan. Pp. 44–57.

(a) The common law causes of action asserted in respondent's complaint, each based on alleged improper processing of a benefit claim under an employee benefit plan, "relate to" an employee benefit plan and therefore fall under ERISA's pre-emption clause. Cf. *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U. S. 724, 739; *Shaw* v. *Delta Air Lines, Inc.*, 463 U. S. 85, 96–100. The pre-emption clause is not limited to state laws specifically designed to affect employee benefit plans. Pp. 47–48.

(b) Under the guidelines set forth in *Metropolitan Life*, respondent's causes of action under state decisional common law—particularly the cause, presently asserted, based on the Mississippi law of bad faith—do not fall under ERISA's saving clause, and thus are not excepted from

pre-emption. A common-sense understanding of the language of the saving clause excepting from pre-emption a state law that "regulates insurance" does not support the argument that the Mississippi law of bad faith falls under the clause. To "regulate" insurance, a law must not just have an impact on the insurance industry, but must be specifically directed toward that industry. Mississippi Supreme Court decisions establish that its law of bad faith applies to any breach of contract, not merely a breach of an insurance contract. Neither do the factors for interpreting the phrase "business of insurance" under the McCarran-Ferguson Act (which factors are appropriate for consideration here) support the assertion that the Mississippi law of bad faith "regulates insurance" for purposes of ERISA's saving clause. Pp. 48–51.

(c) Moreover, interpretation of the saving clause must be informed by the legislative intent concerning ERISA's civil enforcement provisions. The language and structure of those provisions support the conclusion that they were intended to provide exclusive remedies for ERISA-plan participants and beneficiaries asserting improper processing of benefit claims. ERISA's detailed provisions set forth a comprehensive civil enforcement scheme that represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans. The policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA. The conclusion that ERISA's civil enforcement provisions were intended to be exclusive is also confirmed by the legislative history of those provisions, particularly the history demonstrating that the pre-emptive force of ERISA's enforcement provisions was modeled after the powerful pre-emptive force of § 301 of the Labor Management Relations Act, 1947. Pp. 51–56.

770 F. 2d 1311, reversed.

O'CONNOR, J., delivered the opinion for a unanimous Court.

John E. Nolan, Jr., argued the cause for petitioner. With him on the briefs were *Paul J. Ondrasik, Jr.*, *Antonia B. Ianniello*, *George F. Woodliff III*, and *David L. Bacon.*

William C. Walker, Jr., argued the cause for respondent. With him on the brief was *William L. Denton.**

**Erwin N. Griswold, Jack H. Blaine, Phillip E. Stano,* and *John P. Dineen* filed a brief for the American Council of Life Insurance et al. as *amici curiae* urging reversal.

JUSTICE O'CONNOR delivered the opinion of the Court.

This case presents the question whether the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 829, as amended, 29 U. S. C. § 1001 *et seq.*, pre-empts state common law tort and contract actions asserting improper processing of a claim for benefits under an insured employee benefit plan.

I

In March 1975, in Gulfport, Mississippi, respondent Everate W. Dedeaux injured his back in an accident related to his employment for Entex, Inc. (Entex). Entex had at this time a long term disability employee benefit plan established by purchasing a group insurance policy from petitioner, Pilot Life Insurance Co. (Pilot Life). Entex collected and matched its employees' contributions to the plan and forwarded those funds to Pilot Life; the employer also provided forms to its employees for processing disability claims, and forwarded completed forms to Pilot Life. Pilot Life bore the responsibility of determining who would receive disability benefits. Although Dedeaux sought permanent disability benefits following the 1975 accident, Pilot Life terminated his benefits after two years. During the following three years Dedeaux's benefits were reinstated and terminated by Pilot Life several times.

In 1980, Dedeaux instituted a diversity action against Pilot Life in the United States District Court for the Southern District of Mississippi. Dedeaux's complaint contained three counts: "Tortious Breach of Contract"; "Breach of Fiduciary Duties"; and "Fraud in the Inducement." App. 18–23. Dedeaux sought "[d]amages for failure to provide benefits under the insurance policy in a sum to be determined at the time of trial," "[g]eneral damages for mental and emotional distress and other incidental damages in the sum of $250,000.00," and "[p]unitive and exemplary damages in the

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Solicitor General Fried, Deputy Solicitor General Kuhl, Christopher J. Wright, George R. Salem, and *Allen H. Feldman* filed a brief for the United States as *amicus curiae.*

sum of $500,000.00." *Id.*, at 23–24. Dedeaux did not assert any of the several causes of action available to him under ERISA, see *infra*, at 53.

At the close of discovery, Pilot Life moved for summary judgment, arguing that ERISA pre-empted Dedeaux's common law claim for failure to pay benefits on the group insurance policy. The District Court granted Pilot Life summary judgment, finding all Dedeaux's claims pre-empted. App. to Pet. Cert. 16a.

The Court of Appeals for the Fifth Circuit reversed, primarily on the basis of this Court's decision in *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U. S. 724 (1985). See 770 F. 2d 1311 (1985). We granted certiorari, 478 U. S. 1004 (1986), and now reverse.

II

In ERISA, Congress set out to

> "protect . . . participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts." §2, as set forth in 29 U. S. C. §1001(b).

ERISA comprehensively regulates, among other things, employee welfare benefit plans that, "through the purchase of insurance or otherwise," provide medical, surgical, or hospital care, or benefits in the event of sickness, accident, disability, or death. §3(1), 29 U. S. C. §1002(1).

Congress capped off the massive undertaking of ERISA with three provisions relating to the pre-emptive effect of the federal legislation:

> "Except as provided in subsection (b) of this section [the saving clause], the provisions of this subchapter and

subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . . ." § 514(a), as set forth in 29 U. S. C. § 1144(a) (pre-emption clause).

"Except as provided in subparagraph (B) [the deemer clause], nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities." § 514(b)(2)(A), as set forth in 29 U. S. C. § 1144(b)(2)(A) (saving clause).

"Neither an employee benefit plan . . . nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies." § 514(b)(2)(B), 29 U. S. C. § 1144(b)(2)(B) (deemer clause).

To summarize the pure mechanics of the provisions quoted above: If a state law "relate[s] to . . . employee benefit plan[s]," it is pre-empted. § 514(a). The saving clause excepts from the pre-emption clause laws that "regulat[e] insurance." § 514(b)(2)(A). The deemer clause makes clear that a state law that "purport[s] to regulate insurance" cannot deem an employee benefit plan to be an insurance company. § 514(b)(2)(B).

"[T]he question whether a certain state action is pre-empted by federal law is one of congressional intent. '"The purpose of Congress is the ultimate touchstone."'" *Allis-Chalmers Corp.* v. *Lueck*, 471 U. S. 202, 208 (1985), quoting *Malone* v. *White Motor Corp.*, 435 U. S. 497, 504 (1978), quoting *Retail Clerks* v. *Schermerhorn*, 375 U. S. 96, 103 (1963). We have observed in the past that the express pre-

emption provisions of ERISA are deliberately expansive, and designed to "establish pension plan regulation as exclusively a federal concern." *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U. S. 504, 523 (1981). As we explained in *Shaw* v. *Delta Air Lines, Inc.*, 463 U. S. 85, 98 (1983):

> "The bill that became ERISA originally contained a limited pre-emption clause, applicable only to state laws relating to the specific subjects covered by ERISA. The Conference Committee rejected those provisions in favor of the present language, and indicated that section's preemptive scope was as broad as its language. See H. R. Conf. Rep. No. 93–1280, p. 383 (1974); S. Conf. Rep. No. 93–1090, p. 383 (1974)."

The House and Senate sponsors emphasized both the breadth and importance of the pre-emption provisions. Representative Dent described the "reservation to Federal authority [of] the sole power to regulate the field of employee benefit plans" as ERISA's "crowning achievement." 120 Cong. Rec. 29197 (1974). Senator Williams said:

> "It should be stressed that with the narrow exceptions specified in the bill, the substantive and enforcement provisions of the conference substitute are intended to preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans. This principle is intended to apply in its broadest sense to all actions of State or local governments, or any instrumentality thereof, which have the force or effect of law." *Id.*, at 29933.

See also *Shaw* v. *Delta Air Lines, Inc.*, *supra*, at 99–100, n. 20 (describing remarks of Sen. Javits).

In *Metropolitan Life*, this Court, noting that the pre-emption and saving clauses "perhaps are not a model of legislative drafting," 471 U. S., at 739, interpreted these clauses in relation to a Massachusetts statute that required minimum

mental health care benefits to be provided Massachusetts residents covered by general health insurance policies. The appellants in *Metropolitan Life* argued that the state statute, as applied to insurance policies purchased by employee health care plans regulated by ERISA, was pre-empted.

The Court concluded, first, that the Massachusetts statute did "relate to . . . employee benefit plan[s]," thus placing the state statute within the broad sweep of the pre-emption clause, § 514(a). *Metropolitan Life*, *supra*, at 739. However, the Court held that, because the state statute was one that "regulate[d] insurance," the saving clause prevented the state law from being pre-empted. In determining whether the Massachusetts statute regulated insurance, the Court was guided by case law interpreting the phrase "business of insurance" in the McCarran-Ferguson Act, 59 Stat. 33, as amended, 15 U. S. C. § 1011 *et seq.*

Given the "statutory complexity" of ERISA's three pre-emption provisions, *Metropolitan Life*, *supra*, at 740, as well as the wide variety of state statutory and decisional law arguably affected by the federal pre-emption provisions, it is not surprising that we are again called on to interpret these provisions.

III

There is no dispute that the common law causes of action asserted in Dedeaux's complaint "relate to" an employee benefit plan and therefore fall under ERISA's express pre-emption clause, § 514(a). In both *Metropolitan Life*, *supra*, and *Shaw* v. *Delta Air Lines, Inc.*, *supra*, at 96–100, we noted the expansive sweep of the pre-emption clause. In both cases "[t]he phrase 'relate to' was given its broad common-sense meaning, such that a state law 'relate[s] to' a benefit plan 'in the normal sense of the phrase, if it has a connection with or reference to such a plan.'" *Metropolitan Life*, *supra*, at 739, quoting *Shaw* v. *Delta Air Lines*, *supra*, at 97. In particular we have emphasized that the pre-emption clause is not limited to "state laws specifically de-

signed to affect employee benefit plans." *Shaw* v. *Delta Air Lines*, *supra*, at 98. The common law causes of action raised in Dedeaux's complaint, each based on alleged improper processing of a claim for benefits under an employee benefit plan, undoubtedly meet the criteria for pre-emption under § 514(a).

Unless these common law causes of action fall under an exception to § 514(a), therefore, they are expressly pre-empted. Although Dedeaux's complaint pleaded several state common law causes of action, before this Court Dedeaux has described only one of the three counts—called "tortious breach of contract" in the complaint, and "the Mississippi law of bad faith" in respondent's brief—as protected from the pre-emptive effect of § 514(a). The Mississippi law of bad faith, Dedeaux argues, is a law "which regulates insurance," and thus is saved from pre-emption by § 514(b)(2)(A).[1]

In *Metropolitan Life*, we were guided by several considerations in determining whether a state law falls under the saving clause. First, we took what guidance was available from a "common-sense view" of the language of the saving clause itself. 471 U. S., at 740. Second, we made use of the case law interpreting the phrase "business of insurance" under the McCarran-Ferguson Act, 15 U. S. C. § 1011 *et seq.*, in interpreting the saving clause.[2] Three criteria have been used to determine whether a practice falls under the "business of insurance" for purposes of the McCarran-Ferguson Act:

> "*[F]irst*, whether the practice has the effect of transferring or spreading a policyholder's risk; *second*, whether the practice is an integral part of the policy relationship

[1] Decisional law that "regulates insurance" may fall under the saving clause. The saving clause, § 514(b)(2)(A), covers "any law of any State." For purposes of § 514, "[t]he term 'State law' includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State." 29 U. S. C. §§ 1144(c)(1) and (2).

[2] The McCarran-Ferguson Act provides, in relevant part: "The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business." 15 U. S. C. § 1012(a).

between the insurer and the insured; and *third*, whether the practice is limited to entities within the insurance industry." *Union Labor Life Ins. Co.* v. *Pireno*, 458 U. S. 119, 129 (1982) (emphasis in original).

In the present case, the considerations weighed in *Metropolitan Life* argue against the assertion that the Mississippi law of bad faith is a state law that "regulates insurance."

As early as 1915 the Mississippi Supreme Court had recognized that punitive damages were available in a contract case when "the act or omission constituting the breach of the contract amounts also to the commission of a tort." See *Hood* v. *Moffett*, 109 Miss. 757, 767, 69 So. 664, 666 (1915) (involving a physician's breach of a contract to attend to a woman at her approaching "accouchement"). In *American Railway Express Co.* v. *Bailey*, 142 Miss. 622, 631, 107 So. 761, 763 (1926), a case involving a failure of a finance company to deliver to the plaintiff the correct amount of money cabled to the plaintiff through the finance company's offices, the Mississippi Supreme Court explained that punitive damages could be available when the breach of contract was "attended by some intentional wrong, insult, abuse, or gross negligence, which amounts to an independent tort." In *Standard Life Insurance Co.* v. *Veal*, 354 So. 2d 239 (1977), the Mississippi Supreme Court, citing *D. L. Fair Lumber Co.* v. *Weems*, 196 Miss. 201, 16 So. 2d 770 (1944) (breach of contract was accompanied by "the breaking down and destruction of another's fence"), *American Railway Express Co.* v. *Bailey*, *supra*, and *Hood* v. *Moffett*, *supra*, upheld an award of punitive damages against a defendant insurance company for failure to pay on a credit life policy. Since *Veal*, the Mississippi Supreme Court has considered a large number of cases in which plaintiffs have sought punitive damages from insurance companies for failure to pay a claim under an insurance contract, and in a great many of these cases the court has used the identical formulation, first stated in *Bailey*, of what must "attend" the breach of contract in order for puni-

tive damages to be recoverable. See, *e. g.*, *Employers Mutual Casualty Co.* v. *Tompkins*, 490 So. 2d 897, 902 (1986); *State Farm Fire & Casualty Co.* v. *Simpson*, 477 So. 2d 242, 248 (1985); *Consolidated American Life Ins. Co.* v. *Toche*, 410 So. 2d 1303, 1304 (1982); *Gulf Guaranty Life Ins. Co.* v. *Kelley*, 389 So. 2d 920, 922 (1980); *State Farm Mutual Automobile Ins. Co.* v. *Roberts*, 379 So. 2d 321, 322 (1980); *New Hampshire Ins. Co.* v. *Smith*, 357 So. 2d 119, 121 (1978); *Lincoln National Life Ins. Co.* v. *Crews*, 341 So. 2d 1321, 1322 (1977). Recently the Mississippi Supreme Court stated that "[w]e have come to term an insurance carrier which refuses to pay a claim when there is no reasonably arguable basis to deny it as acting in 'bad faith,' and a lawsuit based upon such an arbitrary refusal as a 'bad faith' cause of action." *Blue Cross & Blue Shield of Mississippi, Inc.* v. *Campbell*, 466 So. 2d 833, 842 (1984).

Certainly a common-sense understanding of the phrase "regulates insurance" does not support the argument that the Mississippi law of bad faith falls under the saving clause. A common-sense view of the word "regulates" would lead to the conclusion that in order to regulate insurance, a law must not just have an impact on the insurance industry, but must be specifically directed toward that industry. Even though the Mississippi Supreme Court has identified its law of bad faith with the insurance industry, the roots of this law are firmly planted in the general principles of Mississippi tort and contract law. Any breach of contract, and not merely breach of an insurance contract, may lead to liability for punitive damages under Mississippi law.

Neither do the McCarran-Ferguson Act factors support the assertion that the Mississippi law of bad faith "regulates insurance." Unlike the mandated-benefits law at issue in *Metropolitan Life*, the Mississippi common law of bad faith does not effect a spreading of policyholder risk. The state common law of bad faith may be said to concern "the policy relationship between the insurer and the insured." The con-

nection to the insurer-insured relationship is attenuated at best, however. In contrast to the mandated-benefits law in *Metropolitan Life*, the common law of bad faith does not define the terms of the relationship between the insurer and the insured; it declares only that, whatever terms have been agreed upon in the insurance contract, a breach of that contract may in certain circumstances allow the policyholder to obtain punitive damages. The state common law of bad faith is therefore no more "integral" to the insurer-insured relationship than any State's general contract law is integral to a contract made in that State. Finally, as we have just noted, Mississippi's law of bad faith, even if associated with the insurance industry, has developed from general principles of tort and contract law available in any Mississippi breach of contract case. Cf. *Hart* v. *Orion Ins. Co.*, 453 F. 2d 1358 (CA10 1971) (general state arbitration statutes do not regulate the business of insurance under the McCarran-Ferguson Act); *Hamilton Life Ins. Co.* v. *Republic National Life Ins. Co.*, 408 F. 2d 606 (CA2 1969) (same). Accordingly, the Mississippi common law of bad faith at most meets one of the three criteria used to identify the "business of insurance" under the McCarran-Ferguson Act, and used in *Metropolitan Life* to identify laws that "regulat[e] insurance" under the saving clause.

In the present case, moreover, we are obliged in interpreting the saving clause to consider not only the factors by which we were guided in *Metropolitan Life*, but also the role of the saving clause in ERISA as a whole. On numerous occasions we have noted that "'"'[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.'"'" *Kelly* v. *Robinson*, 479 U. S. 36, 43 (1986), quoting *Offshore Logistics, Inc.* v. *Tallentire*, 477 U. S. 207, 221 (1986) (quoting *Mastro Plastics Corp.* v. *NLRB*, 350 U. S. 270, 285 (1956) (in turn quoting *United States* v. *Heirs of Boisdoré*, 8 How. 113, 122 (1849))). Because in this case,

the state cause of action seeks remedies for the improper processing of a claim for benefits under an ERISA-regulated plan, our understanding of the saving clause must be informed by the legislative intent concerning the civil enforcement provisions provided by ERISA § 502(a), 29 U. S. C. § 1132(a).

The Solicitor General, for the United States as *amicus curiae*, argues that Congress clearly expressed an intent that the civil enforcement provisions of ERISA § 502(a) be the exclusive vehicle for actions by ERISA-plan participants and beneficiaries asserting improper processing of a claim for benefits, and that varying state causes of action for claims within the scope of § 502(a) would pose an obstacle to the purposes and objectives of Congress. Brief for United States as *Amicus Curiae* 18–19. We agree. The conclusion that § 502(a) was intended to be exclusive is supported, first, by the language and structure of the civil enforcement provisions, and second, by legislative history in which Congress declared that the pre-emptive force of § 502(a) was modeled on the exclusive remedy provided by § 301 of the Labor Management Relations Act, 1947 (LMRA), 61 Stat. 156, 29 U. S. C. § 185.

The civil enforcement scheme of § 502(a) is one of the essential tools for accomplishing the stated purposes of ERISA.[3] The civil enforcement scheme is sandwiched be-

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[3] Section 502(a), as set forth in 29 U. S. C. § 1132(a), provides:

"A civil action may be brought—

"(1) by a participant or beneficiary—

"(A) for the relief provided for in subsection (c) of this section [concerning requests to the administrator for information], or

"(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

"(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title [breach of fiduciary duty];

"(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the

tween two other ERISA provisions relevant to enforcement of ERISA and to the processing of a claim for benefits under an employee benefit plan. Section 501, 29 U. S. C. § 1131, authorizes criminal penalties for violations of the reporting and disclosure provisions of ERISA. Section 503, 29 U. S. C. § 1133, requires every employee benefit plan to comply with Department of Labor regulations on giving notice to any participant or beneficiary whose claim for benefits has been denied, and affording a reasonable opportunity for review of the decision denying the claim. Under the civil enforcement provisions of § 502(a), a plan participant or beneficiary may sue to recover benefits due under the plan, to enforce the participant's rights under the plan, or to clarify rights to future benefits. Relief may take the form of accrued benefits due, a declaratory judgment on entitlement to benefits, or an injunction against a plan administrator's improper refusal to pay benefits. A participant or beneficiary may also bring a cause of action for breach of fiduciary duty, and under this cause of action may seek removal of the fiduciary. §§ 502(a)(2), 409. In an action under these civil enforcement provisions, the court in its discretion may allow an award of attorney's fees to either party. § 502(g). See *Massachusetts Mutual Life Ins. Co.* v. *Russell*, 473 U. S. 134, 147 (1985). In *Russell*, we concluded that ERISA's breach of fiduciary duty provision, § 409(a), 29 U. S. C.

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plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

"(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title [information to be furnished to participants];

"(5) except as otherwise provided in subsection (b) of this subsection, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter;

"(6) by the Secretary to collect any civil penalty under subsection (i) of this section."

§ 1109(a), provided no express authority for an award of punitive damages to a beneficiary. Moreover, we declined to find an implied cause of action for punitive damages in that section, noting that "'[t]he presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement.'" *Russell*, *supra*, at 147, quoting *Northwest Airlines, Inc.* v. *Transport Workers*, 451 U. S. 77, 97 (1981). Our examination of these provisions made us "reluctant to tamper with an enforcement scheme crafted with such evident care as the one in ERISA." *Russell*, *supra*, at 147.

In sum, the detailed provisions of § 502(a) set forth a comprehensive civil enforcement scheme that represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans. The policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA. "The six carefully integrated civil enforcement provisions found in § 502(a) of the statute as finally enacted . . . provide strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly." *Russell*, *supra*, at 146 (emphasis in original).

The deliberate care with which ERISA's civil enforcement remedies were drafted and the balancing of policies embodied in its choice of remedies argue strongly for the conclusion that ERISA's civil enforcement remedies were intended to be exclusive. This conclusion is fully confirmed by the legislative history of the civil enforcement provision. The legislative history demonstrates that the pre-emptive force of § 502(a) was modeled after § 301 of the LMRA.

The Conference Report on ERISA describing the civil enforcement provisions of § 502(a) says:

> "Under the conference agreement, civil actions may be brought by a participant or beneficiary to recover benefits due under the plan, to clarify rights to receive future benefits under the plan, and for relief from breach of fiduciary responsibility. . . . [W]ith respect to suits to enforce benefit rights under the plan or to recover benefits under the plan which do not involve application of the title I provisions, they may be brought not only in U. S. district courts but also in State courts of competent jurisdiction. *All such actions in Federal or State courts are to be regarded as arising under the laws of the United States in similar fashion to those brought under section 301 of the Labor-Management Relations Act of 1947.*" H. R. Conf. Rep. No. 93–1280, p. 327 (1974) (emphasis added).

Congress was well aware that the powerful pre-emptive force of § 301 of the LMRA displaced all state actions for violation of contracts between an employer and a labor organization, even when the state action purported to authorize a remedy unavailable under the federal provision. Section 301 pre-empts any "state-law claim [whose resolution] is substantially dependent upon the analysis of the terms of an agreement made between the parties in a labor contract." *Allis-Chalmers Corp.* v. *Lueck*, 471 U. S., at 220. As we observed in *Allis-Chalmers*, the broad pre-emptive effect of § 301 was first analyzed in *Teamsters* v. *Lucas Flour Co.*, 369 U. S. 95 (1962). In *Lucas Flour* the Court found that "[t]he dimensions of § 301 require the conclusion that substantive principles of federal labor law must be paramount in the area covered by the statute." *Id.*, at 103. "[I]n enacting § 301 Congress intended doctrines of federal labor law uniformly to prevail over inconsistent local rules." *Id.*, at 104. Indeed, for purposes of determining federal jurisdiction, this Court has singled out § 301 of the LMRA as having "pre-emptive

force . . . so powerful as to displace entirely any state cause of action 'for violation of contracts between an employer and a labor organization.' Any such suit is purely a creature of federal law . . . ." *Franchise Tax Board of Cal.* v. *Construction Laborers Vacation Trust for Southern Cal.*, 463 U. S. 1, 23 (1983), referring to *Avco Corp.* v. *Machinists*, 390 U. S. 557 (1968).

Congress' specific reference to § 301 of the LMRA to describe the civil enforcement scheme of ERISA makes clear its intention that all suits brought by beneficiaries or participants asserting improper processing of claims under ERISA-regulated plans be treated as federal questions governed by § 502(a). See also H. R. Rep. No. 93–533, p. 12 (1973), reprinted in 2 Senate Committee on Labor and Public Welfare, Legislative History of ERISA, 94th Cong., 2d Sess., 2359 (Comm. Print 1976) ("The uniformity of decision which the Act is designed to foster will help administrators, fiduciaries and participants to predict the legality of proposed actions without the necessity of reference to varying state laws"); 120 Cong. Rec. 29933 (1974) (remarks of Sen. Williams) (suits involving claims for benefits "will be regarded as arising under the laws of the United States, in similar fashion to those brought under section 301 of the Labor Management Relations Act"); *id.*, at 29942 (remarks of Sen. Javits) ("[i]t is also intended that a body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans"). The expectations that a federal common law of rights and obligations under ERISA-regulated plans would develop, indeed, the entire comparison of ERISA's § 502(a) to § 301 of the LMRA, would make little sense if the remedies available to ERISA participants and beneficiaries under § 502(a) could be supplemented or supplanted by varying state laws.

In *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U. S., at 746, this Court rejected an interpretation of the saving clause of ERISA's express pre-emption provisions, § 514(b)(2)(A), 29 U. S. C. § 1144(b)(2)(A), that saved from pre-

emption "only state regulations unrelated to the substantive provisions of ERISA," finding that "[n]othing in the language, structure, or legislative history of the Act" supported this reading of the saving clause. *Metropolitan Life*, however, did not involve a state law that conflicted with a substantive provision of ERISA. Therefore the Court's general observation—that state laws related to ERISA may also fall under the saving clause—was not focused on any particular relationship or conflict between a substantive provision of ERISA and a state law. In particular, the Court had no occasion to consider in *Metropolitan Life* the question raised in the present case: whether Congress might clearly express, through the structure and legislative history of a particular substantive provision of ERISA, an intention that the federal remedy provided by that provision displace state causes of action. Our resolution of this different question does not conflict with the Court's earlier general observations in *Metropolitan Life*.

Considering the common-sense understanding of the saving clause, the McCarran-Ferguson Act factors defining the business of insurance, and, most importantly, the clear expression of congressional intent that ERISA's civil enforcement scheme be exclusive, we conclude that Dedeaux's state law suit asserting improper processing of a claim for benefits under an ERISA-regulated plan is not saved by § 514(b)(2)(A), and therefore is pre-empted by § 514(a).[4] Accordingly, the judgment of the Court of Appeals is

Reversed.

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[4] Because we conclude that Dedeaux's state common law claims fall under the ERISA pre-emption clause and are not rescued by the saving clause, we need not reach petitioner's argument that when an insurance company is engaged in the processing and review of claims for benefits under an employee benefit plan, it is acting in place of the plan's trustees and should be protected from direct state regulation by the deemer clause.

METROPOLITAN LIFE INSURANCE CO. *v.* TAYLOR

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

No. 85-686. Argued January 21, 1987—Decided April 6, 1987*

Section 502(a)(1)(B) of the Employee Retirement Income Security Act of 1974 (ERISA) provides that a participant or beneficiary may bring a civil action to, *inter alia*, recover benefits due him under the terms of an employee benefit plan. Under 28 U. S. C. § 1441(a), any civil action brought in state court of which the federal district courts have original jurisdiction may be removed by the defendant to the appropriate federal district court. Petitioner insurer underwrites an ERISA-covered plan set up by petitioner employer to pay benefits to salaried employees disabled by sickness or accident. After petitioners' doctors found that respondent employee was fit to resume working, his plan benefits were discontinued, his supplemental claim for benefits was denied, and his employment was terminated when he refused to return to work. He then filed suit in state court for reimplementation of his benefits and for related common law contract and tort claims, but petitioners removed the suit to federal court alleging federal question jurisdiction over the disability claim by virtue of ERISA and pendent jurisdiction over the remaining claims. The District Court found the case properly removable and granted summary judgment for petitioners on the merits. However, the Court of Appeals reversed on the ground that the District Court lacked removal jurisdiction, finding that the complaint purported to state only state law causes of action, and that the "well-pleaded complaint" rule, under which a cause of action "arises under" federal law for jurisdictional purposes only when the plaintiff's well-pleaded complaint raises federal law issues, did not allow removal predicated on the basis that the state law claims were subject to the federal defense of ERISA pre-emption. The court also held that the doctrine of *Avco Corp.* v. *Machinists*, 390 U. S. 557, which permits the removal of cases purporting to state only state law causes of action in labor cases pre-empted by § 301 of the Labor Management Relations Act, 1947 (LMRA), did not apply to this case.

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*Together with No. 85-688, *General Motors Corp. v. Taylor*, also on certiorari to the same court.

Held:

1. Under *Pilot Life Ins. Co.* v. *Dedeaux*, *ante*, p. 41, respondent's common law contract and tort claims are pre-empted by ERISA, and this lawsuit falls directly under § 502(a)(1)(B), which provides an exclusive federal cause of action for resolution of suits by beneficiaries to recover benefits from a covered plan. Pp. 62–63.

2. Common law causes of action filed in state court that are pre-empted by ERISA and come within the scope of § 502(a)(1)(B) are removable to federal court under 28 U. S. C. § 1441(b). The *Avco* doctrine applies in this situation to recharacterize a state law complaint displaced by § 502(a)(1)(B) as an action arising under federal law, even though the defense of ERISA pre-emption does not appear on the face of the complaint, as is normally required for removal by the "well-pleaded complaint" rule. That Congress meant to so completely pre-empt this subject area that any claim is necessarily federal in character is established by the language of § 502's jurisdictional subsection (f), which closely parallels that of § 301 of the LMRA, and statements in ERISA's civil enforcement provisions' legislative history, which indicate that § 502(a)(1)(B) suits should be regarded as "arising under" federal law in the same manner as § 301 suits. Respondent's contention that removal was improper because it was not "obvious" when he filed suit that his common law action was both pre-empted and displaced by ERISA is not persuasive, since the touchstone of federal courts' removal jurisdiction is not the "obviousness" of the pre-emption defense but the intent of Congress. Pp. 63–67.

763 F. 2d 216, reversed.

O'CONNOR, J., delivered the opinion for a unanimous Court. BRENNAN, J., filed a concurring opinion, in which MARSHALL, J., joined, *post*, p. 67.

David M. Davis argued the cause for petitioners in both cases. With him on the briefs were *Eugene L. Hartwig*, *Daniel G. Galant*, *Stanley R. Strauss*, *George J. Pantos*, *William J. Toppeta*, *Nancy I. Mayer*, *James M. Lenaghan*, *Robert L. Stern*, *Paul M. Bator*, and *Stephen M. Shapiro*.

Peter E. Scheer argued the cause and filed a brief for respondents in both cases.†

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†*John M. Vine* and *Harris Weinstein* filed a brief for the ERISA Industry Committee as *amicus curiae* urging reversal.

JUSTICE O'CONNOR delivered the opinion of the Court.

In *Pilot Life Ins. Co.* v. *Dedeaux*, *ante*, p. 41, the Court held that state common law causes of action asserting improper processing of a claim for benefits under an employee benefit plan regulated by the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 829, 29 U. S. C. § 1001 *et seq.*, are pre-empted by the Act. 29 U. S. C. § 1144 (a). The question presented by this litigation is whether these state common law claims are not only pre-empted by ERISA, but also displaced by ERISA's civil enforcement provision, § 502(a)(1)(B), 29 U. S. C. § 1132(a)(1)(B),[1] to the extent that complaints filed in state courts purporting to plead such state common law causes of action are removable to federal court under 28 U. S. C. § 1441(b).

I

General Motors Corporation, a Delaware corporation whose principal place of business is in Michigan, has set up an employee benefit plan subject to the provisions of ERISA for its salaried employees. The plan pays benefits to salaried employees disabled by sickness or accident and is insured by the Metropolitan Life Insurance Company (Metropolitan).

General Motors employed Michigan resident Arthur Taylor as a salaried employee from 1959–1980. In 1961 Taylor was involved in a job-related automobile accident and sustained a back injury. Taylor filed a workers' compensation claim for this injury, and he eventually returned to work. In May 1980, while embroiled in a divorce and child custody dispute, Taylor took a leave of absence from his work on account of

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[1] Section 502(a)(1)(B) provides:

"A civil action may be brought—

"(1) by a participant or beneficiary—

. . . . . .

"(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan."

severe emotional problems. Metropolitan began paying benefits under General Motors' employee benefit plan, but asked Taylor to submit to a psychiatric examination by a designated psychiatrist. He did so and the psychiatrist determined that Taylor was emotionally unable to work. Six weeks later, after a followup examination, however, Metropolitan's psychiatrist determined that Taylor was now fit for work; Metropolitan stopped making payments as of July 30, 1980.

Meanwhile, Taylor had filed a supplemental claim for benefits alleging that his back injuries disabled him from continuing his work. Metropolitan again sent Taylor to be examined, this time by an orthopedist. The physician found no orthopedic problems and Metropolitan subsequently denied the supplemental disability claim. On October 31, General Motors requested that Taylor report to its medical department for an examination. That examination took place on November 5 and a General Motors physician concluded that Taylor was not disabled. When Taylor nevertheless refused to return to work, General Motors notified him that his employment had been terminated.

Six months later Taylor filed suit against General Motors and Metropolitan in Michigan state court praying for judgment for "compensatory damages for money contractually owed Plaintiff, compensation for mental anguish caused by breach of this contract, as well as immediate reimplementation of all benefits and insurance coverages Plaintiff is entitled to," App. to Pet. for Cert. in No. 85–688, pp. 28a–29a. Taylor also asserted claims for wrongful termination of his employment and for wrongfully failing to promote him in retaliation for the 1961 worker's compensation claim. *Id.*, at 25a–26a. General Motors and Metropolitan removed the suit to federal court alleging federal question jurisdiction over the disability benefits claim by virtue of ERISA and pendent jurisdiction over the remaining claims. *Id.*, at 30a. The District Court found the case properly removable and granted

General Motors and Metropolitan summary judgment on the merits. 588 F. Supp. 562 (ED Mich. 1984).

The Court of Appeals reversed on the ground that the District Court lacked removal jurisdiction. 763 F. 2d 216 (CA6 1985). Noting a split in authority on the question among the federal courts,[2] the Court of Appeals found that Taylor's complaint stated only state law causes of action subject to the federal defense of ERISA pre-emption, and that the "well-pleaded complaint" rule of *Louisville & Nashville R. Co.* v. *Mottley*, 211 U. S. 149 (1908), precluded removal on the basis of a federal defense. 763 F. 2d, at 219. The Court of Appeals further held that the established doctrine permitting the removal of cases purporting to state only state law causes of action in labor cases pre-empted by § 301 of the Labor Management Relations Act, 1947 (LMRA), 61 Stat. 156, 29 U. S. C. § 185, did not apply to this case. 763 F. 2d, at 220. We granted certiorari, 475 U. S. 1009 (1986), and now reverse.

II

Under our decision in *Pilot Life Ins. Co.* v. *Dedeaux*, *ante*, p. 41, Taylor's common law contract and tort claims are pre-empted by ERISA. This lawsuit "relate[s] to [an] employee benefit plan." § 514(a), 29 U. S. C. § 1144(a). It is based upon common law of general application that is not a law regulating insurance. See *Pilot Life Ins. Co.* v. *Dedeaux*, *ante*, at 48–51. Accordingly, the suit is pre-empted by § 514(a) and is not saved by § 514(b)(2)(A). *Ante*, at 48. Moreover, as a suit by a beneficiary to recover benefits from

[2] Compare *Clorox Co.* v. *United States District Court*, 779 F. 2d 517, 521 (CA9 1985); *Roe* v. *General American Life Ins. Co.*, 712 F. 2d 450, 452 (CA10 1983); *Leonardis* v. *Local 282 Pension Trust Fund*, 391 F. Supp. 554, 556–557 (EDNY 1975); *Tolson* v. *Retirement Committee of the Briggs & Stratton Retirement Plan*, 566 F. Supp. 1503, 1504 (ED Wis. 1983) (all finding removal jurisdiction), with *Taylor* v. *General Motors Corp.*, 763 F. 2d 216, 219–220 (CA6 1985); *Powers* v. *South Central United Food & Commercial Workers Unions*, 719 F. 2d 760, 763–767 (CA5 1983) (no removal jurisdiction).

a covered plan, it falls directly under § 502(a)(1)(B) of ERISA, which provides an exclusive federal cause of action for resolution of such disputes. *Ante*, at 56.

III

The century-old jurisdictional framework governing removal of federal question cases from state into federal courts is described in JUSTICE BRENNAN's opinion for a unanimous Court in *Franchise Tax Board of Cal.* v. *Construction Laborers Vacation Trust for Southern Cal.*, 463 U. S. 1 (1983). By statute "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending." 28 U. S. C. § 1441(a). One category of cases over which the district courts have original jurisdiction are "federal question" cases; that is, those cases "arising under the Constitution, laws, or treaties of the United States." 28 U. S. C. § 1331. It is long settled law that a cause of action arises under federal law only when the plaintiff's well-pleaded complaint raises issues of federal law. *Gully* v. *First National Bank*, 299 U. S. 109 (1936); *Louisville & Nashville R. Co.* v. *Mottley*, *supra*. The "well-pleaded complaint rule" is the basic principle marking the boundaries of the federal question jurisdiction of the federal district courts. *Franchise Tax Board of Cal.* v. *Construction Laborers Vacation Trust for Southern Cal.*, *supra*, at 9–12.

Federal pre-emption is ordinarily a federal defense to the plaintiff's suit. As a defense, it does not appear on the face of a well-pleaded complaint, and, therefore, does not authorize removal to federal court. *Gully* v. *First National Bank*, *supra*. One corollary of the well-pleaded complaint rule developed in the case law, however, is that Congress may so completely pre-empt a particular area that any civil complaint raising this select group of claims is necessarily federal

in character. For 20 years, this Court has singled out claims pre-empted by § 301 of the LMRA for such special treatment. *Avco Corp.* v. *Machinists*, 390 U. S. 557 (1968).

> "The necessary ground of decision [in *Avco*] was that the pre-emptive force of § 301 is so powerful as to displace entirely any state cause of action 'for violation of contracts between an employer and a labor organization.' Any such suit is purely a creature of federal law, notwithstanding the fact that state law would provide a cause of action in the absence of § 301." *Franchise Tax Board of Cal.* v. *Construction Laborers Vacation Trust for Southern Cal.*, *supra*, at 23 (footnote omitted).

There is no dispute in this litigation that Taylor's complaint, although pre-empted by ERISA, purported to raise only state law causes of action. The question therefore resolves itself into whether or not the *Avco* principle can be extended to statutes other than the LMRA in order to recharacterize a state law complaint displaced by § 502(a)(1)(B) as an action arising under federal law. In *Franchise Tax Board*, the Court held that ERISA pre-emption, without more, does not convert a state claim into an action arising under federal law. *Franchise Tax Board of Cal.* v. *Construction Laborers Vacation Trust for Southern Cal.*, 463 U. S., at 25–27. The court suggested, however, that a state action that was not only pre-empted by ERISA, but also came "within the scope of § 502(a) of ERISA" might fall within the *Avco* rule. *Id.*, at 24–25. The claim in this case, unlike the state tax collection suit in *Franchise Tax Board*, is within the scope of § 502(a) and we therefore must face the question specifically reserved by *Franchise Tax Board*.

In the absence of explicit direction from Congress, this question would be a close one. As we have made clear today in *Pilot Life Ins. Co.* v. *Dedeaux*, *ante*, at 54, "[t]he policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and benefi-

ciaries were free to obtain remedies under state law that Congress rejected in ERISA." Cf. *Franchise Tax Board of Cal.* v. *Construction Laborers Vacation Trust for Southern Cal.*, 463 U. S., at 25–26 ("Unlike the contract rights at issue in *Avco*, the State's right to enforce its tax levies is not of central concern to the federal statute"). Even with a provision such as § 502(a)(1)(B) that lies at the heart of a statute with the unique pre-emptive force of ERISA, *id.*, at 24, n. 26, however, we would be reluctant to find that extraordinary pre-emptive power, such as has been found with respect to § 301 of the LMRA, that converts an ordinary state common law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule. But the language of the jurisdictional subsection of ERISA's civil enforcement provisions closely parallels that of § 301 of the LMRA. Section 502(f) says:

> "The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action." 29 U. S. C. § 1132(f).

Cf. § 301(a) of the LMRA, 29 U. S. C. § 185(a). The presumption that similar language in two labor law statutes has a similar meaning is fully confirmed by the legislative history of ERISA's civil enforcement provisions. The Conference Report on ERISA describing the civil enforcement provisions of § 502(a) says:

> "[W]ith respect to suits to enforce benefit rights under the plan or to recover benefits under the plan which do not involve application of the title I provisions, they may be brought not only in U. S. district courts but also in State courts of competent jurisdiction. *All such actions in Federal or State courts are to be regarded as arising under the laws of the United States in similar fashion to*

those brought under section 301 of the Labor-Management Relations Act of 1947." H. R. Conf. Rep. No. 93–1280, p. 327 (1974) (emphasis added).

No more specific reference to the *Avco* rule can be expected and the rest of the legislative history consistently sets out this clear intention to make § 502(a)(1)(B) suits brought by participants or beneficiaries federal questions for the purposes of federal court jurisdiction in like manner as § 301 of the LMRA. See *Pilot Life Ins. Co.* v. *Dedeaux*, *ante*, at 54–55. For example, Senator Williams, a sponsor of ERISA, emphasized that the civil enforcement section would enable participants and beneficiaries to bring suit to recover benefits denied contrary to the terms of the plan and that when they did so "[i]t is intended that such actions will be regarded as arising under the laws of the United States, in similar fashion to those brought under section 301 of the Labor Management Relations Act." 120 Cong. Rec. 29933 (1974). See also *id.*, at 29942 (remarks of Sen. Javits) (federal substantive law to "deal with issues involving rights and obligations under private welfare and pension plans").

Taylor argues strenuously that this action cannot be removed to federal court because it was not "obvious" at the time he filed suit that his common law action was both pre-empted by § 514(a), 29 U. S. C. § 1144(a), and also displaced by the civil enforcement provisions of § 502(a). See Brief for Respondent 14–21. But the touchstone of the federal district court's removal jurisdiction is not the "obviousness" of the pre-emption defense but the intent of Congress. Indeed, as we have noted, even an "obvious" pre-emption defense does not, in most cases, create removal jurisdiction. In this case, however, Congress has clearly manifested an intent to make causes of action within the scope of the civil enforcement provisions of § 502(a) removable to federal court. Since we have found Taylor's cause of action to be within the scope of § 502(a), we must honor that intent whether pre-emption was obvious or not at the time this suit was filed.

Accordingly, this suit, though it purports to raise only state law claims, is necessarily federal in character by virtue of the clearly manifested intent of Congress. It, therefore, "arise[s] under the . . . laws . . . of the United States," 28 U. S. C. § 1331, and is removable to federal court by the defendants, 28 U. S. C. § 1441(b). The judgment of the Court of Appeals is

Reversed.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, concurring.

I write separately only to note that today's holding is a narrow one. The Court rejects the position, urged by respondent, that removal jurisdiction exists only when the complaint states a claim that is "obviously" pre-empted by state law—that is, when a federal statute has obviously pre-empted state law, or when a decision of this Court has construed an ambiguous federal statute to pre-empt state law. The Court instead focuses on the "intent of Congress," *ante*, at 66, to make respondent's cause of action removable to federal court. This intent to pre-empt became effective when ERISA became law. Consequently, although pre-emption was not obvious under respondent's standard at the time of removal,* the District Court did in fact have jurisdiction over respondent's pre-empted claim.

While I join the Court's opinion, I note that our decision should not be interpreted as adopting a broad rule that *any* defense premised on congressional intent to pre-empt state law is sufficient to establish removal jurisdiction. The Court holds only that removal jurisdiction exists when, as here,

*In the understated words of a prior case which this Court repeats today, the pre-emption provisions of ERISA "'perhaps are not a model of legislative drafting,'" *Pilot Life Ins. Co.* v. *Dedeaux*, *ante*, at 46, quoting *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U. S. 724, 739 (1985). Accordingly, before today's decision in *Pilot Life*, the answer to the question whether ERISA pre-empted state claims of the sort at issue here was not obvious.

"Congress has *clearly* manifested an intent to make causes of action . . . *removable to federal court.*" *Ibid.* (emphasis added). In future cases involving other statutes, the prudent course for a federal court that does not find a *clear* congressional intent to create removal jurisdiction will be to remand the case to state court.

CTS CORP. *v.* DYNAMICS CORPORATION OF AMERICA

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 86–71. Argued March 2, 1987—Decided April 21, 1987*

The federal Williams Act and implementing regulations govern hostile corporate stock tender offers by requiring, *inter alia*, that offers remain open for at least 20 business days. An Indiana Act applies to certain business corporations chartered in Indiana that have specified levels of shares or shareholders within the State and that opt into the Act's protection. The Indiana Act provides that the acquisition of "control shares" in such a corporation—shares that, but for the Act, would bring the acquiring entity's voting power to or above certain threshold levels—does not include voting rights unless a majority of all pre-existing disinterested shareholders so agree at their next regularly scheduled meeting. However, the stock acquiror can require a special meeting within 50 days by following specified procedures. Appellee Dynamics Corporation announced a tender offer that would have raised its ownership interest in CTS Corporation above the Indiana Act's threshold. Dynamics also filed suit in Federal District Court alleging federal securities violations by CTS. After CTS opted into the Indiana Act, Dynamics amended its complaint to challenge the Act's validity. The District Court granted Dynamics' motion for declaratory relief, ruling that the Act is pre-empted by the Williams Act and violates the Commerce Clause. The Court of Appeals affirmed, adopting the holding of the plurality opinion in *Edgar* v. *MITE Corp.*, 457 U. S. 624, that the Williams Act pre-empts state statutes that upset the balance between target company management and a tender offeror. The court based its pre-emption finding on the view that the Indiana Act, in effect, imposes at least a 50-day delay on the consummation of tender offers and that this conflicts with the minimum 20-day, hold-open period under the Williams Act. The court also held that the state Act violates the Commerce Clause since it deprives nonresidents of the valued opportunity to accept tender offers from other nonresidents, and that it violates the conflict-of-laws "internal affairs" doctrine in that it has a direct, intended, and

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*Together with No. 86–97, *Indiana* v. *Dynamics Corporation of America*, also on appeal from the same court.

substantial effect on the interstate market in securities and corporate control.

Held:

1. The Indiana Act is consistent with the provisions and purposes of the Williams Act and is not pre-empted thereby. Pp. 78–87.

(a) The Indiana Act protects independent shareholders from the coercive aspects of tender offers by allowing them to vote as a group, and thereby furthers the Williams Act's basic purpose of placing investors on an equal footing with takeover bidders. Moreover, the Indiana Act avoids the problems the plurality discussed in *MITE*, since it does not give either management or the offeror an advantage in communicating with shareholders, nor impose an indefinite delay on offers, nor allow the state government to interpose its views of fairness between willing buyers and sellers. Thus, the Act satisfies even the *MITE* plurality's broad interpretation of the Williams Act. Pp. 81–84.

(b) The possibility that the Indiana Act will delay some tender offers does not mandate pre-emption. The state Act neither imposes an absolute 50-day delay on the consummation of tender offers nor precludes offerors from purchasing shares as soon as federal law permits. If an adverse shareholder vote is feared, the tender offer can be conditioned on the shares' receiving voting rights within a specified period. Furthermore, even assuming that the Indiana Act does impose some additional delay, the *MITE* plurality found only that "unreasonable" delays conflict with the Williams Act. Here, it cannot be said that a 50-day delay is unreasonable since that period falls within a 60-day period Congress established for tendering shareholders to withdraw their unpurchased shares. If the Williams Act were construed to pre-empt any state statute that caused delays, it would pre-empt a variety of state corporate laws of hitherto unquestioned validity. The longstanding prevalence of state regulation in this area suggests that, if Congress had intended to pre-empt all such state laws, it would have said so. Pp. 84–87.

2. The Indiana Act does not violate the Commerce Clause. The Act's limited effect on interstate commerce is justified by the State's interests in defining attributes of its corporations' shares and in protecting shareholders. Pp. 87–94.

(a) The Act does not discriminate against interstate commerce since it has the same effect on tender offers whether or not the offeror is an Indiana domiciliary or resident. That the Act might apply most often to out-of-state entities who launch most hostile tender offers is irrelevant, since a claim of discrimination is not established by the mere fact that the burden of a state regulation falls on some interstate companies. Pp. 87–88.

(b) The Act does not create an impermissible risk of inconsistent regulation of tender offers by different States. It simply and evenhandedly exercises the State's firmly established authority to define the voting rights of shareholders in Indiana corporations, and thus subjects such corporations to the law of only one State. Pp. 88–89.

(c) The Court of Appeals' holding that the Act unconstitutionally hinders tender offers ignores the fact that a State, in its role as overseer of corporate governance, enacts laws that necessarily affect certain aspects of interstate commerce, particularly with respect to corporations with shareholders in other States. A State has interests in promoting stable relationships among parties involved in its corporations and in ensuring that investors have an effective voice in corporate affairs. The Indiana Act validly furthers these interests by allowing shareholders collectively to determine whether the takeover is advantageous to them. The argument that Indiana has no legitimate interest in protecting nonresident shareholders is unavailing, since the Act applies only to corporations incorporated in Indiana that have a substantial number of shareholders in the State. Pp. 89–93.

(d) Even if the Act should decrease the number of successful tender offers for Indiana corporations, this would not offend the Commerce Clause. The Act does not prohibit any resident or nonresident from offering to purchase, or from purchasing, shares in Indiana corporations, or from attempting thereby to gain control. It only provides regulatory procedures designed for the better protection of the corporations' shareholders. The Commerce Clause does not protect the particular structure or methods of operation in a market. Pp. 93–94.

794 F. 2d 250, reversed.

POWELL, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BRENNAN, MARSHALL, and O'CONNOR, JJ., joined, and in Parts I, III–A, and III–B of which SCALIA, J., joined. SCALIA, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 94. WHITE, J., filed a dissenting opinion, in Part II of which BLACKMUN and STEVENS, JJ., joined, *post*, p. 97.

James A. Strain argued the cause for appellant in No. 86–71. With him on the brief were *Richard E. Deer* and *Stanley C. Fickle*. *John F. Pritchard* argued the cause and filed a brief for appellant in No. 86–97.

Lowell E. Sachnoff argued the cause for appellee in both cases. With him on the brief were *Dean A. Dickie* and *Sarah R. Wolff.*†

JUSTICE POWELL delivered the opinion of the Court.

These cases present the questions whether the Control Share Acquisitions Chapter of the Indiana Business Corporation Law, Ind. Code § 23–1–42–1 *et seq.* (Supp. 1986), is preempted by the Williams Act, 82 Stat. 454, as amended, 15 U. S. C. §§ 78m(d)–(e) and 78n(d)–(f) (1982 ed. and Supp. III), or violates the Commerce Clause of the Federal Constitution, Art. I, § 8, cl. 3.

I

A

On March 4, 1986, the Governor of Indiana signed a revised Indiana Business Corporation Law, Ind. Code § 23–1–17–1 *et seq.* (Supp. 1986). That law included the Control Share Acquisitions Chapter (Indiana Act or Act). Beginning on August 1, 1987, the Act will apply to any corporation incorporated in Indiana, § 23–1–17–3(a), unless the corporation amends its articles of incorporation or bylaws to opt out of the Act, § 23–1–42–5. Before that date, any Indiana corporation can opt into the Act by resolution of its board of directors. § 23–1–17–3(b). The Act applies only to "issuing

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†Briefs of *amici curiae* urging reversal were filed for the State of New York by *Robert Abrams*, Attorney General, *O. Peter Sherwood*, Solicitor General, *Mary Ellen Burns*, Deputy Chief Assistant Attorney General, and *Colvin W. Grannum*, Assistant Attorney General; for the State of Minnesota by *Hubert H. Humphrey III*, Attorney General, and *Alan I. Gilbert* and *Barry R. Greller*, Special Assistant Attorneys General; and for the Indiana Chamber of Commerce et al. by *Donald F. Elliott, Jr.*, and *Barton R. Peterson.*

Briefs of *amici curiae* urging affirmance were filed for the Securities and Exchange Commission et al. by *Solicitor General Fried, Deputy Solicitor General Cohen, Roy T. Englert, Jr., Daniel L. Goelzer*, and *Paul Gonson;* for the Securities Industry Association, Inc., by *Marc P. Cherno, Irwin Blum*, and *William J. Fitzpatrick;* and for the United Shareholders Association by *James Edward Maloney* and *David E. Warden.*

public corporations." The term "corporation" includes only businesses incorporated in Indiana. See § 23–1–20–5. An "issuing public corporation" is defined as:

> "a corporation that has:
>
> "(1) one hundred (100) or more shareholders;
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> "(2) its principal place of business, its principal office, or substantial assets within Indiana; and
>
> "(3) either:
>
> "(A) more than ten percent (10%) of its shareholders resident in Indiana;
>
> "(B) more than ten percent (10%) of its shares owned by Indiana residents; or
>
> "(C) ten thousand (10,000) shareholders resident in Indiana." § 23–1–42–4(a).[1]

The Act focuses on the acquisition of "control shares" in an issuing public corporation. Under the Act, an entity acquires "control shares" whenever it acquires shares that, but for the operation of the Act, would bring its voting power in the corporation to or above any of three thresholds: 20%, 33⅓%, or 50%. § 23–1–42–1. An entity that acquires control shares does not necessarily acquire voting rights. Rather, it gains those rights only "to the extent granted by resolution approved by the shareholders of the issuing public corporation." § 23–1–42–9(a). Section 23–1–42–9(b) requires a majority vote of all disinterested[2] shareholders holding each

[1] These thresholds are much higher than the 5% threshold acquisition requirement that brings a tender offer under the coverage of the Williams Act. See 15 U. S. C. § 78n(d)(1).

[2] "Interested shares" are shares with respect to which the acquiror, an officer, or an inside director of the corporation "may exercise or direct the exercise of the voting power of the corporation in the election of directors." § 23–1–42–3. If the record date passes before the acquiror purchases shares pursuant to the tender offer, the purchased shares will not be "interested shares" within the meaning of the Act; although the acquiror may own the shares on the date of the meeting, it will not "exercise . . . the voting power" of the shares.

As a practical matter, the record date usually will pass before shares change hands. Under Securities and Exchange Commission (SEC) regu-

class of stock for passage of such a resolution. The practical effect of this requirement is to condition acquisition of control of a corporation on approval of a majority of the pre-existing disinterested shareholders.[3]

The shareholders decide whether to confer rights on the control shares at the next regularly scheduled meeting of the shareholders, or at a specially scheduled meeting. The

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lations, the shares cannot be purchased until 20 business days after the offer commences. 17 CFR § 240.14e–1(a) (1986). If the acquiror seeks an early resolution of the issue—as most acquirors will—the meeting required by the Act must be held no more than 50 calendar days after the offer commences, about three weeks after the earliest date on which the shares could be purchased. See § 23–1–42–7. The Act requires management to give notice of the meeting "as promptly as reasonably practicable . . . to all shareholders of record as of the record date set for the meeting." § 23–1–42–8(a). It seems likely that management of the target corporation would violate this obligation if it delayed setting the record date and sending notice until after 20 business days had passed. Thus, we assume that the record date usually will be set before the date on which federal law first permits purchase of the shares.

[3] The United States and appellee Dynamics Corporation suggest that § 23–1–42–9(b)(1) requires a second vote by *all* shareholders of record. Brief for SEC and United States as *Amici Curiae* 5, and n. 6; Brief for Appellee 2–3, and n. 5. Indiana disputes this interpretation of its Act. Brief for Appellant in No. 86–87, p. 29, n. Section 23–1–42–9(b)(1) provides:

"[T]he resolution must be approved by:

"(1) each voting group entitled to vote separately on the proposal by a majority of all the votes entitled to be cast by that voting group, with the holders of the outstanding shares of a class being entitled to vote as a separate voting group if the proposed control share acquisition would, if fully carried out, result in any of the changes described in [Indiana Code § 23–1–38–4(a) (describing fundamental changes in corporate organization)]."

The United States contends that this section always requires a separate vote by all shareholders and that the last clause merely specifies that the vote shall be taken by separate groups if the acquisition would result in one of the listed transactions. Indiana argues that this section requires a separate vote only if the acquisition would result in one of the listed transactions. Because it is unnecessary to our decision, we express no opinion as to the appropriate interpretation of this section.

acquiror can require management of the corporation to hold such a special meeting within 50 days if it files an "acquiring person statement,"[4] requests the meeting, and agrees to pay the expenses of the meeting. See § 23–1–42–7. If the shareholders do not vote to restore voting rights to the shares, the corporation may redeem the control shares from the acquiror at fair market value, but it is not required to do so. § 23–1–42–10(b). Similarly, if the acquiror does not file an acquiring person statement with the corporation, the corporation may, if its bylaws or articles of incorporation so provide, redeem the shares at any time after 60 days after the acquiror's last acquisition. § 23–1–42–10(a).

B

On March 10, 1986, appellee Dynamics Corporation of America (Dynamics) owned 9.6% of the common stock of appellant CTS Corporation, an Indiana corporation. On that day, six days after the Act went into effect, Dynamics announced a tender offer for another million shares in CTS; purchase of those shares would have brought Dynamics' ownership interest in CTS to 27.5%. Also on March 10, Dynamics filed suit in the United States District Court for the Northern District of Illinois, alleging that CTS had violated the federal securities laws in a number of respects no longer relevant to these proceedings. On March 27, the board of directors of CTS, an Indiana corporation, elected to be governed by the provisions of the Act, see § 23–1–17–3.

Four days later, on March 31, Dynamics moved for leave to amend its complaint to allege that the Act is pre-empted by the Williams Act, 15 U. S. C. §§ 78m(d)–(e) and 78n(d)–(f) (1982 ed. and Supp. III), and violates the Commerce Clause, Art. I, § 8, cl. 3. Dynamics sought a temporary restraining order, a preliminary injunction, and declaratory relief against

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[4] An "acquiring person statement" is an information statement describing, *inter alia*, the identity of the acquiring person and the terms and extent of the proposed acquisition. See § 23–1–42–6.

CTS' use of the Act. On April 9, the District Court ruled that the Williams Act pre-empts the Indiana Act and granted Dynamics' motion for declaratory relief. 637 F. Supp. 389 (ND Ill. 1986). Relying on JUSTICE WHITE's plurality opinion in *Edgar* v. *MITE Corp.*, 457 U. S. 624 (1982), the court concluded that the Act "wholly frustrates the purpose and objective of Congress in striking a balance between the investor, management, and the takeover bidder in takeover contests." 637 F. Supp., at 399. A week later, on April 17, the District Court issued an opinion accepting Dynamics' claim that the Act violates the Commerce Clause. This holding rested on the court's conclusion that "the substantial interference with interstate commerce created by the [Act] outweighs the articulated local benefits so as to create an impermissible indirect burden on interstate commerce." *Id.*, at 406. The District Court certified its decisions on the Williams Act and Commerce Clause claims as final under Federal Rule of Civil Procedure 54(b). *Ibid.*

CTS appealed the District Court's holdings on these claims to the Court of Appeals for the Seventh Circuit. Because of the imminence of CTS' annual meeting, the Court of Appeals consolidated and expedited the two appeals. On April 23—23 days after Dynamics first contested application of the Act in the District Court—the Court of Appeals issued an order affirming the judgment of the District Court. The opinion followed on May 28. 794 F. 2d 250 (1986).

After disposing of a variety of questions not relevant to this appeal, the Court of Appeals examined Dynamics' claim that the Williams Act pre-empts the Indiana Act. The court looked first to the plurality opinion in *Edgar* v. *MITE Corp.*, *supra*, in which three Justices found that the Williams Act pre-empts state statutes that upset the balance between target management and a tender offeror. The court noted that some commentators had disputed this view of the Williams Act, concluding instead that the Williams Act was "an anti-takeover statute, expressing a view, however benighted,

that hostile takeovers are bad." 794 F. 2d, at 262. It also noted:

> "[I]t is a big leap from saying that the Williams Act does not itself exhibit much hostility to tender offers to saying that it implicitly forbids states to adopt more hostile regulations. . . . But whatever doubts of the Williams' Act preemptive intent we might entertain as an original matter are stilled by the weight of precedent." *Ibid.*

Once the court had decided to apply the analysis of the *MITE* plurality, it found the case straightforward:

> "Very few tender offers could run the gauntlet that Indiana has set up. In any event, if the Williams Act is to be taken as a congressional determination that a month (roughly) is enough time to force a tender offer to be kept open, 50 days is too much; and 50 days is the minimum under the Indiana act if the target corporation so chooses." *Id.*, at 263.

The court next addressed Dynamic's Commerce Clause challenge to the Act. Applying the balancing test articulated in *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137 (1970), the court found the Act unconstitutional:

> "Unlike a state's blue sky law the Indiana statute is calculated to impede transactions between residents of other states. For the sake of trivial or even negative benefits to its residents Indiana is depriving nonresidents of the valued opportunity to accept tender offers from other nonresidents.
>
> ". . . Even if a corporation's tangible assets are immovable, the efficiency with which they are employed and the proportions in which the earnings they generate are divided between management and shareholders depends on the market for corporate control—an interstate, indeed international, market that the State of Indiana is not authorized to opt out of, as in effect it has done in this statute." 794 F. 2d, at 264.

Finally, the court addressed the "internal affairs" doctrine, a "principle of conflict of laws . . . designed to make sure that the law of only one state shall govern the internal affairs of a corporation or other association." *Ibid.* It stated:

> "We may assume without having to decide that Indiana has a broad latitude in regulating those affairs, even when the consequence may be to make it harder to take over an Indiana corporation. . . . But in this case the effect on the interstate market in securities and corporate control is direct, intended, and substantial. . . . [T]hat the mode of regulation involves jiggering with voting rights cannot take it outside the scope of judicial review under the commerce clause." *Ibid.*

Accordingly, the court affirmed the judgment of the District Court.

Both Indiana and CTS filed jurisdictional statements. We noted probable jurisdiction under 28 U. S. C. § 1254(2), 479 U. S. 810 (1986), and now reverse.[5]

II

The first question in these cases is whether the Williams Act pre-empts the Indiana Act. As we have stated frequently, absent an explicit indication by Congress of an intent to pre-empt state law, a state statute is pre-empted only

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[5] CTS and Dynamics have settled several of the disputes associated with Dynamics' tender offer for shares of CTS. The case is not moot, however, because the judgment of this Court still affects voting rights in the shares Dynamics purchased pursuant to the offer. If we were to affirm, Dynamics would continue to exercise the voting rights it had under the judgment of the Court of Appeals that the Act was pre-empted and unconstitutional. Because we decide today to reverse the judgment of the Court of Appeals, Dynamics will have no voting rights in its shares unless shareholders of CTS grant those rights in a meeting held pursuant to the Act. See Settlement Agreement, p. 7, par. 12, reprinted in letter from James A. Strain, Counsel for CTS, to Joseph F. Spaniol, Jr., Clerk of the United States Supreme Court (Mar. 13, 1987).

"'where compliance with both federal and state regulations is a physical impossibility . . . ,' *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U. S. 132, 142–143 (1963), or where the state 'law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' *Hines* v. *Davidowitz*, 312 U. S. 52, 67 (1941) . . . ." *Ray* v. *Atlantic Richfield Co.*, 435 U. S. 151, 158 (1978).

Because it is entirely possible for entities to comply with both the Williams Act and the Indiana Act, the state statute can be pre-empted only if it frustrates the purposes of the federal law.

A

Our discussion begins with a brief summary of the structure and purposes of the Williams Act. Congress passed the Williams Act in 1968 in response to the increasing number of hostile tender offers. Before its passage, these transactions were not covered by the disclosure requirements of the federal securities laws. See *Piper* v. *Chris-Craft Industries, Inc.*, 430 U. S. 1, 22 (1977). The Williams Act, backed by regulations of the SEC, imposes requirements in two basic areas. First, it requires the offeror to file a statement disclosing information about the offer, including: the offeror's background and identity; the source and amount of the funds to be used in making the purchase; the purpose of the purchase, including any plans to liquidate the company or make major changes in its corporate structure; and the extent of the offeror's holdings in the target company. See 15 U. S. C. § 78n(d)(1) (incorporating § 78m(d)(1) by reference); 17 CFR §§ 240.13d–1, 240.14d–3 (1986).

Second, the Williams Act, and the regulations that accompany it, establish procedural rules to govern tender offers. For example, stockholders who tender their shares may withdraw them while the offer remains open, and, if the offeror has not purchased their shares, any time after 60 days from commencement of the offer. 15 U. S. C. § 78n(d)(5); 17

CFR § 240.14d–7(a)(1) (1986), as amended, 51 Fed. Reg. 25873 (1986). The offer must remain open for at least 20 business days. 17 CFR § 240.14e–1(a) (1986). If more shares are tendered than the offeror sought to purchase, purchases must be made on a pro rata basis from each tendering shareholder. 15 U. S. C. § 78n(d)(6); 17 CFR § 240.14(8) (1986). Finally, the offeror must pay the same price for all purchases; if the offering price is increased before the end of the offer, those who already have tendered must receive the benefit of the increased price. § 78n(d)(7).

B

The Indiana Act differs in major respects from the Illinois statute that the Court considered in *Edgar* v. *MITE Corp.*, 457 U. S. 624 (1982). After reviewing the legislative history of the Williams Act, JUSTICE WHITE, joined by Chief Justice Burger and JUSTICE BLACKMUN (the plurality), concluded that the Williams Act struck a careful balance between the interests of offerors and target companies, and that any state statute that "upset" this balance was pre-empted. *Id.*, at 632–634.

The plurality then identified three offending features of the Illinois statute. JUSTICE WHITE's opinion first noted that the Illinois statute provided for a 20-day precommencement period. During this time, management could disseminate its views on the upcoming offer to shareholders, but offerors could not publish their offers. The plurality found that this provision gave management "a powerful tool to combat tender offers." *Id.*, at 635. This contrasted dramatically with the Williams Act; Congress had deleted express precommencement notice provisions from the Williams Act. According to the plurality, Congress had determined that the potentially adverse consequences of such a provision on shareholders should be avoided. Thus, the plurality concluded that the Illinois provision "frustrate[d] the objectives of the Williams Act." *Ibid.* The second criticized feature of

the Illinois statute was a provision for a hearing on a tender offer that, because it set no deadline, allowed management "'to stymie indefinitely a takeover,'" *id.*, at 637 (quoting *MITE Corp.* v. *Dixon*, 633 F. 2d 486, 494 (CA7 1980)). The plurality noted that "'delay can seriously impede a tender offer,'" 457 U. S., at 637 (quoting *Great Western United Corp.* v. *Kidwell*, 577 F. 2d 1256, 1277 (CA5 1978) (Wisdom, J.)), and that "Congress anticipated that investors and the takeover offeror would be free to go forward without unreasonable delay," 457 U. S., at 639. Accordingly, the plurality concluded that this provision conflicted with the Williams Act. The third troublesome feature of the Illinois statute was its requirement that the fairness of tender offers would be reviewed by the Illinois Secretary of State. Noting that "Congress intended for investors to be free to make their own decisions," the plurality concluded that "'[t]he state thus offers investor protection at the expense of investor autonomy—an approach quite in conflict with that adopted by Congress.'" *Id.*, at 639–640 (quoting *MITE Corp.* v. *Dixon*, *supra*, at 494).

C

As the plurality opinion in *MITE* did not represent the views of a majority of the Court,[6] we are not bound by its reasoning. We need not question that reasoning, however, because we believe the Indiana Act passes muster even under the broad interpretation of the Williams Act articulated by JUSTICE WHITE in *MITE*. As is apparent from our summary of its reasoning, the overriding concern of the

[6]JUSTICE WHITE's opinion on the pre-emption issue, 457 U. S., at 630–640, was joined only by Chief Justice Burger and by JUSTICE BLACKMUN. Two Justices disagreed with JUSTICE WHITE's conclusion. See *id.*, at 646–647 (POWELL, J., concurring in part); *id.*, at 655 (STEVENS, J., concurring in part and concurring in judgment). Four Justices did not address the question. See *id.*, at 655 (O'CONNOR, J., concurring in part); *id.*, at 664 (MARSHALL, J., with whom BRENNAN, J., joined, dissenting); *id.*, at 667 (REHNQUIST, J., dissenting).

MITE plurality was that the Illinois statute considered in that case operated to favor management against offerors, to the detriment of shareholders. By contrast, the statute now before the Court protects the independent shareholder against the contending parties. Thus, the Act furthers a basic purpose of the Williams Act, "'plac[ing] investors on an equal footing with the takeover bidder,'" *Piper* v. *Chris-Craft Industries, Inc.*, 430 U. S., at 30 (quoting the Senate Report accompanying the Williams Act, S. Rep. No. 550, 90th Cong., 1st Sess., 4 (1967)).[7]

The Indiana Act operates on the assumption, implicit in the Williams Act, that independent shareholders faced with tender offers often are at a disadvantage. By allowing such

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[7] Dynamics finds evidence of an intent to favor management in several features of the Act. It argues that the provision of the Act allowing management to opt into the Act, see § 23–1–17–3(b), grants management a strategic advantage because tender offerors will be reluctant to take the expensive preliminary steps of a tender offer if they do not know whether their efforts will be subjected to the Act's requirements. But this provision is only a temporary option available for the first 17 months after enactment of the Act. The Indiana Legislature reasonably could have concluded that corporations should be allowed an interim period during which the Act would not apply automatically. Because of its short duration, the potential strategic advantage offered by the opportunity to opt into the Act during this transition period is of little significance.

The Act also imposes some added expenses on the offeror, requiring it, *inter alia*, to pay the costs of special shareholder meetings to vote on the transfer of voting rights, see § 23–1–42–7(a). In our view, the expenses of such a meeting fairly are charged to the offeror. A corporation pays the costs of annual meetings that it holds to discuss its affairs. If an offeror—who has no official position with the corporation—desires a special meeting solely to discuss the voting rights of the offeror, it is not unreasonable to have the offeror pay for the meeting.

Of course, by regulating tender offers, the Act makes them more expensive and thus deters them somewhat, but this type of reasonable regulation does not alter the balance between management and offeror in any significant way. The principal result of the Act is to grant shareholders the power to deliberate collectively about the merits of tender offers. This result is fully in accord with the purposes of the Williams Act.

shareholders to vote as a group, the Act protects them from the coercive aspects of some tender offers. If, for example, shareholders believe that a successful tender offer will be followed by a purchase of nontendering shares at a depressed price, individual shareholders may tender their shares—even if they doubt the tender offer is in the corporation's best interest—to protect themselves from being forced to sell their shares at a depressed price. As the SEC explains: "The alternative of not accepting the tender offer is virtual assurance that, if the offer is successful, the shares will have to be sold in the lower priced, second step." Two-Tier Tender Offer Pricing and Non-Tender Offer Purchase Programs, SEC Exchange Act Rel. No. 21079 (June 21, 1984), [1984 Transfer Binder] CCH Fed. Sec. L. Rep. ¶83,637, p. 86,916 (footnote omitted) (hereinafter SEC Release No. 21079). See Lowenstein, Pruning Deadwood in Hostile Takeovers: A Proposal for Legislation, 83 Colum. L. Rev. 249, 307–309 (1983). In such a situation under the Indiana Act, the shareholders as a group, acting in the corporation's best interest, could reject the offer, although individual shareholders might be inclined to accept it. The desire of the Indiana Legislature to protect shareholders of Indiana corporations from this type of coercive offer does not conflict with the Williams Act. Rather, it furthers the federal policy of investor protection.

In implementing its goal, the Indiana Act avoids the problems the plurality discussed in *MITE*. Unlike the *MITE* statute, the Indiana Act does not give either management or the offeror an advantage in communicating with the shareholders about the impending offer. The Act also does not impose an indefinite delay on tender offers. Nothing in the Act prohibits an offeror from consummating an offer on the 20th business day, the earliest day permitted under applicable federal regulations, see 17 CFR §240.14e–1(a) (1986). Nor does the Act allow the state government to interpose its views of fairness between willing buyers and sellers of shares

of the target company. Rather, the Act allows *shareholders* to evaluate the fairness of the offer collectively.

D

The Court of Appeals based its finding of pre-emption on its view that the practical effect of the Indiana Act is to delay consummation of tender offers until 50 days after the commencement of the offer. 794 F. 2d, at 263. As did the Court of Appeals, Dynamics reasons that no rational offeror will purchase shares until it gains assurance that those shares will carry voting rights. Because it is possible that voting rights will not be conferred until a shareholder meeting 50 days after commencement of the offer, Dynamics concludes that the Act imposes a 50-day delay. This, it argues, conflicts with the shorter 20-business-day period established by the SEC as the minimum period for which a tender offer may be held open. 17 CFR § 240.14e–1 (1986). We find the alleged conflict illusory.

The Act does not impose an absolute 50-day delay on tender offers, nor does it preclude an offeror from purchasing shares as soon as federal law permits. If the offeror fears an adverse shareholder vote under the Act, it can make a conditional tender offer, offering to accept shares on the condition that the shares receive voting rights within a certain period of time. The Williams Act permits tender offers to be conditioned on the offeror's subsequently obtaining regulatory approval. *E. g.*, Interpretive Release Relating to Tender Offer Rules, SEC Exchange Act Rel. No. 34–16623 (Mar. 5, 1980), 3 CCH Fed. Sec. L. Rep. ¶ 24,284I, p. 17,758, quoted in *MacFadden Holdings, Inc.* v. *JB Acquisition Corp.*, 802 F. 2d 62, 70 (CA2 1986).[8] There is no reason to doubt that

[8] Although the SEC does not appear to have spoken authoritatively on this point, similar transactions are not uncommon. For example, Hanson Trust recently conditioned consummation of a tender offer for shares in SCM Corporation on the removal of a "lockup option" that would have seriously diminished the value of acquiring the shares of SCM Corporation.

this type of conditional tender offer would be legitimate as well.[9]

Even assuming that the Indiana Act imposes some additional delay, nothing in *MITE* suggested that *any* delay imposed by state regulation, however short, would create a conflict with the Williams Act. The plurality argued only that the offeror should "be free to go forward without *unreasonable* delay." 457 U. S., at 639 (emphasis added). In that case, the Court was confronted with the potential for indefinite delay and presented with no persuasive reason why some deadline could not be established. By contrast, the Indiana Act provides that full voting rights will be vested—if this eventually is to occur—within 50 days after commencement of the offer. This period is within the 60-day period Congress established for reinstitution of withdrawal rights in 15 U. S. C. § 78n(d)(5). We cannot say that a delay within that congressionally determined period is unreasonable.

Finally, we note that the Williams Act would pre-empt a variety of state corporate laws of hitherto unquestioned validity if it were construed to pre-empt any state statute that may limit or delay the free exercise of power after a successful tender offer. State corporate laws commonly permit corporations to stagger the terms of their directors. See Model Business Corp. Act § 37 (1969 draft) in 3 Model Business Corp. Act Ann. (2d ed. 1971) (hereinafter MBCA); American

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See *Hanson Trust PLC, HSCM* v. *ML SCM Acquisition Inc., ML L.B.O.*, 781 F. 2d 264, 272, and n. 7 (CA2 1986).

[9] Dynamics argues that conditional tender offers are not an adequate alternative because they leave management in place for three extra weeks, with "free rein to take other defensive steps that will diminish the value of tendered shares." Brief for Appellee 37. We reject this contention. In the unlikely event that management were to take actions designed to diminish the value of the corporation's shares, it may incur liability under state law. But this problem does not control our pre-emption analysis. Neither the Act nor any other federal statute can assure that shareholders do not suffer from the mismanagement of corporate officers and directors. Cf. *Cort* v. *Ash*, 422 U. S. 66, 84 (1975).

Bar Foundation, Revised Model Business Corp. Act § 8.06 (1984 draft) (1985) (hereinafter RMBCA).[10] By staggering the terms of directors, and thus having annual elections for only one class of directors each year, corporations may delay the time when a successful offeror gains control of the board of directors. Similarly, state corporation laws commonly provide for cumulative voting. See 1 MBCA § 33, ¶ 4; RMBCA § 7.28.[11] By enabling minority shareholders to assure themselves of representation in each class of directors, cumulative voting provisions can delay further the ability of offerors to gain untrammeled authority over the affairs of the target corporation. See Hochman & Folger, Deflecting Takeovers: Charter and By-Law Techniques, 34 Bus. Law. 537, 538–539 (1979).

In our view, the possibility that the Indiana Act will delay some tender offers is insufficient to require a conclusion that the Williams Act pre-empts the Act. The longstanding prevalence of state regulation in this area suggests that, if Congress had intended to pre-empt all state laws that delay the acquisition of voting control following a tender offer, it would have said so explicitly. The regulatory conditions that the Act places on tender offers are consistent with the text and the purposes of the Williams Act. Accordingly, we

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[10] Every State except Arkansas and California allows classification of directors to stagger their terms of office. See 2 Model Business Corp. Act Ann. § 8.06, p. 830 (3d ed., Supp. 1986).

[11] "Cumulative voting is a means devised to protect minorities by providing a method of voting which assures to a minority, if it is sufficiently purposeful and cohesive, representation on the board of directors to an extent roughly proportionate to the minority's size. This is achieved by permitting each shareholder . . . to cast the total number of his votes for a single candidate for election to the board, or to distribute such total among any number of such candidates (the total number of his votes being equal to the number of shares he is voting multiplied by the number of directors to be elected)." 1 MBCA § 33, ¶ 4 comment. Every State permits cumulative voting. See 2 Model Business Corp. Act Ann. § 7.28, pp. 675–677 (3d ed., Supp. 1986).

hold that the Williams Act does not pre-empt the Indiana Act.

III

As an alternative basis for its decision, the Court of Appeals held that the Act violates the Commerce Clause of the Federal Constitution. We now address this holding. On its face, the Commerce Clause is nothing more than a grant to Congress of the power "[t]o regulate Commerce . . . among the several States . . . ," Art. I, § 8, cl. 3. But it has been settled for more than a century that the Clause prohibits States from taking certain actions respecting interstate commerce even absent congressional action. See, *e. g.*, *Cooley* v. *Board of Wardens*, 12 How. 299 (1852). The Court's interpretation of "these great silences of the Constitution," *H. P. Hood & Sons, Inc.* v. *Du Mond*, 336 U. S. 525, 535 (1949), has not always been easy to follow. Rather, as the volume and complexity of commerce and regulation have grown in this country, the Court has articulated a variety of tests in an attempt to describe the difference between those regulations that the Commerce Clause permits and those regulations that it prohibits. See, *e. g.*, *Raymond Motor Transportation, Inc.* v. *Rice*, 434 U. S. 429, 441, n. 15 (1978).

A

The principal objects of dormant Commerce Clause scrutiny are statutes that discriminate against interstate commerce. See, *e. g.*, *Lewis* v. *BT Investment Managers, Inc.*, 447 U. S. 27, 36–37 (1980); *Philadelphia* v. *New Jersey*, 437 U. S. 617, 624 (1978). See generally Regan, The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause, 84 Mich. L. Rev. 1091 (1986). The Indiana Act is not such a statute. It has the same effects on tender offers whether or not the offeror is a domiciliary or resident of Indiana. Thus, it "visits its effects equally upon both interstate and local business," *Lewis* v. *BT Investment Managers, Inc.*, *supra*, at 36.

Dynamics nevertheless contends that the statute is discriminatory because it will apply most often to out-of-state entities. This argument rests on the contention that, as a practical matter, most hostile tender offers are launched by offerors outside Indiana. But this argument avails Dynamics little. "The fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce." *Exxon Corp.* v. *Governor of Maryland*, 437 U. S. 117, 126 (1978). See *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U. S. 456, 471–472 (1981) (rejecting a claim of discrimination because the challenged statute "regulate[d] evenhandedly . . . without regard to whether the [commerce came] from outside the State"); *Commonwealth Edison Co.* v. *Montana*, 453 U. S. 609, 619 (1981) (rejecting a claim of discrimination because the "tax burden [was] borne according to the amount . . . consumed and not according to any distinction between in-state and out-of-state consumers"). Because nothing in the Indiana Act imposes a greater burden on out-of-state offerors than it does on similarly situated Indiana offerors, we reject the contention that the Act discriminates against interstate commerce.

B

This Court's recent Commerce Clause cases also have invalidated statutes that may adversely affect interstate commerce by subjecting activities to inconsistent regulations. *E. g.*, *Brown-Forman Distillers Corp.* v. *New York State Liquor Authority*, 476 U. S. 573, 583–584 (1986); *Edgar* v. *MITE Corp.*, 457 U. S., at 642 (plurality opinion of WHITE, J.); *Kassel* v. *Consolidated Freightways Corp.*, 450 U. S. 662, 671 (1981) (plurality opinion of POWELL, J.). See *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761, 774 (1945) (noting the "confusion and difficulty" that would attend the "unsatisfied need for uniformity" in setting maximum limits on train lengths); *Cooley* v. *Board of Wardens*, *supra*, at 319 (stating that the Commerce Clause prohibits States from regulating

subjects that "are in their nature national, or admit only of one uniform system, or plan of regulation"). The Indiana Act poses no such problem. So long as each State regulates voting rights only in the corporations it has created, each corporation will be subject to the law of only one State. No principle of corporation law and practice is more firmly established than a State's authority to regulate domestic corporations, including the authority to define the voting rights of shareholders. See Restatement (Second) of Conflict of Laws § 304 (1971) (concluding that the law of the incorporating State generally should "determine the right of a shareholder to participate in the administration of the affairs of the corporation"). Accordingly, we conclude that the Indiana Act does not create an impermissible risk of inconsistent regulation by different States.

C

The Court of Appeals did not find the Act unconstitutional for either of these threshold reasons. Rather, its decision rested on its view of the Act's potential to hinder tender offers. We think the Court of Appeals failed to appreciate the significance for Commerce Clause analysis of the fact that state regulation of corporate governance is regulation of entities whose very existence and attributes are a product of state law. As Chief Justice Marshall explained:

> "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created." *Trustees of Dartmouth College* v. *Woodward*, 4 Wheat. 518, 636 (1819).

See *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 822–824 (1978) (REHNQUIST, J., dissenting). Every State in this country has enacted laws regulating corporate gover-

nance. By prohibiting certain transactions, and regulating others, such laws necessarily affect certain aspects of interstate commerce. This necessarily is true with respect to corporations with shareholders in States other than the State of incorporation. Large corporations that are listed on national exchanges, or even regional exchanges, will have shareholders in many States and shares that are traded frequently. The markets that facilitate this national and international participation in ownership of corporations are essential for providing capital not only for new enterprises but also for established companies that need to expand their businesses. This beneficial free market system depends at its core upon the fact that a corporation—except in the rarest situations—is organized under, and governed by, the law of a single jurisdiction, traditionally the corporate law of the State of its incorporation.

These regulatory laws may affect directly a variety of corporate transactions. Mergers are a typical example. In view of the substantial effect that a merger may have on the shareholders' interests in a corporation, many States require supermajority votes to approve mergers. See, *e. g.*, 2 MBCA § 73 (requiring approval of a merger by a majority of all shares, rather than simply a majority of votes cast); RMBCA § 11.03 (same). By requiring a greater vote for mergers than is required for other transactions, these laws make it more difficult for corporations to merge. State laws also may provide for "dissenters' rights" under which minority shareholders who disagree with corporate decisions to take particular actions are entitled to sell their shares to the corporation at fair market value. See, *e. g.*, 2 MBCA §§ 80, 81; RMBCA § 13.02. By requiring the corporation to purchase the shares of dissenting shareholders, these laws may inhibit a corporation from engaging in the specified transactions.[12]

[12] Numerous other common regulations may affect both nonresident and resident shareholders of a corporation. Specified votes may be required for the sale of all of the corporation's assets. See 2 MBCA § 79; RMBCA

It thus is an accepted part of the business landscape in this country for States to create corporations, to prescribe their powers, and to define the rights that are acquired by purchasing their shares. A State has an interest in promoting stable relationships among parties involved in the corporations it charters, as well as in ensuring that investors in such corporations have an effective voice in corporate affairs.

There can be no doubt that the Act reflects these concerns. The primary purpose of the Act is to protect the shareholders of Indiana corporations. It does this by affording shareholders, when a takeover offer is made, an opportunity to decide collectively whether the resulting change in voting control of the corporation, as they perceive it, would be desirable. A change of management may have important effects on the shareholders' interests; it is well within the State's role as overseer of corporate governance to offer this opportunity. The autonomy provided by allowing shareholders collectively to determine whether the takeover is advantageous to their

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§ 12.02. The election of directors may be staggered over a period of years to prevent abrupt changes in management. See 1 MBCA § 37; RMBCA § 8.06. Various classes of stock may be created with differences in voting rights as to dividends and on liquidation. See 1 MBCA § 15; RMBCA § 6.01(c). Provisions may be made for cumulative voting. See 1 MBCA § 33, ¶ 4; RMBCA § 7.28; n. 9, *supra*. Corporations may adopt restrictions on payment of dividends to ensure that specified ratios of assets to liabilities are maintained for the benefit of the holders of corporate bonds or notes. See 1 MBCA § 45 (noting that a corporation's articles of incorporation can restrict payment of dividends); RMBCA § 6.40 (same). Where the shares of a corporation are held in States other than that of incorporation, actions taken pursuant to these and similar provisions of state law will affect all shareholders alike wherever they reside or are domiciled.

Nor is it unusual for partnership law to restrict certain transactions. For example, a purchaser of a partnership interest generally can gain a right to control the business only with the consent of other owners. See Uniform Partnership Act § 27, 6 U. L. A. 353 (1969); Uniform Limited Partnership Act § 19 (1916 draft), 6 U. L. A. 603 (1969); Revised Uniform Limited Partnership Act §§ 702, 704 (1976 draft), 6 U. L. A. 259, 261 (Supp. 1986). These provisions—in force in the great majority of the States—bear a striking resemblance to the Act at issue in this case.

interests may be especially beneficial where a hostile tender offer may coerce shareholders into tendering their shares.

Appellee Dynamics responds to this concern by arguing that the prospect of coercive tender offers is illusory, and that tender offers generally should be favored because they reallocate corporate assets into the hands of management who can use them most effectively.[13] See generally Easterbrook & Fischel, The Proper Role of a Target's Management in Responding to a Tender Offer, 94 Harv. L. Rev. 1161 (1981). As indicated *supra*, at 82–83, Indiana's concern with tender offers is not groundless. Indeed, the potentially coercive aspects of tender offers have been recognized by the SEC, see SEC Release No. 21079, p. 86,916, and by a number of scholarly commentators, see, *e. g.*, Bradley & Rosenzweig, Defensive Stock Repurchases, 99 Harv. L. Rev. 1377, 1412–1413 (1986); Macey & McChesney, A Theoretical Analysis of Corporate Greenmail, 95 Yale L. J. 13, 20–22 (1985); Lowenstein, 83 Colum. L. Rev., at 307–309. The Constitution does not require the States to subscribe to any particular economic theory. We are not inclined "to second-guess the empirical judgments of lawmakers concerning the utility of legislation," *Kassel* v. *Consolidated Freightways Corp.*, 450 U. S., at 679 (BRENNAN, J., concurring in judgment). In our view, the possibility of coercion in some takeover bids offers additional justification for Indiana's decision to promote the autonomy of independent shareholders.

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[13] It is appropriate to note when discussing the merits and demerits of tender offers that generalizations usually require qualification. No one doubts that some successful tender offers will provide more effective management or other benefits such as needed diversification. But there is no reason to *assume* that the type of conglomerate corporation that may result from repetitive takeovers necessarily will result in more effective management or otherwise be beneficial to shareholders. The divergent views in the literature—and even now being debated in the Congress—reflect the reality that the type and utility of tender offers vary widely. Of course, in many situations the offer to shareholders is simply a cash price substantially higher than the market price prior to the offer.

Dynamics argues in any event that the State has "'no legitimate interest in protecting the nonresident shareholders.'" Brief for Appellee 21 (quoting *Edgar* v. *MITE Corp.*, 457 U. S., at 644). Dynamics relies heavily on the statement by the *MITE* Court that "[i]nsofar as the . . . law burdens out-of-state transactions, there is nothing to be weighed in the balance to sustain the law." 457 U. S., at 644. But that comment was made in reference to an Illinois law that applied as well to out-of-state corporations as to in-state corporations. We agree that Indiana has no interest in protecting nonresident shareholders *of nonresident corporations*. But this Act applies only to corporations incorporated in Indiana. We reject the contention that Indiana has no interest in providing for the shareholders of its corporations the voting autonomy granted by the Act. Indiana has a substantial interest in preventing the corporate form from becoming a shield for unfair business dealing. Moreover, unlike the Illinois statute invalidated in *MITE*, the Indiana Act applies only to corporations that have a substantial number of shareholders in Indiana. See Ind. Code § 23–1–42–4(a)(3) (Supp. 1986). Thus, every application of the Indiana Act will affect a substantial number of Indiana residents, whom Indiana indisputably has an interest in protecting.

D

Dynamics' argument that the Act is unconstitutional ultimately rests on its contention that the Act will limit the number of successful tender offers. There is little evidence that this will occur. But even if true, this result would not substantially affect our Commerce Clause analysis. We reiterate that this Act does not prohibit any entity—resident or nonresident—from offering to purchase, or from purchasing, shares in Indiana corporations, or from attempting thereby to gain control. It only provides regulatory procedures designed for the better protection of the corporations' shareholders. We have rejected the "notion that the Commerce

Clause protects the particular structure or methods of operation in a . . . market." *Exxon Corp.* v. *Governor of Maryland*, 437 U. S., at 127. The very commodity that is traded in the securities market is one whose characteristics are defined by state law. Similarly, the very commodity that is traded in the "market for corporate control"—the corporation—is one that owes its existence and attributes to state law. Indiana need not define these commodities as other States do; it need only provide that residents and nonresidents have equal access to them. This Indiana has done. Accordingly, even if the Act should decrease the number of successful tender offers for Indiana corporations, this would not offend the Commerce Clause.[14]

IV

On its face, the Indiana Control Share Acquisitions Chapter evenhandedly determines the voting rights of shares of Indiana corporations. The Act does not conflict with the provisions or purposes of the Williams Act. To the limited extent that the Act affects interstate commerce, this is justified by the State's interests in defining the attributes of shares in its corporations and in protecting shareholders. Congress has never questioned the need for state regulation of these matters. Nor do we think such regulation offends the Constitution. Accordingly, we reverse the judgment of the Court of Appeals.

It is so ordered.

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

I join Parts I, III–A, and III–B of the Court's opinion. However, having found, as those Parts do, that the Indiana

[14] CTS also contends that the Act does not violate the Commerce Clause—regardless of any burdens it may impose on interstate commerce—because a corporation's decision to be covered by the Act is purely "private" activity beyond the reach of the Commerce Clause. Because we reverse the judgment of the Court of Appeals on other grounds, we have no occasion to consider this argument.

Control Share Acquisitions Chapter neither "discriminates against interstate commerce," *ante*, at 88, nor "create[s] an impermissible risk of inconsistent regulation by different States," *ante*, at 89, I would conclude without further analysis that it is not invalid under the dormant Commerce Clause. While it has become standard practice at least since *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137 (1970), to consider, in addition to these factors, whether the burden on commerce imposed by a state statute "is clearly excessive in relation to the putative local benefits," *id.*, at 142, such an inquiry is ill suited to the judicial function and should be undertaken rarely if at all. This case is a good illustration of the point. Whether the control shares statute "protects shareholders of Indiana corporations," Brief for Appellant in No. 86–97, p. 88, or protects incumbent management seems to me a highly debatable question, but it is extraordinary to think that the constitutionality of the Act should depend on the answer. Nothing in the Constitution says that the protection of entrenched management is any less important a "putative local benefit" than the protection of entrenched shareholders, and I do not know what qualifies us to make that judgment—or the related judgment as to how effective the present statute is in achieving one or the other objective—or the ultimate (and most ineffable) judgment as to whether, given importance-level x, and effectiveness-level y, the worth of the statute is "outweighed" by impact-on-commerce z.

One commentator has suggested that, at least much of the time, we do not in fact mean what we say when we declare that statutes which neither discriminate against commerce nor present a threat of multiple and inconsistent burdens might nonetheless be unconstitutional under a "balancing" test. See Regan, The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause, 84 Mich. L. Rev. 1091 (1986). If he is not correct, he ought to be. As long as a State's corporation law governs only its own corporations and does not discriminate against out-of-state interests, it should survive this Court's scrutiny under

the Commerce Clause, whether it promotes shareholder welfare or industrial stagnation. Beyond that, it is for Congress to prescribe its invalidity.

I also agree with the Court that the Indiana Control Share Acquisitions Chapter is not pre-empted by the Williams Act, but I reach that conclusion without entering into the debate over the purposes of the two statutes. The Williams Act is governed by the antipre-emption provision of the Securities Exchange Act of 1934, 15 U. S. C. § 78bb(a), which provides that nothing it contains "shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security or any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder." Unless it serves no function, that language forecloses pre-emption on the basis of conflicting "purpose" as opposed to conflicting "provision." Even if it does not have literal application to the present case (because, perhaps, the Indiana agency responsible for securities matters has no enforcement responsibility with regard to this legislation), it nonetheless refutes the proposition that Congress meant the Williams Act to displace *all* state laws with conflicting purpose. And if any are to survive, surely the States' corporation codes are among them. It would be peculiar to hold that Indiana could have pursued the purpose at issue here through its blue-sky laws, but cannot pursue it through the State's even more sacrosanct authority over the structure of domestic corporations. Prescribing voting rights for the governance of state-chartered companies is a traditional state function with which the Federal Congress has never, to my knowledge, intentionally interfered. I would require far more evidence than is available here to find implicit pre-emption of that function by a federal statute whose provisions concededly do not conflict with the state law.

I do not share the Court's apparent high estimation of the beneficence of the state statute at issue here. But a law can

be both economic folly and constitutional. The Indiana Control Share Acquisitions Chapter is at least the latter. I therefore concur in the judgment of the Court.

JUSTICE WHITE, with whom JUSTICE BLACKMUN and JUSTICE STEVENS join as to Part II, dissenting.

The majority today upholds Indiana's Control Share Acquisitions Chapter, a statute which will predictably foreclose completely some tender offers for stock in Indiana corporations. I disagree with the conclusion that the Chapter is neither pre-empted by the Williams Act nor in conflict with the Commerce Clause. The Chapter undermines the policy of the Williams Act by effectively preventing minority shareholders, in some circumstances, from acting in their own best interests by selling their stock. In addition, the Chapter will substantially burden the interstate market in corporate ownership, particularly if other States follow Indiana's lead as many already have done. The Chapter, therefore, directly inhibits interstate commerce, the very economic consequences the Commerce Clause was intended to prevent. The opinion of the Court of Appeals is far more persuasive than that of the majority today, and the judgment of that court should be affirmed.

I

The Williams Act expressed Congress' concern that individual investors be given sufficient information so that they could make an informed choice on whether to tender their stock in response to a tender offer. The problem with the approach the majority adopts today is that it equates protection of individual investors, the focus of the Williams Act, with the protection of shareholders as a group. Indiana's Control Share Acquisitions Chapter undoubtedly helps protect the interests of a majority of the shareholders in any corporation subject to its terms, but in many instances, it will effectively prevent an individual investor from selling his stock at a premium. Indiana's statute, therefore, does not

"furthe[r] the federal policy of *investor* protection," *ante*, at 83 (emphasis added), as the majority claims.

In discussing the legislative history of the Williams Act, the Court, in *Piper* v. *Chris-Craft Industries, Inc.*, 430 U. S. 1 (1977), looked to the legislative history of the Williams Act and concluded that the Act was designed to protect individual investors, not management and not tender offerors: "The sponsors of this legislation were plainly sensitive to the suggestion that the measure would favor one side or the other in control contests; however, they made it clear that the legislation was designed solely to get needed information to the investor, the constant focal point of the committee hearings." *Id.*, at 30–31. The Court specifically noted that the Williams Act's legislative history shows that Congress recognized that some "takeover bids . . . often serve a useful function." *Id.*, at 30. As quoted by the majority, *ante*, at 82, the basic purpose of the Williams Act is "'plac[ing] *investors* on an equal footing with the takeover bidder.'" *Piper*, *supra*, at 30 (emphasis added).

The Control Share Acquisitions Chapter, by design, will frustrate individual investment decisions. Concededly, the Control Share Acquisitions Chapter allows the majority of a corporation's shareholders to block a tender offer and thereby thwart the desires of an individual investor to sell his stock. In the context of discussing how the Chapter can be used to deal with the coercive aspects of some tender offers, the majority states: "In such a situation under the Indiana Act, the shareholders as a group, acting in the corporation's best interest, could reject the offer, although individual shareholders might be inclined to accept it." *Ante*, at 83. I do not dispute that the Chapter provides additional protection for Indiana corporations, particularly in helping those corporations maintain the status quo. But it is clear to me that Indiana's scheme conflicts with the Williams Act's careful balance, which was intended to protect individual investors and permit them to decide whether it is in their best interests

to tender their stock. As noted by the plurality in *MITE*, "Congress . . . did not want to deny shareholders 'the opportunities which result from the competitive bidding for a block of stock of a given company,' namely, the opportunity to sell shares for a premium over their market price. 113 Cong. Rec. 24666 (1967) (remarks of Sen. Javits)." *Edgar* v. *MITE Corp.*, 457 U. S. 624, 633, n. 9 (1982).

The majority claims that if the Williams Act pre-empts Indiana's Control Share Acquisitions Chapter, it also pre-empts a number of other corporate-control provisions such as cumulative voting or staggering the terms of directors. But this view ignores the fundamental distinction between these other corporate-control provisions and the Chapter: unlike those other provisions, the Chapter is designed to prevent certain tender offers from ever taking place. It is transactional in nature, although it is characterized by the State as involving only the voting rights of certain shares. "[T]his Court is not bound by '[t]he name, description or characterization given [a challenged statute] by the legislature or the courts of the State,' but will determine for itself the practical impact of the law." *Hughes* v. *Oklahoma*, 441 U. S. 322, 336 (1979) (quoting *Lacoste* v. *Louisiana Dept. of Conservation*, 263 U. S. 545, 550 (1924)). The Control Share Acquisitions Chapter will effectively prevent minority shareholders in some circumstances from selling their stock to a willing tender offeror. It is the practical impact of the Chapter that leads to the conclusion that it is pre-empted by the Williams Act.

II

Given the impact of the Control Share Acquisitions Chapter, it is clear that Indiana is directly regulating the purchase and sale of shares of stock in interstate commerce. Appellant CTS' stock is traded on the New York Stock Exchange, and people from all over the country buy and sell CTS' shares daily. Yet, under Indiana's scheme, any prospective purchaser will be effectively precluded from purchasing CTS'

shares if the purchaser crosses one of the Chapter's threshold ownership levels and a majority of CTS' shareholders refuse to give the purchaser voting rights. This Court should not countenance such a restraint on interstate trade.

The United States, as *amicus curiae*, argues that Indiana's Control Share Acquisitions Chapter "is written as a restraint on the *transferability* of voting rights in specified transactions, and it could not be written in any other way without changing its meaning. Since the restraint on the transfer of voting rights is a restraint on the transfer of shares, the Indiana Chapter, like the Illinois Act [in *MITE*], restrains 'transfers of stock by stockholders to a third party.'" Brief for Securities and Exchange Commission and United States as *Amici Curiae* 26. I agree. The majority ignores the practical impact of the Chapter in concluding that the Chapter does not violate the Commerce Clause. The Chapter is characterized as merely defining "the attributes of shares in its corporations," *ante*, at 94. The majority sees the trees but not the forest.

The Commerce Clause was included in our Constitution by the Framers to prevent the very type of economic protectionism Indiana's Control Share Acquisitions Chapter represents:

> "The few simple words of the Commerce Clause—'The Congress shall have Power . . . To regulate Commerce . . . among the several States . . .'—reflected a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Hughes*, *supra*, at 325–326.

The State of Indiana, in its brief, admits that at least one of the Chapter's goals is to protect Indiana corporations. The State notes that the Chapter permits shareholders "to deter-

mine . . . whether [a tender offeror] will liquidate the company or remove it from the State." Brief for Appellant in No. 86–97, p. 19. The State repeats this point later in its brief: "The Statute permits shareholders (who may also be community residents or employees or suppliers of the corporation) to determine the intentions of any offeror concerning the liquidation of the company or its possible removal from the State." *Id.*, at 90. A state law which permits a majority of an Indiana corporation's stockholders to prevent individual investors, including out-of-state stockholders, from selling their stock to an out-of-state tender offeror and thereby frustrate any transfer of corporate control, is the archetype of the kind of state law that the Commerce Clause forbids.

Unlike state blue sky laws, Indiana's Control Share Acquisitions Chapter regulates the purchase and sale of stock of Indiana corporations in interstate commerce. Indeed, as noted above, the Chapter will inevitably be used to block interstate transactions in such stock. Because the Commerce Clause protects the "interstate market" in such securities, *Exxon Corp.* v. *Governor of Maryland*, 437 U. S. 117, 127 (1978), and because the Control Share Acquisitions Chapter substantially interferes with this interstate market, the Chapter clearly conflicts with the Commerce Clause.

With all due respect, I dissent.

UNITED STATES *v.* JOHN DOE, INC. I, ET AL.

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

No. 85–1613. Argued January 12, 1987—Decided April 21, 1987

Under *United States* v. *Sells Engineering, Inc.*, 463 U. S. 418, attorneys for the Civil Division (CD) of the Department of Justice (DOJ) may not automatically obtain disclosure of grand jury materials for use in a civil suit, but must instead seek a district court disclosure order under Rule 6(e)(3)(C)(i) of the Federal Rules of Criminal Procedure, which order is available upon a showing of "particularized need." After an extensive investigation, a grand jury that had been convened by attorneys from the DOJ's Antitrust Division (AD) was discharged upon their conclusion that, although respondents had engaged in price fixing violative of the Sherman Act, criminal prosecution was unwarranted under the circumstances. Subsequently, in preparation for a possible civil action against respondents, the AD attorneys reviewed materials furnished to the grand jury and concluded that respondents had violated the False Claims Act, primary enforcement responsibility for which rests in the CD. Because they wished to consult with CD lawyers and also with the appropriate local United States Attorney before bringing suit, the AD lawyers obtained a Rule 6(e) order allowing them to disclose grand jury material to six named Government attorneys. The District Court denied respondents' motions to vacate the disclosure order and to enjoin the Government from using the grand jury information in the anticipated civil suit. However, after allowing the Government to file a complaint under seal, the Court of Appeals reversed both aspects of the District Court's denial of relief to respondents, holding that, because the AD attorneys were now involved only in civil proceedings, they were forbidden from making continued use of grand jury information without first obtaining a court order, and that disclosure to the six attorneys for consultation purposes was not supported by an adequate showing of "particularized need." Nonetheless, the court took no action with respect to the complaint, concluding that it disclosed nothing about the grand jury investigation.

Held:

1. An attorney who conducted a criminal prosecution may make continued use of grand jury materials in the civil phase of the dispute without obtaining a court order to do so under Rule 6(e). The Rule forbids a Government attorney to "disclose" material, which word cannot be inter-

preted to embrace a solitary reexamination of grand jury material in the privacy of an attorney's office. Thus, by its plain language, the Rule merely prohibits those who already have legitimate access to grand jury material from revealing the material to *others* not authorized to receive it. Respondents' contention that disclosure to unauthorized outsiders will result inevitably when a civil complaint is filed is refuted by the record, which indicates that the complaint the DOJ filed did not quote or refer to any grand jury transcripts, documents, or witnesses, refer to the existence of a grand jury, or indirectly disclose grand jury material. Pp. 107–111.

2. Pursuant to the considerations described in *Sells*, there was a "particularized need" for disclosure of the grand jury materials to the CD lawyers and the United States Attorney. Disclosure was requested to enable the AD lawyers to obtain the full benefit of the experience and expertise of the other Government lawyers, and thus serves the public purpose of efficient, effective, and evenhanded enforcement of federal statutes. Since the contemplated use of the material might result in a decision not to proceed with a civil action, the disclosure could have the effect of saving the Government, the potential defendants, and the witnesses costly and time-consuming discovery. The disclosure's public benefits clearly outweigh its dangers, since it poses comparatively little risk to grand jury secrecy, to the integrity of the grand jury itself, or to the normal civil limitations on the Government's discovery and investigative powers. The Court of Appeals exaggerated the significance of potential alternative information sources by means of discovery under the Antitrust Civil Process Act. Wide discretion must be afforded district courts in evaluating the appropriateness of disclosure, and the District Court here did not abuse its discretion. Pp. 111–117.

774 F. 2d 34, reversed.

STEVENS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and POWELL, O'CONNOR, and SCALIA, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL and BLACKMUN, JJ., joined, *post*, p. 117. WHITE, J., took no part in the consideration or decision of the case.

Deputy Solicitor General Cohen argued the cause for the United States. With him on the briefs were *Solicitor General Fried*, *Assistant Attorneys General Ginsburg* and *Willard*, *Deputy Assistant Attorney General Cannon*, *Paul J. Larkin, Jr.*, *Robert B. Nicholson*, *Douglas N. Letter*, *Anna Swerdel*, and *Carolyn G. Mark*.

Paul R. Grand argued the cause for respondents. With him on the brief were *Theodore V. Wells, Jr.*, *Walter Sterling Surrey*, *Carol M. Welu*, and *Howard Adler, Jr.**

JUSTICE STEVENS delivered the opinion of the Court.

In *United States* v. *Sells Engineering, Inc.*, 463 U. S. 418 (1983), we held that attorneys for the Civil Division of the Justice Department may not automatically obtain disclosure of grand jury materials for use in a civil suit, but must instead seek a court order of disclosure, available upon a showing of "particularized need." We explicitly left open the "issue concerning continued use of grand jury materials, in the civil phase of a dispute, by an attorney who himself conducted the criminal prosecution." *Id.*, at 431, n. 15. Today, we decide that open question. In addition, for the first time, we review a concrete application of the "particularized need" standard to a request for disclosure to Government attorneys.

I

In March 1982, attorneys in the Antitrust Division of the Department of Justice were authorized to conduct a grand jury investigation of three American corporations suspected of conspiring to fix the price of tallow being sold to a foreign government and financed by the Department of State's Agency for International Development. After subpoenaing thousands of documents from the three corporate respondents, and taking the testimony of numerous witnesses, including the five individual respondents, the Department of Justice conferred with some of respondents' attorneys and concluded that although respondents had violated § 1 of the Sherman Act, 15 U. S. C. § 1, criminal prosecution was not warranted under the circumstances. In early June

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**J. Randolph Wilson*, *William H. Allen*, *David A. Donohoe*, *Owen M. Johnson, Jr.*, and *Paul B. Hewitt* filed a brief for Archer-Daniels-Midland Co. et al. as *amici curiae* urging affirmance.

1984, the grand jury was discharged without returning any indictments.

On June 28, 1984, the attorneys who had been in charge of the grand jury investigation served Civil Investigative Demands (CID's), pursuant to the Antitrust Civil Process Act, 76 Stat. 548, as amended, 15 U. S. C. §§ 1311–1314, on approximately two dozen persons and entities, including the corporate respondents, calling for the production of various documents. The Antitrust Division advised each respondent that it could comply with the CID by certifying that the requested documents had already been furnished to the grand jury. Two of the corporate respondents refused to do so, and also refused to furnish any additional copies of the documents.

After further investigation, the Antitrust Division attorneys came to the tentative conclusion that respondents had violated the False Claims Act, 31 U. S. C. §§ 3729–3731, and the Foreign Assistance Act, 22 U. S. C. §§ 2151–2429 (1982 ed. and Supp. III), as well as the Sherman Act. Because the Civil Division of the Department of Justice has primary responsibility for enforcing the False Claims Act, see 28 CFR § 0.45(d) (1986), the Antitrust Division deemed it appropriate to consult with lawyers in the Civil Division before initiating a civil action. Additionally, because of the venue of the contemplated civil action, the Antitrust Division felt it necessary to consult with the United States Attorney for the Southern District of New York. Accordingly, the Antitrust Division lawyers filed a motion in the District Court for the Southern District of New York requesting an order under Federal Rule of Criminal Procedure 6(e) allowing them to disclose grand jury material to six named Government attorneys and such associates as those attorneys might designate. After an *ex parte* hearing, the District Court granted the motion, based on its finding that the Government's interest in coordinating fair and efficient enforcement of the False Claims Act, and obtaining the Civil Division's and United States Attor-

ney's expert consultation, constituted a particularized need for the requested disclosure.

On March 6, 1985, the Government advised respondents that the Rule 6(e) order had previously been entered and that a civil action would be filed against them within two weeks. Respondents immediately moved to vacate the Rule 6(e) order and, additionally, to enjoin the Government from using the grand jury information in "preparing, filing, or litigating" the anticipated civil action. The District Court denied both forms of relief. Respondents immediately appealed, and also moved for immediate interim relief from the Court of Appeals for the Second Circuit. The Court of Appeals granted partial relief, allowing the Government to file a complaint, but ordering that it be filed under seal.

After expedited consideration, The Court of Appeals reversed both aspects of the District Court's order. *In re Grand Jury Investigation*, 774 F. 2d 34 (1985). First, the court examined the issue left open in *Sells*, and agreed with respondents that, because the attorneys who had worked on the grand jury investigation were now involved only in civil proceedings, the attorneys were forbidden from making continued use of grand jury information without first obtaining a court order. 774 F. 2d, at 40–43. Nonetheless, the Court of Appeals took no action with respect to the complaint that had been filed, because the court concluded that the complaint disclosed nothing about the grand jury investigation. *Id.*, at 42. With respect to the District Court's order allowing disclosure to the six attorneys for consultation purposes, the Court of Appeals held that the order was not supported by an adequate showing of "particularized need." *Id.*, at 37–40. We granted certiorari, 476 U. S. 1140 (1986), and now reverse.[1]

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[1] The Court of Appeals rejected respondents' challenge to the *ex parte* nature of the initial Rule 6(e) hearing. 774 F. 2d, at 37. Respondents have not cross-petitioned for certiorari on that point, and we do not address it.

II

The "General Rule of Secrecy" set forth in Federal Rule of Criminal Procedure 6(e) provides that certain persons, including attorneys for the Government, "shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules."[2] Unlike our previous decisions in this area, which have primarily involved exceptions to the

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[2] Rule 6(e) provides, in relevant part, as follows:

"Recording and Disclosure of Proceedings.

. . . . . .

"(2) General Rule of Secrecy. A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. . . .

"(3) Exceptions.

"(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to—

"(i) an attorney for the government for use in the performance of such attorney's duty; and

"(ii) such government personnel . . . as are deemed necessary . . . to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law.

"(B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in performance of such attorney's duty to enforce federal criminal law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury . . . with the names of the persons to whom such disclosure has been made.

"(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—

"(i) when so directed by a court preliminarily to or in connection with a judicial proceeding; or

"(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury."

general rule,[3] this case involves a more preliminary question: what constitutes disclosure? The Court of Appeals acknowledged that "to characterize [attorneys'] continued access in the civil phase to the materials to which they had access in the criminal phase as disclosure within the meaning of rule 6(e) seems fictional at first glance." 774 F. 2d, at 40. But the Court of Appeals reasoned that the attorneys could not possibly remember all the details of the grand jury investigation and therefore the use of grand jury materials "to refresh their recollection as to documents or testimony to which they had access in the grand jury proceeding is tantamount to a further disclosure." *Ibid.*

Contrary to the Court of Appeals' conclusion, it seems plain to us that Rule 6(e) prohibits those with information about the workings of the grand jury from revealing such information to other persons who are not authorized to have access to it under the Rule. The Rule does not contain a prohibition against the continued use of information by attorneys who legitimately obtained access to the information through the grand jury investigation. The Court of Appeals' reasoning is unpersuasive because it stretches the plain meaning of the Rule's language much too far. It is indeed fictional—and not just "at first glance"—to interpret the word "disclose" to embrace a solitary reexamination of material in the privacy of an attorney's office.[4] For example, it is obvious that the prohibition against disclosure does not mean that an attorney

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[3] See, *e. g.*, *United States* v. *Procter & Gamble Co.*, 356 U. S. 677 (1958); *Pittsburgh Plate Glass Co.* v. *United States*, 360 U. S. 395 (1959); *Dennis* v. *United States*, 384 U. S. 855 (1966); *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U. S. 211 (1979); *Illinois* v. *Abbott & Associates, Inc.*, 460 U. S. 557 (1983); *United States* v. *Sells Engineering, Inc.*, 463 U. S. 418 (1983); *United States* v. *Baggott*, 463 U. S. 476 (1983).

[4] The word "disclose" is not defined in the Rule, but the common dictionary definitions include to "open up," to "expose to view," to "open up to general knowledge," and to "make known or public . . . something previously held close or secret." See Webster's Third New International Dictionary 645 (1976); Webster's New Collegiate Dictionary 325 (1977).

who prepared a legal memorandum (which happens to include some information about matters related to the workings of the grand jury) for his file, is barred from looking at the memorandum once the grand jury investigation terminates. As the Court of Appeals for the Eighth Circuit recently concluded, "[f]or there to be a disclosure, grand jury matters must be disclosed to *someone*." *United States* v. *Archer-Daniels-Midland Co.*, 785 F. 2d 206, 212 (1986), cert. pending, No. 85–1840.

Because we decide this case based on our reading of the Rule's plain language, there is no need to address the parties' arguments about the extent to which continued use threatens some of the values of grand jury privacy identified in our cases[5] and cataloged in *Sells Engineering*, 463 U. S., at 432–433. While such arguments are relevant when language is susceptible of more than one plausible interpretation, we have recognized that in some cases "[w]e do not have before us a choice between a 'liberal' approach toward [a Rule], on the one hand, and a 'technical' interpretation of the Rule, on the other hand. The choice, instead, is between recognizing or ignoring what the Rule provides in plain language. We accept the Rule as meaning what it says." *Schiavone* v. *Fortune*, 477 U. S. 21, 30 (1986). As for the policy arguments, it

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[5] In *Procter & Gamble*, the Court listed the following reasons for grand jury secrecy:

"'(1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.'" 356 U. S., at 681, n. 6, quoting *United States* v. *Rose*, 215 F. 2d 617, 628–629 (CA3 1954).

suffices to say that, as the Court of Appeals recognized, the implications of our construction are not so absurd or contrary to Congress' aims as to call into question our construction of the plain meaning of the term "disclosure" as used in this Rule.

Respondents urge in the alternative that Rule 6(e) prohibits attorneys' continued use of grand jury materials because the filing of a civil complaint itself discloses grand jury materials to outsiders. Respondents argue that such disclosure is inevitable because a civil complaint's factual allegations will invariably be based on information obtained during the grand jury investigation. This hypothetical fear is not substantiated by the record in this case. The Court of Appeals stated that the Government's complaint "does not quote from or refer to any grand jury transcripts or documents subpoenaed by the grand jury, and does not mention any witnesses before the grand jury, or even refer to the existence of a grand jury." 774 F. 2d, at 37. Nor do respondents identify anything in the complaint that indirectly discloses grand jury information. We have no basis for questioning the accuracy of the Court of Appeals' conclusion that the filing of the complaint did not constitute a prohibited disclosure. A Government attorney may have a variety of uses for grand jury material in a planning stage, even though the material will not be used, or even alluded to, in any filing or proceeding.[6] In

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[6] JUSTICE BRENNAN argues that "there can be little doubt that grand jury information was used" in preparing the complaint. *Post*, at 124, n. 5. Mere "use" of grand jury information in the preparation of a civil complaint would not constitute prohibited disclosure. In this case, for example, one cannot say whether the Government relied at all on the grand jury information. The Government obviously had some evidence of wrongdoing (or at least suspicion) before it convened the grand jury. The general allegations of the civil complaint may well have disclosed nothing that the Government attorneys did not already know before they convened the grand jury, even though the grand jury investigation corroborated the previously known facts. To be sure, the Government's decision to bring a civil action was "based on the evidence obtained in the course of its grand jury testi-

this vein, it is important to emphasize that the issue before us is only whether an attorney who was involved in a grand jury investigation (and is therefore presumably familiar with the "matters occurring before the grand jury") may later review that information in a manner that does not involve any further disclosure to others. Without addressing the very different matter of an attorney's disclosing grand jury information to others, inadvertently or purposefully, in the course of a civil proceeding, we hold that Rule 6(e) does not require the attorney to obtain a court order before refamiliarizing himself or herself with the details of a grand jury investigation.

III

The Department of Justice properly recognized that under our holding in *Sells* it could not disclose information to previously uninvolved attorneys from the Civil Division or the United States Attorney's office without a court order pursuant to Rule 6(e)(3)(C)(i).[7] Upon the Department's motion, the District Court granted an order, finding a "particularized need for disclosure" pursuant to the considerations described in *Sells*. The District Court accepted the Government's argument that consultation and coordination between the Civil Division, the United States Attorney, and the Antitrust Division was necessary to ensure consistent enforcement of the False Claims Act and "the fair and evenhanded administration of justice." App. 14. The Court of Appeals reversed on this point, however, concluding that disclosure was unnec-

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mony," *ibid.*, but this does not mean that the complaint disclosed any of that information, or that, as JUSTICE BRENNAN believes, *post*, at 128, the Government has no interest in the material unless it actually introduces it or otherwise discloses it at trial.

[7] Rule 6(e)(3)(C)(i) provides:

"(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—

"(i) when so directed by a court preliminarily to or in connection with a judicial proceeding."

essary because the same information could eventually have been obtained through civil discovery.

In *Sells* we noted that Rule 6(e) itself does not prescribe the substantive standard governing the issuance of an order pursuant to Rule 6(e)(3)(C)(i) and that the case law that had developed in response to requests for disclosure by private parties had consistently required "a strong showing of particularized need" before disclosure is permitted. 463 U. S., at 443–445; see generally *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U. S. 211, 222–223 (1979).[8] Although we held that this same standard applies where a court is asked to order disclosure to a government attorney, see 463 U. S., at 443–444; *Illinois* v. *Abbott & Associates, Inc.*, 460 U. S. 557 (1983), we made it clear that the concerns that underlie the policy of grand jury secrecy are implicated to a much lesser extent when the disclosure merely involves Government attorneys.

> "Nothing in *Douglas Oil*, however, requires a district court to pretend that there are no differences between governmental bodies and private parties. The *Douglas Oil* standard is a highly flexible one, adaptable to different circumstances and sensitive to the fact that the requirements of secrecy are greater in some situations than in others. Hence, although *Abbott* and the legislative history foreclose any special dispensation from the *Douglas Oil* standard for Government agencies, the standard itself accommodates any relevant considerations, peculiar to Government movants, that weigh for or against disclosure in a given case. For example, a district court might reasonably consider that disclosure

[8] In *Douglas Oil*, we described the standard as follows:

"Parties seeking grand jury transcripts under Rule 6(e) must show that the material they seek is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that their request is structured to cover only material so needed . . . ." 441 U. S., at 222.

> to Justice Department attorneys poses less risk of further leakage or improper use than would disclosure to private parties or the general public. Similarly, we are informed that it is the usual policy of the Justice Department not to seek civil use of grand jury materials until the criminal aspect of the matter is closed. Cf. *Douglas Oil*, *supra*, at 222–223. And 'under the particularized-need standard, the district court may weigh the public interest, if any, served by disclosure to a governmental body . . . .' *Abbott*, *supra*, at 567–568, n. 15. On the other hand, for example, in weighing the need for disclosure, the court could take into account any alternative discovery tools available by statute or regulation to the agency seeking disclosure." 463 U. S., at 445.

In this case, the disclosures were requested to enable the Antitrust Division lawyers who had conducted the grand jury investigation to obtain the full benefit of the experience and expertise of the Civil Division lawyers who regularly handle litigation under the False Claims Act, and of the local United States Attorney who is regularly consulted before actions are filed in his or her district. The public purposes served by the disclosure—efficient, effective, and evenhanded enforcement of federal statutes—are certainly valid and were not questioned by the Court of Appeals. Particularly because the contemplated use of the material was to make a decision on whether to proceed with a civil action, the disclosure here could have had the effect of saving the Government, the potential defendants, and witnesses the pains of costly and time-consuming depositions and interrogatories which might have later turned out to be wasted if the Government decided not to file a civil action after all. To be sure, as we recognized in *Sells*, not every instance of "saving time and expense" justifies disclosure. *Id.*, at 431. The question that must be asked is whether the public benefits of the disclosure in this case outweigh the dangers created by the limited disclosure requested.

In *Sells* we recognized three types of dangers involved in disclosure of grand jury information to Government attorneys for use related to civil proceedings. First, we stated that disclosure not only increases the "number of persons to whom the information is available (thereby increasing the risk of inadvertent or illegal release to others), but also it renders considerably more concrete the threat to the willingness of witnesses to come forward and to testify fully and candidly." *Id.*, at 432 (footnote omitted). Neither of these fears is well founded with respect to the narrow disclosure involved in this case. The disclosure of a summary of a portion of the grand jury record to named attorneys for purposes of consultation does not pose the same risk of a wide breach of grand jury secrecy as would allowing unlimited use of the material to all attorneys in another division—the disclosure involved in *Sells*. Moreover, the fact that the grand jury had already terminated mitigates the damage of a possible inadvertent disclosure. See *id.*, at 445. Finally, because the disclosure authorized in this case would not directly result in any witness' testimony being used against him or her in a civil proceeding, there is little fear that the disclosure will have any effect on future grand jury testimony.

The second concern identified in *Sells* is the threat to the integrity of the grand jury itself. We explained that if "prosecutors in a given case knew that their colleagues would be free to use the materials generated by the grand jury for a civil case, they might be tempted to manipulate the grand jury's powerful investigative tools to root out additional evidence useful in the civil suit, or even to start or continue a grand jury inquiry where no criminal prosecution seemed likely." *Id.*, at 432. The discussion of this concern in *Sells* dealt with whether the Civil Division should be given unfettered access to grand jury materials. We think the concern is far less worrisome when the attorneys seeking disclosure must go before a court and demonstrate a particularized need prior to any disclosure, and when, as part of that inquiry, the

district court may properly consider whether the circumstances disclose any evidence of grand jury abuse. In this case, for example, one of the Government attorneys involved in the criminal investigation submitted an affidavit attesting to the Department's good faith in conducting the grand jury investigation, App. 17–19, and there has been no evidence or allegation to the contrary. The fact that a court is involved in this manner lessens some of the usual difficulty in detecting grand jury abuse. See *Sells*, 463 U. S., at 432. Moreover, we think the fear of abuse is minimal when the civil use contemplated is simply consultation with various Government lawyers about the prudence of proceeding with a civil action.

The final concern discussed in *Sells* is that "use of grand jury materials by Government agencies in civil or administrative settings threatens to subvert the limitations applied outside the grand jury context on the Government's powers of discovery and investigation." *Id.*, at 433. We continue to believe that this is an important concern, but it is not seriously implicated when the Government simply wishes to use the material for consultation. Of course, when the Government requests disclosure for use in an actual adversarial proceeding, this factor (as well as the others) may require a stronger showing of necessity. We have explained that "as the considerations justifying secrecy become less relevant, a party asserting a need for grand jury [material] will have a lesser burden in showing justification." *Douglas Oil*, 441 U. S., at 223.

Although it recognized that the disclosure in this case did not seriously threaten the values of grand jury secrecy, the Court of Appeals nonetheless concluded that the request for disclosure should have been denied because virtually all of the relevant information could have been obtained from respondents through discovery under the Antitrust Civil Proc-

ess Act.[9] The Court of Appeals believed that the delay and expense that would be caused by such duplicative discovery was not a relevant factor in the particularized need analysis. 774 F. 2d, at 39.

While the possibility of obtaining information from alternative sources is certainly an important factor, we believe that the Court of Appeals exaggerated its significance in this case. Even if we assume that all of the relevant material could have been obtained through the civil discovery tools available to the Government,[10] our precedents do not establish a *per se* rule against disclosure. Rather, we have repeatedly stressed that wide discretion must be afforded to district court judges in evaluating whether disclosure is appropriate. See *Douglas Oil*, 441 U. S., at 228; *id.*, at 236–237 (STEVENS, J., dissenting); *Pittsburgh Plate Glass Co.* v. *United States*, 360 U. S. 395, 399 (1959). The threat to grand jury secrecy was minimal in this context, and under the circumstances, the District Court properly considered the strong "public interests served" through disclosure. See *Sells*, 463 U. S., at 445; *id.*, at 469–470 (Burger, C. J., dissenting). As we noted in *Sells*, the governing standard is "a highly flexible one, adaptable to different circumstances and sensitive to the fact that the requirements of secrecy are greater in some situa-

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[9] The Court of Appeals was also concerned about the specificity of the requested disclosure. While this concern was appropriate, the lack of particularity was not overly dangerous in this setting because the interest in preserving secrecy from Civil Division lawyers was minimal, and the Antitrust lawyers obviously would not have any reason to burden them with portions of the record that were not relevant to the advisory task that they were being asked to perform.

[10] It is far from clear that this assumption is accurate. Only in 1986 did Congress amend the False Claims Act so as to allow the use of CID's for investigations of violations of that Act. See Pub. L. 99–562, 100 Stat. 3153. In addition, the Government's opportunity to proceed with civil discovery before deciding whether to file a civil complaint was significantly hampered by the fact that the statute of limitations on one of the claims was to run shortly after the grand jury was dismissed.

tions than in others." *Id.*, at 445. The District Court correctly examined the relevant factors and we cannot say that it abused its discretion in determining that the equities leaned in favor of disclosure.[11]

The judgment of the Court of Appeals is

Reversed.

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

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

Rule 6(e) greatly restricts the availability of grand jury evidence in order to preserve the secrecy and integrity of grand jury proceedings. Consistent with these concerns, in *United States* v. *Sells Engineering, Inc.*, 463 U. S. 418 (1983), this Court rejected the contention that grand jury information is automatically available to any Justice Department Civil Division attorney. Essential to that conclusion was the principle that automatic access to grand jury material is appropriate only for the limited purpose of permitting a prosecutor to assist the grand jury, and that a Government attorney seeking to use grand jury information for civil purposes lacks such a

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[11] Based on his assumption that any complaint filed would necessarily disclose grand jury information, JUSTICE BRENNAN concludes that there could be no legitimate justification for disclosure to the Civil Division lawyers and the United States Attorney for consultation purposes. This argument misses two points. First, the Antitrust Division may have wanted the attorneys' advice on the matter even if they would not have been able to disclose the actual grand jury materials in a subsequent civil proceeding. See n. 6, *supra*. Second, in the event that the consultations confirmed the position that a civil suit was appropriate, the Antitrust Division attorneys may have planned on eventually seeking a second court order that would allow them to disclose the material in a civil suit. See *post*, at 127 (Government may, of course, seek court order permitting disclosure in civil case). The purpose of the consultation, therefore, was not necessarily intertwined with any disclosure that JUSTICE BRENNAN believes is prohibited.

justification. *Id.*, at 431. Given this holding, it is simply irrelevant whether the attorney who desires to use grand jury information in a civil action worked with the grand jury at an earlier time. The crucial fact is that the use to which that attorney would put this information is in no way in aid of the grand jury. Nonetheless, the Court today holds that an attorney's past connection with that body makes grand jury material automatically available to that attorney for the purpose of determining whether a civil complaint should be filed. The Court reaches this result only by adopting a severely restricted construction of the word "disclosure" in Rule 6(e). Because this construction ignores the substantive concerns of that Rule and is flatly inconsistent with the reasoning in *Sells*, I dissent.

I

The grand jury is an exception to our reliance on the adversarial process in our criminal justice system. As we have stated:

> "[The grand jury] is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime." *Blair* v. *United States*, 250 U. S. 273, 282 (1919).

By virtue of the grand jury's character as an inquisitorial body, "there are few if any other forums in which a governmental body has such relatively unregulated power to compel other persons to divulge information or produce evidence." *United States* v. *Sells Engineering, Inc.*, *supra*, at 433.[1]

[1] See also *United States* v. *Calandra*, 414 U. S. 338, 343 (1974) ("The grand jury may compel the production of evidence or the testimony of witnesses as it considers appropriate, and its operation generally is unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials"); 2 S. Beale & W. Bryson, Grand Jury Law and

Persons may be summoned to testify even if no charge whatsoever is pending, *Wilson* v. *United States*, 221 U. S. 361 (1911), and even if they are only potential defendants, *United States* v. *Wong*, 431 U. S. 174, 179, n. 8 (1977). Except for privilege provisions, the Federal Rules of Evidence do not apply to proceedings before grand juries. Fed. Rule Evid. 1101(d)(2). The exclusionary rule is inapplicable in the grand jury context, *United States* v. *Calandra*, 414 U. S. 338 (1974), as is the usual requirement that one demonstrate the reasonableness of a subpoena to appear and provide voice or handwriting exemplars, *United States* v. *Dionisio*, 410 U. S. 1 (1973). Furthermore, a witness generally is not permitted to have counsel present in the grand jury room while testifying. 1 S. Beale & W. Bryson, Grand Jury Law and Practice § 6:16, p. 6–88 (1986).

These exceptional powers are wielded not on behalf of the prosecutor, but in aid of the grand jury as an "arm of the court." *Levine* v. *United States*, 362 U. S. 610, 617 (1960). They are employed to permit the grand jury to fulfill its "invaluable function in our society of standing between the accuser and the accused . . . to determine whether a charge is founded upon reason." *Wood* v. *Georgia*, 370 U. S. 375, 390 (1962). Thus, the information generated by the grand jury's inquiry is "not the property of the Government's attorneys, agents or investigators, nor are they entitled to possession of them in such a case. Instead, those documents are records of the court." *United States* v. *Procter & Gamble Co.*, 356 U. S. 677, 684–685 (1958) (Whittaker, J., concurring). See also *In re Grand Jury Investigation of Cuisinarts, Inc.*, 665 F. 2d 24, 31 (CA2 1981) ("[G]rand jury proceedings remain the records of the courts"), cert. denied *sub nom. Connecticut* v. *Cuisinarts, Inc.*, 460 U. S. 1068 (1983).

Recognition of the unique purpose for which grand jury powers are employed informed our decision in *Sells*. In that

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Practice § 7:01, p. 7–4 (1986) ("[T]he grand jury has the most extensive subpoena power known to the law").

case, we rejected the Government's argument that the provision in Rule 6(e)(3)(A)(i) for disclosure of material to an attorney for the Government "for use in the performance of such attorney's duty" made grand jury information automatically available for use by Justice Department civil attorneys. Subsection (A)(i), we held, justified automatic access only for the limited purpose of enabling prosecutors to perform their role of assisting the grand jury. "An attorney with only civil duties," we stated, "lacks both the prosecutor's special role in supporting the grand jury, and the prosecutor's own crucial need to know what occurs before the grand jury." *Sells*, 463 U. S., at 431 (footnote omitted). As a result, "'[f]ederal prosecutors' are given a free hand concerning use of grand jury materials, at least pursuant to their 'duties relating to criminal law enforcement'; but disclosure of 'grand jury-developed evidence for civil law enforcement purposes' requires a (C)(i) court order." *Id.*, at 441–442 (quoting S. Rep. No. 95–354, p. 8 (1977)).

Such a rule, we held, was as applicable to attorneys within the Justice Department as to attorneys in agencies outside it. 463 U. S., at 442. The legislative history of subsection (A)(ii), permitting disclosure to the prosecutor's support staff, indicated, we said, that

> "Congress' expressions of concern about civil use of grand jury materials did not distinguish in principle between such use by outside agencies and by the Department; rather, *the key distinction was between disclosure for criminal use, as to which access should be automatic, and for civil use, as to which a court order should be required.*" *Id.*, at 440 (footnote omitted) (emphasis added).

The issue of automatic access by an attorney who earlier assisted the grand jury was not presented in *Sells*, and we did not reach it. *Id.*, at 431, n. 15. As the above language indicates, however, *Sells* makes clear that the automatic availability of grand jury information is determined not by

the identity of the attorney who seeks to use the material, but by the use to which the material would be put.[2] Thus, it is irrelevant whether an attorney *once* worked with the grand jury—what matters is whether that attorney *now* does.

II

The Court today evades this logic by finding that no "disclosure" under Rule 6(e) occurs when an attorney who assisted the grand jury uses grand jury material in determining whether a civil suit should be filed. The premise of this conclusion is that Rule 6(e) prohibits only "those with information about the workings of the grand jury from revealing such information to *other persons* who are not authorized to have access to it under the Rule," *ante*, at 108 (emphasis added).[3]

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[2] See also *United States* v. *Sells Engineering, Inc.*, 463 U. S., at 428 ("[I]t is immaterial that certain attorneys happen to be assigned to a unit called the Civil Division, or that their usual duties involve only civil cases. If, for example, the Attorney General (for whatever reason) were to detail a Civil Division attorney to conduct a criminal grand jury investigation, nothing in Rule 6 would prevent that attorney from doing so; he need not secure a transfer out of the Civil Division").

[3] The Court also rejects the position that, where an attorney who files a civil suit was permitted to use grand jury information to determine if that suit should be filed, a complaint relating to conduct that was the subject of the grand jury investigation necessarily discloses grand jury information. Instead, the Court notes that the complaint in this case did not specifically identify any information as the product of grand jury proceedings, nor have respondents identified "anything in the complaint that indirectly discloses grand jury information." *Ante*, at 110. Determining somehow whether a complaint utilizes grand jury information is an inherently uncertain exercise, however, as is indicated by the Court's speculation about the possible scenarios under which the Government might not have relied on grand jury information in filing the civil complaint in this case. *Ante*, at 110, n. 6. To base the determination whether there has been disclosure on such shifting sands is fundamentally inconsistent with the spirit of Rule 6(e)'s stringent and categorical prohibition on automatic access to grand jury material. This is why it is preferable, as is set forth *infra*, to impose a bright-line prohibition on automatic access to grand jury material for *any* civil attorney.

The Court declares that it need not inquire whether its construction of Rule 6(e) is consistent with the Rule's purposes, since the Court derives that construction from its "reading of the Rule's plain language." *Ante*, at 109.

Before addressing the Court's "plain language" argument, it is important to make clear just how seriously the Court's interpretation of the Rule is at odds with the Rule's underlying purposes.

The first interest furthered by the secrecy imposed by Rule 6(e) is encouragement of witnesses to testify fully and candidly. *Sells*, *supra*, at 432; *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U. S. 211, 219 (1979). The Court's construction of the term "disclosure" directly conflicts with this interest, for "[i]f a witness knows or fears that his testimony before the grand jury will be routinely available for use in governmental civil litigation or administrative action, he may well be less willing to speak for fear that he will get himself into trouble in some other forum." *Sells*, *supra*, at 432. The fact that the attorney utilizing this testimony received it directly from the grand jury, rather than from an attorney who worked with the grand jury, will hardly be relevant to a witness. It is the *substance* of the witness' testimony that will expose him or her to civil liability, not the identity of the Government attorney who employs it for this purpose. The Court's narrow construction of the term "disclosure" thus creates exactly the disincentive that Rule 6(e)'s restriction on disclosure is intended to prevent.[4]

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[4] The Government is unpersuasive in arguing that this prospect is no more of a disincentive than the possibility that testimony will be revealed under the Jencks Act or under a Rule 6(e) court order. The Jencks Act authorizes the disclosure of grand jury statements only if the witness is called by the United States to testify at trial, only to the criminal defendant, and only to the extent that the statement relates to the subject matter of the witness' testimony at trial. 18 U. S. C. § 3500. Disclosure under a Rule 6(e) court order requires a judicial determination that the need for disclosure "outweighs the public interest in secrecy," *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U. S. 211, 223 (1979). These provisions for

A second major interest served by Rule 6(e) is protection of the integrity of the grand jury. The automatic availability of grand jury material for civil use creates a temptation to utilize the grand jury's expansive investigative powers to generate evidence useful in civil litigation. In our society, the inquisitorial character of the grand jury is an anomaly that can be justified only if that body's powers are used in service of its unique historical function. Governmental appropriation of grand jury information for civil use thus diminishes public willingness to countenance the grand jury's far-reaching authority. Furthermore, circumvention of normal restrictions on the Government's civil discovery methods "would grant to the Government a virtual *ex parte* form of discovery, from which its civil litigation opponents are excluded unless they make a strong showing of particularized need." *Sells*, 463 U. S., at 434.

This concern about the use of grand jury information for civil purposes is reflected throughout the legislative history of the amendment adding subsection (3)(A)(ii) to Rule 6(e), which permits disclosure to nonattorneys for the purpose of assisting the prosecutor. We recounted this history in detail in *Sells*, *supra*, at 436–442, and there is no need to repeat it in detail here. The House of Representatives rejected the amendment as originally drafted because

> "[i]t was feared that the proposed change would allow Government agency personnel to obtain grand jury information which they could later use in connection with an unrelated civil or criminal case. This would enable those agencies to circumvent statutes that specifically circumscribe the investigative procedure otherwise available to them." H. R. Rep. No. 95–195, p. 4 (1977) (footnote omitted).

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disclosure under limited circumstances hardly compare with the automatic, wholesale availability of grand jury information for the purpose of filing a civil complaint.

In response, the final version of the Rule sought

> "to allay the concerns of those who fear that such prosecutorial power will lead to misuse of the grand jury to enforce non-criminal Federal laws by (1) providing a clear prohibition, subject to the penalty of contempt and (2) requiring that a court order under paragraph (C) be obtained to authorize such a disclosure." S. Rep. No. 95–354, p. 8 (1977).

The Court's construction of Rule 6(e) undercuts such objectives. The fact that there may be no expansion of the group of persons who possess grand jury information is simply irrelevant to a concern that the Government may seek to use the grand jury for civil purposes. If anything, there is even more motivation for such misuse when the prospective beneficiary in the civil context would be the prosecutor, as opposed to some other Government civil attorney. The Court's decision today creates an incentive for the Government to use prosecutors rather than civil attorneys to prepare and file civil complaints based on grand jury information, a practice directly at odds with Congress' intention to minimize the opportunity for using such information outside the grand jury context.[5] This temptation to employ the grand jury as a

[5] Contrary to the Court's assumption, there can be little doubt that grand jury information was used as the basis for the complaint in this case. The grand jury investigation produced some 250,000 pages of subpoenaed documents and transcripts of the testimony of "dozens of witnesses." *In re Grand Jury Investigation*, 774 F. 2d 34, 40 (CA2 1985). Two of the three respondents refused to certify in response to a Civil Investigative Demand (CID) by the Government that all documents requested by the CID had been submitted to the grand jury. These respondents furnished no documents in response to the CID's, nor did the Government attempt to enforce such demands. At least as to these two corporations, therefore, grand jury material is the *only* information that could have served as the basis for the civil complaint. The prominent role of grand jury material in preparing the complaint against respondents is underscored by the Antitrust Division's request for a Rule 6(e) order authorizing disclosure to the Civil Division and the United States Attorney's Office. As the Govern-

civil investigative unit is clearly inconsistent with the intention that Rule 6(e) operate to impede the use of grand jury information for civil purposes.[6] It is far more consonant with that intention to find that matters occurring before the grand jury are "disclosed" any time they are put to use outside the grand jury context, whether or not the attorney who uses them assisted the grand jury at an earlier time. There was "disclosure" in this case under that standard.

The Court avoids confronting the extent to which its decision undercuts the objectives of the Rule by maintaining that its construction of the Rule is compelled by the "plain meaning" of the word "disclosure." It is surely unlikely, however, that a construction that produces results so clearly at variance with the concerns of the Rule is required by its "plain language." Contrary to the Court's approach, the purposes of the Rule, not dictionary definitions, have guided courts in construing this term of art. For instance, the Court's assumption that "disclosure" does not occur when a party seeking to utilize information is already in legitimate possession of it is belied by "the well settled rule that a witness is not entitled to a copy of his grand jury testimony on demand, even though he obviously was present in the grand jury room during the receipt of evidence, *since a rule of automatic access would expose grand jury witnesses to potential intimidation*" by making it possible for those with power over the witness to monitor his or her testimony. Brief for

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ment stated in that request, "The Antitrust Division currently is considering whether to bring a civil action, *based on the evidence obtained in the course of its grand jury investigation*, alleging violations of [the Sherman, False Claims, and Foreign Assistance Acts]." App. 10 (emphasis added).

[6] It is true that any given grand jury investigation may be challenged on the ground that it is intended to generate information for a civil suit. *United States* v. *Procter & Gamble Co.*, 356 U. S. 677, 683–684 (1958). However, the need for a prophylactic rule against automatic disclosure rests on recognition of the fact that "if and when [grand jury misuse] does occur, it would often be very difficult to detect and prove." *Sells*, 463 U. S., at 432.

United States 26, n. 20 (emphasis added).[7] See, *e. g.*, *United States* v. *Clavey*, 565 F. 2d 111, 113–114 (CA7 1978) (treating as "disclosure" access of grand jury witness to own prior testimony, noting "policy reasons justifying strict preservation of the secrecy" of grand jury proceedings); *Bast* v. *United States*, 542 F. 2d 893, 895–896 (CA4 1976) (treating as "disclosure" access of grand jury witness to own prior testimony, noting that "the secrecy of grand jury proceedings encourages witnesses to testify without fear of retaliation and protects the independence of the grand jury"). Cf. *Executive Securities Corp.* v. *Doe*, 702 F. 2d 406, 408–409 (CA2 1983) (treating as "disclosure" access to grand jury material by a party familiar with such material by virtue of earlier Rule 6(e) disclosure order). Thus, although the Court's construction of the term "disclosure" would not encompass access to grand jury material by parties already familiar with such material, such access is routinely regarded as "disclosure" in certain instances because such a construction of the Rule furthers its basic purposes.

Furthermore, even relying on dictionary definitions, it is just as plausible to say that one "'make[s] known or public . . . something previously held close or secret,'" *ante*, at 108, n. 4 (quoting Webster's Third New International Dictionary 645 (1976)), when, as in this case, one takes information from a secret grand jury proceeding and puts it to use in the form of factual allegations recounted in a civil lawsuit. See n. 5, *supra*. By now, it should be apparent that the Court's interpretation of the term "disclosure" is not compelled by the Rule's plain language. Given this fact, the appropriate course is to determine which interpretation is appropriate by reference to the underlying policy concerns of Rule 6(e). As

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[7] The prosecutor and the witness obviously differ in their respective bases for possession of grand jury information. The prosecutor's access to it is authorized by Rule 6(e)(3)(A)(i); no such explicit authorization is necessary for the witness, of course, since he or she is the direct source of this information.

the preceding analysis demonstrates, the Court's construction is seriously deficient by that standard.

The Court's cramped reading of Rule 6(e) is particularly unjustified because the more plausible interpretation suggested above would not absolutely foreclose the Government from utilizing grand jury information outside the grand jury context. Rather, that interpretation would merely preclude *automatic* use of grand jury information, requiring a disinterested court in each case to weigh the need for grand jury secrecy against the need for civil use of the material. Even where judicial permission was not forthcoming, significant duplication of time and effort could be avoided by conducting the civil investigation *first*, and then referring cases for criminal prosecution. This is the procedure followed by the Securities and Exchange Commission, which conducts an initial civil investigation and then refers cases for prosecution to the Justice Department if warranted. 15 U. S. C. § 78u(h)(9)(B). Similarly, since this Court held in *United States* v. *Baggot*, 463 U. S. 476 (1983), that grand jury material could not be disclosed to the Internal Revenue Service (IRS) for use in a tax audit, the IRS conducts its own civil investigations, which may generate information useful in a subsequent criminal prosecution. In this case, the availability of expansive discovery powers under the Antitrust Civil Process Act, 15 U. S. C. §§ 1311–1314, would make it easy to avoid any purported duplication of effort.

Adoption of the interpretation urged by respondents therefore would impose no significant cost on the Government, and would be most consistent with the interests furthered by grand jury secrecy.

III

I would also affirm the Court of Appeals insofar as it held that the Antitrust Division was not entitled to disclose grand jury material to the Civil Division and United States Attorney's Office, although for a different reason than that offered by the court below. The Antitrust Division sought this dis-

closure for the purpose of receiving advice whether filing a complaint on the basis of certain evidence would be consistent with Government enforcement policy. Most, if not all, of this evidence, however, was grand jury material, the use of which in a civil context had not been authorized by a court order. See n. 5, *supra*. Since this evidence could not legitimately serve as the basis for a civil complaint without a court order, there was no justification for its disclosure to third parties at that point. In effect, the Antitrust Division sought disclosure to obtain advice about the strength of evidence that the Division had not received authorization to use in filing its complaint. As a result, there was no "need" for disclosure justifying an exception to Rule 6(e)'s general rule of grand jury secrecy.

IV

The Court today forsakes reliance on a disinterested judge to determine the propriety of the civil use of grand jury material in the circumstances of this case. The Court therefore leaves this decision entirely to the discretion of a party who stands to gain from utilizing the grand jury's enormous investigative powers for the purpose of preparing a civil complaint. This interpretation of Rule 6(e) is fundamentally at odds with that Rule's mandate that grand jury information be used for civil purposes only when, in particular circumstances, the need for the information outweighs the interest in grand jury secrecy. I dissent.

GRANBERRY *v.* GREER, WARDEN

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

No. 85–6790. Argued February 24, 1987—Decided April 21, 1987

Petitioner, a state prisoner, filed a habeas corpus action in Federal District Court pursuant to 28 U. S. C. § 2254. The court dismissed the petition on the merits. On petitioner's appeal to the Court of Appeals, respondent for the first time interposed the defense that petitioner had not exhausted his state remedies. The court rejected petitioner's argument that the nonexhaustion defense had been waived by the failure to assert it in the District Court, and remanded the cause to the District Court with instructions to dismiss without prejudice.

Held: Where the State fails to raise an arguably meritorious nonexhaustion defense in the district court, the court of appeals should exercise discretion in each case to determine whether the interests of comity and federalism, and the interests of justice, will be better served by addressing the merits forthwith or by requiring a series of additional state and district court proceedings before reviewing the petitioner's claim. The failure to exhaust state remedies does not deprive an appellate court of jurisdiction to consider the merits of a habeas corpus application. The appellate court is not required to dismiss for nonexhaustion notwithstanding the State's failure to raise the issue below; nor is the appellate court obligated to regard the State's omission as an absolute waiver of the claim. The history of the exhaustion doctrine supports the middle course announced in this case. The Court of Appeals' judgment in this case is vacated, and the case is remanded for further proceedings, because the court simply held that the nonexhaustion doctrine could not be waived, and made no attempt to determine whether the interests of justice would be better served by addressing the merits of the habeas petition or by requiring additional state proceedings before doing so. Pp. 131–136.

780 F. 2d 14, vacated and remanded.

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

Howard B. Eisenberg, by appointment of the Court, 479 U. S. 912, argued the cause and filed briefs for petitioner.

Marcia L. Friedl, Assistant Attorney General of Illinois, argued the cause for respondent. On the brief were *Neil*

F. Hartigan, Attorney General, *Roma J. Stewart*, Solicitor General, and *Mark L. Rotert* and *Terence M. Madsen*, Assistant Attorneys General.

JUSTICE STEVENS delivered the opinion of the Court.

Petitioner, a state prisoner, applied to the District Court for the Southern District of Illinois for a writ of habeas corpus pursuant to 28 U. S. C. § 2254. The Magistrate to whom the District Court referred the case ordered the State of Illinois to file an answer; the State instead filed a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, arguing that the petition failed to state a claim upon which relief could be granted. The District Court adopted the Magistrate's recommendation and dismissed the petition on the merits. When petitioner appealed to the Court of Appeals for the Seventh Circuit, respondent for the first time interposed the defense that petitioner had not exhausted his state remedies.[1] In response, petitioner contended that the State had waived that defense by failing to raise it in the District Court. The Court of Appeals rejected the waiver argument and remanded the cause to the District Court with instructions to dismiss without prejudice. *Granberry* v. *Mizell*, 780 F. 2d 14 (1985). Because the Courts of Appeals have given different answers to the question whether the State's failure to raise nonexhaustion in the district court constitutes a waiver of that defense in the court of appeals,[2] we granted certiorari. 479 U. S. 813 (1986).

[1] Before seeking federal relief, petitioner had filed a mandamus action in the Illinois Supreme Court in 1981. That court denied the petition "without prejudice to proceeding in any appropriate circuit court for consideration of the question presented." App. 10. In 1983, petitioner commenced a second mandamus action in the Illinois Supreme Court, which denied the motion for leave to file a petition for writ of mandamus. *Id.*, at 9.

[2] Compare *Batchelor* v. *Cupp*, 693 F. 2d 859, 862–864 (CA9 1982); *Naranjo* v. *Ricketts*, 696 F. 2d 83, 87 (CA10 1982), with *Jenkins* v. *Fitzberger*, 440 F. 2d 1188, 1189 (CA4 1971); *McGee* v. *Estelle*, 722 F. 2d 1206, 1214 (CA5 1984) (en banc); *Purnell* v. *Missouri Department of Corrections*, 753 F. 2d 703, 710 (CA8 1985).

How an appellate court ought to handle a nonexhausted habeas petition when the State has not raised this objection in the district court is a question that might be answered in three different ways. We might treat the State's silence on the matter as a procedural default precluding the State from raising the issue on appeal.[3] At the other extreme, we might treat nonexhaustion as an inflexible bar to consideration of the merits of the petition by the federal court, and therefore require that a petition be dismissed when it appears that there has been a failure to exhaust.[4] Or, third, we might adopt an intermediate approach and direct the courts of appeals to exercise discretion in each case to decide whether the administration of justice would be better served by insisting on exhaustion or by reaching the merits of the petition forthwith.

We have already decided that the failure to exhaust state remedies does not deprive an appellate court of jurisdiction to consider the merits of a habeas corpus application. See *Strickland* v. *Washington*, 466 U. S. 668, 684 (1984) (citing *Rose* v. *Lundy*, 455 U. S. 509, 515–520 (1982)); see also *Frisbie* v. *Collins*, 342 U. S. 519, 521–522 (1952). As the *Strickland* case demonstrates, there are some cases in which it is appropriate for an appellate court to address the merits of a habeas corpus petition notwithstanding the lack of complete exhaustion. Although there is a strong presumption in favor of requiring the prisoner to pursue his available state remedies, his failure to do so is not an absolute bar to appellate consideration of his claims.

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[3] Cf. *Wainwright* v. *Sykes*, 433 U. S. 72 (1977); *Murray* v. *Carrier*, 477 U. S. 478 (1986); *Smith* v. *Murray*, 477 U. S. 527 (1986).

[4] Cf. *Iowa Mutual Insurance Co.* v. *LaPlante*, 480 U. S. 9 (1987) (district court may not exercise diversity jurisdiction until remedies in parallel tribal court proceeding have been exhausted); *National Farmers Union Insurance Cos.* v. *Crow Tribe*, 471 U. S. 845 (1985) (comity requires that tribal remedies be exhausted before district court considers issue of tribal court jurisdiction).

We have also expressed our reluctance to adopt rules that allow a party to withhold raising a defense until after the "main event"—in this case, the proceeding in the District Court—is over. See *Wainwright* v. *Sykes*, 433 U. S. 72, 89–90 (1977). Although the record indicates that the State's failure to raise the nonexhaustion defense in this case was the result of inadvertence,[5] rather than a matter of tactics, it seems unwise to adopt a rule that would permit, and might even encourage, the State to seek a favorable ruling on the merits in the district court while holding the exhaustion defense in reserve for use on appeal if necessary. If the habeas petition is meritorious, such a rule would prolong the prisoner's confinement for no other reason than the State's postponement of the exhaustion defense to the appellate level.[6]

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[5] Rule 5 of the Rules governing § 2254 cases in the United States district courts requires that the answer to a habeas petition "shall state whether the petitioner has exhausted his state remedies including any post-conviction remedies available to him under the statutes or procedural rules of the state. . . ." The State's Rule 12(b)(6) motion and accompanying brief did not contain this required statement. App. 12–17. The State represents that this omission "was a mistake on the part of the assistants, on the part of the assistant attorney general. . . . The assistant was not even aware of the exhaustion requirement." Tr. of Oral Arg. 29, 38 (counsel for respondent).

It is also true, of course, that the Magistrate, upon receipt of the Rule 12(b)(6) motion, did not then ask the State to make a Rule 5 statement of whether petitioner had exhausted his state remedies. Instead, the Magistrate gave notice to petitioner that the State had filed a motion to dismiss with "an affidavit or other documentary evidence," and that accordingly, under Rule 56(c) of the Federal Rules of Civil Procedure, petitioner could not "rest upon the mere allegations of your Petition," but must send affidavits establishing a genuine issue for trial. Record Doc. No. 7. Petitioner filed a response, and the Magistrate then issued his Report and Recommendation that the motion to dismiss be granted. The District Court adopted this recommendation and dismissed the action, without referring to the exhaustion issue. App. 18–21.

[6] The State can successfully defend a habeas action either by obtaining dismissal for failure to exhaust or by winning on the merits, while the prisoner can only obtain the relief he seeks if the court reaches the merits and

Moreover, if the court of appeals is convinced that the petition has no merit, a belated application of the exhaustion rule might simply require useless litigation in the state courts.

We are not persuaded by either of the extreme positions. The appellate court is not required to dismiss for nonexhaustion notwithstanding the State's failure to raise it, and the court is not obligated to regard the State's omission as an absolute waiver of the claim. Instead, we think the history of the exhaustion doctrine, as recently reviewed in *Rose* v. *Lundy*, 455 U. S. 509 (1982), points in the direction of a middle course:

> "The exhaustion doctrine existed long before its codification by Congress in 1948. In *Ex parte Royall*, 117 U. S. 241, 251 (1886), this Court wrote that as a matter of comity, federal courts should not consider a claim in a habeas corpus petition until after the state courts have had an opportunity to act:
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> "'The injunction to hear the case summarily, and thereupon "to dispose of the party as law and justice require" does not deprive the court of discretion as to the time and mode in which it will exert the powers conferred upon it. That discretion should be exercised in the light of the relations existing, under our system of government, between the judicial tribunals of the Union and of the States, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution.'

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rules in his favor. A rule requiring dismissal when the defense of nonexhaustion is raised at the appellate level for the first time therefore would never operate to the prisoner's benefit. If the prisoner obtains relief in district court, the State could assert this rule to obtain a reversal on appeal, while conversely, if the district court denies habeas relief and the prisoner appeals, the rule requiring dismissal would not result in reversal of the denial of habeas relief.

"Subsequent cases refined the principle that state remedies must be exhausted except in unusual circumstances. See, *e. g.*, *United States ex rel. Kennedy* v. *Tyler*, 269 U. S. 13, 17–19 (1925) (holding that the lower court should have dismissed the petition because none of the questions had been raised in the state courts. 'In the regular and ordinary course of procedure, the power of the highest state court in respect of such questions should first be exhausted'). In *Ex parte Hawk*, 321 U. S. 114, 117 (1944), this Court reiterated that comity was the basis for the exhaustion doctrine: 'it is a principle controlling all habeas corpus petitions to the federal courts, that those courts will interfere with the administration of justice in the state courts only "in rare cases where exceptional circumstances of peculiar urgency are shown to exist."'

. . . . . .

"In 1948, Congress codified the exhaustion doctrine in 28 U. S. C. § 2254, citing *Ex parte Hawk* as correctly stating the principle of exhaustion." *Id.*, at 515–516 (footnotes omitted).

When the State answers a habeas corpus petition, it has a duty to advise the district court whether the prisoner has, in fact, exhausted all available state remedies. See n. 5, *supra*. As this case demonstrates, however, there are exceptional cases in which the State fails, whether inadvertently or otherwise, to raise an arguably meritorious nonexhaustion defense. The State's omission in such a case makes it appropriate for the court of appeals to take a fresh look at the issue. The court should determine whether the interests of comity and federalism will be better served by addressing the merits forthwith or by requiring a series of additional state and district court proceedings before reviewing the merits of the petitioner's claim.

If, for example, the case presents an issue on which an unresolved question of fact or of state law might have an impor-

tant bearing, both comity and judicial efficiency may make it appropriate for the court to insist on complete exhaustion to make sure that it may ultimately review the issue on a fully informed basis. On the other hand, if it is perfectly clear that the applicant does not raise even a colorable federal claim, the interests of the petitioner, the warden, the state attorney general, the state courts, and the federal courts will all be well served even if the State fails to raise the exhaustion defense, the district court denies the habeas petition, and the court of appeals affirms the judgment of the district court forthwith. See *United States ex rel. Allum* v. *Twomey*, 484 F. 2d 740, 743 (CA7 1973); Note, State Waiver of the Exhaustion Requirement in Habeas Corpus Cases, 52 Geo. Wash. L. Rev. 419, 433 (1984).[7]

Conversely, if a full trial has been held in the district court and it is evident that a miscarriage of justice has occurred, it may also be appropriate for the court of appeals to hold that the nonexhaustion defense has been waived in order to avoid unnecessary delay in granting relief that is plainly warranted. In *Frisbie* v. *Collins*, 342 U. S. 519 (1952), respondent brought a habeas action in District Court, seeking release from a Michigan state prison. The State did not raise the availability of state relief, and the District Court denied the writ. The Court of Appeals reached the merits of the habeas petition and reversed. While we ultimately disagreed with

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[7] The Rules governing § 2254 cases in the United States district courts leave open this possibility. While the Magistrate requested the State to file an answer in this case, Rule 4 authorizes a district judge summarily to dismiss a habeas petition if "it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court." If the petition is not summarily dismissed, "the judge shall order the respondent to file an answer or other pleading. . . ." The answer "shall state whether the petitioner has exhausted his state remedies." Rule 5. Thus, the District Court's dismissal of a nonmeritorious petition under Rule 4 pretermits consideration of the issue of nonexhaustion. Similarly, it is appropriate for the court of appeals to dispose of nonmeritorious petitions without reaching the nonexhaustion issue.

the Court of Appeals' conclusion on the merits, we rejected the State's nonexhaustion argument and approved the Court of Appeals' determination that "special circumstances" required "prompt federal intervention." *Id.*, at 522. We noted that the general rule of exhaustion "is not rigid and inflexible . . . . Whether such circumstances exist calls for a factual appraisal by the court in each special situation." *Id.*, at 521.[8] As we recognized in *Frisbie*, the cases in which the nonexhaustion defense is not asserted in the district court may present a wide variety of circumstances which the courts of appeals, drawing on their familiarity with state criminal practice, are able to evaluate individually.

In this case the Court of Appeals simply held that the nonexhaustion defense could not be waived, and made no attempt to determine whether the interests of justice would be better served by addressing the merits of the habeas petition or by requiring additional state proceedings before doing so. Accordingly, we vacate the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.[9]

It is so ordered.

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[8] See, *e. g.*, *Marino* v. *Ragen*, 332 U. S. 561, 564 (1947) (Rutledge, J., concurring) (exhaustion should not be required "whenever it may become clear that the alleged state remedy is nothing but a procedural morass offering no substantial hope of relief").

[9] Petitioner has also contested the Court of Appeals' determination that he failed to exhaust his state remedies. *Granberry* v. *Mizell*, 780 F. 2d 14, 16 (1985). On that issue, however, we defer to the Court of Appeals which is more familiar with Illinois' practice than we are.

TISON *v.* ARIZONA

CERTIORARI TO THE SUPREME COURT OF ARIZONA

No. 84–6075. Argued November 3, 1986—Decided April 21, 1987*

Petitioner brothers, along with other members of their family, planned and effected the escape of their father from prison where he was serving a life sentence for having killed a guard during a previous escape. Petitioners entered the prison with a chest filled with guns, armed their father and another convicted murderer, later helped to abduct, detain, and rob a family of four, and watched their father and the other convict murder the members of that family with shotguns. Although they both later stated that they were surprised by the shooting, neither petitioner made any effort to help the victims, but drove away in the victims' car with the rest of the escape party. After the Arizona Supreme Court affirmed petitioners' individual convictions for capital murder under that State's felony-murder and accomplice-liability statutes, petitioners collaterally attacked their death sentences in state postconviction proceedings, alleging that *Enmund* v. *Florida*, 458 U. S. 782, which had been decided in the interim, required reversal. However, the State Supreme Court determined that they should be executed, holding that *Enmund* requires a finding of "intent to kill," and interpreting that phrase to include situations in which the defendant intended, contemplated, or anticipated that lethal force would or might be used, or that life would or might be taken in accomplishing the underlying felony. Despite finding that petitioners did not specifically intend that the victims die, plan the homicides in advance, or actually fire the shots, the court ruled that the requisite intent was established by evidence that petitioners played an active part in planning and executing the breakout and in the events that lead to the murders, and that they did nothing to interfere with the killings nor to disassociate themselves from the killers afterward. Although only one of the petitioners testified that he would have been willing to kill, the court found that both of them could have anticipated the use of lethal force.

Held: Although petitioners neither intended to kill the victims nor inflicted the fatal wounds, the record might support a finding that they had the culpable mental state of reckless indifference to human life. The Eighth Amendment does not prohibit the death penalty as disproportionate in

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*Together with *Tison* v. *Arizona*, also on certiorari to the same court (see this Court's Rule 19.4).

the case of a defendant whose participation in a felony that results in murder is major and whose mental state is one of reckless indifference. A survey of state felony-murder laws and judicial decisions after *Enmund* indicates a societal consensus that that combination of factors may justify the death penalty even without a specific "intent to kill." Reckless disregard for human life also represents a highly culpable mental state that may support a capital sentencing judgment in combination with major participation in the felony resulting in death. Because the Arizona Supreme Court affirmed these death sentences upon a finding that the defendants "intended, contemplated, or anticipated that lethal force would or might be used or that life would or might be taken," the case must be remanded. Pp. 146–158.

142 Ariz. 446, 690 P. 2d 747, and 142 Ariz. 454, 690 P. 2d 755, vacated and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, POWELL, and SCALIA, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, and in Parts I, II, III, and IV–A of which BLACKMUN and STEVENS, JJ., joined, *post*, p. 159.

Alan M. Dershowitz, by appointment of the Court, 475 U. S. 1079, argued the cause for petitioners. With him on the briefs were *Stephen H. Oleskey*, *Cynthia O. Hamilton*, *Susan Estrich*, and *Nathan Dershowitz*.

William J. Schafer III argued the cause for respondent. With him on the brief was *Robert K. Corbin*, Attorney General of Arizona.

JUSTICE O'CONNOR delivered the opinion of the Court.

The question presented is whether the petitioners' participation in the events leading up to and following the murder of four members of a family makes the sentences of death imposed by the Arizona courts constitutionally permissible although neither petitioner specifically intended to kill the victims and neither inflicted the fatal gunshot wounds. We hold that the Arizona Supreme Court applied an erroneous standard in making the findings required by *Enmund* v. *Florida*, 458 U. S. 782 (1982), and, therefore, vacate the judgments below and remand the case for further proceedings not inconsistent with this opinion.

I

Gary Tison was sentenced to life imprisonment as the result of a prison escape during the course of which he had killed a guard. After he had been in prison a number of years, Gary Tison's wife, their three sons Donald, Ricky, and Raymond, Gary's brother Joseph, and other relatives made plans to help Gary Tison escape again. See *State* v. *Dorothy Tison*, Cr. No. 108352 (Super. Ct. Maricopa County 1981). The Tison family assembled a large arsenal of weapons for this purpose. Plans for escape were discussed with Gary Tison, who insisted that his cellmate, Randy Greenawalt, also a convicted murderer, be included in the prison break. The following facts are largely evidenced by petitioners' detailed confessions given as part of a plea bargain according to the terms of which the State agreed not to seek the death sentence. The Arizona courts interpreted the plea agreement to require that petitioners testify to the planning stages of the breakout. When they refused to do so, the bargain was rescinded and they were tried, convicted, and sentenced to death.

On July 30, 1978, the three Tison brothers entered the Arizona State Prison at Florence carrying a large ice chest filled with guns. The Tisons armed Greenawalt and their father, and the group, brandishing their weapons, locked the prison guards and visitors present in a storage closet. The five men fled the prison grounds in the Tisons' Ford Galaxy automobile. No shots were fired at the prison.

After leaving the prison, the men abandoned the Ford automobile and proceeded on to an isolated house in a white Lincoln automobile that the brothers had parked at a hospital near the prison. At the house, the Lincoln automobile had a flat tire; the only spare tire was pressed into service. After two nights at the house, the group drove toward Flagstaff. As the group traveled on back roads and secondary highways through the desert, another tire blew out. The group de-

cided to flag down a passing motorist and steal a car. Raymond stood out in front of the Lincoln; the other four armed themselves and lay in wait by the side of the road. One car passed by without stopping, but a second car, a Mazda occupied by John Lyons, his wife Donnelda, his 2-year-old son Christopher, and his 15-year-old niece, Theresa Tyson, pulled over to render aid.

As Raymond showed John Lyons the flat tire on the Lincoln, the other Tisons and Greenawalt emerged. The Lyons family was forced into the backseat of the Lincoln. Raymond and Donald drove the Lincoln down a dirt road off the highway and then down a gas line service road farther into the desert; Gary Tison, Ricky Tison, and Randy Greenawalt followed in the Lyons' Mazda. The two cars were parked trunk to trunk and the Lyons family was ordered to stand in front of the Lincoln's headlights. The Tisons transferred their belongings from the Lincoln into the Mazda. They discovered guns and money in the Mazda which they kept, and they put the rest of the Lyons' possessions in the Lincoln.

Gary Tison then told Raymond to drive the Lincoln still farther into the desert. Raymond did so, and, while the others guarded the Lyons and Theresa Tyson, Gary fired his shotgun into the radiator, presumably to completely disable the vehicle. The Lyons and Theresa Tyson were then escorted to the Lincoln and again ordered to stand in its headlights. Ricky Tison reported that John Lyons begged, in comments "more or less directed at everybody," "Jesus, don't kill me." Gary Tison said he was "thinking about it." App. 39, 108. John Lyons asked the Tisons and Greenawalt to "[g]ive us some water . . . just leave us out here, and you all go home." Gary Tison then told his sons to go back to the Mazda and get some water. Raymond later explained that his father "was like in conflict with himself . . . . What it was, I think it was the baby being there and all this, and he wasn't sure about what to do." *Id.*, at 20–21, 74.

The petitioners' statements diverge to some extent, but it appears that both of them went back towards the Mazda, along with Donald, while Randy Greenawalt and Gary Tison stayed at the Lincoln guarding the victims. Raymond recalled being at the Mazda filling the water jug "when we started hearing the shots." *Id.*, at 21. Ricky said that the brothers gave the water jug to Gary Tison who then, with Randy Greenawalt went behind the Lincoln, where they spoke briefly, then raised the shotguns and started firing. *Id.*, at 41, 111. In any event, petitioners agree they saw Greenawalt and their father brutally murder their four captives with repeated blasts from their shotguns. Neither made an effort to help the victims, though both later stated they were surprised by the shooting. The Tisons got into the Mazda and drove away, continuing their flight. Physical evidence suggested that Theresa Tyson managed to crawl away from the bloodbath, severely injured. She died in the desert after the Tisons left.

Several days later the Tisons and Greenawalt were apprehended after a shootout at a police roadblock. Donald Tison was killed. Gary Tison escaped into the desert where he subsequently died of exposure. Raymond and Ricky Tison and Randy Greenawalt were captured and tried jointly for the crimes associated with the prison break itself and the shootout at the roadblock; each was convicted and sentenced.

The State then individually tried each of the petitioners for capital murder of the four victims as well as for the associated crimes of armed robbery, kidnaping, and car theft. The capital murder charges were based on Arizona felony-murder law providing that a killing occurring during the perpetration of robbery or kidnaping is capital murder, Ariz. Rev. Stat. Ann. § 13–452 (1956) (repealed 1978), and that each participant in the kidnaping or robbery is legally responsible for the acts of his accomplices. Ariz. Rev. Stat. Ann. § 13–139 (1956) (repealed 1978). Each of the petitioners was con-

victed of the four murders under these accomplice liability and felony-murder statutes.[1]

Arizona law also provided for a capital sentencing proceeding, to be conducted without a jury, to determine whether the crime was sufficiently aggravated to warrant the death sentence. Ariz. Rev. Stat. Ann. § 13–454(A) (Supp. 1973) (repealed 1978). The statute set out six aggravating and four mitigating factors. Ariz. Rev. Stat. Ann. §§ 13–454(E), (F) (Supp. 1973) (repealed 1978). The judge found three statutory aggravating factors:

(1) the Tisons had created a grave risk of death to others (not the victims);

(2) the murders had been committed for pecuniary gain;

(3) the murders were especially heinous.

The judge found no statutory mitigating factor. Importantly, the judge specifically found that the crime was *not* mitigated by the fact that each of the petitioners' "participation was relatively minor." Ariz. Rev. Stat. Ann. § 13–454(F)(3) (Supp. 1973) (repealed 1978). Rather, he found that the "participation of each [petitioner] in the crimes giving rise to the application of the felony murder rule in this case was very substantial." App. 284–285. The trial judge also specifically found, *id.*, at 285, that each "could reasonably have foreseen that his conduct . . . would cause or create a grave risk of . . . death." Ariz. Rev. Stat. Ann. § 13–454(F)(4) (Supp. 1973) (repealed 1978). He did find, however, three nonstatutory mitigating factors:

(1) the petitioners' youth—Ricky was 20 and Raymond was 19;

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[1] Arizona has recodified and broadened its felony-murder statute to include killings occurring during the course of a variety of sex and narcotics offenses and escape. See Ariz. Rev. Stat. Ann. §§ 13–1105(A)(2), (B) (Supp. 1986). The accomplice liability provisions of Arizona law have been modernized and recodified also. See Ariz. Rev. Stat. Ann. §§ 13–301, 13–303(A)(3), (B)(2) (1978 and Supp. 1986). Neither change would have diminished Ricky Tison's or Raymond Tison's legal accountability for the deaths that occurred.

(2) neither had prior felony records;

(3) each had been convicted of the murders under the felony-murder rule.

Nevertheless, the judge sentenced both petitioners to death.

On direct appeal, the Arizona Supreme Court affirmed. The Court found:

> "The record establishes that both Ricky and Raymond Tison were present when the homicides took place and that they occurred as part of and in the course of the escape and continuous attempt to prevent recapture. The deaths would not have occurred but for their assistance. That they did not specifically intend that the Lyonses and Theresa Tyson die, that they did not plot in advance that these homicides would take place, or that they did not actually pull the triggers on the guns which inflicted the fatal wounds is of little significance." *State* v. *(Ricky Wayne) Tison*, 129 Ariz. 526, 545, 633 P. 2d 335, 354 (1981).

In evaluating the trial court's findings of aggravating and mitigating factors, the Arizona Supreme Court found the first aggravating factor—creation of grave risk to others—not supported by the evidence. All those killed were intended victims, and no one else was endangered. The Arizona Supreme Court, however, upheld the "pecuniary gain" and "heinousness" aggravating circumstances and the death sentences. This Court denied the Tisons' petition for certiorari. 459 U. S. 882 (1982).

Petitioners then collaterally attacked their death sentences in state postconviction proceedings alleging that *Enmund* v. *Florida*, 458 U. S. 782 (1982), which had been decided in the interim, required reversal. A divided Arizona Supreme Court, interpreting *Enmund* to require a finding of "intent to kill," declared in Raymond Tison's case "the dictate of *Enmund* is satisfied," writing:

"Intend *[sic]* to kill includes the situation in which the defendant intended, contemplated, or anticipated that lethal force would or might be used or that life would or might be taken in accomplishing the underlying felony. *Enmund, supra; State* v. *Emery*, [141 Ariz. 549, 554, 688 P. 2d 175, 180 (1984)] filed June 6, 1984.

"In the present case the evidence does not show that petitioner killed or attempted to kill. The evidence does demonstrate beyond a reasonable doubt, however, that petitioner intended to kill. Petitioner played an active part in preparing the breakout, including obtaining a getaway car and various weapons. At the breakout scene itself, petitioner played a crucial role by, among other things, holding a gun on prison guards. Petitioner knew that Gary Tison's murder conviction arose out of the killing of a guard during an earlier prison escape attempt. Thus petitioner could anticipate the use of lethal force during this attempt to flee confinement; in fact, he later said that during the escape he would have been willing personally to kill in a 'very close life or death situation,' and that he recognized that after the escape there was a possibility of killings.

"The use of lethal force that petitioner contemplated indeed occurred when the gang abducted the people who stopped on the highway to render aid. Petitioner played an active part in the events that led to the murders. He assisted in the abduction by flagging down the victims as they drove by, while the other members of the gang remained hidden and armed. He assisted in escorting the victims to the murder site. At the site, petitioner, Ricky Tison and Greenawalt placed the gang's possessions in the victims' Mazda and the victims' possessions in the gang's disabled Lincoln Continental. After Gary Tison rendered the Lincoln inoperable by firing into its engine compartment, petitioner assisted in escorting the victims to the Lincoln. Petitioner then

watched Gary Tison and Greenawalt fire in the direction of the victims. Petitioner did nothing to interfere. After the killings, petitioner did nothing to disassociate himself from Gary Tison and Greenawalt, but instead used the victims' car to continue on the joint venture, a venture that lasted several more days.

"From these facts we conclude that petitioner intended to kill. Petitioner's participation up to the moment of the firing of the fatal shots was substantially the same as that of Gary Tison and Greenawalt. . . . Petitioner, actively participated in the events leading to death by, *inter alia*, providing the murder weapons and helping abduct the victims. Also petitioner was present at the murder site, did nothing to interfere with the murders, and after the murders even continued on the joint venture.

". . . In *Enmund*, unlike in the present case, the defendant did not actively participate in the events leading to death (by, for example, as in the present case, helping abduct the victims) and was not present at the murder site." 142 Ariz. 454, 456–457, 690 P. 2d 755, 757–758 (1984).

In Ricky Tison's case the Arizona Supreme Court relied on a similar recitation of facts to find intent. It found that though Ricky Tison had not said that he would have been willing to kill, he "could anticipate the use of lethal force during this attempt to flee confinement." 142 Ariz. 446, 448, 690 P. 2d 747, 749 (1984). The court noted that Ricky Tison armed himself and hid on the side of the road with the others while Raymond flagged down the Lyons family. Ricky claimed to have a somewhat better view than Raymond did of the actual killing. Otherwise, the court noted, Ricky Tison's participation was substantially the same as Raymond's. *Id.*, at 447–448, 690 P. 2d, at 748–749. We granted certiorari in

order to consider the Arizona Supreme Court's application of *Enmund*. 475 U. S. 1010 (1986).[2]

II

In *Enmund* v. *Florida*, this Court reversed the death sentence of a defendant convicted under Florida's felony-murder rule. Enmund was the driver of the "getaway" car in an armed robbery of a dwelling. The occupants of the house, an elderly couple, resisted and Enmund's accomplices killed them. The Florida Supreme Court found the inference that Enmund was the person in the car by the side of the road waiting to help his accomplices escape sufficient to support his sentence of death:

> "'[T]he only evidence of the degree of [Enmund's] participation is the jury's likely inference that he was the person in the car by the side of the road near the scene of the crimes. The jury could have concluded that he was there, a few hundred feet away, waiting to help the robbers escape with the Kerseys' money. The evidence, therefore, was sufficient to find that the appellant was a principal of the second degree, constructively present aiding and abetting the commission of the crime of robbery. This conclusion supports the verdicts of murder in the first degree on the basis of the felony murder por-

[2] Petitioners devote a substantial portion of their brief on the merits to arguing that Arizona has given an unconstitutionally broad construction to the aggravating factors in its capital sentencing statute. See *Godfrey* v. *Georgia*, 446 U. S. 420 (1980). This Court granted certiorari on the following question:

"Is the December 4, 1984 decision of the Arizona Supreme Court to execute petitioners in conflict with the holding of *Enmund* v. *Florida*, 458 U. S. 782 (1982), where—in words of the Arizona Supreme Court—petitioners 'did not specifically intend that the [victims] die, . . . did not plot in advance that these homicides would take place, or . . . did not actually pull the triggers on the guns which inflicted the fatal wounds . . . .'" Pet. for Cert. 2. In our view, the question presented does not fairly encompass an attack on Arizona's construction of its aggravating factors and we express no view on that subject. See this Court's Rule 21.1(a).

tion of section 782.04(1)(a).' 399 So. 2d, at 1370." *Enmund* v. *Florida*, 458 U. S., at 786.

This Court, citing the weight of legislative and community opinion, found a broad societal consensus, with which it agreed, that the death penalty was disproportional to the crime of robbery-felony murder "in these circumstances." *Id.*, at 788. The Court noted that although 32 American jurisdictions permitted the imposition of the death penalty for felony murders under a variety of circumstances, Florida was 1 of only 8 jurisdictions that authorized the death penalty "solely for participation in a robbery in which another robber takes life." *Id.*, at 789. Enmund was, therefore, sentenced under a distinct minority regime, a regime that permitted the imposition of the death penalty for felony murder *simpliciter*. At the other end of the spectrum, eight States required a finding of intent to kill before death could be imposed in a felony-murder case and one State required actual participation in the killing. The remaining States authorizing capital punishment for felony murders fell into two somewhat overlapping middle categories: three authorized the death penalty when the defendant acted with recklessness or extreme indifference to human life, and nine others, including Arizona, required a finding of some aggravating factor beyond the fact that the killing had occurred during the course of a felony before a capital sentence might be imposed. Arizona fell into a subcategory of six States which made "minimal participation in a capital felony committed by another person a [statutory] mitigating circumstance." *Id.*, at 792. Two more jurisdictions required a finding that the defendant's participation in the felony was not "relatively minor" before authorizing a capital sentence. *Id.*, at 791.[3]

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[3] Vermont fell into none of these categories. Vermont limited the death penalty to defendants who commit a second unrelated murder or murder a correctional officer. See *Enmund* v. *Florida*, 458 U. S. 782, 791, n. 11 (1982).

After surveying the States' felony-murder statutes, the *Enmund* Court next examined the behavior of juries in cases like Enmund's in its attempt to assess American attitudes toward capital punishment in felony-murder cases. Of 739 death row inmates, only 41 did not participate in the fatal assault. All but 16 of these were physically present at the scene of the murder and of these only 3, including Enmund, were sentenced to death in the absence of a finding that they had collaborated in a scheme designed to kill. The Court found the fact that only 3 of 739 death row inmates had been sentenced to death absent an intent to kill, physical presence, or direct participation in the fatal assault persuasive evidence that American juries considered the death sentence disproportional to felony murder *simpliciter*.

Against this background, the Court undertook its own proportionality analysis. Armed robbery is a serious offense, but one for which the penalty of death is plainly excessive; the imposition of the death penalty for robbery, therefore, violates the Eighth and Fourteenth Amendments' proscription "'against all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged.'" *Weems* v. *United States*, 217 U. S. 349, 371 (1910) (quoting *O'Neil* v. *Vermont*, 144 U. S. 323, 339–340 (1892)); cf. *Coker* v. *Georgia*, 433 U. S. 584 (1977) (holding the death penalty disproportional to the crime of rape). Furthermore, the Court found that Enmund's degree of participation in *the murders* was so tangential that it could not be said to justify a sentence of death. It found that neither the deterrent nor the retributive purposes of the death penalty were advanced by imposing the death penalty upon Enmund. The *Enmund* Court was unconvinced "that the threat that the death penalty will be imposed for murder will measurably deter one who does not kill and has no intention or purpose that life will be taken." 458 U. S., at 798–799. In reaching this conclusion, the Court relied upon the fact that killing only rarely occurred during the course of robber-

ies, and such killing as did occur even more rarely resulted in death sentences if the evidence did not support an inference that the defendant intended to kill. The Court acknowledged, however, that "[i]t would be very different if the likelihood of a killing in the course of a robbery were so substantial that one should share the blame for the killing if he somehow participated in the felony." *Id.*, at 799.

That difference was also related to the second purpose of capital punishment, retribution. The heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender. While the States generally have wide discretion in deciding how much retribution to exact in a given case, the death penalty, "unique in its severity and irrevocability," *Gregg* v. *Georgia*, 428 U. S. 153, 187 (1976), requires the State to inquire into the relevant facets of "the character and record of the individual offender." *Woodson* v. *North Carolina*, 428 U. S. 280, 304 (1976). Thus, in Enmund's case, "the focus [had to] be on *his* culpability, not on that of those who committed the robbery and shot the victims, for we insist on 'individualized consideration as a constitutional requirement in imposing the death sentence.'" *Enmund* v. *Florida*, *supra*, at 798 (quoting *Lockett* v. *Ohio*, 438 U. S. 586, 605 (1978)) (emphasis in original). Since Enmund's own participation in the felony murder was so attenuated and since there was no proof that Enmund had any culpable mental state, *Enmund* v. *Florida*, *supra*, at 790–791, the death penalty was excessive retribution for his crimes.

Enmund explicitly dealt with two distinct subsets of all felony murders in assessing whether Enmund's sentence was disproportional under the Eighth Amendment. At one pole was Enmund himself: the minor actor in an armed robbery, not on the scene, who neither intended to kill nor was found to have had any culpable mental state. Only a small minority of States even authorized the death penalty in such circumstances and even within those jurisdictions the death

penalty was almost never exacted for such a crime. The Court held that capital punishment was disproportional in these cases. *Enmund* also clearly dealt with the other polar case: the felony murderer who actually killed, attempted to kill, or intended to kill. The Court clearly held that the equally small minority of jurisdictions that limited the death penalty to these circumstances could continue to exact it in accordance with local law when the circumstances warranted. The Tison brothers' cases fall into neither of these neat categories.

Petitioners argue strenuously that they did not "intend to kill" as that concept has been generally understood in the common law. We accept this as true. Traditionally, "one intends certain consequences when he desires that his acts cause those consequences or knows that those consequences are substantially certain to result from his acts." W. LaFave & A. Scott, Criminal Law § 28, p. 196 (1972); see *Lockett* v. *Ohio*, *supra*, at 625–626 (1978) (opinion of WHITE, J.) (equating intent with purposeful conduct); see also Perkins, A Rationale of Mens Rea, 52 Harv. L. Rev. 905, 911 (1939). As petitioners point out, there is no evidence that either Ricky or Raymond Tison took any act which he desired to, or was substantially certain would, cause death.

The Arizona Supreme Court did not attempt to argue that the facts of this case supported an inference of "intent" in the traditional sense. Instead, the Arizona Supreme Court attempted to reformulate "intent to kill" as a species of foreseeability. The Arizona Supreme Court wrote:

> "Intend *[sic]* to kill includes the situation in which the defendant intended, contemplated, or anticipated that lethal force would or might be used or that life would or might be taken in accomplishing the underlying felony." 142 Ariz., at 456, 690 P. 2d, at 757.

This definition of intent is broader than that described by the *Enmund* Court. Participants in violent felonies like armed robberies can frequently "anticipat[e] that lethal force . . .

might be used . . . in accomplishing the underlying felony." Enmund himself may well have so anticipated. Indeed, the possibility of bloodshed is inherent in the commission of any violent felony and this possibility is generally foreseeable and foreseen; it is one principal reason that felons arm themselves. The Arizona Supreme Court's attempted reformulation of intent to kill amounts to little more than a restatement of the felony-murder rule itself. Petitioners do not fall within the "intent to kill" category of felony murderers for which *Enmund* explicitly finds the death penalty permissible under the Eighth Amendment.

On the other hand, it is equally clear that petitioners also fall outside the category of felony murderers for whom *Enmund* explicitly held the death penalty disproportional: their degree of participation in the crimes was major rather than minor, and the record would support a finding of the culpable mental state of reckless indifference to human life. We take the facts as the Arizona Supreme Court has given them to us. *Cabana* v. *Bullock*, 474 U. S. 376 (1986).

Raymond Tison brought an arsenal of lethal weapons into the Arizona State Prison which he then handed over to two convicted murderers, one of whom he knew had killed a prison guard in the course of a previous escape attempt. By his own admission he was prepared to kill in furtherance of the prison break. He performed the crucial role of flagging down a passing car occupied by an innocent family whose fate was then entrusted to the known killers he had previously armed. He robbed these people at their direction and then guarded the victims at gunpoint while they considered what next to do. He stood by and watched the killing, making no effort to assist the victims before, during, or after the shooting. Instead, he chose to assist the killers in their continuing criminal endeavors, ending in a gun battle with the police in the final showdown.

Ricky Tison's behavior differs in slight details only. Like Raymond, he intentionally brought the guns into the prison

to arm the murderers. He could have foreseen that lethal force might be used, particularly since he knew that his father's previous escape attempt had resulted in murder. He, too, participated fully in the kidnaping and robbery and watched the killing after which he chose to aid those whom he had placed in the position to kill rather than their victims.

These facts not only indicate that the Tison brothers' participation in the crime was anything but minor; they also would clearly support a finding that they both subjectively appreciated that their acts were likely to result in the taking of innocent life. The issue raised by this case is whether the Eighth Amendment prohibits the death penalty in the intermediate case of the defendant whose participation is major and whose mental state is one of reckless indifference to the value of human life. *Enmund* does not specifically address this point. We now take up the task of determining whether the Eighth Amendment proportionality requirement bars the death penalty under these circumstances.

Like the *Enmund* Court, we find the state legislatures' judgment as to proportionality in these circumstances relevant to this constitutional inquiry.[4] The largest number of States still fall into the two intermediate categories discussed in *Enmund*. Four States authorize the death penalty in

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[4] The state statutes discussed in *Enmund* v. *Florida* are largely unchanged. Mississippi and Nevada have modified their statutes to require a finding that the defendant killed, attempted to kill, or intended to kill, or that lethal force be employed, presumably in light of *Enmund*. Miss. Code Ann. § 99–19–101(7) (Supp. 1986); Nev. Rev. Stat. §§ 200.030(1)(b), 200.030(4), 200.033(4)(a)–(b) (1985). New Jersey has joined the ranks of the States imposing capital punishment in intentional murders but not felony murders. N. J. Stat. Ann. §§ 2C:11–3a(a), (c) (West Supp. 1986). Oregon now authorizes capital punishment for felony murders when the defendant intends to kill. Ore. Rev. Stat. §§ 163.095(d), 163.115(1)(b) (1985). Vermont has further narrowed the circumstances in which it authorizes capital punishment: now only the murderers of correctional officers may be subject to death. Vt. Stat. Ann., Tit. 13, §§ 2303(b), (c) (Supp. 1986).

felony-murder cases upon a showing of culpable mental state such as recklessness or extreme indifference to human life.[5] Two jurisdictions require that the defendant's participation be substantial[6] and the statutes of at least six more, including Arizona, take minor participation in the felony expressly into account in mitigation of the murder.[7] These requirements significantly overlap both in this case and in general, for the greater the defendant's participation in the felony murder, the more likely that he acted with reckless indifference to human life. At a minimum, however, it can be said that all these jurisdictions, as well as six States which *Enmund* classified along with Florida as permitting capital punishment for felony murder *simpliciter*,[8] and the three States which simply require some additional aggravation before imposing the death penalty upon a felony murderer,[9]

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[5] Ark. Stat. Ann. § 41–1501(1)(a) (1977 and Supp. 1985); Del. Code Ann., Tit. 11, §§ 636(a)(2), (b) (1979); Ky. Rev. Stat. § 507.020(1)(b) (1985); Ill. Rev. Stat., ch. 38, ¶¶ 9–1(a)(3), 9–1(b)(6) (1986).

[6] Conn. Gen. Stat. § 53a–46a(g)(4) (1985); 49 U. S. C. App. § 1473(c)(6)(D).

[7] Ariz. Rev. Stat. Ann. § 13–703(G)(3) (1978 and Supp. 1986); Colo. Rev. Stat. § 16–11–103(5)(d) (1978 and Supp. 1985); Ind. Code § 35–50–2–9(c)(4) (Supp. 1986); Mont. Code Ann. § 46–18–304(6) (1985); Neb. Rev. Stat. § 29–2523(2)(e) (1985); N. C. Gen. Stat. § 15A–2000(f)(4) (1983).

[8] Cal. Penal Code Ann. §§ 189, 190.2(a)(17) (West Supp. 1987); Fla. Stat. §§ 782.04(1)(a), 775.082(1), 921.141(5)(d) (1985); Ga. Code §§ 16–5–1(a), 17–10–30(b)(2) (1984 and 1982); S. C. Code §§ 16–3–10, 16–3–20(C)(a)(1) (1985 and Supp. 1986); Tenn. Code Ann. §§ 39–2–202(a), 39–2–203(i)(7) (1982); Wyo. Stat. §§ 6–2–101, 6–2–102(h)(iv) (1983).

The dissent objects to our classification of California among the States whose statutes authorize capital punishment for felony murder *simpliciter* on the ground that the California Supreme Court in *Carlos* v. *Superior Court*, 35 Cal. 3d 131, 672 P. 2d 862 (1983), construed its capital murder statute to require a finding of intent to kill. *Post*, at 175, n. 13. But the California Supreme Court only did so in light of perceived federal constitutional limitations stemming from our then recent decision in *Enmund*. See *Carlos* v. *Superior Court*, *supra*, at 147–152, 672 P. 2d, at 873–877.

[9] Idaho Code § 19–2515(g) (Supp. 1986); Okla. Stat., Tit. 21, § 701.12 (1981); S. D. Codified Laws § 23A–27A–1 (Supp. 1986).

specifically authorize the death penalty in a felony-murder case where, though the defendant's mental state fell short of intent to kill, the defendant was a major actor in a felony in which he knew death was highly likely to occur. On the other hand, even after *Enmund*, only 11 States authorizing capital punishment forbid imposition of the death penalty even though the defendant's participation in the felony murder is major and the likelihood of killing is so substantial as to raise an inference of extreme recklessness.[10] This substantial and recent legislative authorization of the death penalty for the crime of felony murder regardless of the absence of a finding of an intent to kill powerfully suggests that our society does *not* reject the death penalty as grossly excessive under these circumstances, *Gregg* v. *Georgia*, 428 U. S., at 179–181 (opinion of Stewart, POWELL, and STEVENS, JJ.); see also *Coker* v. *Georgia*, 433 U. S., at 594.

Moreover, a number of state courts have interpreted *Enmund* to permit the imposition of the death penalty in such aggravated felony murders. We do not approve or disapprove the judgments as to proportionality reached on the particular facts of these cases, but we note the apparent consensus that substantial participation in a violent felony under circumstances likely to result in the loss of innocent human life may justify the death penalty even absent an "intent to kill." See, *e. g.*, *Clines* v. *State*, 280 Ark. 77, 84, 656 S. W. 2d 684, 687 (1983) (armed, forced entry, nighttime robbery of private dwelling known to be occupied plus evidence that kill-

[10] Ala. Code §§ 13A–2–23, 13A–5–40(a)(2), (b), 13A–5–51, 13A–6–2(a)(2) (1982 and Supp. 1986); La. Rev. Stat. Ann. § 14:30(A)(1) (West 1986); Miss. Code Ann. § 99–19–101(7) (Supp. 1986); Nev. Rev. Stat. §§ 200.030(1)(b), 200.030(4), 200.033(4)(a)–(b) (1986); N. J. Stat. Ann. §§ 2C:11–3a(a), (c) (West Supp. 1986) (felony murder not capital); N. M. Stat. Ann. §§ 30–2–1 (A)(2), 31–20A–5 (1984); Ohio Rev. Code Ann. §§ 2903.01(B)–(D), 2929.02 (A), 2929.04(A)(7) (1982); Ore. Rev. Stat. §§ 163.095(d), 163.115(1)(b) (1985); Tex. Penal Code Ann. §§ 19.02(a), 19.03(a)(2) (1974 and Supp. 1986); Utah Code Ann. § 76–5–202(1) (Supp. 1986); Va. Code § 18.2–31 (Supp. 1986).

ing contemplated), cert. denied, 465 U. S. 1051 (1984); *Deputy* v. *State*, 500 A. 2d 581, 599–600 (Del. 1985) (defendant present at scene; robbed victims; conflicting evidence as to participation in killing), cert. pending, No. 85–6272; *Ruffin* v. *State*, 420 So. 2d 591, 594 (Fla. 1982) (defendant present, assisted codefendant in kidnaping, raped victim, made no effort to interfere with codefendant's killing victim and continued on the joint venture); *People* v. *Davis*, 95 Ill. 2d 1, 52, 447 N. E. 2d 353, 378 (defendant present at the scene and had participated in other crimes with Holman, the triggerman, during which Holman had killed under similar circumstances), cert. denied, 464 U. S. 1001 (1983); *Selvage* v. *State*, 680 S. W. 2d 17, 22 (Tex. Cr. App. 1984) (participant in jewelry store robbery during the course of which a security guard was killed; no evidence that defendant himself shot the guard but he did fire a weapon at those who gave chase); see also *Allen* v. *State*, 253 Ga. 390, 395, n. 3, 321 S. E. 2d 710, 715, n. 3 (1984) ("The result in *[Enmund* v. *Florida]* does not turn on the mere fact that Enmund was convicted of felony murder. It is important to note how attenuated was Enmund's responsibility for the deaths of the victims in that case"), cert. denied, 470 U. S. 1059 (1985).

Against this backdrop, we now consider the proportionality of the death penalty in these midrange felony-murder cases for which the majority of American jurisdictions clearly authorize capital punishment and for which American courts have not been nearly so reluctant to impose death as they are in the case of felony murder *simpliciter*.[11]

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[11] The fact that the Arizona Supreme Court purported to find "intent to kill" before affirming death sentences after *Enmund* provides no support for the proposition that it ordinarily has considered major participation in a violent felony resulting in death combined with a reckless indifference towards human life insufficient to support a capital sentence. Cf. *post*, at 178–179, and n. 17. The Arizona Supreme Court has made formal findings of "intent to kill" to comply with the perceived "dictate of *Enmund*." 142 Ariz. 454, 456, 690 P. 2d 755, 758 (1984). In fact, the standard applied by the Arizona Supreme Court was *not* a classic intent one, but rather was

A critical facet of the individualized determination of culpability required in capital cases is the mental state with which the defendant commits the crime. Deeply ingrained in our legal tradition is the idea that the more purposeful is the criminal conduct, the more serious is the offense, and, therefore, the more severely it ought to be punished. The ancient concept of malice aforethought was an early attempt to focus on mental state in order to distinguish those who deserved death from those who through "Benefit of . . . Clergy" would be spared. 23 Hen. 8, ch. 1, §§ 3, 4 (1531); 1 Edw. 6, ch. 12, § 10 (1547). Over time, malice aforethought came to be inferred from the mere act of killing in a variety of circumstances; in reaction, Pennsylvania became the first American jurisdiction to distinguish between degrees of murder, reserving capital punishment to "wilful, deliberate and premeditated" killings and felony murders. 3 Pa. Laws 1794, ch. 1766, pp. 186–187 (1810). More recently, in *Lockett* v. *Ohio*, 438 U. S. 586 (1978), the plurality opinion made clear that the defendant's mental state was critical to weighing a defendant's culpability under a system of guided discretion, vacating a death sentence imposed under an Ohio statute that did not permit the sentencing authority to take into account "[t]he absence of direct proof that the defendant intended to cause the death of the victim." *Id.*, at 608 (opinion of Burger, C. J.); see also *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982) (adopting position of *Lockett* plurality). In *Enmund* v. *Florida*, the Court recognized again the importance of mental state, explicitly permitting the death penalty in at least those cases where the felony murderer intended to kill and forbidding it in the case of a minor actor not shown to have had any culpable mental state.

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whether "a defendant contemplated, anticipated, or intended that lethal force would or might be used." *State* v. *Emery*, 141 Ariz. 549, 554, 688 P. 2d 175, 180 (1984). As we have shown, *supra*, at 150, this standard amounted to little more than a requirement that killing be foreseeable.

A narrow focus on the question of whether or not a given defendant "intended to kill," however, is a highly unsatisfactory means of definitively distinguishing the most culpable and dangerous of murderers. Many who intend to, and do, kill are not criminally liable at all—those who act in self-defense or with other justification or excuse. Other intentional homicides, though criminal, are often felt undeserving of the death penalty—those that are the result of provocation. On the other hand, some nonintentional murderers may be among the most dangerous and inhumane of all—the person who tortures another not caring whether the victim lives or dies, or the robber who shoots someone in the course of the robbery, utterly indifferent to the fact that the desire to rob may have the unintended consequence of killing the victim as well as taking the victim's property. This reckless indifference to the value of human life may be every bit as shocking to the moral sense as an "intent to kill." Indeed it is for this very reason that the common law and modern criminal codes alike have classified behavior such as occurred in this case along with intentional murders. See, *e. g.*, G. Fletcher, Rethinking Criminal Law § 6.5, pp. 447–448 (1978) ("[I]n the common law, intentional killing is not the only basis for establishing the most egregious form of criminal homicide . . . . For example, the Model Penal Code treats reckless killing, 'manifesting extreme indifference to the value of human life,' as equivalent to purposeful and knowing killing"). *Enmund* held that when "intent to kill" results in its logical though not inevitable consequence—the taking of human life—the Eighth Amendment permits the State to exact the death penalty after a careful weighing of the aggravating and mitigating circumstances. Similarly, we hold that the reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state, a mental state that may be taken into account in making a capi-

tal sentencing judgment when that conduct causes its natural, though also not inevitable, lethal result.

The petitioners' own personal involvement in the crimes was not minor, but rather, as specifically found by the trial court, "substantial." Far from merely sitting in a car away from the actual scene of the murders acting as the getaway driver to a robbery, each petitioner was actively involved in every element of the kidnaping-robbery and was physically present during the entire sequence of criminal activity culminating in the murder of the Lyons family and the subsequent flight. The Tisons' high level of participation in these crimes further implicates them in the resulting deaths. Accordingly, they fall well within the overlapping second intermediate position which focuses on the defendant's degree of participation in the felony.

Only a small minority of those jurisdictions imposing capital punishment for felony murder have rejected the possibility of a capital sentence absent an intent to kill, and we do not find this minority position constitutionally required. We will not attempt to precisely delineate the particular types of conduct and states of mind warranting imposition of the death penalty here. Rather, we simply hold that major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement.[12] The Arizona courts have clearly found that the former exists; we now vacate the judgments below and remand for determination of the latter in further proceedings not inconsistent with this opinion. *Cabana* v. *Bullock*, 474 U. S. 376 (1986).

It is so ordered.

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[12] Although we state these two requirements separately, they often overlap. For example, we do not doubt that there are some felonies as to which one could properly conclude that any major participant necessarily exhibits reckless indifference to the value of human life. Moreover, even in cases where the fact that the defendant was a major participant in a felony did not suffice to establish reckless indifference, that fact would still often provide significant support for such a finding.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, and with whom JUSTICE BLACKMUN and JUSTICE STEVENS join as to Parts I through IV-A, dissenting.

The murders that Gary Tison and Randy Greenawalt committed revolt and grieve all who learn of them. When the deaths of the Lyons family and Theresa Tyson were first reported, many in Arizona erupted "in a towering yell" for retribution and justice.[1] Yet Gary Tison, the central figure in this tragedy, the man who had his family arrange his and Greenawalt's escape from prison, and the man who chose, with Greenawalt, to murder this family while his sons stood by, died of exposure in the desert before society could arrest him and bring him to trial. The question this case presents is what punishment Arizona may constitutionally exact from two of Gary Tison's sons for their role in these events. Because our precedents and our Constitution compel a different answer than the one the Court reaches today, I dissent.

I

Under the felony-murder doctrine, a person who commits a felony is liable for *any* murder that occurs during the commission of that felony, regardless of whether he or she commits, attempts to commit, or intended to commit that murder. The doctrine thus imposes liability on felons for killings committed by cofelons during a felony. This curious doctrine is a living fossil from a legal era in which all felonies were punishable by death; in those circumstances, the state of mind of the felon with respect to the murder was understandably superfluous, because he or she could be executed simply for intentionally committing the felony.[2] Today, in

[1] App. 297 (quoting Paul Dean in the Arizona Republic, Aug. 16, 1978).

[2] As explained in the Commentaries on the Model Penal Code: "At common law all felonies were punishable by death. In a felony-murder situation, it made little difference whether the actor was convicted of murder or of the underlying felony because the sanction was the same. The primary use of the felony-murder rule at common law therefore was to deal with a homicide that occurred in furtherance of an attempted felony that failed. Since attempts were punished as misdemeanors, . . . the use of the felony-

most American jurisdictions and in virtually all European and Commonwealth countries, a felon cannot be executed for a murder that he or she did not commit or specifically intend or attempt to commit. In some American jurisdictions, however, the authority to impose death in such circumstances still persists. Arizona is such a jurisdiction.

The proceedings below illustrate how, under the felony-murder doctrine, a defendant may be held liable and sentenced to death for a murder that he or she neither committed nor intended to commit. The prosecutor argued to the jury that it did not matter that Gary Tison and Randy Greenawalt had caused the killings, because under the felony-murder rule the Tisons could nonetheless be found legally responsible for those killings. App. 173–174, 185, 191. The trial judge's instructions were consistent with the prosecutor's argument. *Id.*, at 179, 218–219. In sentencing petitioners, the trial court did not find that they had killed, attempted to kill, or intended to kill anyone. *Id.*, at 280–289. Nevertheless, the court upheld the jury's verdict that Ricky and Raymond Tison were liable under the felony-murder doctrine for the murders that their father and Randy Greenawalt had committed. Furthermore, the court found as an aggravating factor *against petitioners* the "heinous, cruel and depraved manner" in which Gary Tison and Randy Greenawalt carried out the murders. *Id.*, at 282–283. As a result, the court imposed the death sentence.[3]

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murder rule allowed the courts to punish the actor in the same manner as if his attempt had succeeded. Thus, a conviction for attempted robbery was a misdemeanor, but a homicide committed in the attempt was murder and punishable by death." ALI, Model Penal Code Commentaries § 210.2, p. 31, n. 74 (Off. Draft 1980).

[3] As the Court notes, *ante*, at 146, n. 2, it has expressed no view on the constitutionality of Arizona's decision to attribute to petitioners as an aggravating factor the manner in which other individuals carried out the killings. On its face, however, that decision would seem to violate the core Eighth Amendment requirement that capital punishment be based on an "individualized consideration" of the defendant's culpability, *Lockett* v.

The Arizona Supreme Court affirmed. It held that the Tisons "did not specifically intend that the Lyons and Theresa Tyson die, that they did not plot in advance that these homicides would take place, [and] that they did not actually pull the triggers on the guns which inflicted the fatal wounds. . . ." *State* v. *Tison*, 129 Ariz. 526, 545, 633 P. 2d 335, 354 (1981). The court found these facts to be "of little significance," however, because "the non-participation in the shooting was not controlling since both [brothers] took part in the robbery, the kidnapping, and were present assisting in the detention of the Lyonses and Theresa Tyson while the homicides were committed." *State* v. *Tison*, 129 Ariz. 546, 556, 633 P. 2d 355, 365 (1981). Thus, while the Arizona courts acknowledged that petitioners had neither participated in the shootings nor intended that they occur, those courts nonetheless imposed the death sentence under the theory of felony murder.

After the decision of the Arizona Supreme Court, this Court addressed, in *Enmund* v. *Florida*, 458 U. S. 782 (1982), the question "whether death is a valid penalty under the Eighth and Fourteenth Amendments for one who neither took life, attempted to take life, nor intended to take life." *Id.*, at 787. The question arose because the Florida Supreme Court affirmed the death sentence for Earl Enmund, an accomplice in an armed robbery in which his two cofelons had killed the two individuals that the felons had intended to rob. Enmund did not shoot anyone, and there was nothing in the record concerning Enmund's mental state with regard to the killings, but the Florida Supreme Court had held him strictly liable for the killings under the felony-murder doctrine. *Enmund* v. *State*, 399 So. 2d 1362, 1369 (1981).

Ohio, 438 U. S. 586, 605 (1978). It therefore remains open to the state courts to consider whether Arizona's aggravating factors were interpreted and applied so broadly as to violate the Constitution. *Godfrey* v. *Georgia*, 446 U. S. 420 (1980).

In reversing the Florida Supreme Court, this Court took note of the "overwhelming evidence" of "[s]ociety's rejection of the death penalty for accomplice liability in felony murders." 458 U. S., at 794. The Court observed that, in imposing the death penalty upon Enmund, the Florida Supreme Court had failed to focus on "Enmund's own conduct . . . [and] on *his* culpability." *Id.*, at 798 (emphasis in original). The Court then explained, and rejected, the felony-murder doctrine as a theory of capital culpability.

> "Enmund *did not kill or intend to kill* and thus his culpability is plainly different from that of the robbers who killed; yet the State treated them alike and attributed to Enmund the culpability of those who killed the Kerseys. This was impermissible under the Eighth Amendment." *Ibid.* (emphasis added).

Enmund obviously cast considerable doubt on the constitutionality of the death sentences imposed on petitioners in this case. Following the *Enmund* decision, petitioners applied to the Arizona Supreme Court for postconviction review. They argued that *Enmund* prevented the State from imposing the death sentence because they, like Enmund, were accomplices to a felony in which killings occurred that they neither committed nor intended to commit. Despite its earlier holding that petitioners had not killed or intended to kill anyone, the Arizona Supreme Court again upheld the Tisons' sentences. First, the court defined intent broadly, adopting a definition that equates "intent to kill" with the foreseeability of harm:

> "Intend *[sic]* to kill includes the situation in which the defendant intended, contemplated, or anticipated that lethal force would or might be used or that life would or might be taken in accomplishing the underlying felony." 142 Ariz. 454, 456, 690 P. 2d 755, 757 (1984).

The court then reviewed, in a passage this Court quotes at length, *ante*, at 144–145, petitioners' conduct during the

escape and subsequent flight. The court did not attempt to link any of petitioners' statements or actions to the decision to kill the family, nor did it make any findings concerning petitioners' mental states at the time of the shootings. Instead, the court found that each petitioner "could [have] anticipate[d] the use of lethal force during this attempt to flee confinement." 142 Ariz. 446, 448, 690 P. 2d 747, 749 (1984); 142 Ariz., at 456, 690 P. 2d, at 757. The Arizona Supreme Court then held, by a vote of 3–2, that this finding was sufficient to establish that petitioners "intended" (within the meaning of *Enmund*) to kill the Lyons family, and affirmed the death sentences.

The Arizona Supreme Court thus attempted to comply with *Enmund* by making a finding as to petitioners' mental state. The foreseeability standard that the court applied was erroneous, however, because "the possibility of bloodshed is inherent in the commission of any violent felony and this possibility is generally foreseeable and foreseen." *Ante*, at 151. Under the lower court's standard, any participant in a violent felony during which a killing occurred, including Enmund, would be liable for the death penalty. This Court therefore properly rejects today the lower court's misguided attempt to preserve its earlier judgment by equating intent with foreseeable harm. *Ante*, at 150–151. In my view, this rejection completes the analytic work necessary to decide this case, and on this basis petitioners' sentences should have been vacated and the judgment reversed.

The Court has chosen instead to announce a new substantive standard for capital liability: a defendant's "major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement." *Ante*, at 158. The Court then remands the case for a determination by the state court whether petitioners are culpable under this new standard. Nevertheless, the Court observes, in dictum, that "the record would support a finding of the culpable mental state of

reckless indifference to human life." *Ante*, at 151; see also *ante*, at 152. ("These facts . . . would clearly support a finding that [both sons] subjectively appreciated that their acts were likely to result in the taking of innocent life").

I join no part of this. First, the Court's dictum that its new category of *mens rea* is applicable to these petitioners is not supported by the record. Second, even assuming petitioners may be so categorized, objective evidence and this Court's Eighth Amendment jurisprudence demonstrate that the death penalty is disproportionate punishment for this category of defendants. Finally, the fact that the Court reaches a different conclusion is illustrative of the profound problems that continue to plague capital sentencing.

II

The facts on which the Court relies are not sufficient, in my view, to support the Court's conclusion that petitioners acted with reckless disregard for human life.[4] But even if they

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[4] Petitioners' presence at the scene of the murders, and their participation in flagging down the vehicle, and robbing and guarding the family, indicate nothing whatsoever about their subjective appreciation that their father and his friend would suddenly decide to kill the family. Each of petitioners' actions was perfectly consistent with, and indeed necessary to, the felony of stealing a car in order to continue the flight from prison. Nothing in the record suggests that any of their actions were inconsistent with that aim. Indeed, the trial court recognized the disjunction between the felonies and the murders when it found that Gary Tison's and Greenawalt's decision to murder the family was senseless and unnecessary to the escape. The court based its finding of aggravating circumstances in part "on the senselessness of the murders," and stated that:

"It was not essential to the defendants' continuing evasion of arrest that these persons were murdered. The victims could easily have been restrained sufficiently to permit the defendants to travel a long distance before the robberies, the kidnappings, and the theft were reported." App. 283.

Thus the Court's findings about petitioners' mental states regarding the murders are based solely on inferences from petitioners' participation in the underlying felonies. Their decision to provide arms for and participate

were, the Court's decision to restrict its vision to the limited set of facts that "the Arizona Supreme Court has given . . . to us," *ante*, at 151, is improper.[5] By limiting itself to the facts the lower court found relevant to the foreseeability standard, this Court insulates itself from other evidence in the record directly relevant to the new standard articulated today. This evidence suggests that the question of petitioners' mental states with respect to the shootings is very much an open one to be decided only after a thorough evidentiary hearing. I therefore stress that nothing in the Court's opinion abrogates the State's responsibility independently and fairly to consider all the relevant evidence before applying the Court's new standard. See *Cabana* v. *Bullock*, 474 U. S. 376, 391 (1986) ("Considerations of federalism and comity counsel respect for the ability of state courts to carry out their role as the primary protectors of the rights of criminal defendants").

The evidence in the record overlooked today regarding petitioners' mental states with respect to the shootings is not trivial. For example, while the Court has found that petitioners made no effort prior to the shooting to assist the victims, the uncontradicted statements of both petitioners are

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in a prison breakout and escape may support the lower court's finding that they should have anticipated that lethal force might be used during the breakout and subsequent flight, but it does not support the Court's conclusions about petitioners' mental states concerning the shootings that actually occurred.

[5] When the Arizona Supreme Court first reviewed this case on appeal, it stated that petitioners' degree of *mens rea* was of little significance to the case. On rehearing, the Arizona Supreme Court did make a finding that petitioners could have anticipated that lethal force would be used during the breakout or subsequent flight. In that regard, it referred to facts concerning the breakout and escape. See *ante*, at 143–145. The court did not refer to the evidence in the record of petitioners' mental states concerning the *actual shootings*, however, nor was such evidence relevant to its decision. Given the question it had chosen to address, evidence regarding petitioners' actual mental states with regard to the shooting was superfluous.

that just prior to the shootings they were attempting to find a jug of water to give to the family. App. 20–21, 39–41, 74–75, 109. While the Court states that petitioners were on the scene during the shooting and that they watched it occur, Raymond stated that he and Ricky were still engaged in repacking the Mazda after finding the water jug when the shootings occurred. *Id.*, at 21, 75. Ricky stated that they had returned with the water, but were still some distance ("farther than this room") from the Lincoln when the shootings started, *id.*, at 40–41, 111, and that the brothers then turned away from the scene and went back to the Mazda, *id.*, at 113. Neither stated that they anticipated that the shootings would occur, or that they could have done anything to prevent them or to help the victims afterward.[6] Both, however, expressed feelings of surprise, helplessness, and regret. This statement of Raymond's is illustrative:

> "Well, I just think you should know when we first came into this we had an agreement with my dad that nobody would get hurt because we [the brothers] wanted no one hurt. And when this [killing of the kidnap victims] came about we were not expecting it. And it took us by surprise as much as it took the family [the victims] by surprise because we were not expecting this to happen. And I feel bad about it happening. I wish we could [have done] something to stop it, but by the time it happened it was too late to stop it. And it's just something

[6] In addition, the Court's statement that Raymond did not act to assist the victims "after" the shooting, and its statement that Ricky "watched the killing after which he chose to aid those whom he had placed in the position to kill rather than their victims," *ante*, at 152, takes license with the facts found by the Arizona Supreme Court. That court did not say whether petitioners did anything to help the victims following the shooting, nor did it make any findings that would lead one to believe that something could have been done to assist them. The lower court merely stated that petitioners did not "disassociate" themselves from their father and Greenawalt after the shooting. *Ante*, at 145 (citation omitted).

we are going to live with the rest of our lives. It will always be there." 142 Ariz., at 462, 690 P. 2d, at 763; see also App. 242.[7]

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[7] These expressions are consistent with other evidence about the sons' mental states that this Court, like the lower courts, has neglected. Neither son had a prior felony record. App. 233–234. Both lived at home with their mother, and visited their father, whom they believed to be "a model prisoner," each week. See Brief for Petitioners 3 (citing Tr. of Mar. 14, 1979, hearing). They did not plan the breakout or escape; rather their father, after thinking about it himself for a year, mentioned the idea to Raymond for the first time one week before the breakout, and discussed with his sons the possibility of having them participate only the day before the breakout. App. 50–51, 91. The sons conditioned their participation on their father's promise that no one would get hurt; during the breakout, their father kept his word. The trial court found that the murders their father later committed were senseless and unnecessary to the felony of stealing a car in which the sons participated; and just prior to the shootings the sons were retrieving a water jug for the family. Given these circumstances, the sons' own testimony that they were surprised by the killings, and did not expect them to occur, appears more plausible than the Court's speculation that they "subjectively appreciated that their activities were likely to result in the taking of innocent life." *Ante*, at 152. The report of the psychologist, who examined both sons, also suggests that they may not have appreciated the consequences of their participation:

"These most unfortunate youngsters were born into an extremely pathological family and were exposed to one of the premier sociopaths of recent Arizona history. In my opinion this very fact had a severe influence upon the personality structure of these youngsters . . . .

. . . . .

"I do believe that their father, Gary Tison, exerted a strong, consistent, destructive but subtle pressure upon these youngsters and I believe that these young men got committed to an act which was essentially 'over their heads.' Once committed, it was too late and there does not appear to be any true defense based on brainwashing, mental deficiency, mental illness or irresistable urge. There was a family obsession, the boys were 'trained' to think of their father as an innocent person being victimized in the state prison but both youngsters have made perfectly clear that they were functioning of their own volition. At a deeper psychological level it may have been less of their own volition than as a result of Mr. Tison's 'conditioning' and the rather amoral attitudes within the family home." Brief for Petitioners 11–12, n. 16.

In light of this evidence, it is not surprising that the Arizona Supreme Court rested its judgment on the narrow ground that petitioners could have anticipated that lethal force might be used during the escape, or that the state probation officer—who reviewed at length all the facts concerning the sons' mental states—did not recommend that the death sentence be imposed. The discrepancy between those aspects of the record on which the Court has chosen to focus and those aspects it has chosen to ignore underscores the point that a reliable and individualized *Enmund* determination can be made only by the trial court following an evidentiary hearing. See *Cabana* v. *Bullock*, 474 U. S., at 397–407 (BLACKMUN, J., dissenting); *id.*, at 407–408 (STEVENS, J., dissenting).

III

Notwithstanding the Court's unwarranted observations on the applicability of its new standard to this case, the basic flaw in today's decision is the Court's failure to conduct the sort of proportionality analysis that the Constitution and past cases require. Creation of a new category of culpability is not enough to distinguish this case from *Enmund*. The Court must also establish that death is a proportionate punishment for individuals in this category. In other words, the Court must demonstrate that major participation in a felony with a state of mind of reckless indifference to human life deserves the same punishment as intending to commit a murder or actually committing a murder. The Court does not attempt to conduct a proportionality review of the kind performed in past cases raising a proportionality question, *e. g.*, *Solem* v. *Helm*, 463 U. S. 277 (1983); *Enmund* v. *Florida*, 458 U. S. 782 (1982); *Coker* v. *Georgia*, 433 U. S. 584 (1977), but instead offers two reasons in support of its view.

A

One reason the Court offers for its conclusion that death is proportionate punishment for persons falling within its new

category is that limiting the death penalty to those who intend to kill "is a highly unsatisfactory means of definitively distinguishing the most culpable and dangerous of murderers." *Ante*, at 157. To illustrate that intention cannot be dispositive, the Court offers as examples "the person *who tortures* another not caring whether the victim lives or dies, or the robber *who shoots* someone in the course of the robbery, utterly indifferent to the fact that the desire to rob may have the unintended consequence of killing the victim as well as taking the victim's property." *Ibid.* (emphasis added). Influential commentators and some States have approved the use of the death penalty for persons, like those given in the Court's examples, *who kill* others in circumstances manifesting an extreme indifference to the value of human life.[8] Thus an exception to the requirement that only intentional murders be punished with death might be made for persons who actually commit an act of homicide; *Enmund*, by distinguishing from the accomplice case "those who kill," clearly reserved that question. But the constitutionality of the death penalty for those individuals is no more relevant to this case than it was to *Enmund*, because this case, like *Enmund*, involves accomplices *who did not kill*. Thus, although some of the "most culpable and dangerous of murderers" may be those who killed without specifically intending to kill, it is considerably more difficult to apply that rubric con-

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[8] For example, the Court quotes Professor Fletcher's observation that "the Model Penal Code treats reckless *killing* . . . as equivalent to purposeful and knowing killing." *Ante*, at 157 (emphasis added). The Model Penal Code advocates replacing the felony-murder rule with a rule that allows a conviction for murder only when the killer acted with intent, purpose, or "reckless[ness] under circumstances manifesting extreme indifference to the value of human life." See ALI, Model Penal Code Commentaries § 210.2, p. 13 (Off. Draft 1980). The Code offers as examples shooting into a crowd or an automobile, or shooting a person in the course of playing Russian roulette. *Id.*, at 22–23.

vincingly to those who not only did not intend to kill, but who also have not killed.[9]

It is precisely in this context—where the defendant has not killed—that a finding that he or she nevertheless intended to kill seems indispensable to establishing capital culpability. It is important first to note that such a defendant has not committed an *act* for which he or she could be sentenced to death. The applicability of the death penalty therefore turns entirely on the defendant's mental state with regard to an act committed by another. Factors such as the defendant's major participation in the events surrounding the killing or the defendant's presence at the scene are relevant insofar as they illuminate the defendant's mental state with regard to the killings. They cannot serve, however, as independent grounds for imposing the death penalty.

Second, when evaluating such a defendant's mental state, a determination that the defendant acted with intent is qualitatively different from a determination that the defendant acted with reckless indifference to human life. The difference lies in the nature of the choice each has made. The reckless actor has not *chosen* to bring about the killing in the way the intentional actor has. The person who chooses to

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[9] A second problem with the Court's examples is that they illustrate wanton, but nevertheless intentional, killings, rather than unintentional killings. The element that these wanton killings lack is not intent, but rather premeditation and deliberation. Professor Fletcher explains the point:

"[W]hile planning and calculation represent one form of heinous or cold-blooded murder, premeditation is not the only feature that makes *intentional* killings wicked. Wanton killings are generally regarded as among the most wicked, and the feature that makes a killing wanton is precisely the absence of detached reflection before the deed. Fitzjames Stephen put the case of a man who 'sees a boy sitting on a bridge over a deep river and, out of mere wanton barbarity, pushes him into it and so drowns him.' Killing without a motive can usually be just as wicked as killing after detached reflection about one's goals." G. Fletcher, Rethinking Criminal Law 254 (1978) (footnote omitted; emphasis added).

act recklessly and is indifferent to the possibility of fatal consequences often deserves serious punishment. But because that person has not chosen to kill, his or her moral and criminal culpability is of a different degree than that of one who killed or intended to kill.

The importance of distinguishing between these different choices is rooted in our belief in the "freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." *Morissette* v. *United States*, 342 U. S. 246, 250 (1952). To be faithful to this belief, which is "universal and persistent in mature systems of law," *ibid.*, the criminal law must ensure that the punishment an individual receives conforms to the choices that individual has made.[10] Differential punishment of reckless and intentional actions is therefore essential if we are to retain "the relation between criminal liability and moral culpability" on which criminal justice depends. *People* v. *Washington*, 62 Cal. 2d 777, 783, 402 P. 2d 130, 134 (1965) (opinion of Traynor, C. J.). The State's ultimate sanction—if it is ever to be used—must be reserved for those whose culpability is greatest. Cf. *Enmund*, 458 U. S., at 798 ("It is fundamental that 'causing harm intentionally must be punished more severely than causing the same harm unintentionally'" (citation omitted)); *United States* v. *United States Gypsum Co.*, 438 U. S. 422, 444 (1978).

Distinguishing intentional from reckless action in assessing culpability is particularly important in felony-murder cases. JUSTICE WHITE stressed the importance of this distinction in *Lockett* v. *Ohio*, 438 U. S. 586 (1978), a felony-murder case in

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[10] We show this fidelity, for example, when we decline to hold a young child as morally and criminally responsible for an illegal act as we would hold an adult who committed the same act. Although the child has committed the illegal act and caused the harmful result, the child's actions are presumed not to reflect a mature capacity for choice, and the child's culpability for the act is accordingly reduced.

which the petitioner's death sentence was vacated on other grounds.

> "[S]ociety has made a judgment, which has deep roots in the history of the criminal law . . . distinguishing at least for purpose of the imposition of the death penalty between the culpability of those who acted with and those who acted without a purpose to destroy life.
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> . . . . . .
>
> "[T]he type of conduct which Ohio would punish by death requires at most the degree of *mens rea* defined by the ALI Model Penal Code (1962) as *recklessness:* conduct undertaken with knowledge that death is likely to follow. Since I would hold that death may not be inflicted for killings consistent with the Eighth Amendment without a finding that the defendant engaged in conduct with *the conscious purpose of producing death*, these sentences must be set aside." *Id.*, at 626–628 (emphasis added; footnotes omitted).

In *Enmund*, the Court explained at length the reasons a finding of intent is a necessary prerequisite to the imposition of the death penalty. In any given case, the Court said, the death penalty must "measurably contribut[e]" to one or both of the two "social purposes"—deterrence and retribution—which this Court has accepted as justifications for the death penalty. *Enmund*, *supra*, at 798, citing *Gregg* v. *Georgia*, 428 U. S. 153, 183 (1976). If it does not so contribute, it "'is nothing more than the purposeless and needless imposition of pain and suffering' and hence an unconstitutional punishment." *Enmund*, *supra*, at 798, quoting *Coker* v. *Georgia*, 433 U. S., at 592. Enmund's lack of intent to commit the murder—rather than the lack of evidence as to his mental state—was the decisive factor in the Court's decision that the death penalty served neither of the two purposes. With regard to deterrence, the Court was

> "quite unconvinced . . . that the threat that the death penalty will be imposed for murder will measurably deter one who does not kill and has no intention or purpose that life will be taken. Instead, it seems likely that 'capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation' . . . ." *Enmund*, *supra*, at 798–799.[11]

As for retribution, the Court again found that Enmund's lack of intent, together with the fact that he did not kill the victims, was decisive. "American criminal law has long considered a defendant's intention—and therefore his moral guilt—to be critical to the 'degree of [his] criminal culpability.'" 458 U. S., at 800 (citation omitted). The Court concluded that "[p]utting Enmund to death to avenge two killings that he did not commit and had no intention of committing or causing does not measurably contribute to the retributive end of ensuring that the criminal gets his just deserts." *Id.*, at 801. Thus, in *Enmund* the Court established that a finding of an intent to kill was a constitutional prerequisite for the imposition of the death penalty on an accomplice who did not kill. The Court has since reiterated that "*Enmund* . . . imposes a categorical rule: a person who has not in fact killed, attempted to kill, or intended that a killing take place or that lethal force be used may not be sentenced to death." *Ca-*

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[11] The Court acknowledged that "[i]t would be very different if the likelihood of a killing in the course of a robbery were so substantial that one should share the blame for the killing if he somehow participated in the felony." 458 U. S., at 799. Nevertheless, the Court saw no reason to depart from its conclusion that the death penalty could not be justified as a deterrent in that case, because "competent observers have concluded that there is no basis in experience for the notion that death so frequently occurs in the course of a felony for which killing is not an essential ingredient that the death penalty should be considered as a justifiable deterrent to the felony itself." *Ibid.* The trial court found that the killings in the case were not an essential ingredient of the felony. App. 283, quoted *infra*, at 164, n. 4. Thus the goal of deterrence is no more served in this case than it was in *Enmund*.

bana v. *Bullock*, 474 U. S., at 386. The Court's decision today to approve the death penalty for accomplices who lack this mental state is inconsistent with *Enmund* and with the only justifications this Court has put forth for imposing the death penalty in any case.

B

The Court's second reason for abandoning the intent requirement is based on its survey of state statutes authorizing the death penalty for felony murder, and on a handful of state cases.[12] On this basis, the Court concludes that "[o]nly

[12] We should be reluctant to conclude too much from the Court's survey of state decisions, because most jurisdictions would not approve the death penalty in the circumstances here, see n. 13, *infra*, and the Court neglects decisions applying the law of those States. *E. g.*, *Clark* v. *Louisiana State Penitentiary*, 694 F. 2d 75 (CA5 1982) (under Louisiana law, jury must find specific intent to kill); *People* v. *Garcia*, 36 Cal. 3d 539, 684 P. 2d 826 (1984) (death penalty for felony murder may not be imposed without finding of specific intent to kill), cert. denied, 469 U. S. 1229 (1985).

Moreover, the cases the Court does cite are distinguishable from this case. In four of the five cases cited as evidence of an "apparent consensus" that intent to kill is not a prerequisite for imposing the death penalty, the court did not specifically find an absence of any act or intent to kill. Moreover, in each of these cases the court at least suggested that the defendants intended to kill, attempted to kill, or participated in the actual killing. *Clines* v. *State*, 280 Ark. 77, 84, 656 S. W. 2d 684, 687 (1983) ("There was direct evidence from more than one source that appellants had discussed among themselves the necessity of murder if they met resistance" and evidence that victim "was immediately attacked by appellants, sustaining blows to his head and face from the metal chain and a mortal wound to the chest"), cert. denied, 465 U. S. 1051 (1984); *Deputy* v. *State*, 500 A. 2d 581, 599 (Del. 1985) ("Deputy was not solely a participant in the underlying felony, but was instead present during, and involved in, the actual murders"), cert. pending, No. 85–6272; *Ruffin* v. *State*, 420 So. 2d 591, 594 (Fla. 1982) ("Evidence is abundantly clear and sufficient to demonstrate Ruffin's joint participation in the premeditated murder of Karol Hurst"); *Selvage* v. *State*, 680 S. W. 2d 17, 22 (Tex. Cr. App. 1984) ("Unlike Enmund, appellant used lethal force to effectuate a safe escape and attempted to kill Ventura and Roberts as they pursued him and his companion from the jewelry store"). As for the fifth case, *People* v. *Davis*, 95 Ill. 2d 1, 52–53, 447 N. E. 2d 353, 378–379 (1983) (defendant received death

a small minority *of those jurisdictions imposing capital punishment for felony murder* have rejected the possibility of a capital sentence absent an intent to kill, and we do not find this minority position constitutionally required." *Ante*, at 158 (emphasis added). The Court would thus have us believe that "the majority of American jurisdictions clearly authorize capital punishment" in cases such as this. *Ante*, at 155. This is not the case. First, the Court excludes from its survey those jurisdictions that have abolished the death penalty and those that have authorized it only in circumstances different from those presented here. When these jurisdictions are included, and are considered with those jurisdictions that require a finding of intent to kill in order to impose the death sentence for felony murder, one discovers that approximately three-fifths of American jurisdictions do not authorize the death penalty for a nontriggerman absent a finding that he intended to kill. Thus, contrary to the Court's implication that its view is consonant with that of "the majority of American jurisdictions," *ibid.*, the Court's view is itself distinctly the minority position.[13]

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sentence for his role in successive burglaries during each of which codefendant killed resident), the court appears to have held that the defendant "knew" that his codefendant would commit the murder, a mental state significantly different than that attributed to the Tisons.

[13] Thirteen States and the District of Columbia have abolished the death penalty. NAACP Legal Defense and Educational Fund, Death Row U. S. A. 1 (Aug. 1986). According to the Court, *ante*, at 154–156, n. 10, 11 States would not authorize the death penalty in the circumstances presented here. At least four other States not cataloged by the Court also restrict the imposition of capital punishment to those who actually commit and intend to commit murder, and two more States reject the death penalty for most felony murders, see this note *infra*, at 176. In addition, the Supreme Court of at least one of the States cited by the majority as a State authorizing the death penalty absent a finding of intent has explicitly ruled that juries must find that a felony-murder defendant had a specific intent to kill before imposing the death sentence. *Carlos* v. *Superior Court of Los Angeles Co.*, 35 Cal. 3d 131, 672 P. 2d 862 (1983). Thus it appears that

Second, it is critical to examine not simply those jurisdictions that authorize the death penalty in a given circumstance, but those that actually *impose* it. Evidence that a penalty is imposed only infrequently suggests not only that jurisdictions are reluctant to apply it but also that, when it is applied, its imposition is arbitrary and therefore unconstitutional. *Furman* v. *Georgia*, 408 U. S. 238 (1972). Thus, the Court in *Enmund* examined the relevant statistics on the imposition of the death penalty for accomplices in a felony murder. The Court found that of all executions between 1954 and 1982, there were "*only 6 cases out of 362 where a nontriggerman felony murderer was executed. All six executions took place in 1955.*" 458 U. S., at 794 (emphasis added). This evidence obviously militates against imposing the death penalty on petitioners as powerfully as it did against imposing it on Enmund.[14]

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about three-fifths of the States and the District of Columbia have rejected the position the Court adopts today.

For States that restrict the imposition of capital punishment to those who actually and intentionally kill, see Mo. Rev. Stat. §§ 565.001, 565.003, 565.020 (1986) (death penalty reserved for those who intentionally, knowingly, and deliberately cause death); 18 Pa. Cons. Stat. §§ 2502(a), (b), (d), 1102 (1982) (death penalty reserved for those who commit an intentional killing); Vt. Stat. Ann., Tit. 13, §§ 2303(b), (c) (Supp. 1986) (only murderers of correctional officers subject to death penalty); Wash. Rev. Code §§ 9A.32.030, 10.95.020 (1985) (death penalty reserved for those who commit premeditated killing with at least one aggravating circumstance). Two other States also forbid imposition of the death penalty under the general standards announced today, although other aspects of their statutes might render them applicable to these defendants on the facts of this case. See Md. Ann. Code, Art. 27, §§ 410, 412(b), 413(d)(10), 413(e)(1), 413(d)(5) (1957 and Supp. 1986) (death penalty may be imposed only on person who committed the killing, but possible exception if victim is a child); N. H. Rev. Stat. Ann. §§ 630:1, 630:1(III), 630:1-a(I)(b)(2) (1986) (death penalty reserved for killing a law enforcement officer, murder for hire, and killing during a kidnaping).

[14] Although the Court ignores the statistics on actual executions, it does refer earlier in its opinion to the evidence discussed in *Enmund* that of the 739 inmates on death row for whom sufficient data were available, only 41

The Court in *Enmund* also looked at the imposition of the death penalty for felony murder within Florida, the State that had sentenced Enmund. Of the 45 murderers then on death row, 36 had been found to have "intended" to take life, and 8 of the 9 for which there was no finding of intent had been the triggerman. Thus in only one case—*Enmund*—had someone (such as the Tisons) who had neither killed nor intended to kill received the death sentence. Finally, the Court noted that in no Commonwealth or European country could Enmund have been executed, since all have either abolished or never employed a felony-murder doctrine. *Id.*, at 796–797, n. 22.[15]

The Court today neither reviews nor updates this evidence. Had it done so, it would have discovered that, even

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did not participate in the fatal assault on the victim and only 16 were not present. *Ante*, at 148; see *Enmund*, 458 U. S., at 795. While in *Enmund* the Court focused on a breakdown of these statistics into those physically present at the scene and those not, that information is not relevant here. What would be relevant, and what the summary in *Enmund* does not tell us, is how many of the 41 who did not participate were also found not to have intended that the murder occur.

Although statistics on the average sentences given for nontriggermen in felony murders were not presented to the Court, it is possible that such statistics would reveal a wide range of results. One felony-murder case worth noting in this regard is *People* v. *Ganter*, 56 Ill. App. 3d 316, 371 N. E. 2d 1072 (1977). Ganter and a codefendant committed an armed robbery of a store, during which Ganter killed one of the store's owners. "The evidence at trial showed defendant was the actual murderer. He shot Thomas at close range, without provocation and as Thomas stood in a helpless position. The accomplice, although accountable for the death by his participation in the attempt *[sic]* armed robbery, did not do the actual killing." *Id.*, at 328, 371 N. E. 2d, at 1080–1081. Ganter was sentenced to 20–30 years; his accomplice was sentenced to 3–6 years. *Id.*, at 321, 327, 371 N. E. 2d, at 1076, 1080.

[15] Since *Enmund* was decided, the Netherlands and Australia have abolished the death penalty for all offenses, and Cyprus, El Salvador, and Argentina have abolished it for all crimes except those committed in wartime or in violation of military law. Amnesty International, United States of America, The Death Penalty 228–231 (1987).

including the 65 executions since *Enmund*, "[t]he fact remains that we are not aware of a single person convicted of felony murder over the past quarter century who did not kill or attempt to kill, and did not intend the death of the victim, who has been executed . . . ." 458 U. S., at 796.[16] Of the 64 persons on death row in Arizona, all of those who have raised and lost an *Enmund* challenge in the Arizona Supreme Court have been found either to have killed or to have specifically intended to kill.[17] Thus, like Enmund, the Tisons' sentence

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[16] Lists of those executed and those on death row are published in NAACP Legal Defense Fund, Death Row U. S. A. (Mar. 1987). Review of those executed since 1982 reveals that each person executed was found to have committed a killing and/or to have intended to kill. In only two cases does there remain some doubt whether the person executed actually killed the victim; in each case, however, the defendant was found at a minimum to have intended to kill. *Green* v. *Zant*, 738 F. 2d 1529, 1533–1534 (CA11) (case was presented to jury on malice-murder rather than felony-murder theory, and evidence supported verdict on that theory), cert. denied, 469 U. S. 1098 (1984); *Skillern* v. *Estelle*, 720 F. 2d 839, 844 (CA5 1983) (evidence supports finding that Skillern agreed and "plotted in advance" to kill the eventual victim), cert. denied *sub nom. Skillern* v. *Procunier*, 469 U. S. 1067 (1984).

[17] See Amnesty International, *supra*, at 192 (listing death row totals by State as of Oct. 1986). The cases since *Enmund* in which the Arizona Supreme Court has rejected the defendant's *Enmund* challenge and affirmed the death sentence are: *State* v. *Correll*, 148 Ariz. 468, 478, 715 P. 2d 721, 731 (1986) (defendant intended to kill victims and "verbally encouraged" codefendant to proceed with killing); *State* v. *Martinez-Villareal*, 145 Ariz. 441, 702 P. 2d 670 (defendant actively took part in the murder and intended to kill), cert. denied, 474 U. S. 975 (1985); *State* v. *Hooper*, 145 Ariz. 538, 703 P. 2d 482 (1985) (defendant killed for hire), cert. denied, 474 U. S. 1073 (1986); *State* v. *Bishop*, 144 Ariz. 521, 698 P. 2d 1240 (1985) (defendant planned and intended to kill, assaulted victim, and abandoned victim in mine shaft); *State* v. *Poland*, 144 Ariz. 388, 698 P. 2d 183 (1985) (defendants killed victims), aff'd, 476 U. S. 147 (1986); *State* v. *Villafuerte*, 142 Ariz. 323, 690 P. 2d 42 (1984) (defendant killed victim), cert. denied, 469 U. S. 1230 (1985); *State* v. *Fisher*, 141 Ariz. 227, 686 P. 2d 750 (defendant killed victim), cert. denied, 469 U. S. 1066 (1984); *State* v. *James*, 141 Ariz. 141, 685 P. 2d 1293 (defendant killed and intended to kill), cert. denied, 469 U. S. 990 (1984); *State* v. *Harding*, 141 Ariz. 492, 687 P. 2d 1247

appears to be an aberration within Arizona itself as well as nationally and internationally. The Court's objective evidence that the statutes of roughly 20 States appear to authorize the death penalty for defendants in the Court's new category is therefore an inadequate substitute for a proper proportionality analysis, and is not persuasive evidence that the punishment that was unconstitutional for Enmund is constitutional for the Tisons.

C

The Court's failure to examine the full range of relevant evidence is troubling not simply because of what that examination would have revealed, but because until today such an examination has been treated as constitutionally required *whenever* the Court undertakes to determine whether a given punishment is disproportionate to the severity of a given crime. *Enmund* is only one of a series of cases that have framed the proportionality inquiry in this way. See, *e. g.*, *Coker* v. *Georgia*, 433 U. S. 584 (1977). In the most recent such case, *Solem* v. *Helm*, 463 U. S. 277, 292 (1983), the Court summarized the essence of the inquiry:

> "In sum, a court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences *imposed* on other criminals in the same jurisdiction; and (iii) the sentences

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(1984) (defendant killed victim); *State* v. *Libberton*, 141 Ariz. 132, 685 P. 2d 1284 (1984) (defendant killed victim); *State* v. *Jordan*, 137 Ariz. 504, 672 P. 2d 169 (1983) (defendant killed and intended to kill); *State* v. *Smith*, 138 Ariz. 79, 673 P. 2d 17 (1983) (defendant killed and intended to kill), cert. denied, 465 U. S. 1074 (1984); *State* v. *Richmond*, 136 Ariz. 312, 666 P. 2d 57 (defendant intended to kill, participated in assault that led to death), cert. denied, 464 U. S. 986 (1983); *State* v. *McDaniel*, 136 Ariz. 188, 665 P. 2d 70 (1983) (defendant killed victim); *State* v. *Gillies*, 135 Ariz. 500, 662 P. 2d 1007 (1983) (defendant took an active and deliberate part in the killing). Although the Court suggests otherwise, *ante*, at 155–156, n. 11, in none of these cases does the Arizona Supreme Court's finding of intent appear to rest, as it did here, on a finding that a killing was merely foreseeable.

imposed for commission of the same crime in other jurisdictions." (Emphasis added.)

By addressing at best only the first of these criteria, the Court has ignored most of the guidance this Court has developed for evaluating the proportionality of punishment.

Such guidance is essential in determining the constitutional limits on the State's power to punish. These limits must be defined with care, not simply because the death penalty is involved, but because the social purposes that the Court has said justify the death penalty—retribution and deterrence—are justifications that possess inadequate self-limiting principles. As Professor Packer observed, under a theory of deterrence the state may justify such punishments as "boiling people in oil; a slow and painful death may be thought more of a deterrent to crime than a quick and painless one." Packer, Making the Punishment Fit the Crime, 77 Harv. L. Rev. 1071, 1076 (1964).[18] Retribution, which has as its core logic

[18] The utilitarian logic of deterrence can also justify unjust punishments that are more commonly dispensed. See Fletcher, Rethinking Criminal Law, at 415 ("Judges in traffic courts are readily tempted by the philosophy that regardless of whether the particular suspect has committed the violation, a punitive fine will make him drive more carefully in the future").

A sophisticated utilitarian theory of deterrence might propose some limiting principles, *e. g.*, "no punishment must cause more misery than the offense unchecked." H. Hart, Punishment and Responsibility 76 (1968). But as Hart points out, this and other principles "do not seem to account for the character of the normal unwillingness to 'punish' those who have not broken the law at all, nor for the moral objection to strict liability which permits the punishment of those who act without *mens rea*." *Ibid.* In Hart's view, "civilized moral thought" would limit the utilitarian theories of punishment "by the demand that punishment should not be applied to the innocent," and by limiting "punishments in order to maintain a scale for different offenses which reflects, albeit very roughly, the distinction felt between the moral gravity of these offenses. Thus we make some approximation to the ideal of justice of treating morally like cases alike and morally different ones differently." *Id.*, at 80. It is worth noting that both of the limits Hart identifies have been given vitality in the Court's proportionality jurisprudence. *E. g.*, *Robinson* v. *California*, 370 U. S.

the crude proportionality of "an eye for an eye," has been regarded as a constitutionally valid basis for punishment only when the punishment is consistent with an "individualized consideration" of the defendant's culpability, *Lockett* v. *Ohio*, 438 U. S., at 605, and when "the administration of criminal justice" works to "channe[l]" society's "instinct for retribution." *Furman* v. *Georgia*, 408 U. S., at 308 (Stewart, J., concurring). Without such channeling, a State could impose a judgment of execution by torture as appropriate retribution for murder by torture.[19] Thus, under a simple theory either of deterrence or retribution, unfettered by the Constitution, results disturbing to civil sensibilities and inconsistent with "the evolving standards of decency" in our society become rationally defensible. Cf. *Trop* v. *Dulles*, 356 U. S. 86, 101 (1958).

The Framers provided in the Eighth Amendment the limiting principles otherwise absent in the prevailing theories of punishment. One such principle is that the States may not impose punishment that is disproportionate to the severity of

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660, 667 (1962) ("Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold"); *Enmund* v. *Florida*, 458 U. S., at 801 (Enmund's "punishment must be tailored to his personal responsibility and moral guilt").

[19] Such punishment might also be defended on the utilitarian ground that it was necessary to satisfy the community's thirst for retribution and thereby keep the peace. Such grounds can be used to justify the punishment even of innocent people when the guilty have not been found and the mob threatens new violence. It is thus clear that "channeling" retributive instincts requires the State to do more than simply replicate the punishment that private vengeance would exact. To do less is simply to socialize vigilantism. As JUSTICE MARSHALL has stated: "[T]he Eighth Amendment is our insulation from our baser selves. The 'cruel and unusual' language limits the avenues through which vengeance can be channeled. Were this not so, the language would be empty and a return to the rack and other tortures would be possible in a given case." *Furman* v. *Georgia*, 408 U. S. 238, 345 (1972) (concurring opinion). See also *Gregg* v. *Georgia*, 428 U. S. 153, 237–241 (1976) (MARSHALL, J., dissenting) (death penalty unnecessary to further legitimate retributive goals).

the offense or to the individual's own conduct and culpability. Because the proportionality inquiry in this case overlooked evidence and considerations essential to such an inquiry, it is not surprising that the result appears incongruous. Ricky and Raymond Tison are similarly situated with Earl Enmund in every respect that mattered to the decision in *Enmund*. Like Enmund, the Tisons neither killed nor attempted or intended to kill anyone. Like Enmund, the Tisons have been sentenced to death for the intentional acts of others which the Tisons did not expect, which were not essential to the felony, and over which they had no control. Unlike Enmund, however, the Tisons will be the first individuals in over 30 years to be executed for such behavior.

I conclude that the proportionality analysis and result in this case cannot be reconciled with the analyses and results of previous cases. On this ground alone, I would dissent. But the fact that this Court's death penalty jurisprudence can validate different results in analytically indistinguishable cases suggests that something more profoundly disturbing than faithlessness to precedent is at work in capital sentencing.

IV

In 1922, "five negroes who were convicted of murder in the first degree and sentenced to death by the Court of the State of Arkansas" appealed to this Court from an order of the District Court dismissing their writ of habeas corpus. *Moore* v. *Dempsey*, 261 U. S. 86, 87 (1923). The crux of their appeal was that they "were hurried to conviction under the pressure of a mob without any regard for their rights and without according to them due process of law." *Ibid.* In reversing the order, Justice Holmes stated the following for the Court:

> "It certainly is true that mere mistakes of law in the course of a trial are not to be corrected [by habeas corpus]. But if the case is that the whole proceeding is a mask—that counsel, jury, and judge were swept to the fatal end by an irresistible wave of public passion, and

that the State Courts failed to correct the wrong, neither perfection in the machinery for correction nor the possibility that the trial court and counsel saw no other way of avoiding an immediate outbreak of the mob can prevent this Court from securing to the petitioners their constitutional rights." *Id.*, at 91.

A

In *Furman* v. *Georgia*, *supra*, this Court concluded that the State's procedural machinery was so imperfect that imposition of the death penalty had become arbitrary and therefore unconstitutional. A scant four years later, however, the Court validated Georgia's new machinery, and in 1977 executions resumed. In this case, the State appears to have afforded petitioners all of the procedures that this Court has deemed sufficient to produce constitutional sentencing decisions. Yet in this case, as in *Moore*, "perfection in the [State's] machinery for correction" has not secured to petitioners their constitutional rights. So rarely does any State (let alone any Western country other than our own) ever execute a person who neither killed nor intended to kill that "these death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual." *Furman* v. *Georgia*, *supra*, at 309 (Stewart, J., concurring). This case thus demonstrates, as *Furman* also did, that we have yet to achieve a system capable of "distinguishing the few cases in which the [death penalty] is imposed from the many cases in which it is not." 408 U. S., at 313 (WHITE, J., concurring).

What makes this a difficult case is the challenge of giving substantive content to the concept of criminal culpability. Our Constitution demands that the sentencing decision itself, and not merely the procedures that produce it, respond to the reasonable goals of punishment. But the decision to execute these petitioners, like the state courts' decisions in *Moore*, and like other decisions to kill, appears responsive

less to reason than to other, more visceral, demands. The urge to employ the felony-murder doctrine against accomplices is undoubtedly strong when the killings stir public passion and the actual murderer is beyond human grasp. And an intuition that sons and daughters must sometimes be punished for the sins of the father may be deeply rooted in our consciousness.[20] Yet punishment that conforms more closely to such retributive instincts than to the Eighth Amendment is tragically anachronistic in a society governed by our Constitution.

B

This case thus illustrates the enduring truth of Justice Harlan's observation that the tasks of identifying "those characteristics of criminal homicides and their perpetrators which call for the death penalty, and [of] express[ing] these characteristics in language which can be *fairly* understood and applied by the sentencing authority appear to be . . . beyond present human ability." *McGautha* v. *California*, 402 U. S. 183, 204 (1971) (emphasis added). The persistence of doctrines (such as felony murder) that allow excessive discretion in apportioning criminal culpability and of decisions (such as today's) that do not even attempt "precisely [to] delineate the particular types of conduct and states of mind warranting imposition of the death penalty," *ante*, at 158, demonstrates that this Court has still not articulated rules that will ensure that capital sentencing decisions conform to the substantive principles of the Eighth Amendment. Arbitrariness continues so to infect both the procedure and substance of capital sentencing that any decision to impose the

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[20] The prophets warned Israel that theirs was "a jealous God, visiting the iniquity of the fathers upon the children unto the third and fourth generation of them that hate [Him]." Exodus, 20:5 (King James version). See, *e. g.*, Horace, Odes III, 6:1 (C. Bennett trans. 1939) ("Thy fathers' sins, O Roman, thou, though guiltless, shall expiate"); W. Shakespeare, The Merchant of Venice, Act III, scene 5, line 1 ("Yes, truly, for look you, the sins of the father are to be laid upon the children"); H. Ibsen, Ghosts (1881).

death penalty remains cruel and unusual. For this reason, as well as for the reasons expressed in *Gregg* v. *Georgia*, 428 U. S., at 227, I adhere to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, and dissent.

CRUZ *v.* NEW YORK

CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

No. 85–5939. Argued December 1, 1986—Decided April 21, 1987

Under *Bruton* v. *United States*, 391 U. S. 123, a defendant is deprived of his rights under the Confrontation Clause of the Sixth Amendment when his codefendant's incriminating confession is introduced at their joint trial, even if the jury is instructed to consider that confession only against the codefendant. At petitioner's and his brother's joint trial for the felony murder of a gas station attendant, the court allowed the State, over petitioner's objection, to introduce the brother's videotaped confession that he had killed the attendant who had just shot petitioner. The brother did not himself testify, and the court warned the jury that his confession was not to be used against petitioner. The State also called a witness who testified about a conversation with petitioner which recited essentially the same facts as the brother's confession. The New York Court of Appeals affirmed petitioner's conviction, adopting the reasoning of the plurality opinion in *Parker* v. *Randolph*, 442 U. S. 62, that *Bruton* did not require the brother's confession to be excluded because petitioner had himself confessed and his confession "interlocked" with his brother's.

Held:

1. Where a nontestifying codefendant's confession facially incriminating the defendant is not directly admissible against the defendant, the Confrontation Clause bars its admission at their joint trial, even if the jury is instructed not to consider it against the defendant, and even if the defendant's own confession is admitted against him. The *Parker* plurality's view that *Bruton* is inapplicable to cases involving interlocking confessions is rejected in favor of JUSTICE BLACKMUN's view in *Parker* that, although introduction of the defendant's own interlocking confession cannot cure the Confrontation Clause violation caused by introduction of the nontestifying codefendant's confession, it might, in some cases, render that violation harmless. The *Parker* plurality's view is predicated on the erroneous theory that, when the defendant has himself confessed, introduction of the codefendant's confession will seldom, if ever, be of the "devastating" character required by *Bruton* to prove a Confrontation Clause violation. Although *Bruton* did consider "devastating" effect, it did so in the context of justification for excluding the entire category of codefendant confessions that implicate the defendant, and not as a factor whose existence must be assessed on a case-by-case basis. The assump-

tion that an interlocking confession precludes devastation is rendered untenable by the infinite variability of inculpatory statements and their likely effect on juries. In fact, "interlocking" bears an inverse relationship to devastation, since a codefendant's confession that corroborates the defendant's alleged confession significantly harms the defendant's case, whereas one that is positively incompatible gives credence to the defendant's assertion that his own alleged confession was nonexistent or false. The "interlocking" nature of a codefendant's confession pertains not to its harmfulness but to its *reliability*, which, although relevant to whether the confession should be admitted as evidence against the defendant, is irrelevant to the questions whether the jury is likely to obey the instruction to disregard it or whether the jury's failure to do so is likely to be inconsequential. Pp. 189–193.

2. Although a codefendant's interlocking confession incriminating the defendant may not be admitted at trial, the defendant's own confession may be considered in assessing whether his codefendant's statements are supported by sufficient "indicia of reliability" to be directly admissible against him (assuming the codefendant's "unavailability") despite the lack of opportunity for cross-examination, and may be considered on appeal in assessing whether any Confrontation Clause violation was harmless. Pp. 193–194.

66 N. Y. 2d 61, 485 N. E. 2d 221, reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. WHITE, J., filed a dissenting opinion, in which REHNQUIST, C. J., and POWELL and O'CONNOR, JJ., joined, *post*, p. 194.

Robert S. Dean argued the cause for petitioner. With him on the briefs was *Philip L. Weinstein.*

Peter D. Coddington argued the cause for respondent. With him on the brief was *Mario Merola.*

Robert H. Klonoff argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Fried, Assistant Attorney General Trott,* and *Deputy Solicitor General Bryson.*

JUSTICE SCALIA delivered the opinion of the Court.

In *Bruton* v. *United States*, 391 U. S. 123 (1968), we held that a defendant is deprived of his rights under the Confrontation Clause when his codefendant's incriminating con-

fession is introduced at their joint trial, even if the jury is instructed to consider that confession only against the codefendant. In *Parker* v. *Randolph*, 442 U. S. 62 (1979), we considered, but were unable authoritatively to resolve, the question whether *Bruton* applies where the defendant's own confession, corroborating that of his codefendant, is introduced against him. We resolve that question today.

I

Jerry Cruz was murdered on March 15, 1982. That is not the murder for which petitioner was tried and convicted, but the investigation of the one led to the solving of the other. On the day following Jerry Cruz's murder, and on several later occasions, the police talked to Jerry's brother Norberto about the killing. On April 27, Norberto for the first time informed the police of a November 29, 1981, visit by petitioner Eulogio Cruz and his brother Benjamin to the apartment Norberto shared with Jerry. (Eulogio and Benjamin Cruz were longtime friends of Norberto and Jerry Cruz, but the two sets of brothers were not related.) Norberto said that at the time of the visit Eulogio was nervous and was wearing a bloodstained bandage around his arm. According to Norberto, Eulogio confided that he and Benjamin had gone to a Bronx gas station the night before, intending to rob it; that Eulogio and the attendant had struggled; and that, after the attendant had grabbed a gun from behind a counter and shot Eulogio in the arm, Benjamin had killed him. Norberto claimed that Benjamin gave a similar account of the incident.

On May 3, 1982, the police questioned Benjamin about the murder of Jerry Cruz. He strongly denied any connection with that homicide and became frustrated when the police seemed unwilling to believe him. Suddenly, to prove that he would tell the truth about killing someone if he were guilty, Benjamin spontaneously confessed to the murder of the gas station attendant. Later that evening, he gave a detailed videotaped confession to an Assistant District Attorney, in

which he admitted that he, Eulogio, Jerry Cruz, and a fourth man had robbed the gas station, and that he had killed the attendant after the attendant shot Eulogio. Benjamin and Eulogio were indicted for felony murder of the station attendant.

The brothers were tried jointly, over Eulogio's objection. Likewise over Eulogio's objection, the trial judge allowed the prosecutor to introduce Benjamin's videotaped confession, warning the jury that the confession was not to be used against Eulogio. The government also called Norberto, who testified about his November 29 conversation with Eulogio and Benjamin. Finally, the government introduced police testimony, forensic evidence, and photographs of the scene of the murder, all of which corroborated Benjamin's videotaped confession and the statements recounted by Norberto. At the trial's end, however, Norberto's testimony stood as the only evidence admissible against Eulogio that directly linked him to the crime. Eulogio's attorney tried to persuade the jury that Norberto had suspected Eulogio and Benjamin of killing his brother Jerry and had fabricated his testimony to gain revenge. Unconvinced, the jury convicted both defendants.

The New York Court of Appeals affirmed Eulogio's conviction, 66 N. Y. 2d 61, 485 N. E. 2d 221 (1985), adopting the reasoning of the plurality opinion in *Parker* that *Bruton* did not require the codefendant's confession to be excluded because Eulogio had himself confessed and his confession "interlocked" with Benjamin's. We granted certiorari. 476 U. S. 1168 (1986).

II

The Confrontation Clause of the Sixth Amendment guarantees the right of a criminal defendant "to be confronted with the witnesses against him." We have held that that guarantee, extended against the States by the Fourteenth Amendment, includes the right to cross-examine witnesses. See *Pointer* v. *Texas*, 380 U. S. 400, 404 (1965). Where two or

more defendants are tried jointly, therefore, the pretrial confession of one of them that implicates the others is not admissible against the others unless the confessing defendant waives his Fifth Amendment rights so as to permit cross-examination.

Ordinarily, a witness is considered to be a witness "against" a defendant for purposes of the Confrontation Clause only if his testimony is part of the body of evidence that the jury may consider in assessing his guilt. Therefore, a witness whose testimony is introduced in a joint trial with the limiting instruction that it be used only to assess the guilt of one of the defendants will not be considered to be a witness "against" the other defendants. In *Bruton*, however, we held that this principle will not be applied to validate, under the Confrontation Clause, introduction of a nontestifying codefendant's confession implicating the defendant, with instructions that the jury should disregard the confession insofar as its consideration of the defendant's guilt is concerned. We said:

> "[T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. Such a context is presented here, where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial. Not only are the incriminations devastating to the defendant but their credibility is inevitably suspect . . . ." 391 U. S., at 135–136 (citations omitted).

We had occasion to revisit this issue in *Parker*, which resembled *Bruton* in all major respects save one: Each of the jointly tried defendants had himself confessed, his own confession was introduced against him, and his confession recited essentially the same facts as those of his nontestifying

codefendants. The plurality of four Justices found no Sixth Amendment violation. It understood *Bruton* to hold that the Confrontation Clause is violated only when introduction of a codefendant's confession is "devastating" to the defendant's case. When the defendant has himself confessed, the plurality reasoned, "[his] case has already been devastated," 442 U. S., at 75, n. 7, so that the codefendant's confession "will seldom, if ever, be of the 'devastating' character referred to in *Bruton*," and impeaching that confession on cross-examination "would likely yield small advantage," *id.*, at 73. Thus, the plurality would have held *Bruton* inapplicable to cases involving interlocking confessions. The four remaining Justices participating in the case disagreed, subscribing to the view expressed by JUSTICE BLACKMUN that introduction of the defendant's own interlocking confession might, in some cases, render the violation of the Confrontation Clause harmless, but could not cause introduction of the nontestifying codefendant's confession not to constitute a violation. *Id.*, at 77–80 (BLACKMUN, J., concurring in part and concurring in judgment). (JUSTICE BLACKMUN alone went on to find that the interlocking confession did make the error harmless in the case before the Court, thereby producing a majority for affirmance of the convictions. *Id.*, at 80–81.) We face again today the issue on which the Court was evenly divided in *Parker*.

We adopt the approach espoused by JUSTICE BLACKMUN. While "devastating" practical effect was one of the factors that *Bruton* considered in assessing whether the Confrontation Clause might sometimes require departure from the general rule that jury instructions suffice to exclude improper testimony, 391 U. S., at 136, it did not suggest that the existence of such an effect should be assessed on a case-by-case basis. Rather, that factor was one of the justifications for excepting from the general rule the entire category of codefendant confessions that implicate the defendant in the crime. It is impossible to imagine why there should be

excluded from that category, as generally not "devastating," codefendant confessions that "interlock" with the defendant's own confession. "[T]he infinite variability of inculpatory statements (whether made by defendants or codefendants), and of their likely effect on juries, makes [the assumption that an interlocking confession will preclude devastation] untenable." *Parker*, 442 U. S., at 84 (STEVENS, J., dissenting). In this case, for example, the precise content and even the existence of petitioner's own confession were open to question, since they depended upon acceptance of Norberto's testimony, whereas the incriminating confession of codefendant Benjamin was on videotape.

In fact, it seems to us that "interlocking" bears a positively inverse relationship to devastation. A codefendant's confession will be relatively harmless if the incriminating story it tells is different from that which the defendant himself is alleged to have told, but enormously damaging if it confirms, in all essential respects, the defendant's alleged confession. It might be otherwise if the defendant were *standing by* his confession, in which case it could be said that the codefendant's confession does no more than support the defendant's very own case. But in the real world of criminal litigation, the defendant is seeking to *avoid* his confession—on the ground that it was not accurately reported, or that it was not really true when made. In the present case, for example, petitioner sought to establish that Norberto had a motive for falsely reporting a confession that never in fact occurred. In such circumstances a codefendant's confession that corroborates the defendant's confession significantly harms the defendant's case, whereas one that is positively incompatible gives credence to the defendant's assertion that his own alleged confession was nonexistent or false. Quite obviously, what the "interlocking" nature of the codefendant's confession pertains to is not its *harmfulness* but rather its *reliability:* If it confirms essentially the same facts as the defendant's own confession it is more likely to be true. Its reliability,

however, may be relevant to whether the confession should (despite the lack of opportunity for cross-examination) be *admitted as evidence* against the defendant, see *Lee* v. *Illinois*, 476 U. S. 530 (1986), but cannot conceivably be relevant to whether, assuming it cannot be admitted, the jury is likely to obey the instruction to disregard it, or the jury's failure to obey is likely to be inconsequential. The law cannot command respect if such an inexplicable exception to a supposed constitutional imperative is adopted. Having decided *Bruton*, we must face the honest consequences of what it holds.

The dissent makes no effort to respond to these points, urging instead a rejection of our "remorseless logic" in favor of "common sense and judgment." See *post*, at 197. But those qualities, even in their most remorseless form, are not separable. It seems to us illogical, and therefore contrary to common sense and good judgment, to believe that codefendant confessions are less likely to be taken into account by the jury the more they are corroborated by the defendant's own admissions; or that they are less likely to be harmful when they confirm the validity of the defendant's alleged confession. Far from carrying *Bruton* "to the outer limits of its logic," *ibid.*, our holding here does no more than reaffirm its central proposition. This case is indistinguishable from *Bruton* with respect to those factors the Court has deemed relevant in this area: the likelihood that the instruction will be disregarded, *Bruton*, 391 U. S., at 135; the probability that such disregard will have a devastating effect, *id.*, at 136; and the determinability of these facts in advance of trial, *Richardson* v. *Marsh*, *post*, at 208.

We hold that, where a nontestifying codefendant's confession incriminating the defendant is not directly admissible against the defendant, see *Lee* v. *Illinois*, *supra*, the Confrontation Clause bars its admission at their joint trial, even if the jury is instructed not to consider it against the defendant, and even if the defendant's own confession is admitted against him. Of course, the defendant's confession may be

considered at trial in assessing whether his codefendant's statements are supported by sufficient "indicia of reliability" to be directly admissible against him (assuming the "unavailability" of the codefendant) despite the lack of opportunity for cross-examination, see *Lee*, *supra*, at 543–544; *Bruton*, *supra*, at 128, n. 3, and may be considered on appeal in assessing whether any Confrontation Clause violation was harmless, see *Harrington* v. *California*, 395 U. S. 250 (1969).

Because the Court of Appeals analyzed petitioner's Confrontation Clause claim under an approach we have now rejected, we reverse and remand for further proceedings not inconsistent with this opinion.

So ordered.

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

Bruton v. *United States*, 391 U. S. 123 (1968), involved a joint trial and the admission of a codefendant's confession with instructions to the jury not to consider it against the defendant.[1] Concededly, if the jury had followed its instructions there would have been no error, constitutional or otherwise. But the Court held that in "some contexts"—and the *Bruton* case fell in that category—the chance was "so great" that the jury would not follow its instructions to consider the codefendant's confession only against him, and the failure to follow such instructions would be so "devastating"

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[1] The crime with which Bruton and his codefendant Evans were charged was the robbery of postal funds from a jewelry store that operated a contract branch for the United States Post Office Department. *Evans* v. *United States*, 375 F. 2d 355, 357 (CA8 1967). Evans was readily identified by the store's owner and another employee, who knew him as a frequent visitor to the store, but the owner could not identify Bruton as Evan's accomplice. *Ibid.* The employee did identify Bruton at trial, but admitted that she had failed to identify him at a first lineup of three persons, and had identified him only at a second lineup, at a time when she suspected that he had been part of the previous lineup. App. in *Bruton* v. *United States*, O. T. 1967, No. 705, pp. 70–73.

to the defendant's case, that it would be constitutional error to admit the confession even against the codefendant. *Id.*, at 135–136. The introduction of the codefendant's confession "posed a substantial threat to petitioner's right to confront the witnesses against him," a threat the Court said it could not ignore. *Id.*, at 137.

In *Bruton*, the defendant himself had not confessed. Here, it is otherwise: defendant Cruz had confessed and his confession was properly before the jury. Yet the Court's holding is that the codefendant's confession was inadmissible even if it completely "interlocked" with that of Cruz himself, that is, was substantially the same as and consistent with Cruz's confession with respect to all elements of the crime and did not threaten to incriminate Cruz any more than his own confession.

This makes little sense to me. "[T]he defendant's own confession is probably the most probative and damaging evidence that can be admitted against him. Though itself an out-of-court statement, it is admitted as reliable evidence because it is an admission of guilt by the defendant and constitutes direct evidence of the facts to which it relates. Even the testimony of an eyewitness may be less reliable than the defendant's own confession. An observer may not correctly perceive, understand, or remember the acts of another, but the admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct." *Id.*, at 139–140 (WHITE, J., dissenting). Confessions of defendants have profound impact on juries, so much that we held in *Jackson* v. *Denno*, 378 U. S. 368 (1964), that there is justifiable doubt that juries will disregard them even if told to do so. But a codefendant's out-of-court statements implicating the defendant are not only hearsay but also have traditionally been viewed with special suspicion. *Bruton*, *supra*, at 136; *Holmgren* v.

United States, 217 U. S. 509, 523–524 (1910); *Crawford* v. *United States*, 212 U. S. 183, 204 (1909). And the jury may be so informed. *Bruton* held that where the defendant has not himself confessed, there is too great a chance that the jury would rely on the codefendant's confession. But here, Cruz had admitted the crime and this fact was before the jury. I disagree with the Court's proposition that in every interlocking confession case, the jury, with the defendant's confession properly before it, would be tempted to disobey its instructions and fail to understand that presumptively unreliable evidence must not be used against the defendant. Nor is it remotely possible that in every case the admission of an interlocking confession by a codefendant will have the devastating effect referred to in *Bruton*.[2]

The Court finds it "impossible to imagine" why the defendant's interlocking confession could ever make the *Bruton* rule inapplicable; any such conclusion would be "illogical." *Ante*, at 191, 193. But many Court of Appeals Judges—as many as embrace the Court's harmless-error rule—are not so unimaginative; they see nothing illogical, in interlocking confession cases, in adhering to the traditional presumption that juries follow their instructions.[3] Of course, the decision here is not

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[2] The Court is of the view that "'interlocking' bears a positively inverse relationship to devastation." *Ante*, at 192. In so reasoning, the Court gives no weight whatsoever to the devastating effect that the defendant's own confession is likely to have upon his case. The majority's excuse for ignoring this consideration apparently is that the damaging effect of the defendant's confession may vary somewhat from case to case. *Ibid.* But the *Bruton* rule is prophylactic in nature, and, in view of the fact that it imposes significant burdens on the prosecution, see *Richardson* v. *Marsh*, *post*, at 209–210, the rule should be confined to those cases where the jury's ignoring of limiting instructions is most likely to change the verdict, which is to say, those cases where there is the greatest risk that jury misconduct will lead to the conviction of an innocent defendant. It is self-evident that, as a class, cases where the defendant has not confessed fit that description far better than cases where the defendant has confessed.

[3] As I read the cases, the Second, Seventh, and Eleventh Circuits follow the course the Court rejects. *United States ex rel. Catanzaro* v. *Man-*

a matter of imagination or logic, but one of common sense and judgment in interpreting the Constitution. *Bruton* disallowed the codefendant's confession into evidence, even with an instruction to disregard it as evidence against Bruton, because it posed a "substantial threat" to his Confrontation Clause rights. It does not defy logic to find that in other circumstances, such as where the defendant's own confession interlocks with his codefendant's, the threat is not of such magnitude. Even where remorseless logic may seem to justify the extension of what otherwise might be a sound constitutional rule, common sense should prevail. Otherwise, especially in applying prophylactic rules, we may trivialize the principles of prior cases by applying them to situations that in general do not really pose the dangers that the rules were intended to obviate.

The Court states that "[W]e must face the honest consequences" of the *Bruton* decision. *Ante*, at 193. But *Richardson* v. *Marsh*, *post*, p. 200, decided today, recognizes that *Bruton* cannot be followed to the outer limits of its logic without serious disruption of the State's ability to conduct joint trials. In *Richardson*, the Court of Appeals held inadmissible a codefendant's confession even though it had been redacted to eliminate any references to the defendant, the

cusi, 404 F. 2d 296, 300 (CA2 1968); *United States* v. *Paternina-Vergara*, 749 F. 2d 993, 998–999 (CA2 1984); *United States* v. *Spinks*, 470 F. 2d 64 (CA7 1972); *United States* v. *Kroesser*, 731 F. 2d 1509 (CA11 1984). The Fourth and Fifth Circuits lean in that direction, *United States* v. *Smith*, 792 F. 2d 441, 443 (CA4 1986); *Mack* v. *Maggio*, 538 F. 2d 1129 (CA5 1976); *United States* v. *Miller*, 666 F. 2d 991, 997–999 (CA5 1982); and the Tenth Circuit's view is that any difference between the two views is only a legal nicety, *Metropolis* v. *Turner*, 437 F. 2d 207 (1971). The Third, Sixth, Eighth, and Ninth Circuits take the harmless-error route. *United States* v. *DiGilio*, 538 F. 2d 972 (CA3 1976); *Hodges* v. *Rose*, 570 F. 2d 643, 647 (CA6 1978); *United States* v. *Parker*, 622 F. 2d 298 (CA8 1980); *United States* v. *Espericueta-Reyes*, 631 F. 2d 616, 624, n. 11 (CA9 1980). The Court of Appeals Judges who have addressed the issue are approximately equally divided as to whether to apply *Bruton* in interlocking confession cases.

fear being that the jury, if it disobeyed its instructions, could have drawn unfavorable inferences from the challenged confession when considered together with other evidence. *Marsh* v. *Richardson*, 781 F. 2d 1201 (CA6 1986). We reversed the Court of Appeals despite this possibility, thus rejecting the *Bruton* claim, *post*, at 211, as we should do in this case.

That the error the Court finds may be harmless and the conviction saved will not comfort prosecutors and judges. I doubt that the former will seek joint trials in interlocking confession cases, and if that occurs, the judge is not likely to commit error by admitting the codefendant's confession. Of course, defendants may be tried separately and *Bruton* problems avoided. But joint trials "conserve state funds, diminish inconvenience to witnesses and public authorities, and avoid delays in bringing those accused of crime to trial," *Bruton*, 391 U. S., at 134, to say nothing of the possibility of inconsistent verdicts and the effect of severance on already overburdened state and federal court systems. See also *Richardson* v. *Marsh*, *post*, at 209–210.

I thus adhere to the views expressed by the plurality in *Parker* v. *Randolph*, 442 U. S. 62 (1979). There was no constitutional error here that *Bruton* sought to avoid, and no occasion to inquire into harmless error. In announcing its prophylactic rule, *Bruton* did not address the situation where the defendant himself had confessed, and I would not extend its holding to cases where the jury has heard the defendant's own confession.

Lee v. *Illinois*, 476 U. S. 530 (1986), and *Ohio* v. *Roberts*, 448 U. S. 56 (1980), suggest that a codefendant's interlocking confession will often be admissible against the defendant, in which event there would not be the Confrontation Clause issue *Bruton* identified.[4] Here, the codefendant's confession

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[4] As JUSTICE BLACKMUN commented in dissent in *Lee:*

"In *Bruton* v. *United States*, 391 U. S. 123 (1968), the inadmissibility of the codefendant's out-of-court statements against the defendant was not contested . . . . The *Bruton* rule thus necessarily applies only to situa-

carries numerous indicia of reliability; and I gather that the Court's disposition does not deny the state courts, on remand, the opportunity to deal with the admissibility of that confession against Cruz.

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tions in which the out-of-court statements are constitutionally inadmissible against the defendant." 476 U. S., at 552, n. 5.

RICHARDSON, WARDEN *v.* MARSH

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

No. 85–1433. Argued January 14, 1987—Decided April 21, 1987

Respondent and Benjamin Williams were charged with murder, robbery, and assault. At their joint trial, Williams' confession was admitted over respondent's objection. The confession had been redacted to omit all reference to respondent—indeed, to omit all indication that anyone other than Williams and a third accomplice participated in the crime. In his confession, Williams described a conversation he had with the third accomplice as they drove to the victims' home, during which the accomplice said that he would have to kill the victims after robbing them. At the time the confession was admitted, the jury was admonished not to use it in any way against respondent. Williams did not testify. Respondent's testimony indicated that she had been in the car with Williams and the third accomplice but had not heard their conversation. Respondent insisted that she had not intended to rob or kill anyone. Respondent was convicted of felony murder and assault to commit murder, and the Michigan Court of Appeals affirmed. The Federal District Court denied respondent's petition for a writ of habeas corpus, but the Court of Appeals reversed, holding that respondent was entitled to a new trial under *Bruton* v. *United States*, 391 U. S. 123. *Bruton* held that a defendant is deprived of his rights under the Confrontation Clause when his nontestifying codefendant's confession naming him as a participant in the crime is introduced at their joint trial, even if the jury is instructed to consider that confession only against the codefendant. The Court of Appeals held that *Bruton* requires the same result when the codefendant's confession is redacted to omit any reference to the defendant, but the defendant is nonetheless linked to the confession by evidence properly admitted against him at trial.

Held: The Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession with a proper limiting instruction when, as here, the confession is redacted to eliminate not only the defendant's name, but any reference to her existence. The *Bruton* Court recognized a very narrow exception to the almost invariable assumption of the law that jurors follow their instructions in the situation when the facially incriminating confession of a nontestifying codefendant is introduced at a joint trial and the jury is instructed to consider the confession only against the codefendant. In that situation, *Bruton* explained, the

risk that the jury will not follow its instructions is so great and the consequences of that failure so vital to the defendant that jurors will be assumed incapable of obeying their instructions. There are two important distinctions between this case and *Bruton*, which cause it to fall outside the narrow exception *Bruton* created. First, in *Bruton* the codefendant's confession expressly implicated the defendant as his accomplice, whereas here the confession was not incriminating on its face, but became so only when linked with evidence introduced later at trial. Where the necessity of such linkage is involved, there does not exist the overwhelming probability of jurors' inability to disregard incriminating inferences that is the foundation of *Bruton*. Second, evidence requiring linkage differs from evidence incriminating on its face in the practical effects which application of the *Bruton* exception would produce. If limited to facially incriminating confessions, *Bruton* can be complied with by redaction. If extended to confessions incriminating by connection, not only is that not possible, but it is not even possible to predict the admissibility of a confession in advance of trial. Compliance with the Court of Appeals' overbroad reading of *Bruton* could not be achieved without enormous costs to the criminal justice system. Pp. 206–211.

781 F. 2d 1201, reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, BLACKMUN, POWELL, and O'CONNOR, JJ., joined. STEVENS, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 211.

Timothy A. Baughman argued the cause for petitioner. With him on the briefs was *John D. O'Hair*.

Lawrence S. Robbins argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Fried*, *Assistant Attorney General Trott*, and *Deputy Solicitor General Bryson*.

R. Steven Whalen, by appointment of the Court, 478 U. S. 1003, argued the cause and filed a brief for respondent.

JUSTICE SCALIA delivered the opinion of the Court.

In *Bruton* v. *United States*, 391 U. S. 123 (1968), we held that a defendant is deprived of his rights under the Confrontation Clause when his nontestifying codefendant's confession naming him as a participant in the crime is introduced at their joint trial, even if the jury is instructed to consider

that confession only against the codefendant. Today we consider whether *Bruton* requires the same result when the codefendant's confession is redacted to omit any reference to the defendant, but the defendant is nonetheless linked to the confession by evidence properly admitted against him at trial.

I

Respondent Clarissa Marsh, Benjamin Williams, and Kareem Martin were charged with assaulting Cynthia Knighton and murdering her 4-year-old son, Koran, and her aunt, Ollie Scott. Respondent and Williams were tried jointly, over her objection. (Martin was a fugitive at the time of trial.) At the trial, Knighton testified as follows: On the evening of October 29, 1978, she and her son were at Scott's home when respondent and her boyfriend Martin visited. After a brief conversation in the living room, respondent announced that she had come to "pick up something" from Scott and rose from the couch. Martin then pulled out a gun, pointed it at Scott and the Knightons, and said that "someone had gotten killed and [Scott] knew something about it." Respondent immediately walked to the front door and peered out the peephole. The doorbell rang, respondent opened the door, and Williams walked in, carrying a gun. As Williams passed respondent, he asked, "Where's the money?" Martin forced Scott upstairs, and Williams went into the kitchen, leaving respondent alone with the Knightons. Knighton and her son attempted to flee, but respondent grabbed Knighton and held her until Williams returned. Williams ordered the Knightons to lie on the floor and then went upstairs to assist Martin. Respondent, again left alone with the Knightons, stood by the front door and occasionally peered out the peephole. A few minutes later, Martin, Williams, and Scott came down the stairs, and Martin handed a paper grocery bag to respondent. Martin and Williams then forced Scott and the Knightons into the basement, where Martin shot them. Only Cynthia Knighton survived.

In addition to Knighton's testimony, the State introduced (over respondent's objection) a confession given by Williams to the police shortly after his arrest. The confession was redacted to omit all reference to respondent—indeed, to omit all indication that *anyone* other than Martin and Williams participated in the crime.[1] The confession largely corrobo-

[1] The redacted confession in its entirety read:

"On Sunday evening, October the 29th, 1978, at about 6:30 p.m., I was over to my girl friend's house at 237 Moss, Highland Park, when I received a phone call from a friend of mine named Kareem Martin. He said he had been looking for me and James Coleman, who I call Tom. He asked me if I wanted to go on a robbery with him. I said okay. Then he said he'd be by and pick me up. About 15 or 20 minutes later Kareem came by in his black Monte Carlo car. I got in the car and Kareem told me he was going to stick up this crib, told me the place was a numbers house. Kareem said there would be over $5,000 or $10,000 in the place. Kareem said he would have to take them out after the robbery. Kareem had a big silver gun. He gave me a long barrelled *[sic]* .22 revolver. We then drove over to this house and parked the car across the big street near the house. The plan was that I would wait in the car in front of the house and then I would move the car down across the big street because he didn't want anybody to see the car. Okay, Kareem went up to the house and went inside. A couple of minutes later I moved the car and went up to the house. As I entered, Kareem and this older lady were in the dining room, a little boy and another younger woman were sitting on the couch in the front room. I pulled my pistol and told the younger woman and the little boy to lay on the floor. Kareem took the older lady upstairs. He had a pistol, also. I stayed downstairs with the two people on the floor. After Kareem took the lady upstairs I went upstairs and the lady was laying on the bed in the room to the left as you get up the stairs. The lady had already given us two bags full of money before we ever got upstairs. Kareem had thought she had more money and that's why we had went upstairs. Me and Kareem started searching the rooms but I didn't find any money. I came downstairs and then Kareem came down with the lady. I said, 'Let's go, let's go.' Kareem said no. Kareem then took the two ladies and little boy down the basement and that's when I left to go to the car. I went to the car and got in the back seat. A couple of minutes later Kareem came to the car and said he thinks the girl was still living because she was still moving and he didn't have any more bullets. He asked me how come I didn't go down the basement and I said I wasn't doing no shit like that. He then dropped me back off at my girl's house in Highland

rated Knighton's account of the activities of persons other than respondent in the house. In addition, the confession described a conversation Williams had with Martin as they drove to the Scott home, during which, according to Williams, Martin said that he would have to kill the victims after the robbery. At the time the confession was admitted, the jury was admonished not to use it in any way against respondent. Williams did not testify.

After the State rested, respondent took the stand. She testified that on October 29, 1978, she had lost money that Martin intended to use to buy drugs. Martin was upset, and suggested to respondent that she borrow money from Scott, with whom she had worked in the past. Martin and respondent picked up Williams and drove to Scott's house. During the drive, respondent, who was sitting in the backseat, "knew that [Martin and Williams] were talking" but could not hear the conversation because "the radio was on and the speaker was right in [her] ear." Martin and respondent were admitted into the home, and respondent had a short conversation with Scott, during which she asked for a loan. Martin then pulled a gun, and respondent walked to the door to see where the car was. When she saw Williams, she opened the door for him. Respondent testified that during the robbery she did not feel free to leave and was too scared to flee. She said that she did not know why she prevented the Knightons from escaping. She admitted taking the bag from Martin, but said that after Martin and Williams took the victims into the basement, she left the house without the bag. Respondent insisted that she had possessed no prior knowledge that Martin and Williams were armed, had heard no conversation about anyone's being harmed, and had not intended to rob or kill anyone.

Park and I was supposed to get together with him today, get my share of the robbery after he had counted the money. That's all." App. in No. 84–1777 (CA6), pp. 88–90.

During his closing argument, the prosecutor admonished the jury not to use Williams' confession against respondent. Later in his argument, however, he linked respondent to the portion of Williams' confession describing his conversation with Martin in the car.[2] (Respondent's attorney did not object to this.) After closing arguments, the judge again instructed the jury that Williams' confession was not to be considered against respondent. The jury convicted respondent of two counts of felony murder in the perpetration of an armed robbery and one count of assault with intent to commit murder. The Michigan Court of Appeals affirmed in an unpublished opinion, *People* v. *Marsh*, No. 46128 (Dec. 17, 1980), and the Michigan Supreme Court denied leave to appeal, 412 Mich. 927 (1982).

Respondent then filed a petition for a writ of habeas corpus pursuant to 28 U. S. C. § 2254. She alleged that her conviction was not supported by sufficient evidence and that introduction of Williams' confession at the joint trial had violated her rights under the Confrontation Clause. The District Court denied the petition. Civ. Action No. 83–CV–2665–DT (ED Mich., Oct. 11, 1984). The United States Court of Appeals for the Sixth Circuit reversed. 781 F. 2d 1201 (1986). The Court of Appeals held that in determining whether *Bruton* bars the admission of a nontestifying codefendant's confession, a court must assess the confession's "inculpatory

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[2] The prosecutor said:

"It's important in light of [respondent's] testimony when she says Kareem drives over to Benjamin Williams' home and picks him up to go over. What's the thing that she says? 'Well, I'm sitting in the back seat of the car.' 'Did you hear any conversation that was going on in the front seat between Kareem and Mr. Williams?' 'No, couldn't hear any conversation. The radio was too loud.' I asked *[sic]* you whether that is reasonable. Why did she say that? Why did she say she couldn't hear any conversation? She said, 'I know they were having conversation but I couldn't hear it because of the radio.' Because if she admits that she heard the conversation and she admits to the plan, she's guilty of at least armed robbery. So she can't tell you that." *Id.*, at 164.

value" by examining not only the face of the confession, but also all of the evidence introduced at trial. 781 F. 2d, at 1212. Here, Williams' account of the conversation in the car was the only *direct* evidence that respondent knew before entering Scott's house that the victims would be robbed and killed. Respondent's own testimony placed her in that car. In light of the "paucity" of other evidence of malice and the prosecutor's linkage of respondent and the statement in the car during closing argument, admission of Williams' confession "was powerfully incriminating to [respondent] with respect to the critical element of intent." *Id.*, at 1213. Thus, the Court of Appeals concluded, the Confrontation Clause was violated. We granted certiorari, 476 U. S. 1168 (1986), because the Sixth Circuit's decision conflicts with those of other Courts of Appeals which have declined to adopt the "evidentiary linkage" or "contextual implication" approach to *Bruton* questions, see, *e. g.*, *United States* v. *Belle*, 593 F. 2d 487 (CA3 1979) (en banc).

II

The Confrontation Clause of the Sixth Amendment, extended against the States by the Fourteenth Amendment, guarantees the right of a criminal defendant "to be confronted with the witnesses against him." The right of confrontation includes the right to cross-examine witnesses. See *Pointer* v. *Texas*, 380 U. S. 400, 404, 406–407 (1965). Therefore, where two defendants are tried jointly, the pretrial confession of one cannot be admitted against the other unless the confessing defendant takes the stand.

Ordinarily, a witness whose testimony is introduced at a joint trial is not considered to be a witness "against" a defendant if the jury is instructed to consider that testimony only against a codefendant. This accords with the almost invariable assumption of the law that jurors follow their instructions, *Francis* v. *Franklin*, 471 U. S. 307, 325, n. 9 (1985), which we have applied in many varying contexts. For example, in *Harris* v. *New York*, 401 U. S. 222 (1971),

we held that statements elicited from a defendant in violation of *Miranda* v. *Arizona*, 384 U. S. 436 (1966), can be introduced to impeach that defendant's credibility, even though they are inadmissible as evidence of his guilt, so long as the jury is instructed accordingly. Similarly, in *Spencer* v. *Texas*, 385 U. S. 554 (1967), we held that evidence of the defendant's prior criminal convictions could be introduced for the purpose of sentence enhancement, so long as the jury was instructed it could not be used for purposes of determining guilt. Accord, *Marshall* v. *Lonberger*, 459 U. S. 422, 438–439, n. 6 (1983). See also *Tennessee* v. *Street*, 471 U. S. 409, 414–416 (1985) (instruction to consider accomplice's incriminating confession only for purpose of assessing truthfulness of defendant's claim that his own confession was coerced); *Watkins* v. *Sowders*, 449 U. S. 341, 347 (1981) (instruction not to consider erroneously admitted eyewitness identification evidence); *Walder* v. *United States*, 347 U. S. 62 (1954) (instruction to consider unlawfully seized physical evidence only in assessing defendant's credibility). In *Bruton*, however, we recognized a narrow exception to this principle: We held that a defendant is deprived of his Sixth Amendment right of confrontation when the facially incriminating confession of a nontestifying codefendant is introduced at their joint trial, even if the jury is instructed to consider the confession only against the codefendant. We said:

> "[T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. Such a context is presented here, where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial. . . ." 391 U. S., at 135–136 (citations omitted).

There is an important distinction between this case and *Bruton*, which causes it to fall outside the narrow exception we have created. In *Bruton*, the codefendant's confession "expressly implicat[ed]" the defendant as his accomplice. *Id.*, at 124, n. 1. Thus, at the time that confession was introduced there was not the slightest doubt that it would prove "powerfully incriminating." *Id.*, at 135. By contrast, in this case the confession was not incriminating on its face, and became so only when linked with evidence introduced later at trial (the defendant's own testimony).[3]

Where the necessity of such linkage is involved, it is a less valid generalization that the jury will not likely obey the instruction to disregard the evidence. Specific testimony that "the defendant helped me commit the crime" is more vivid than inferential incrimination, and hence more difficult to thrust out of mind. Moreover, with regard to such an explicit statement the only issue is, plain and simply, whether the jury can possibly be expected to forget it in assessing the defendant's guilt; whereas with regard to inferential incrimination the judge's instruction may well be successful in dissuading the jury from entering onto the path of inference in the first place, so that there is no incrimination to forget. In short, while it may not always be simple for the members of a jury to obey the instruction that they disregard an incriminating inference, there does not exist the overwhelming probability of their inability to do so that is the foundation of *Bruton*'s exception to the general rule.

Even more significantly, evidence requiring linkage differs from evidence incriminating on its face in the practical effects which application of the *Bruton* exception would produce. If

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[3] The dissent is mistaken in believing we "assum[e] that [Williams'] confession did not incriminate respondent." *Post*, at 215, n. 3. To the contrary, the very premise of our discussion is that respondent would have been harmed by Williams' confession *if* the jury had disobeyed its instructions. Our disagreement pertains not to whether the confession incriminated respondent, but to whether the trial court could properly assume that the jury did not use it against her.

limited to facially incriminating confessions, *Bruton* can be complied with by redaction—a possibility suggested in that opinion itself. *Id.*, at 134, n. 10. If extended to confessions incriminating by connection, not only is that not possible, but it is not even possible to predict the admissibility of a confession in advance of trial. The "contextual implication" doctrine articulated by the Court of Appeals would presumably require the trial judge to assess at the end of each trial whether, in light of all of the evidence, a nontestifying codefendant's confession has been so "powerfully incriminating" that a new, separate trial is required for the defendant. This obviously lends itself to manipulation by the defense—and even without manipulation will result in numerous mistrials and appeals. It might be suggested that those consequences could be reduced by conducting a pretrial hearing at which prosecution and defense would reveal the evidence they plan to introduce, enabling the court to assess compliance with *Bruton ex ante* rather than *ex post.* If this approach is even feasible under the Federal Rules (which is doubtful—see, *e. g.*, Fed. Rule Crim. Proc. 14), it would be time consuming and obviously far from foolproof.

One might say, of course, that a certain way of assuring compliance would be to try defendants separately whenever an incriminating statement of one of them is sought to be used. That is not as facile or as just a remedy as might seem. Joint trials play a vital role in the criminal justice system, accounting for almost one-third of federal criminal trials in the past five years. Memorandum from David L. Cook, Administrative Office of the United States Courts, to Supreme Court Library (Feb. 20, 1987) (available in Clerk of Court's case file). Many joint trials—for example, those involving large conspiracies to import and distribute illegal drugs—involve a dozen or more codefendants. Confessions by one or more of the defendants are commonplace—and indeed the probability of confession increases with the number

of participants, since each has reduced assurance that he will be protected by his own silence. It would impair both the efficiency and the fairness of the criminal justice system to require, in all these cases of joint crimes where incriminating statements exist, that prosecutors bring separate proceedings, presenting the same evidence again and again, requiring victims and witnesses to repeat the inconvenience (and sometimes trauma) of testifying, and randomly favoring the last-tried defendants who have the advantage of knowing the prosecution's case beforehand. Joint trials generally serve the interests of justice by avoiding inconsistent verdicts and enabling more accurate assessment of relative culpability—advantages which sometimes operate to the defendant's benefit. Even apart from these tactical considerations, joint trials generally serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts.[4] The other way of assuring compliance with an expansive *Bruton* rule would be to forgo use of codefendant confessions. That price also is too high, since confessions "are more than merely 'desirable'; they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law." *Moran* v. *Burbine*, 475 U. S. 412, 426 (1986) (citation omitted).

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[4] The dissent notes that "all of the cases in this Court that involved joint trials conducted after *Bruton* was decided, in which compliance with the rule of that case was at issue, appear to have originated in a state court." *Post*, at 219. It concludes from this that "*[f]ederal* prosecutors seem to have had little difficulty" in implementing *Bruton* as the dissent believes it must be implemented. *Ibid.* Since the cases in question number only a handful, the fact that they happened to be state cases may signify nothing more than that there are many times more state prosecutions than federal. There is assuredly no basis to believe that federal prosecutors have been applying the dissent's interpretation of *Bruton*. Indeed the contrary proposition—as well as the harmfulness of that interpretation to federal law enforcement efforts—is suggested by the fact that the Solicitor General has appeared here as *amicus* to urge reversal for substantially the reasons we have given. See Brief for United States as *Amicus Curiae*.

The rule that juries are presumed to follow their instructions is a pragmatic one, rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation of the interests of the state and the defendant in the criminal justice process. On the precise facts of *Bruton*, involving a facially incriminating confession, we found that accommodation inadequate. As our discussion above shows, the calculus changes when confessions that do not name the defendant are at issue. While we continue to apply *Bruton* where we have found that its rationale validly applies, see *Cruz* v. *New York*, *ante*, p. 186, we decline to extend it further. We hold that the Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession with a proper limiting instruction when, as here, the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence.[5]

In the present case, however, the prosecutor sought to undo the effect of the limiting instruction by urging the jury to use Williams' confession in evaluating respondent's case. See *supra*, at 205, and n. 2. On remand, the court should consider whether, in light of respondent's failure to object to the prosecutor's comments, the error can serve as the basis for granting a writ of habeas corpus. See *Wainwright* v. *Sykes*, 433 U. S. 72 (1977).

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

So ordered.

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

The rationale of our decision in *Bruton* v. *United States*, 391 U. S. 123, 135–136 (1968), applies without exception to all

[5] We express no opinion on the admissibility of a confession in which the defendant's name has been replaced with a symbol or neutral pronoun.

inadmissible confessions that are "powerfully incriminating." Today, however, the Court draws a distinction of constitutional magnitude between those confessions that directly identify the defendant and those that rely for their inculpatory effect on the factual and legal relationships of their contents to other evidence before the jury. Even if the jury's indirect inference of the defendant's guilt based on an inadmissible confession is much more devastating to the defendant's case than its inference from a direct reference in the codefendant's confession, the Court requires the exclusion of only the latter statement. This illogical result demeans the values protected by the Confrontation Clause. Moreover, neither reason nor experience supports the Court's argument that a consistent application of the rationale of the *Bruton* case would impose unacceptable burdens on the administration of justice.

I

It is a "basic premise" of the Confrontation Clause that certain kinds of hearsay "are at once so damaging, so suspect, and yet so difficult to discount, that jurors cannot be trusted to give such evidence the minimal weight it logically deserves, *whatever* instructions the trial judge might give."[1]

[1] *Bruton* v. *United States*, 391 U. S. 123, 138 (1968) (Stewart, J., concurring) (emphasis in original). Judge Learned Hand and Justice Frankfurter also would recognize that the admission of Williams' confession, even with limiting instructions, placed too great a strain upon the jury's ability to exclude this evidence from its consideration of respondent's innocence or guilt. As we noted in *Bruton:*

"Judge Hand addressed the subject several times. The limiting instruction, he said, is a 'recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody's else,' *Nash* v. *United States*, 54 F. 2d 1006, 1007; 'Nobody can indeed fail to doubt whether the caution is effective, or whether usually the practical result is not to let in hearsay,' *United States* v. *Gottfried*, 165 F. 2d 360, 367; 'it is indeed very hard to believe that a jury will, or for that matter can, in practice observe the admonition,' *Delli Paoli* v. *United States*, 229 F. 2d 319, 321. Judge Hand referred to the instruction as a 'placebo,' medically defined as 'a medicinal lie.' " 391 U. S., at 132, n. 8.

This constitutionally mandated skepticism undergirds the *Bruton* holding and is equally applicable to this case. The Court framed the issue in *Bruton* as "whether the conviction of a defendant at a joint trial should be set aside although the jury was instructed that a codefendant's confession inculpating the defendant had to be disregarded in determining his guilt or innocence." 391 U. S., at 123–124. We answered that question in the affirmative, noting that the Sixth Amendment is violated "where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial." *Id.*, at 135–136.

Today the Court nevertheless draws a line between codefendant confessions that expressly name the defendant and those that do not. The Court relies on the presumption that in the latter category "it is a less valid generalization that the jury will not likely obey the instruction to disregard the evidence." *Ante*, at 208. I agree; but I do not read *Bruton* to require the exclusion of *all* codefendant confessions that do not mention the defendant.[2] Some such confessions may not have any significant impact on the defendant's case. But others will. If we presume, as we must, that jurors give their full and vigorous attention to every witness and each item of evidence, the very acts of listening and seeing will sometimes lead them down "the path of inference." Indeed, the Court tacitly acknowledges this point; while the Court speculates that the judge's instruction may dissuade the jury

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In a similar vein, Justice Frankfurter observed:

"The Government should not have the windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should not consider but which they cannot put out of their minds." *Delli Paoli* v. *United States*, 352 U. S. 232, 248 (1957) (dissenting opinion).

[2] Indeed, I have no doubt that there are some codefendant confessions that expressly mention the defendant but nevertheless need not be excluded under *Bruton* because they are not prejudicial.

from making inferences at all, it also concedes the probability of their occurrence, arguing that there is no overwhelming probability that jurors will be unable to "disregard an incriminating inference." *Ibid.* *Bruton* has always required trial judges to answer the question whether a particular confession is or is not "powerfully incriminating" on a case-by-case basis; they should follow the same analysis whether or not the defendant is actually named by his or her codefendant.

Instructing the jury that it was to consider Benjamin Williams' confession only against him, and not against Clarissa Marsh, failed to guarantee the level of certainty required by the Confrontation Clause. The uncertainty arose because the prosecution's case made it clear at the time Williams' statement was introduced that the statement would prove "powerfully incriminating" of the *respondent* as well as of Williams himself. There can be absolutely no doubt that spreading Williams' carefully edited confession before the jury intolerably interfered with the jury's solemn duty to treat the statement as nothing more than meaningless sounds in its consideration of Marsh's guilt or innocence.

At the time that Williams' confession was introduced, the evidence already had established that respondent and two men committed an armed robbery in the course of which the two men killed two persons and shot a third. *Ante*, at 202. There was a sharp dispute, however, on the question whether respondent herself intended to commit a robbery in which murder was a foreseeable result, or knew that the two men planned to do so. The quantum of evidence admissible against respondent was just sufficient to establish this intent and hence to support her conviction. As the Court of Appeals explained:

> "[T]he issue is whether the evidence was sufficient to show that Marsh aided and abetted the assault with the specific intent to murder Knighton or with the knowledge that Martin had this specific intent . . . . Marsh's case presents a much closer question on this issue than

> does Williams'. There was no testimony indicating she harbored an intent to murder Knighton, nor was there any showing that she heard Martin's statements regarding the need to 'hurt' or 'take out' the victims. There was, in addition, no testimony placing her in the basement, the scene of the shootings. The evidence does indicate, viewed in the light most favorable to the prosecution, that she was aware that Williams and Martin were armed, that she served as a guard or 'lookout' at the door, that she prevented an attempted escape by Knighton, and that she was given the paper bag thought to contain the proceeds of a robbery. The evidence also indicates that Marsh knew Scott, supporting the inference that it was Marsh who allowed Martin to gain entrance. While it is a close question, we believe the evidence presented at the time of the motion was sufficient to survive a motion for directed verdict." 781 F. 2d 1201, 1204 (CA6 1986) (emphasis omitted).

In the edited statement that the jury was instructed not to consider against Marsh, Williams described the conversation he had with Kareem Martin while they were in a car driving to their victims' residence. In that conversation, Martin stated that "he would have to take them out after the robbery." See *ante*, at 203, n. 1. The State's principal witness had testified that Martin and Marsh arrived at the victims' house together. The jury was therefore certain to infer from the confession that respondent had been in the car and had overheard the statement by Martin. Viewed in the total context of the trial evidence, this confession was of critical importance because it was the only evidence directly linking respondent with the specific intent, expressed before the robbery, to kill the victims afterwards.[3] If Williams had taken

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[3] The Court assumes that the confession did not incriminate respondent at the time the confession was introduced. I disagree. Cynthia Knighton had already testified that respondent and Kareem Martin had arrived at

the witness stand and testified, respondent's lawyer could have cross-examined him to challenge his credibility and to establish or suggest that the car radio was playing so loudly that Marsh could not have overheard the conversation between the two men from the backseat. An acknowledgment of the possibility of such facts by Williams would have done much more to eliminate the certainty beyond a reasonable doubt that Marsh knew about the murder plan than could possibly have been achieved by the later testimony of respondent herself. Moreover, the price respondent had to pay in order to attempt to rebut the obvious inference that she had overheard Martin was to remind the jury once again of what he had said and to give the prosecutor a further opportunity to point to this most damaging evidence on the close question of her specific intent. See *ante*, at 205, n. 2.

The facts in this case are, admittedly, different from those in *Bruton* because Williams' statement did not directly mention respondent. Thus, instead of being "incriminating on its face," *ante*, at 208, it became so only when considered in connection with the other evidence presented to the jury. The difference between the facts of *Bruton* and the facts of this case does not eliminate their common, substantial, and constitutionally unacceptable risk that the jury, when resolving

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the victims' residence together, and that respondent admitted Williams to the house a few minutes later. In his statement Williams said:

"We then drove over to this house and parked the car across the big street near the house. The plan was that I would wait in the car in front of the house and then I would move the car down across the big street because he didn't want anybody to see the car. Okay, Kareem went up to the house and went inside. A couple of minutes later I moved the car and went up to the house." *Ante*, at 203, n. 1.

It is unrealistic to believe that the jury would assume that respondent did not accompany the two men in the car but had just magically appeared at the front door of the apartment at the same time that Martin did.

a critical issue against respondent, may have relied on impermissible evidence.[4]

II

The facts that joint trials conserve prosecutorial resources, diminish inconvenience to witnesses, and avoid delays in the administration of criminal justice have been well known for a long time. See *United States* v. *Lane*, 474 U. S. 438, 449 (1986) (quoting *Bruton*, 391 U. S., at 134). It is equally well known that joint trials create special risks of prejudice to one of the defendants, and that such risks often make it necessary to grant severances. See *Bruton*, 391 U. S., at 131; Fed. Rule Crim. Proc. 14 (Relief from Prejudicial Joinder). The Government argues that the costs of requiring the prosecution to choose between severance and not offering the codefendant's confession at a joint trial outweigh the benefits to the defendant. Brief for United States as *Amicus Curiae* 22. On the scales of justice, however, considerations of fairness normally outweigh administrative concerns.

In the *Bruton* case the United States argued that the normal "benefits of joint proceedings should not have to be sacri-

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[4] It is worth noting that the dissenting opinion in *Bruton* did not regard the Court's decision as limited to codefendant confessions expressly implicating the defendant:

"I would suppose that it will be necessary to exclude all extrajudicial confessions unless all portions of them which implicate defendants other than the declarant are effectively deleted. *Effective deletion will probably require not only omission of all direct and indirect inculpations of codefendants but also of any statement that could be employed against those defendants once their identity is otherwise established.*" 391 U. S., at 143 (emphasis added) (WHITE, J., dissenting).

The author of that opinion today adheres to that interpretation of *Bruton*. See *Cruz* v. *New York*, *ante*, at 195–196 (WHITE, J., dissenting) ("[A] codefendant's out-of-court statements implicating the defendant are not only hearsay but also have traditionally been viewed with special suspicion. . . . *Bruton* held that where the defendant has not himself confessed, there is too great a chance that the jury would rely on the codefendant's confession").

ficed by requiring separate trials in order to use the confession against the declarant." See 391 U. S., at 134. The Court endorsed the answer to this argument that Judge Lehman of the New York Court of Appeals had previously made in his dissenting opinion in *People* v. *Fisher*, 249 N. Y. 419, 432, 164 N. E. 336, 341 (1928):

> "We still adhere to the rule that an accused is entitled to confrontation of the witnesses against him and the right to cross-examine them . . . . We destroy the age-old rule which in the past has been regarded as a fundamental principle of our jurisprudence by a legalistic formula, required of the judge, that the jury may not consider any admissions against any party who did not join in them. We secure greater speed, economy and convenience in the administration of the law at the price of fundamental principles of constitutional liberty. That price is too high."

The concern about the cost of joint trials, even if valid, does not prevail over the interests of justice. Moreover, the Court's effort to revive this concern in a state criminal case rests on the use of irrelevant statistics. The Court makes the startling discovery that joint trials account for "almost one-third of federal criminal trials in the past five years." *Ante*, at 209. In the interest of greater precision, the Court might have stated that there were 10,904 federal criminal trials involving more than one defendant during that 5-year period.[5] The Court might have added that the data base from which that figure was obtained does not contain any information at all to show the number of times that confessions were offered in evidence in those 10,904 federal cases.[6] The

[5] See Memorandum from David L. Cook, Administrative Office of the United States Courts, to Supreme Court Library (Feb. 20, 1987) (available in Clerk of Court's case file).

[6] See Memorandum from David L. Cook, Administrative Office of the United States Courts, to Supreme Court Library (Mar. 25, 1987) (available in Clerk of Court's case file) (establishing that figures cited in Memoran-

relevance of this data is also difficult to discern because all of the cases in this Court that involved joint trials conducted after *Bruton* was decided, in which compliance with the rule of that case was at issue, appear to have originated in a state court. *Federal* prosecutors seem to have had little difficulty, in conducting the literally thousands of joint trials to which the Court points, in maintaining "both the efficiency and the fairness of the criminal justice system" that the Court speculates will occur if *Bruton*'s reasoning is applied to this case. See *ante*, at 210. Presumably the options of granting immunity, making plea bargains, or simply waiting until after a confessing defendant has been tried separately before trying to use his admissions against an accomplice have enabled the Federal Government to enforce the criminal law without sacrificing the basic premise of the Confrontation Clause.[7]

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dum of February 20, 1987, cited *ante*, at 209, carry no information whatever about the number of multiple-defendant trials in which a codefendant's confession was offered or admitted).

[7] The Court expresses an apparently deep-seated fear that an even-handed application of *Bruton* would jeopardize the use of joint trials. This proposition rests on the unsupported assumption that the number of powerfully incriminating confessions that do not name the defendant is too large to be evaluated on a case-by-case basis. The Court then proceeds to the ostensible administrative outrages of the separate trials that would be necessary, contending that it would be unwise to compel prosecutors to "bring separate proceedings, presenting the same evidence again and again, requiring victims and witnesses to repeat the inconvenience (and sometimes trauma) of testifying, and randomly favoring the last-tried defendants who have the advantage of knowing the prosecution's case beforehand." *Ante*, at 210. This speculation also floats unattached to any anchor of reality. Since the likelihood that more than one of the defendants in a joint trial will have confessed is fairly remote, the prospect of "presenting the same evidence again and again" is nothing but a rhetorical flourish. At worst, in the typical case, two trials may be required, one for the confessing defendant and another for the nonconfessing defendant or defendants. And even in that category, presumably most confessing defendants are likely candidates for plea bargaining.

The Court also expresses concern that trial judges will be unable to determine whether a codefendant's confession that does not directly mention the defendant and is inadmissible against him will create a substantial risk of unfair prejudice. In most such cases the trial judge can comply with the dictates of *Bruton* by postponing his or her decision on the admissibility of the confession until the prosecution rests, at which time its potentially inculpatory effect can be evaluated in the light of the government's entire case. The Court expresses concern that such a rule would enable "manipulation by the defense," see *ante*, at 209, by which the Court presumably means the defense might tailor its evidence to make sure that a confession which does not directly mention the defendant is deemed powerfully incriminating when viewed in light of the prosecution's entire case. As a practical matter, I cannot believe that there are many defense lawyers who would deliberately pursue this high-risk strategy of "manipulating" their evidence in order to enhance the prejudicial impact of a codefendant's confession. Moreover, a great many experienced and competent trial judges throughout the Nation are fully capable of managing cases and supervising counsel in order to avoid the problems that seem insurmountable to appellate judges who are sometimes distracted by illogical distinctions and irrelevant statistics.

I respectfully dissent.[8]

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[8] Except for Williams' confession, and the prosecutor's closing argument that will be separately considered on remand, there was a paucity of other evidence connecting respondent with the plan discussed in the car on the way to the victims' home. The Court of Appeals was thus unquestionably correct in concluding that the violation of the Confrontation Clause in this case was not harmless error.

Syllabus

ARKANSAS WRITERS' PROJECT, INC. *v.* RAGLAND, COMMISSIONER OF REVENUE OF ARKANSAS

APPEAL FROM THE SUPREME COURT OF ARKANSAS

No. 85–1370. Argued January 20, 1987—Decided April 22, 1987

Arkansas imposes a tax on receipts from sales of tangible personal property, but exempts numerous items, including newspapers and "religious, professional, trade, and sports journals and/or publications printed and published within this State" (magazine exemption). Appellant publishes in Arkansas a general interest magazine that includes articles on a variety of subjects, including religion and sports. In 1984, relying on *Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Revenue*, 460 U. S. 575, appellant sought a refund of sales tax it had paid since 1982, asserting that the magazine exemption must be construed to include its magazine, and that subjecting its magazine to the sales tax, while sales of newspapers and other magazines were exempt, violated the First and Fourteenth Amendments. After appellee denied the refund claim, appellant sought review in State Chancery Court, stating an additional claim under 42 U. S. C. §§ 1983 and 1988 for injunctive relief and attorney's fees. That court granted appellant summary judgment, construing the magazine exemption to include appellant because its magazine was published and printed in Arkansas. The Arkansas Supreme Court reversed, holding that the magazine exemption applies only to religious, professional, trade, or sports periodicals. The court rejected the claim that the exemption granted to other publications discriminated against appellant, ruling that success on this claim would avail appellant nothing since it would still be subject to tax even if the exemption fell. The court also refused to find that appellant's First and Fourteenth Amendment rights had been violated, ruling that the sales tax was a permissible "ordinary form of taxation" to which publishers are not immune. Accordingly, the court did not consider appellant's attorney's fees claim.

Held:

1. Appellant has standing to challenge the Arkansas sales tax scheme. Appellee's argument that appellant has not asserted an injury that this Court can redress since appellant concededly publishes neither a newspaper nor a religious, professional, trade, or sports journal is unpersuasive, since it would effectively insulate underinclusive statutes from constitutional challenge. Appellant has alleged a sufficient personal stake in this litigation's outcome, in that the State Supreme Court's holding stands as a total bar to appellant's relief, and its constitutional attack

holds the only promise of escape from the burden imposed upon it by the challenged statute. P. 227.

2. The Arkansas sales tax scheme that taxes general interest magazines, but exempts newspapers and religious, professional, trade, and sports journals, violates the First Amendment's freedom of the press guarantee. Pp. 227–234.

(a) Even though there is no evidence of an improper censorial motive, the Arkansas tax burdens rights protected by the First Amendment by discriminating against a small group of magazines, including appellant's, which are the only magazines that pay the tax. Such selective taxation is one of the types of discrimination identified in *Minneapolis Star*. Indeed, its use here is even more disturbing than in that case because the Arkansas statute requires official scrutiny of publications' content as the basis for imposing a tax. This is incompatible with the First Amendment, whose requirements are not avoided merely because the statute does not burden the expression of particular views expressed by specific magazines, and exempts other members of the media that might publish discussions of the various subjects contained in appellant's magazine. Pp. 227–231.

(b) Appellee has not satisfied its heavy burden of showing that its discriminatory tax scheme is necessary to serve a compelling state interest and is narrowly drawn to achieve that end. The State's general interest in raising revenue does not justify selective imposition of the sales tax on some magazines and not others, based solely on their content, since revenues could be raised simply by taxing businesses generally. Furthermore, appellee's assertion that the magazine exemption serves the state interest of encouraging "fledgling" publishers is not persuasive, since the exemption is not narrowly tailored to achieve that end. To the contrary, the exemption is both overinclusive and underinclusive in that it exempts the enumerated types of magazines regardless of whether they are "fledgling" or are lucrative and well established, while making general interest magazines and struggling specialty magazines on other subjects ineligible for favorable tax treatment. Moreover, although the asserted state need to "foster communication" might support a blanket exemption of the press from the sales tax, it cannot justify selective taxation of certain publishers. Pp. 231–232.

3. Since the state courts have not yet indicated whether they will exercise jurisdiction over appellant's claims under §§ 1983 and 1988, this Court remands to give them an opportunity to do so. Pp. 233–234.

287 Ark. 155, 697 S. W. 2d 94 and 698 S. W. 2d 802, reversed and remanded.

MARSHALL, J., delivered the opinion of the Court, in which BRENNAN, WHITE, BLACKMUN, POWELL, and O'CONNOR, JJ., joined, and in Parts I, II, III–B, IV, and V of which STEVENS, J., joined. STEVENS, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 234. SCALIA, J., filed a dissenting opinion, in which REHNQUIST, C. J., joined, *post*, p. 235.

Anne Owings Wilson argued the cause and filed briefs for appellant.

John Steven Clark argued the cause for appellee. With him on the brief were *R. B. Friedlander* and *Joseph V. Svoboda.**

JUSTICE MARSHALL delivered the opinion of the Court.

The question presented in this case is whether a state sales tax scheme that taxes general interest magazines, but exempts newspapers and religious, professional, trade, and sports journals, violates the First Amendment's guarantee of freedom of the press.

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*Briefs of *amici curiae* urging reversal were filed for the American Civil Liberties Union Foundation et al. by *Jack Novik* and *Philip E. Kaplan;* for the City & Regional Magazine Association by *Donald M. Middlebrooks;* for the Magazine Publishers Association by *David Minton;* for the Miami Herald Publishing Co. et al. by *Edward Soto, Gerald B. Cope, Jr., W. Terry Maguire,* and *Parker Thomson;* for Time Inc., by *E. Barrett Prettyman, Jr., David J. Saylor,* and *John G. Roberts, Jr.;* and for the Times Mirror Co. et al. by *Rex S. Heinke, William A. Niese,* and *Jeffrey S. Klein.*

Briefs of *amici curiae* urging affirmance were filed for the Territory of American Samoa et al. by the Attorneys General for their respective jurisdictions as follows: *Thomas J. Miller* of Iowa, *Leulumoega S. Lutu* of American Samoa, *Joseph Lieberman* of Connecticut, *Jim Smith* of Florida, *Corinne K. A. Watanabe* of Hawaii, *Jim Jones* of Idaho, *William J. Guste, Jr.*, of Louisiana, *Hubert H. Humphrey III* of Minnesota, *Michael Turpen* of Oklahoma, *LeRoy S. Zimmerman* of Pennsylvania, *T. Travis Medlock* of South Carolina, *Mark V. Meierhenry* of South Dakota, *Jim Mattox* of Texas, *David L. Wilkinson* of Utah, and *Jeffrey L. Amestoy* of Vermont; and for the State of Maryland by *Stephen H. Sachs,* Attorney General, *Ralph S. Tyler III,* Assistant Attorney General, and *Carmen M. Shepard,* Special Assistant Attorney General.

I

Since 1935, Arkansas has imposed a tax on receipts from sales of tangible personal property. 1935 Ark. Gen. Acts 233, § 4, pp. 593, 594, now codified at Ark. Stat. Ann. § 84–1903(a) (1980 and Supp. 1985). The rate of tax is currently four percent of gross receipts. § 84–1903 (three percent); Ark. Stat. Ann. § 84–1903.1 (Supp. 1985) (additional one percent). Numerous items are exempt from the state sales tax, however. These include "[g]ross receipts or gross proceeds derived from the sale of newspapers," § 84–1904(f) (newspaper exemption),[1] and "religious, professional, trade and sports journals and/or publications printed and published within this State . . . when sold through regular subscriptions." § 84–1904(j) (magazine exemption).[2]

Appellant Arkansas Writers' Project, Inc., publishes Arkansas Times, a general interest monthly magazine with a circulation of approximately 28,000. The magazine includes articles on a variety of subjects, including religion and sports. It is printed and published in Arkansas, and is sold through mail subscriptions, coin-operated stands, and over-the-counter sales. In 1980, following an audit, appellee Commissioner of Revenue assessed tax on sales of Arkansas

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[1] The newspaper exemption was added in 1941. 1941 Ark. Gen. Acts 386, § 4, p. 1060. Gross Receipts Tax Regulations of 1981, adopted by the Arkansas Commissioner of Revenue define a newspaper as "a publication in sheet form containing reports of current events and articles of general interest to the public, published regularly in short intervals such as daily, weekly, or bi-weekly, and intended for general circulation." GR–48(A)(1), reproduced at Record 50.

[2] The magazine exemption was added in 1949. 1949 Ark. Gen. Acts 152, § 2, p. 491. The regulations define a publication as "any pamphlet, magazine, journal, or periodical, other than a newspaper, designed for the information or entertainment of the general public or any segment thereof." GR–48(A)(5), reproduced at Record 50. The term "regular subscription" is defined as "the purchase by advance payment of a specified number of issues of a publication over a certain period of time, and delivered to the subscriber by mail or otherwise." GR–48(A)(6), reproduced at Record 50.

Times. Appellant initially contested the assessment, but eventually reached a settlement with the State and agreed to pay the tax beginning in October 1982. However, appellant reserved the right to renew its challenge if there were a change in the tax law or a court ruling drawing into question the validity of Arkansas' exemption structure. Record 46–47.

Subsequently, in *Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Revenue*, 460 U. S. 575 (1983), this Court held unconstitutional a Minnesota tax on paper and ink used in the production of newspapers. In January 1984, relying on this authority, appellant sought a refund of sales tax paid since October 1982, asserting that the magazine exemption must be construed to include Arkansas Times. It maintained that subjecting Arkansas Times to the sales tax, while sales of newspapers and other magazines were exempt, violated the First and Fourteenth Amendments. The Commissioner denied appellant's claim for refund. App. to Juris. Statement 12–14.

Having exhausted available administrative remedies, appellant filed a complaint in the Chancery Court for Pulaski County, Arkansas, seeking review of the Commissioner's decision. The complaint also stated a claim under 42 U. S. C. §§ 1983 and 1988 for injunctive relief and attorney's fees. The parties stipulated that Arkansas Times is not a "newspaper" or a "religious, professional, trade or sports journal" and that, during the relevant time period, appellant had paid $15,838.22 in sales tax. The Chancery Court granted appellant summary judgment, construing § 84–1904(j) to create two categories of tax-exempt magazines sold through subscriptions, one for religious, professional, trade, and sports journals, and one for publications published and printed within the State of Arkansas. No. 84–1268 (Pulaski Cty. Chancery Ct., Mar. 29, 1985). Because Arkansas Times came within the second category, the court held that the magazine was exempt from sales tax and appellant was entitled to a refund. The court determined that resolution of the

dispute on statutory grounds made it unnecessary to address the constitutional issues raised in appellant's § 1983 claim.

The Arkansas Supreme Court reversed the decision of the Chancery Court. 287 Ark. 155, 697 S. W. 2d 94 (1985). It construed § 84–1904(j) as creating a single exemption and held that, in order to qualify for this exemption, a magazine had to be a "religious, professional, trade, or sports periodical." *Id.*, at 157, 697 S. W. 2d, at 95. Concluding that "neither party has questioned the constitutionality of the exemption," the State Supreme Court failed to address appellant's First and Fourteenth Amendment claims. *Ibid.*

On petition for rehearing, the court issued a supplementary opinion in which it acknowledged that appellant had pursued its constitutional claims and that they "should have been discussed" in the court's original opinion. *Id.*, at 157, 157A, 157B, 698 S. W. 2d 802, 803 (1985). It rejected appellant's claims of discriminatory treatment, reasoning that exemptions granted to other publications need not be considered, because:

> "[I]t would avail [appellant] nothing if it wins its argument. . . . It is immaterial that an exemption in favor of some other taxpayer may be invalid, as discriminatory. If so, it is the exemption that would fall, not the tax against the [Arkansas] *Times*." *Id.*, at 157A, 698 S. W. 2d, at 803.

As to appellant's First Amendment objections, the court noted that this Court has held that "the owners of newspapers are not immune from any of the 'ordinary forms of taxation' for support of the government." *Ibid.*, quoting *Grosjean* v. *American Press Co.*, 297 U. S. 233, 250 (1936). In contrast to *Minneapolis Star*, *supra*, and *Grosjean*, *supra*, the Arkansas Supreme Court concluded that the Arkansas sales tax was a permissible "ordinary form of taxation." Because the court did not find that appellant's First and Fourteenth Amendment rights had been violated, it did not consider the claim for attorney's fees under § 1988.

We noted probable jurisdiction, 476 U. S. 1113 (1986), and we now reverse.

II

As a threshold matter, the Commissioner argues that appellant does not have standing to challenge the Arkansas sales tax scheme. Extending the reasoning of the court below, he contends that, since appellant has conceded that Arkansas Times is neither a newspaper nor a religious, professional, trade, or sports journal, it has not asserted an injury that can be redressed by a favorable decision of this Court and therefore does not meet the requirements for standing set forth in *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U. S. 464, 472 (1982).

We do not accept the Commissioner's notion of standing, for it would effectively insulate underinclusive statutes from constitutional challenge, a proposition we soundly rejected in *Orr* v. *Orr*, 440 U. S. 268, 272 (1979). The Commissioner's position is inconsistent with numerous decisions of this Court in which we have considered claims that others similarly situated were exempt from the operation of a state law adversely affecting the claimant. See, *e. g.*, *Armco Inc.* v. *Hardesty*, 467 U. S. 638 (1984); *Carey* v. *Brown*, 447 U. S. 455 (1980); *Police Dept. of Chicago* v. *Mosley*, 408 U. S. 92 (1972). Contrary to the Commissioner's assertion, appellant has alleged sufficient a personal stake in the outcome of this litigation. "The holding of the [Arkansas] cour[t] stand[s] as a total bar to appellant's relief; [its] constitutional attack holds the only promise of escape from the burden that derives from the challenged statut[e]." *Orr* v. *Orr*, *supra*, at 273.

III

A

Our cases clearly establish that a discriminatory tax on the press burdens rights protected by the First Amendment.[3]

[3] Appellant's First Amendment claims are obviously intertwined with interests arising under the Equal Protection Clause. See *Police Dept. of*

See *Minneapolis Star*, 460 U. S., at 591–592; *Grosjean* v. *American Press Co.*, *supra*, at 244–245. In *Minneapolis Star*, the discrimination took two distinct forms. First, in contrast to generally applicable economic regulations to which the press can legitimately be subject, the Minnesota use tax treated the press differently from other enterprises. 460 U. S., at 581 (the tax "singl[es] out publications for treatment that is . . . unique in Minnesota tax law"). Second, the tax targeted a small group of newspapers. This was due to the fact that the first $100,000 of paper and ink were exempt from the tax; thus "only a handful of publishers pay any tax at all, and even fewer pay any significant amount of tax." *Id.*, at 591.

Both types of discrimination can be established even where, as here, there is no evidence of an improper censorial motive. See *id.*, at 579–580, 592 ("Illicit legislative intent is not the *sine qua non* of a violation of the First Amendment"). This is because selective taxation of the press—either singling out the press as a whole or targeting individual members of the press—poses a particular danger of abuse by the State.

> "A power to tax differentially, as opposed to a power to tax generally, gives a government a powerful weapon against the taxpayer selected. When the State imposes a generally applicable tax, there is little cause for concern. We need not fear that a government will destroy a selected group of taxpayers by burdensome taxation if it must impose the same burden on the rest of its constituency." *Id.*, at 585.

Addressing only the first type of discrimination, the Commissioner defends the Arkansas sales tax as a generally ap-

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Chicago v. *Mosley*, 408 U. S. 92, 94–95 (1972). However, since Arkansas' sales tax system directly implicates freedom of the press, we analyze it primarily in First Amendment terms. See *Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Revenue*, 460 U. S. 575, 585, n. 7 (1983).

plicable economic regulation. He acknowledges the numerous statutory exemptions to the sales tax, including those exempting newspapers and religious, trade, professional, and sports magazines. Nonetheless, apparently because the tax is nominally imposed on receipts from sales of *all* tangible personal property, see §84–1903, he insists that the tax should be upheld.

On the facts of this case, the fundamental question is not whether the tax singles out the press as a whole, but whether it targets a small group within the press. While we indicated in *Minneapolis Star* that a genuinely nondiscriminatory tax on the receipts of newspapers would be constitutionally permissible, 460 U. S., at 586, and n. 9, the Arkansas sales tax cannot be characterized as nondiscriminatory, because it is not evenly applied to all magazines. To the contrary, the magazine exemption means that only a few Arkansas magazines pay any sales tax;[4] in that respect, it operates in much the same way as did the $100,000 exemption to the Minnesota use tax. Because the Arkansas sales tax scheme treats some magazines less favorably than others, it suffers from the second type of discrimination identified in *Minneapolis Star*.

Indeed, this case involves a more disturbing use of selective taxation than *Minneapolis Star*, because the basis on which Arkansas differentiates between magazines is particularly repugnant to First Amendment principles: a magazine's tax status depends entirely on its *content*. "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dept. of Chicago* v.

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[4] Appellant maintains that Arkansas Times is the *only* Arkansas publication that pays sales tax. App. 13 (Affidavit of Alan Leveritt). The Commissioner contends that there are two periodicals, in addition to Arkansas Times, that pay tax. Tr. of Oral Arg. 22. Whether there are three Arkansas magazines paying tax or only one, the burden of the tax clearly falls on a limited group of publishers.

Mosley, 408 U. S., at 95. See also *Carey* v. *Brown*, 447 U. S., at 462–463. "Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment." *Regan* v. *Time, Inc.*, 468 U. S. 641, 648–649 (1984).

If articles in Arkansas Times were uniformly devoted to religion or sports, the magazine would be exempt from the sales tax under § 84–1904(j). However, because the articles deal with a variety of subjects (sometimes including religion and sports), the Commissioner has determined that the magazine's sales may be taxed. In order to determine whether a magazine is subject to sales tax, Arkansas' "enforcement authorities must necessarily examine the content of the message that is conveyed . . . ." *FCC* v. *League of Women Voters of California*, 468 U. S. 364, 383 (1984). Such official scrutiny of the content of publications as the basis for imposing a tax is entirely incompatible with the First Amendment's guarantee of freedom of the press. See *Regan* v. *Time, Inc.*, *supra*, at 648.

Arkansas' system of selective taxation does not evade the strictures of the First Amendment merely because it does not burden the expression of particular *views* by specific magazines. We rejected a similar distinction between content and viewpoint restrictions in *Consolidated Edison Co.* v. *Public Service Comm'n of New York*, 447 U. S. 530 (1980). As we stated in that case, "[t]he First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic." *Id.*, at 537. See *FCC* v. *League of Women Voters of California*, *supra*, at 383–384; *Metromedia, Inc.* v. *San Diego*, 453 U. S. 490, 518–519 (1981) (plurality opinion); *Carey* v. *Brown*, *supra*, at 462, n. 6.

Nor are the requirements of the First Amendment avoided by the fact that Arkansas grants an exemption to other members of the media that might publish discussions of the vari-

ous subjects contained in Arkansas Times. For example, exempting *newspapers* from the tax, see § 84–1904(f), does not change the fact that the State discriminates in determining the tax status of *magazines* published in Arkansas. "It hardly answers one person's objection to a restriction on his speech that another person, outside his control, may speak for him." *Regan* v. *Taxation With Representation of Washington*, 461 U. S. 540, 553 (1983) (BLACKMUN, J., concurring). See also *Virginia Pharmacy Bd.* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 757, n. 15 (1976) ("We are aware of no general principle that freedom of speech may be abridged when the speaker's listeners could come by his message by some other means").

B

Arkansas faces a heavy burden in attempting to defend its content-based approach to taxation of magazines. In order to justify such differential taxation, the State must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end. See *Minneapolis Star*, 460 U. S., at 591–592.

The Commissioner has advanced several state interests. First, he asserts the State's general interest in raising revenue. While we have recognized that this interest is an important one, see *id.*, at 586, it does not explain selective imposition of the sales tax on some magazines and not others, based solely on their content. In *Minneapolis Star*, this interest was invoked in support of differential treatment of the press in relation to other businesses. *Ibid.* In that context, we noted that an interest in raising revenue,

> "[s]tanding alone, . . . cannot justify the special treatment of the press, for an alternative means of achieving the same interest without raising concerns under the First Amendment is clearly available: the State could raise the revenue by taxing businesses generally, avoid-

ing the censorial threat implicit in a tax that singles out the press." *Ibid.* (footnote omitted).

The same is true of a tax that differentiates between members of the press.

The Commissioner also suggests that the exemption of religious, professional, trade, and sports journals was intended to encourage "fledgling" publishers, who have only limited audiences and therefore do not have access to the same volume of advertising revenues as general interest magazines such as Arkansas Times. Brief for Appellee 16. Even assuming that an interest in encouraging fledgling publications might be a compelling one, we do not find the exemption in § 84–1904(j) of religious, professional, trade, and sports journals narrowly tailored to achieve that end. To the contrary, the exemption is both overinclusive and underinclusive. The types of magazines enumerated in § 84–1904(j) are exempt, regardless of whether they are "fledgling"; even the most lucrative and well-established religious, professional, trade, and sports journals do not pay sales tax. By contrast, struggling general interest magazines and struggling specialty magazines on subjects other than those specified in § 84–1904(j) are ineligible for favorable tax treatment.

Finally, the Commissioner asserted for the first time at oral argument a need to "foster communication" in the State. Tr. of Oral Arg. 28, 32. While this state interest might support a blanket exemption of the press from the sales tax, it cannot justify selective taxation of certain publishers. The Arkansas tax scheme only fosters communication on religion, sports, and professional and trade matters. It therefore does not serve its alleged purpose in any significant way.

C

Appellant argues that the Arkansas tax scheme violates the First Amendment because it exempts all newspapers from the tax, but only some magazines. Appellant contends that, under applicable state regulations, see nn. 1 and 2,

supra, the critical distinction between newspapers and magazines is not format, but rather content: newspapers are distinguished from magazines because they contain reports of current events and articles of general interest. Just as content-based distinctions between magazines are impermissible under prior decisions of this Court, appellant claims that content-based distinctions between different members of the media are also impermissible, absent a compelling justification.[5]

Because we hold today that the State's selective application of its sales tax to magazines is unconstitutional and therefore invalid, our ruling eliminates the differential treatment of newspapers and magazines. Accordingly, we need not decide whether a distinction between different types of periodicals presents an additional basis for invalidating the sales tax, as applied to the press.

IV

In the Chancery Court, appellant asserted its First and Fourteenth Amendment claims under 42 U. S. C. § 1983, as well as a corresponding entitlement to attorney's fees under § 1988. Because this Court has found a constitutional violation, appellant urges us to consider its cause of action under § 1983 and order an award of attorney's fees. However, the state courts have not yet indicated whether they will exercise jurisdiction over this claim[6] and we therefore remand to give them an opportunity to do so.

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[5] This challenge was made in the courts below, but it was not addressed by either the Chancery Court or the Arkansas Supreme Court. Since the Chancery Court construed the magazine exemption to cover sales of Arkansas Times, it was not necessary to reach the issue. The Arkansas Supreme Court ruled that the sales tax was a generally applicable regulation and did not examine the impact of the magazine exemption or the newspaper exemption. 287 Ark. 155, 157A, 157B, 698 S. W. 2d 802, 803 (1985).

[6] The Chancery Court construed the magazine exemption to apply to sales of Arkansas Times and therefore did not reach the federal cause of action. The Arkansas Supreme Court reversed the Chancery Court's con-

The parties recognize that federal and state courts have concurrent jurisdiction over actions brought under § 1983, see, *e. g.*, *Martinez* v. *California*, 444 U. S. 277, 283, n. 7 (1980), although the Tax Injunction Act, 28 U. S. C. § 1341, ordinarily precludes federal courts from entertaining challenges to the assessment of state taxes. The parties disagree, however, on whether the state court *must* exercise jurisdiction in such cases.[7] We leave it to the courts on remand to consider the necessity of entertaining this claim.

V

We stated in *Minneapolis Star* that "[a] tax that singles out the press, or that targets individual publications within the press, places a heavy burden on the State to justify its action." 460 U. S., at 592–593. In this case, Arkansas has failed to meet this heavy burden. It has advanced no compelling justification for selective, content-based taxation of certain magazines, and the tax is therefore invalid under the First Amendment. Accordingly, we reverse the judgment of the Arkansas Supreme Court and remand for proceedings not inconsistent with this opinion.

It is so ordered.

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

To the extent that the Court's opinion relies on the proposition that "'government has no power to restrict expression

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struction of the statute and held that there was no First Amendment violation. It found that it was not necessary to consider appellant's claim for attorney's fees under § 1988.

[7] Whether state courts must assume jurisdiction over these cases is not entirely clear. See Note, Section 1983 in State Court: A Remedy for Unconstitutional State Taxation, 95 Yale L. J. 414, 420–421 (1985). See also *Spencer* v. *South Carolina Tax Comm'n*, 281 S. C. 492, 316 S. E. 2d 386, aff'd by an equally divided Court, 471 U. S. 82 (1984). Of course, an affirmance by an equally divided Court is not entitled to precedential weight. See *Neil* v. *Biggers*, 409 U. S. 188, 192 (1972).

because of its message, its ideas, its subject matter, or its content,'" see *ante*, at 229 (quoting *Police Dept. of Chicago* v. *Mosley*, 408 U. S. 92, 95 (1972)), I am unable to join it.* I do, however, agree that the State has the burden of justifying its content-based discrimination and has plainly failed to do so. Accordingly, I join Parts I, II, III–B, IV, and V of the Court's opinion and concur in its judgment.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE joins, dissenting.

All government displays an enduring tendency to silence, or to facilitate silencing, those voices that it disapproves. In the case of the Judicial Branch of Government, the principal restraint upon that tendency, as upon other judicial error, is the requirement that judges write opinions providing logical reasons for treating one situation differently from another. I dissent from today's decision because it provides no rational basis for distinguishing the subsidy scheme here under challenge from many others that are common and unquestionably lawful. It thereby introduces into First Amendment law an element of arbitrariness that ultimately erodes rather than fosters the important freedoms at issue.

The Court's opinion does not dispute, and I think it evident, that the tax exemption in this case has a rational basis sufficient to sustain the tax scheme against ordinary equal protection attack, see, *e. g.*, *Massachusetts Board of Retirement* v. *Murgia*, 427 U. S. 307, 312 (1976) *(per curiam)*. Though assuredly not "narrowly tailored," it is reasonably related to the legitimate goals of encouraging small publishers with limited audiences and advertising revenues (a category which in the State's judgment includes most publishers of religious, professional, trade, and sports magazines) and of

*See my separate opinions in *Consolidated Edison Co.* v. *Public Service Comm'n of New York*, 447 U. S. 530, 544 (1980); *Widmar* v. *Vincent*, 454 U. S. 263, 277 (1981); and *Regan* v. *Time, Inc.*, 468 U. S. 641, 692 (1984); see also *FCC* v. *League of Women Voters of California*, 468 U. S. 364, 408 (1984).

avoiding the collection of taxes where administrative cost exceeds tax proceeds. See Brief for Appellee 15–16. The exemption is found invalid, however, because it does not pass the "strict scrutiny" test applicable to discriminatory restriction or prohibition of speech, namely, that it be "necessary to serve a compelling state interest and . . . narrowly drawn to achieve that end." *Ante*, at 231; cf. *Police Department of Chicago* v. *Mosley*, 408 U. S. 92, 101 (1972) (discriminatory ban on picketing); *Carey* v. *Brown*, 447 U. S. 455, 461–462 (1980) (same).

Here, as in the Court's earlier decision in *Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Revenue*, 460 U. S. 575 (1983), application of the "strict scrutiny" test rests upon the premise that for First Amendment purposes denial of exemption from taxation is equivalent to regulation. That premise is demonstrably erroneous and cannot be consistently applied. Our opinions have long recognized—in First Amendment contexts as elsewhere—the reality that tax exemptions, credits, and deductions are "a form of subsidy that is administered through the tax system," and the general rule that "a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny." *Regan* v. *Taxation With Representation of Washington*, 461 U. S. 540, 544, 549 (1983) (upholding denial of tax exemption for organization engaged in lobbying even though veterans' organizations received exemption regardless of lobbying activities). See also *Cammarano* v. *United States*, 358 U. S. 498, 513 (1959) (deduction for lobbying activities); *Buckley* v. *Valeo*, 424 U. S. 1, 93–95 (1976) (declining to apply strict scrutiny to campaign finance law that excludes certain candidates); *Harris* v. *McRae*, 448 U. S. 297, 324–326 (1980) (declining to apply strict scrutiny to legislative decision not to subsidize abortions even though other medical procedures were subsidized); *Maher* v. *Roe*, 432 U. S. 464 (1977) (same).

The reason that denial of participation in a tax exemption or other subsidy scheme does not necessarily "infringe" a fundamental right is that—unlike direct restriction or prohibition—such a denial does not, as a general rule, have any significant coercive effect. It may, of course, be manipulated so as to do so, in which case the courts will be available to provide relief. But that is not remotely the case here. It is implausible that the 4% sales tax, generally applicable to all sales in the State with the few enumerated exceptions, was meant to inhibit, or had the effect of inhibiting, this appellant's publication.

Perhaps a more stringent, prophylactic rule is appropriate, and can consistently be applied, when the subsidy pertains to the expression of a particular viewpoint on a matter of political concern—a tax exemption, for example, that is expressly available only to publications that take a particular point of view on a controversial issue of foreign policy. Political speech has been accorded special protection elsewhere. See, *e. g.*, *FCC* v. *League of Women Voters of California*, 468 U. S. 364, 375–376 (1984) (invalidating ban on editorializing by recipients of grants from the Corporation for Public Broadcasting, in part on ground that political speech "is entitled to the most exacting degree of First Amendment protection"); *Connick* v. *Myers*, 461 U. S. 138, 143–146 (1983) (discussing history of First Amendment protection for political speech by public employees); *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367 (1969) (upholding FCC's "fairness doctrine," which imposes special obligations upon broadcasters with regard to "controversial issues of public importance"). There is no need, however, and it is realistically quite impossible, to extend to all speech the same degree of protection against exclusion from a subsidy that one might think appropriate for opposing shades of political expression.

By seeking to do so, the majority casts doubt upon a wide variety of tax preferences and subsidies that draw distinctions based upon subject matter. The United States Postal

Service, for example, grants a special bulk rate to written material disseminated by certain nonprofit organizations—religious, educational, scientific, philanthropic, agricultural, labor, veterans', and fraternal organizations. See Domestic Mail Manual § 623 (1985). Must this preference be justified by a "compelling governmental need" because a nonprofit organization devoted to some other purpose—dissemination of information about boxing, for example—does not receive the special rate? The Kennedy Center, which is subsidized by the Federal Government in the amount of up to $23 million per year, see 20 U. S. C. § 76n(a), is authorized by statute to "present classical and contemporary music, opera, drama, dance, and poetry." § 76j. Is this subsidy subject to strict scrutiny because other kinds of expressive activity, such as learned lectures and political speeches, are excluded? Are government research grant programs or the funding activities of the Corporation for Public Broadcasting, see 47 U. S. C. § 396(g)(2), subject to strict scrutiny because they provide money for the study or exposition of some subjects but not others?

Because there is no principled basis to distinguish the subsidization of speech in these areas—which we would surely uphold—from the subsidization that we strike down here, our decision today places the granting or denial of protection within our own idiosyncratic discretion. In my view, that threatens First Amendment rights infinitely more than the tax exemption at issue. I dissent.

Syllabus

UNITED STATES *v.* GENERAL DYNAMICS CORP. ET AL.

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

No. 85–1385. Argued January 13, 1987—Decided April 22, 1987

Under the "all events" test, as embodied in Treasury Regulations, an accrual-basis taxpayer is entitled to deduct a business expense for the taxable year in which all events have occurred which determine the fact of the taxpayer's liability, and in which the amount of that liability can be determined with reasonable accuracy. In the year at issue, a consolidated federal income tax return was filed by General Dynamics Corporation and several of its wholly owned subsidiaries (hereafter respondent). Respondent is an accrual-basis taxpayer whose fiscal year is the calendar year. Beginning in 1972, it became a self-insurer with regard to its employee medical care plan. To receive medical payment reimbursements, employees must submit claims forms to employee benefits personnel, who verify eligibility and forward worthy claims to the plan's administrators, whose claims processors review the claims and approve covered expenses for payment. To account for the delay between the provision of medical services and the payment of claims, respondent established reserve accounts reflecting its liability for medical care received, but still not paid for, as of December 31, 1972. On its amended 1972 tax return, respondent sought a refund based on its claimed deduction of its reserve as an accrued expense. The Internal Revenue Service disallowed the deduction, but the Claims Court sustained it, holding that "all events" which determined the fact of respondent's liability had taken place when its employees received covered services, and that the amount of liability could be determined with reasonable accuracy. The Court of Appeals affirmed.

Held: Where the filing of claims is a condition precedent to liability, an accrual-basis taxpayer providing medical benefits to its employees cannot deduct at the close of the taxable year an estimate of its obligation to pay for medical care obtained by employees or their qualified dependents during the final quarter of the year, claims for which have not been reported to the employer. Pp. 242–247.

(a) The proposed deduction fails the "all events" test because it depends on a mere estimate of respondent's liability based on events that had not occurred before the close of the 1972 taxable year. The last event necessary to fix respondent's liability was not the receipt of medi-

cal care by covered individuals, but the filing of properly documented claims forms. Such filing is not a mere technicality, nor is the possibility that some employees might not file claims after receiving services "extremely remote and speculative." Pp. 242–245.

(b) Respondent has not demonstrated that its liability as to any medical care claims was firmly established as of the close of the 1972 taxable year. Although the parties stipulated that respondent had not received claims for all services rendered during the year by the year's end, and that some claims received had not been processed at that time, respondent failed to show what portion of the claims had been filed by the end of the year, or even that it knew of specific claims that had been filed but not yet processed. The fact that respondent may have been able to make a reasonably accurate actuarial estimate of how many claims would be filed for the last quarter of 1972 cannot justify a deduction. If the "all events" test permitted such a deduction, Congress would not have retained 26 U. S. C. § 832(b)(5), which allows insurance companies to deduct additions to reserves for "incurred but not reported" claims. Pp. 245–247.

773 F. 2d 1224, reversed.

MARSHALL, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BRENNAN, WHITE, POWELL, and SCALIA, JJ., joined. O'CONNOR, J., filed a dissenting opinion, in which BLACKMUN and STEVENS, JJ., joined, *post*, p. 247.

Alan I. Horowitz argued the cause for the United States. With him on the briefs were *Solicitor General Fried*, *Assistant Attorney General Olsen*, *David English Carmack*, and *William A. Whitledge*.

Lynne E. McNown argued the cause for respondents. With her on the brief was *Keith F. Bode*.

JUSTICE MARSHALL delivered the opinion of the Court.

The issue in this case is whether an accrual-basis taxpayer providing medical benefits to its employees may deduct at the close of the taxable year an estimate of its obligation to pay for medical care obtained by employees or their qualified dependents during the final quarter of the year, claims for which have not been reported to the employer.

I

Taxpayers, respondents herein, are the General Dynamics Corporation and several of its wholly owned subsidiaries (General Dynamics).[1] General Dynamics uses the accrual method of accounting for federal tax purposes; its fiscal year is the same as the calendar year. From 1962 until October 1, 1972, General Dynamics purchased group medical insurance for its employees and their qualified dependents from two private insurance carriers. Beginning in October 1972, General Dynamics became a self-insurer with regard to its medical care plans. Instead of continuing to purchase insurance from outside carriers, it undertook to pay medical claims out of its own funds, while continuing to employ private carriers to administer the medical care plans.

To receive reimbursement of expenses for covered medical services, respondent's employees submit claims forms to employee benefits personnel, who verify that the treated persons were eligible under the applicable plan as of the time of treatment. Eligible claims are then forwarded to the plan's administrators. Claims processors review the claims and approve for payment those expenses that are covered under the plan.

Because the processing of claims takes time, and because employees do not always file their claims immediately, there is a delay between the provision of medical services and payment by General Dynamics. To account for this time lag, General Dynamics established reserve accounts to reflect its liability for medical care received, but still not paid for, as of December 31, 1972. It estimated the amount of those reserves with the assistance of its former insurance carriers.

Originally, General Dynamics did not deduct any portion of this reserve in computing its tax for 1972. In 1977, how-

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[1] Respondents filed a consolidated federal income tax return for 1972, the year at issue here. We therefore treat them as a single entity.

ever, after the Internal Revenue Service (IRS) began an audit of its 1972 tax return, General Dynamics filed an amended return, claiming it was entitled to deduct its reserve as an accrued expense, and seeking a refund. The IRS disallowed the deduction, and General Dynamics sought relief in the Claims Court.

The Claims Court sustained the deduction, holding that it satisfied the "all events" test embodied in Treas. Reg. § 1.461–1(a)(2), 26 CFR § 1.461–1(a)(2) (1986), since "all events" which determined the fact of liability had taken place when the employees received covered services, and the amount of liability could be determined with reasonable accuracy. Thus, the court held that General Dynamics was entitled to a refund. 6 Cl. Ct. 250 (1984). The Court of Appeals for the Federal Circuit affirmed, largely on the basis of the Claims Court opinion. 773 F. 2d 1224, 1226 (1985).

The United States sought review of the question whether all the events necessary to fix liability had occurred.[2] We granted certiorari, 476 U. S. 1181 (1986). We reverse.

II

As we noted in *United States* v. *Hughes Properties, Inc.*, 476 U. S. 593, 600 (1986), whether a business expense has been "incurred" so as to entitle an accrual-basis taxpayer to deduct it under § 162(a) of the Internal Revenue Code, 26 U. S. C. § 162(a), is governed by the "all events" test that originated in *United States* v. *Anderson*, 269 U. S. 422, 441 (1926). In *Anderson*, the Court held that a taxpayer was obliged to deduct from its 1916 income a tax on profits from munitions sales that took place in 1916. Although the tax would not be assessed and therefore would not formally be due until 1917, all the events which fixed the amount of the tax and determined the taxpayer's liability to pay it

[2] The United States did not seek review of whether the amount of liability in this case could be determined with reasonable accuracy. See Pet. for Cert. 13, n. 2.

had occurred in 1916. The test is now embodied in Treas. Reg. § 1.461–1(a)(2), 26 CFR § 1.461–1(a)(2) (1986), which provides that "[u]nder an accrual method of accounting, an expense is deductible for the taxable year in which all the events have occurred which determine the fact of the liability and the amount thereof can be determined with reasonable accuracy."[3]

It is fundamental to the "all events" test that, although expenses may be deductible before they have become due and payable, liability must first be firmly established. This is consistent with our prior holdings that a taxpayer may not deduct a liability that is contingent, see *Lucas* v. *American Code Co.*, 280 U. S. 445, 452 (1930), or contested, see *Security Flour Mills Co.* v. *Commissioner of Internal Revenue*, 321 U. S. 281, 284 (1944). Nor may a taxpayer deduct an estimate of an anticipated expense, no matter how statistically certain, if it is based on events that have not occurred by the

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[3] The regulation in force in 1972 was identical to the present version. See 26 CFR § 1.461–1(a)(2) (1972).

The "all events" test has been incorporated into the Internal Revenue Code by the Deficit Reduction Act of 1984, Pub. L. 98–369, 98 Stat 598, 607, 26 U. S. C. § 461(h)(4) (1982 ed., Supp. III). Section 461(h) imposed limits on the application of the test, providing that "in determining whether an amount has been incurred with respect to any item during any taxable year, the all events test shall not be treated as met any earlier than when economic performance with respect to such item occurs." § 461(h)(1). The pertinent portions of the 1984 amendments were retained in the Tax Reform Act of 1986.

Section 461(h) does not apply in this case. It became effective as of July 18, 1984, the date of the enactment of the Deficit Reduction Act. See § 91(g)(1)(A), 26 U. S. C. § 461 note (1982 ed., Supp. III). While that statute permits a taxpayer to elect the application of § 461(h) to amounts incurred on or before July 18, 1984, see § 91(g)(2), there is no indication that the taxpayer here has done so. We do not address how this case would be decided under § 461(h), but note that the legislative history of the Act indicates that, "[i]n the case of . . . employee benefit liabilities, which require a payment by the taxpayer to another person, economic performance occurs as the payments to such person are made." H. R. Rep. No. 98–432, pt. 2, p. 1255 (1984); see also H. Conf. Rep. No. 98–861, p. 872 (1984).

close of the taxable year. *Brown* v. *Helvering*, 291 U. S. 193, 201 (1934); cf. *American Automobile Assn.* v. *United States*, 367 U. S. 687, 693 (1961).

We think that this case, like *Brown*, involves a mere estimate of liability based on events that had not occurred before the close of the taxable year, and therefore the proposed deduction does not pass the "all events" test. We disagree with the legal conclusion of the courts below that the last event necessary to fix the taxpayer's liability was the receipt of medical care by covered individuals.[4] A person covered by a plan could only obtain payment for medical services by filling out and submitting a health-expense-benefits claim form. App. 23. Employees were informed that submission of satisfactory proof of the charges claimed would be necessary to obtain payment under the plans. *Id.*, at 58. General Dynamics was thus liable to pay for covered medical services *only* if properly documented claims forms were filed.[5] Some covered individuals, through oversight, procrastination, confusion over the coverage provided, or fear of disclosure to the employer of the extent or nature of the services received, might not file claims for reimbursement to which they are plainly entitled. Such filing is not a mere technicality. It is crucial to the establishment of liability on the part of the taxpayer. Nor does the failure to file a claim represent the type of "extremely remote and speculative possibility" that we

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[4] We do not challenge the Claims Court's factual conclusion that the processing of the claims was "routine," "clerical," and "ministerial in nature," 6 Cl. Ct. 250, 254 (1984). The Claims Court did not, however, make any factual findings with respect to the *filing* of claims. We conclude that, as a matter of law, the filing of a claim was necessary to create liability.

[5] General Dynamics could not avoid its obligation to pay for services after they were received by, for example, discharging the employee. If an employee were terminated after receiving covered services but before filing a claim, the taxpayer would still be obliged to reimburse that employee, App. 22—but *only in the event* that the employee filed a claim form. The filing of the claim is thus a true condition precedent to liability on the part of the taxpayer.

held in *Hughes*, 476 U. S., at 601, did not render an otherwise fixed liability contingent. Cf. *Lucas* v. *North Texas Lumber Co.*, 281 U. S. 11, 13 (1930) (where executory contract of sale was created in 1916 but papers necessary to effect transfer were not prepared until 1917, unconditional liability for the purchase price was not created in 1916, and the gain from the sale was therefore not realized until 1917). Mere receipt of services for which, in some instances, claims will not be submitted does not, in our judgment, constitute the last link in the chain of events creating liability for purposes of the "all events" test.

The parties stipulated in this case that as of December 31, 1972, the taxpayer had not received all claims for medical treatment services rendered in 1972, and that some claims had been filed for services rendered in 1972 that had not been processed. App. 26. The record does not reflect which portion of the claims against General Dynamics for medical care had been filed but not yet processed and which portion had not even been filed at the close of the 1972 tax year. The taxpayer has the burden of proving its entitlement to a deduction. *Helvering* v. *Taylor*, 293 U. S. 507, 514 (1935). Here, respondent made no showing that, as of December 31, 1972, it knew of specific claims which had been filed but which it had not yet processed. Because the taxpayer failed to demonstrate that any of the deducted reserve represented claims for which its liability was firmly established as of the close of 1972, all the events necessary to establish liability were not shown to have occurred, and therefore no deduction was permissible.

This is not to say that the taxpayer was unable to forecast how many claims would be filed for medical care received during this period, and estimate the liability that would arise from those claims. Based on actuarial data, General Dynamics may have been able to make a reasonable estimate of how many claims would be filed for the last quarter of 1972. But that alone does not justify a deduction. In *Brown*, *supra*,

the taxpayer, a general agent for insurance companies, sought to take a deduction for a reserve representing estimated liability for premiums to be returned on the percentage of insurance policies it anticipated would be cancelled in future years. The agent may well have been capable of estimating with a reasonable degree of accuracy the ratio of cancellation refunds to premiums already paid and establishing its reserve accordingly. Despite the "strong probability that many of the policies written during the taxable year" would be cancelled, 291 U. S., at 201, the Court held that "no liability accrues during the taxable year on account of cancellations which it is expected may occur in future years, since the events necessary to create the liability do not occur during the taxable year." *Id.*, at 200. A reserve based on the proposition that a particular set of events is likely to occur in the future may be an appropriate conservative accounting measure, but does not warrant a tax deduction. See *American Automobile Assn.* v. *United States*, *supra*, at 692; *Lucas* v. *American Code Co.*, 280 U. S., at 452.

That these estimated claims were not intended to fall within the "all events" test is further demonstrated by the fact that the Internal Revenue Code specifically permits insurance companies to deduct additions to reserves for such "incurred but not reported" (IBNR) claims. See 26 U. S. C. § 832(b)(5) (providing that an insurance company may treat as losses incurred "all unpaid losses outstanding at the end of the taxable year"); § 832(c)(4) (permitting deduction of losses incurred as defined in § 832(b)(5)).[6] If the "all events" test permitted the deduction of an estimated reserve representing claims that were actuarially likely but not yet reported, Congress would not have needed to maintain an

[6] During the time that private insurance carriers provided insurance coverage for General Dynamics employees, the insurers maintained reserves for IBNR claims and deducted those reserves in the tax year in which the services were received. 6 Cl. Ct., at 252.

explicit provision that insurance companies could deduct such reserves.[7]

General Dynamics did not show that its liability as to any medical care claims was firmly established as of the close of the 1972 tax year, and is therefore entitled to no deduction. The judgment of the Court of Appeals is

Reversed.

JUSTICE O'CONNOR, with whom JUSTICE BLACKMUN and JUSTICE STEVENS join, dissenting.

Section 446(a) of the Internal Revenue Code of 1954 provides that taxable income "shall be computed under the method of accounting on the basis of which the taxpayer regularly computes his income in keeping his books." The Code specifically recognizes the use of "an accrual method," 26 U. S. C. § 446(c)(2), under which a taxpayer is permitted to deduct an expense in the year in which it is "incurred," regardless of when it is actually paid. § 162(a). Under the "all events" test, long applied by this Court and the Internal Revenue Service, an expense may be accrued and deducted when all the events that determine the fact of liability have occurred, and the amount of the liability can be determined with reasonable accuracy. Treas. Reg. § 1.461–1, 26 CFR § 1.461–1(a)(2) (1986). Because the Court today applies a rigid version of the "all events" test that retreats from our most recent application of that test, and unnecessarily drives a greater wedge between tax and financial accounting methods, I respectfully dissent.

This case calls for the Court to revisit the issue addressed only last Term in *United States* v. *Hughes Properties, Inc.*, 476 U. S. 593 (1986). At issue in *Hughes Properties* was whether a casino operator utilizing the accrual method of accounting could deduct amounts guaranteed for payment on "progressive" slot machines but not yet won by a playing

[7] Respondent has never sought to be treated as an insurance company entitled to take IBNR deductions under the provisions of Subchapter L.

patron. A progressive slot machine has a jackpot whose size increases as money is gambled on the machine. Under Nevada law, a casino operator is prohibited from reducing the amount of the progressive jackpot. We concluded, therefore, that all the events had occurred that determine the fact of the casino operator's liability despite the fact that the jackpot might not be won for as long as four years. We rejected the argument made by the United States that the casino operator's obligation to pay the jackpot arose only upon a winning patron's pull of the handle, even though it was conceivable that the jackpot might never be won:

> "There is always a possibility, of course, that a casino may go out of business, or surrender or lose its license, or go into bankruptcy, with the result that the amounts shown on the jackpot indicators would never be won by playing patrons. But this potential nonpayment of an incurred liability exists for every business that uses an accrual method, and it does not prevent accrual. See, *e. g.*, *Wien Consolidated Airlines, Inc.* v. *Commissioner*, 528 F. 2d 735 (CA9 1976). 'The existence of an absolute liability is necessary; absolute certainty that it will be discharged by payment is not.' *Helvering* v. *Russian Finance & Constr. Corp.*, 77 F. 2d 324, 327 (CA2 1935)." *United States* v. *Hughes Properties, Inc.*, *supra*, at 605–606.

In my view, the circumstances of this case differ little from those in *Hughes Properties*. The taxpayer here is seeking to deduct the amounts reserved to pay for medical services that are determined to have been provided to employees in the taxable year, whether or not the employees' claims for benefits have been received. The taxpayer's various medical benefits plans provided schedules for the medical and hospital benefits, and created a contractual obligation by the taxpayer to pay for the covered services upon presentation of a claim. The courts below found that the obligation to pay became fixed once the covered medical services were re-

ceived by the employee. See App. 25. Once the medical services were rendered to an employee while the relevant benefit plan was in effect, General Dynamics could not avoid liability by terminating the plan prior to the filing of a claim. *Id.*, at 133–134. Neither could General Dynamics extinguish its liability by firing an employee before the employee filed a claim for benefits. *Id.*, at 87.

It is true, of course, that it was theoretically possible that some employees might not file claim forms. In my view, however, this speculative possibility of nonpayment differs not at all from the speculation in *Hughes Properties* that a jackpot might never be paid by a casino. As we observed in *Hughes Properties*, the potential of nonpayment of a liability always exists, and it alone does not prevent accrual. The beneficiary of a liability always has the option of waiving payment, but a taxpayer is still unquestionably entitled to deduct the liability. An injured employee entitled absolutely to reimbursement for medical services under a workers' compensation statute, for example, may fail to utilize the medical services. The employer, however, has been held to be entitled to deduct the expected medical expenses because the workers' compensation law creates liability. See *Wien Consolidated Airlines, Inc.* v. *Commissioner*, 528 F. 2d 735 (CA9 1976) (holding that accrual basis taxpayer may deduct expected workers' compensation payments in year of injury even though injured workers may not utilize medical benefits). Similarly, any business liability could ultimately be discharged in bankruptcy, or a check might never be cashed by its recipient. There can be no doubt, however, that these remote possibilities alone cannot defeat an accrual basis taxpayer's right to deduct the liability when incurred.

The Claims Court found that the processing of the employees' claims was "routine" and "ministerial in nature," 6 Cl. Ct. 250, 254 (1984), and the majority does not question that finding. *Ante*, at 244, n. 4. Instead, the majority holds that "as a matter of law, the filing of a claim was necessary

to create liability." *Ibid.* Even if, in a technical sense, the Court is correct that the filing of a claim is a necessary precondition to liability as a matter of law, the failure to file a claim is at most a "merely formal contingenc[y], or [one] highly improbable under the known facts," that this Court has viewed as insufficient to preclude accrual and deductibility. 2 J. Mertens, Law of Federal Income Taxation § 12.62, p. 241 (M. Weinstein, R. Donovan, P. Gaveras, H. Piech, & R. Neeld rev. 1985). Indeed, in the very case that first announced the "all events" test, *United States* v. *Anderson*, 269 U. S. 422 (1926), this Court concluded that a taxpayer should deduct a federal munitions tax before the year in which the tax was even assessed—in effect before the Government had made a claim for the tax. The Court recognized that "[i]n a technical legal sense it may be argued that a tax does not accrue until it has been assessed and becomes due," but concluded that otherwise all the events that determined the liability for the munitions tax had occurred. *Id.*, at 441. Similarly, in *Continental Tie & Lumber Co.* v. *United States*, 286 U. S. 290 (1932), the Court held that an accrual basis taxpayer should immediately include as income a federal payment to railroads created by statute, but neither claimed by the taxpayer nor awarded by the Federal Government until years later. The Court explained that although no railroad had any vested right to payments under the statute until a claim was made by the railroad and awarded by the Interstate Commerce Commission, "[t]he right to the award was fixed by the passage of the Transportation Act. What remained was mere administrative procedure to ascertain the amount to be paid." *Id.*, at 295. Clearly, the right to reimbursement for medical benefits under any of the medical benefits plans at issue in this case arises once medical services are rendered; the filing and processing of a claim is purely routine and ministerial, and in the nature of a formal contingency, as correctly perceived by the courts below.

The holding of the Court today unnecessarily burdens taxpayers by further expanding the difference between tax and business accounting methods without a compelling reason to do so. Obviously, tax accounting principles must often differ from those of business accounting. The goal of business accounting "is to provide useful and pertinent information to management, shareholders, and creditors," while "the responsibility of the Internal Revenue Service is to protect the public fisc." *United States* v. *Hughes Properties, Inc.*, 476 U. S., at 603. Therefore, while prudent businesses will accrue expenses that are merely reasonably foreseeable, for tax purposes the liability must be fixed. But Congress has expressly permitted taxpayers to use the accrual method of accounting, and from its inception in *United States* v. *Anderson, supra*, the "all events" test has been a practical adjustment of the competing interests in permitting accrual accounting and protecting the public fisc. Unfortunately, the Court today ignores the pragmatic roots of the "all events" test and instead applies it in an essentially mechanistic and wholly unrealistic manner. Because the liability in this case was fixed with no less certainty than the range of expenses both routinely accrued by accrual method taxpayers and approved as deductible for tax purposes by this Court and other courts in a variety of circumstances, I respectfully dissent.

BROCK, SECRETARY OF LABOR, ET AL. *v.* ROADWAY EXPRESS, INC.

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

No. 85–1530. Argued December 3, 1986—Decided April 22, 1987

Section 405 of the Surface Transportation Assistance Act of 1982 forbids the discharge of employees in the commercial motor transportation industry in retaliation for refusing to operate motor vehicles that do not comply with applicable safety standards or for filing complaints alleging such noncompliance. The statute provides for the Secretary of Labor's initial investigation of an employee's discharge and, upon a finding of reasonable cause to believe that the employee was discharged in violation of the Act, requires the Secretary to order the employee's temporary reinstatement by the employer, who may then request an evidentiary hearing and a final decision from the Secretary. This request does not operate to stay the preliminary reinstatement order. The statute requires that the employer be notified of the employee's complaint, but does not specify procedures for employer participation in the Secretary's initial investigation. After appellee, a trucking company subject to § 405's requirements, discharged one of its drivers for allegedly intentionally damaging his assigned truck, the employee unsuccessfully sought relief under a governing collective-bargaining agreement, contending that he was discharged in retaliation for having previously complained of safety violations. He then filed a complaint with the Department of Labor alleging that his discharge violated § 405. Appellee was notified of the complaint, and a field investigator, pursuant to pertinent Department rules, interviewed the discharged employee and other employees, obtaining statements substantiating the retaliatory discharge claim. Appellee was afforded an opportunity to meet with the investigator and submit a written statement detailing the basis for the employee's discharge, but it was not provided with the substance of the evidence collected by the investigator. Ultimately, a preliminary administrative order was issued ordering the employee's reinstatement with backpay. Appellee then filed this action in Federal District Court, seeking injunctive relief and a declaratory judgment that § 405, to the extent it empowered the Secretary to order temporary reinstatement without first conducting an evidentiary hearing, deprived appellee of procedural due process under the Fifth Amendment. The court granted an injunction and, later, summary judgment for appellee.

Held: The judgment is affirmed in part and reversed in part.
624 F. Supp. 197, affirmed in part and reversed in part.

JUSTICE MARSHALL, joined by JUSTICE BLACKMUN, JUSTICE POWELL, and JUSTICE O'CONNOR, concluded that:

1. The Secretary's issuance, after entry of the District Court's judgment, of a final reinstatement order following an evidentiary hearing requested by appellee pursuant to § 405 does not render this appeal moot. Although appellee's obligation to reinstate the employee with backpay now flows from the Secretary's final order, not the preliminary order to which the District Court's injunction and order of summary judgment were directed, the controversy between appellee and the Secretary as to the constitutional adequacy of the Secretary's procedures prior to the issuance of the preliminary reinstatement order falls within the "capable of repetition, yet evading review" exception to the actual case-and-controversy requirement. Pp. 257–258.

2. The District Court properly held that the Secretary's § 405 procedures unconstitutionally deprived appellee of Fifth Amendment procedural due process by failing to provide appellee with the substance of the evidence supporting the employee's complaint before ordering the employee's temporary reinstatement. However, the lack of an evidentiary hearing before temporary reinstatement did not deny procedural due process. Pp. 258–268.

(a) Determining the adequacy of the preliminary reinstatement procedures requires consideration of the Government's interests in promoting highway safety and protecting employees from retaliatory discharge; the employer's interest in controlling the makeup of its work force and, in this case, appellee's property interest—concededly entitled to due process protections—in its contractual right to discharge employees for cause; the employee's interest in not being discharged for having complained about unsafe conditions; the risk of erroneous deprivations through the challenged procedures; and the probable value of additional or substitute procedural safeguards. Pp. 262–263.

(b) In view of the legislative balancing of interests here, due process requires prereinstatement notice of the employee's allegations, notice of the substance of the relevant supporting evidence, an opportunity to submit a written response, and an opportunity to meet with the investigator and present statements from rebuttal witnesses. These procedures provide a reliable initial check against mistaken decisions, cf. *Cleveland Board of Education* v. *Loudermill*, 470 U. S. 532; *Arnett* v. *Kennedy*, 416 U. S. 134, and minimum due process in this context does not require employer confrontation and cross-examination of witnesses before preliminary reinstatement, where a prompt postreinstatement evidentiary hearing is available. Appellee's contention that requiring

an evidentiary hearing as part of the process leading to preliminary reinstatement would not impose a significant additional burden on the Secretary since § 405 provides that a subsequent evidentiary hearing, if requested by the employer, must be "expeditiously conducted" in any event, is not persuasive. Pp. 263–267.

JUSTICE BRENNAN agreed that the Secretary's procedures unconstitutionally deprived appellee of procedural due process by failing to inform it of the substance of the evidence supporting the employee's complaint, but concluded that where, as here, there are factual disputes pertaining to the validity of a deprivation of a property interest and there is no assurance that adequate final process will be prompt, the prereinstatement procedures are unconstitutional unless they give the employer an opportunity to test the strength of the evidence by confronting and cross-examining adverse witnesses and by presenting witnesses on its own behalf. Pp. 269–271.

JUSTICE WHITE, joined by THE CHIEF JUSTICE and JUSTICE SCALIA, concluded that the District Court erred in holding that a full trial-type hearing was necessary prior to termination, so long as the employer was afforded an adequate posttermination hearing at a meaningful time, and also expressed the view that withholding the witnesses' names and statements prior to ordering the temporary reinstatement, in light of § 405's purpose, did not violate appellee's due process rights. Pp. 271–272.

JUSTICE STEVENS agreed with the Court's judgment insofar as it affirmed the District Court, but concluded that the District Court's judgment should be affirmed *in toto*, expressing the view that in this case the Government's interest in highway safety did not justify the entry of a reinstatement order on the basis of evidence that was not disclosed to the employer and tested by cross-examination in an adversary proceeding before the order became effective. Pp. 273–278.

MARSHALL, J., announced the judgment of the Court and delivered an opinion in which BLACKMUN, POWELL, and O'CONNOR, JJ., joined. BRENNAN, J., filed an opinion concurring in part and dissenting in part, *post*, p. 269. WHITE, J., filed an opinion concurring in part and dissenting in part, in which REHNQUIST, C. J., and SCALIA, J., joined, *post*, p. 271. STEVENS, J., filed an opinion dissenting in part, *post*, p. 273.

Andrew J. Pincus argued the cause for appellants. With him on the briefs were *Solicitor General Fried*, *Deputy Solicitor General Cohen*, *George R. Salem*, *Allen H. Feldman*, *Mary-Helen Mautner*, *Steven J. Mandel*, and *Jeanne K. Beck*.

Michael C. Towers argued the cause for appellee. With him on the brief was *John B. Gamble, Jr.**

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

Section 405 of the Surface Transportation Assistance Act of 1982, 96 Stat. 2157, 49 U. S. C. App. § 2305, protects employees in the commercial motor transportation industry from being discharged in retaliation for refusing to operate a motor vehicle that does not comply with applicable state and federal safety regulations or for filing complaints alleging such noncompliance. The statute provides for an initial investigation of an employee's discharge by the Secretary of Labor and, upon a finding of reasonable cause to believe that the employee was discharged in violation of the Act, requires the Secretary to issue an order directing the employer to reinstate the employee. The employer may then request an evidentiary hearing and a final decision from the Secretary, but this request does not operate to stay the preliminary order of reinstatement. The issue presented in this appeal is whether the failure of § 405 to provide for an evidentiary hearing before temporary reinstatement deprives the employer of procedural due process under the Fifth Amendment.

I

Appellee Roadway Express, Inc. (Roadway), is a large interstate trucking company engaged primarily in cargo transportation; it is subject to the requirements of § 405. See 49 U. S. C. App. § 2301(3). On November 22, 1983, Road-

**Paul Alan Levy, Alan B. Morrison,* and *Arthur L. Fox II* filed a brief for Teamsters for a Democratic Union as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the American Trucking Associations, Inc., et al. by *William S. Busker* and *Kenneth E. Siegel;* and for Central Ohio Coal Co. et al. by *Alvin J. McKenna* and *D. Michael Miller.*

way discharged one of its drivers, Jerry Hufstetler, alleging that he had disabled several lights on his assigned truck in order to obtain extra pay while waiting for repairs. Hufstetler filed a grievance, contending that he had not been discharged for an "act of dishonesty" as defined in the governing collective-bargaining agreement, but rather had been discharged in retaliation for having previously complained of safety violations. The grievance was submitted to arbitration, which ultimately resulted in a ruling on January 30, 1984, that Hufstetler had been properly discharged.

On February 7, 1984, Hufstetler filed a complaint with the Department of Labor alleging that his discharge had violated § 405. The Occupational Safety and Health Administration notified Roadway of the complaint and began an investigation. An OSHA field investigator interviewed Hufstetler and other Roadway employees and obtained statements substantiating Hufstetler's retaliatory discharge claim. Roadway was afforded an opportunity to meet with the investigator and submit a written statement detailing the basis for Hufstetler's discharge, but it was not provided with the names of the other witnesses or the substance of their statements. Roadway explained the discharge by reiterating that, as found by the arbitration board, Hufstetler had acted dishonestly in fabricating an equipment breakdown.

Following review of the evidence obtained by the field investigator, the Department of Labor Regional Administrator on January 21, 1985, issued a preliminary decision ordering Hufstetler's immediate reinstatement with backpay. Without detailing the evidence relied upon for this decision, the order stated that the Secretary of Labor had found reasonable cause to believe Hufstetler had been discharged in violation of § 405 for having previously complained about the safety of Roadway's trucks. The order characterized Roadway's asserted basis for the discharge as "conjecture." App. to Juris. Statement 21a.

Roadway then filed the present action in Federal District Court, seeking an injunction against enforcement of the Secretary's order and a declaratory judgment that § 405 was unconstitutional to the extent it empowered the Secretary to order temporary reinstatement without first conducting an evidentiary hearing. The District Court granted Roadway's motion for a preliminary injunction, *Roadway Express, Inc.* v. *Donovan*, 603 F. Supp. 249, and subsequently granted its motion for summary judgment, 624 F. Supp. 197 (ND Ga. 1985).

Roadway also filed objections to the reinstatement order with the Secretary and requested an evidentiary hearing and final decision. This hearing took place in March 1985, before an Administrative Law Judge, and the Secretary issued a decision on August 21, 1986, again ordering reinstatement with backpay. Roadway's appeal from this administrative decision is currently pending in the United States Court of Appeals for the Eleventh Circuit, No. 86–8771.

The Secretary brought this direct appeal from the District Court's order granting Roadway summary judgment. 28 U. S. C. § 1252. We noted probable jurisdiction, 476 U. S. 1113 (1986), and now affirm in part, agreeing with the District Court that the Secretary's procedures unconstitutionally deprived Roadway of procedural due process by failing to provide Roadway with the substance of the evidence supporting Hufstetler's complaint, and reverse in part, rejecting the District Court's conclusion that § 405 is constitutionally infirm because it empowers the Secretary to order preliminary reinstatement without first conducting an evidentiary hearing and affording Roadway an opportunity to cross-examine witnesses.

II

As a threshold matter, we conclude that the Secretary's issuance of the final order of reinstatement following the evidentiary hearing does not render this appeal moot. We acknowledge that Roadway's obligation to reinstate Huf-

stetler and pay back wages now flows from the Secretary's final order and not the preliminary order to which the District Court's injunction and order of summary judgment were directed. Nonetheless, the controversy between Roadway and the Secretary as to the constitutional adequacy of the Secretary's procedures prior to the issuance of the preliminary reinstatement order falls within the "capable of repetition, yet evading review" exception to the actual case-and-controversy requirement. *Southern Pacific Terminal Co.* v. *ICC*, 219 U. S. 498, 515 (1911). The duration of the preliminary order was too short for Roadway's challenge to be fully litigated; yet it can reasonably be expected that Roadway, one of this Nation's largest interstate trucking companies, will be subjected to similar preliminary orders in the future. See *Weinstein* v. *Bradford*, 423 U. S. 147, 149 (1975). Accordingly, we proceed to the merits of this appeal.

III

Section 405 was enacted in 1983 to encourage employee reporting of noncompliance with safety regulations governing commercial motor vehicles. Congress recognized that employees in the transportation industry are often best able to detect safety violations and yet, because they may be threatened with discharge for cooperating with enforcement agencies, they need express protection against retaliation for reporting these violations. See, *e. g.*, 128 Cong. Rec. 32698 (1982) (remarks of Sen. Percy); *id.*, at 32509–32510 (remarks of Sen. Danforth). Section 405 protects employee "whistleblowers" by forbidding discharge, discipline, or other forms of discrimination by the employer in response to an employee's complaining about or refusing to operate motor vehicles that do not meet the applicable safety standards. 49 U. S. C. App. §§ 2305(a), (b).

Congress also recognized that the employee's protection against having to choose between operating an unsafe vehicle and losing his job would lack practical effectiveness if the

employee could not be reinstated pending complete review. The longer a discharged employee remains unemployed, the more devastating are the consequences to his personal financial condition and prospects for reemployment. Ensuring the eventual recovery of backpay may not alone provide sufficient protection to encourage reports of safety violations. Accordingly, § 405 incorporates additional protections, authorizing temporary reinstatement based on a preliminary finding of reasonable cause to believe that the employee has suffered a retaliatory discharge. The statute reflects a careful balancing of the relative interests of the Government, employee, and employer. It evidences a legislative determination that the preliminary investigation and finding of reasonable cause by the Secretary, if followed "expeditiously" by a hearing on the record at the employer's request, provide effective protection to the employee and ensure fair consideration of the employer's interest in making unimpaired hiring decisions. 49 U. S. C. App. § 2305(c)(2)(A).

The statute does not specify procedures for employer participation in the Secretary's investigation, other than to require that the employer be notified of the employee's complaint. 49 U. S. C. App. § 2305(c)(1). The Secretary has assigned the investigative responsibilities to OSHA field investigators, 48 Fed. Reg. 35736 (1983) (Secretary's Order 9–83), who followed standard OSHA procedures until the Secretary issued formal implementing rules for § 405, effective December 22, 1986. See 51 Fed. Reg. 42091 (1986) (proposed 29 CFR pt. 1978). The standard procedures which governed the investigation of Hufstetler's complaint against Roadway in this case required that Roadway be notified "of the complaint and of the substance of the allegation" and also that the field investigator consult with Roadway to obtain its explanation for the discharge before the Secretary made any findings and issued a preliminary reinstatement order. OSHA Instruction CPL 2.45A CH–4, p. X–5 (Mar. 8, 1984); OSHA Instruction DIS.6, pp. 4, 8, 9 (Dec. 12, 1983); OSHA

Investigative Manual, pp. V–1, VI–3, VI–4 (1979). The current implementing rules provide for similar participation by the employer, including an opportunity to meet with the investigator and submit statements from witnesses supporting the employer's position. 51 Fed. Reg., at 42093 (proposed 29 CFR § 1978.103).[1]

Neither set of procedures, however, requires that before ordering preliminary reinstatement the Secretary must hold an evidentiary hearing and allow the employer to cross-examine the witnesses from whom the investigator has obtained statements supporting the employee's complaint. Nor do the procedures require the Secretary to divulge the names of these individuals or the substance of their statements before the preliminary reinstatement order takes effect. Roadway claims that the lack of an evidentiary hearing and the confidentiality of the investigator's evidence operate to deny employers procedural due process under the Fifth Amendment.

The property right of which Roadway asserts it has been deprived without due process derives from the collective-bargaining agreement between Roadway and its employees' union. It is the right to discharge an employee for cause. Acknowledging that the first step is to identify a property or liberty interest entitled to due process protections, *Cleveland Board of Education* v. *Loudermill*, 470 U. S. 532, 538–539 (1985); *Board of Regents* v. *Roth*, 408 U. S. 564, 576–578 (1972), the Secretary concedes that the contractual right to

[1] The new rules provide:

"Within twenty days of his or her receipt of the complaint the [employer] may submit to OSHA a written statement and any affidavits or documents explaining or defending his or her position. Within the same twenty days the [employer] may request a meeting with OSHA to present his or her position. The meeting will be held before the issuance of any findings or preliminary order. At the meeting the named person may be accompanied by counsel and by any persons with information relating to the complaint, who may make statements concerning the case." 51 Fed. Reg. 42093 (1986) (proposed 29 CFR § 1978.103).

discharge an employee for cause constitutes a property interest protected by the Fifth Amendment.[2] Brief for Appellants 16.

"Once it is determined that due process applies, the question remains what process is due." *Morrissey* v. *Brewer*, 408 U. S. 471, 481 (1972). Though the required procedures may vary according to the interests at stake in a particular context, *Boddie* v. *Connecticut*, 401 U. S. 371, 378 (1971), "[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews* v. *Eldridge*, 424 U. S. 319, 333 (1976), quoting *Armstrong* v. *Manzo*, 380 U. S. 545, 552 (1965); see also *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306, 313 (1950). Depending on the circumstances, and the interests at stake, a fairly extensive evidentiary hearing may be constitutionally required before a legitimate claim of entitlement may be terminated. See *Goldberg* v. *Kelly*, 397 U. S. 254, 266–271 (1970) (suspension of welfare benefits invalid if not preceded by an evidentiary hearing giving the recipient an opportunity to confront witnesses and present evidence and argument orally). In other instances, however, the Court has upheld procedures affording less than a full evidentiary hearing if "'some kind of a hearing'" ensuring an effective "initial check against mistaken decisions" is

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[2] Though we accept the Secretary's concession, we do not accept Roadway's separate assertion that it has a property interest in being able to rely exclusively on the contractually mandated arbitration procedures to determine the propriety of a discharge. The essence of this assertion is that, for purposes of enforcing § 405, the Secretary of Labor and the courts should give collateral-estoppel or res judicata effect to decisions reached by arbitration boards. Under the Secretary's implementing rules, issues of collateral estoppel and res judicata may be raised before the Secretary as part of a § 405 proceeding, and the Secretary's decision may be reviewed by the appropriate Court of Appeals. See 51 Fed. Reg., at 42095 (proposed 29 CFR § 1978.112) (interpreting § 405 to allow concurrent jurisdiction over employee complaints before arbitration boards under collective-bargaining agreements and before the Secretary under the statute).

provided before the deprivation occurs, and a prompt opportunity for complete administrative and judicial review is available. *Loudermill*, *supra*, at 542, 545, quoting *Roth*, *supra*, at 569–570; see also *Mathews*, *supra*, at 349.

Determining the adequacy of predeprivation procedures requires consideration of the Government's interest in imposing the temporary deprivation, the private interests of those affected by the deprivation, the risk of erroneous deprivations through the challenged procedures, and the probable value of additional or substitute procedural safeguards. *Mathews*, *supra*, at 335. In the present case, the District Court assessed these factors and determined that § 405 was "unconstitutional and void to the extent that it empowers [the Secretary] to order reinstatement of discharged employees prior to conducting an evidentiary hearing which comports with the minimum requirements of due process." 624 F. Supp., at 203. The court concluded that the employer must be given, "at a minimum, an opportunity to present his side and a chance to confront and cross examine witnesses." *Ibid.* Our consideration of the relevant factors leads us to a different conclusion.

We begin by accepting as substantial the Government's interests in promoting highway safety and protecting employees from retaliatory discharge. Roadway does not question the legislative determination that noncompliance with applicable state and federal safety regulations in the transportation industry is sufficiently widespread to warrant enactment of specific protective legislation encouraging employees to report violations. "Random inspections by Federal and State law enforcement officials in various parts of the country [had] uniformly found widespread violation of safety regulations," and § 405 was designed to assist in combating the "increasing number of deaths, injuries, and property damage due to commercial motor vehicle accidents." 128 Cong. Rec. 32509, 32510 (1982) (remarks of Sen. Danforth and summary of proposed statute).

We also agree with the District Court that Roadway's interest in controlling the makeup of its work force is substantial. 624 F. Supp., at 202. In assessing the competing interests, however, the District Court failed to consider another private interest affected by the Secretary's decision: Hufstetler's interest in not being discharged for having complained about the allegedly unsafe condition of Roadway's trucks. This Court has previously acknowledged the "severity of depriving a person of the means of livelihood." *Loudermill*, 470 U. S., at 543. "While a fired worker may find employment elsewhere, doing so will take some time and is likely to be burdened by the questionable circumstances under which he left his previous job." *Ibid.* In light of the injurious effect a retaliatory discharge can have on an employee's financial status and prospects for alternative interim employment, the employee's substantial interest in retaining his job must be considered along with the employer's interest in determining the constitutional adequacy of the § 405 procedures. The statute reflects a careful balancing of "the strong Congressional policy that persons reporting health and safety violations should not suffer because of this action" and the need "to assure that employers are provided protection from unjustified refusal by their employees to perform legitimate assigned tasks." 128 Cong. Rec. 32510 (1982) (summary of statute).

Reviewing this legislative balancing of interests, we conclude that the employer is sufficiently protected by procedures that do not include an evidentiary hearing before the discharged employee is temporarily reinstated. So long as the prereinstatement procedures establish a reliable "initial check against mistaken decisions," *Loudermill*, *supra*, at 545, and complete and expeditious review is available, then the preliminary reinstatement provision of § 405 fairly balances the competing interests of the Government, the employer, and the employee, and a prior evidentiary hearing is not otherwise constitutionally required.

We thus confront the crucial question whether the Secretary's procedures implementing § 405 reliably protect against the risk of erroneous deprivation, even if only temporary, of an employer's right to discharge an employee. We conclude that minimum due process for the employer in this context requires notice of the employee's allegations, notice of the substance of the relevant supporting evidence, an opportunity to submit a written response, and an opportunity to meet with the investigator and present statements from rebuttal witnesses. The presentation of the employer's witnesses need not be formal, and cross-examination of the employee's witnesses need not be afforded at this stage of the proceedings.

In *Loudermill*, the Court considered the temporary deprivation of a state government employee's right not to be discharged without cause, indicating that the employee was entitled to "oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story" before the temporary discharge took effect, though a full evidentiary hearing including the right to confront and cross-examine adverse witnesses could be delayed for a reasonable period. 470 U. S., at 546. Similarly, in *Arnett* v. *Kennedy*, 416 U. S. 134 (1974), the Court upheld the procedures upon which a Federal Government employee had been temporarily discharged, where those procedures did not provide for a full evidentiary hearing until after the discharge became effective but did afford the employee "advance written notice of the reasons for his proposed discharge and the materials on which the notice [was] based," as well as "the right to respond to the charges both orally and in writing, including the submission of affidavits." *Id.*, at 170 (opinion of POWELL, J.). These cases reflect that the constitutional requirement of a meaningful opportunity to respond before a temporary deprivation may take effect entails, at a minimum, the right to be informed not only of the nature of the charges but also of

the substance of the relevant supporting evidence. If the employer is not provided this information, the procedures implementing § 405 contain an unacceptable risk of erroneous decisions.

The Secretary represents that it is the practice of Department of Labor investigators to inform employers of the substance of the evidence supporting employees' allegations. Brief for Appellants 40, n. 19. Though we do not find this practice expressed in the field manuals for OSHA investigators or in the Secretary's new regulations, we accept the representation as embodying an established, official procedure for implementing § 405 of which employers are specifically made aware. It is undisputed, however, that in this case the procedure was not followed, for Roadway requested and was denied access to the information upon which the Secretary based the order for Hufstetler's preliminary reinstatement. 624 F. Supp., at 200. Given this circumstance, the District Court correctly held that Roadway had been denied a due process protection to which it was entitled, and we affirm the order of summary judgment in that respect.

Notice of an employee's complaint of retaliatory discharge and of the relevant supporting evidence would be of little use if an avenue were not available through which the employer could effectively articulate its response. On this score, assuming the employer is informed of the substance of the evidence supporting the employee's complaint, the Secretary's current procedures allowing the employer to submit a written response, including affidavits and supporting documents, and to meet with the investigator to respond verbally to the employee's charges and present statements from the employer's witnesses, see n. 1, *supra;* 51 Fed. Reg., at 42093 (proposed 29 CFR § 1978.103), satisfy the due process requirements for reliability. Except for the Secretary's failure to inform Roadway of the evidence supporting Hufstetler's complaint, similar procedures were followed in this case.

Roadway contends that, absent an opportunity for the employer to confront and cross-examine the witnesses whose statements support the employee's complaint, the Secretary's preliminary procedures will produce unreliable decisions. We conclude, however, that as a general rule the employer's interest is adequately protected without the right of confrontation and cross-examination, again so long as the employer is otherwise provided an opportunity to respond "at a meaningful time and in a meaningful manner." *Armstrong*, 380 U. S., at 552. Providing the employer the relevant supporting evidence and a chance to meet informally with the investigator, to submit statements from witnesses and to argue its position orally, satisfies the constitutional requirement of due process for the temporary deprivation under § 405. Each of these procedures contributes significantly to the reliability of the Secretary's preliminary decision without extending inordinately the period in which the employee must suffer unemployment. To allow the employer and employee an opportunity to test the credibility of opposing witnesses during the investigation would not increase the reliability of the preliminary decision sufficiently to justify the additional delay. Moreover, the primary function of the investigator is not to make credibility determinations, but rather to determine simply whether reasonable cause exists to believe that the employee has been discharged for engaging in protected conduct. Ensuring the employer a meaningful opportunity to respond to the employee's complaint and supporting evidence maintains the principal focus on the employee's conduct and the employer's reason for his discharge. Final assessments of the credibility of supporting witnesses are appropriately reserved for the administrative law judge, before whom an opportunity for complete cross-examination of opposing witnesses is provided.

Roadway finally argues that requiring an evidentiary hearing as part of the process leading to preliminary reinstate-

ment would not impose a significant additional burden on the Secretary since a subsequent evidentiary hearing must be "expeditiously conducted" in any event. 49 U. S. C. App. § 2305(c)(2)(A). Again, however, Roadway's suggested approach would undoubtedly delay issuance of the Secretary's order of reinstatement.[3] In addition to the extra time required for the hearing itself, this approach would provide an incentive for employers to engage in dilatory tactics. Added delay at this stage of the Secretary's proceedings would further undermine the ability of employees to obtain a means of livelihood, and unfairly tip the statute's balance of interests against them.

This is not to say, however, that the employer's interest in an expeditious resolution of the employee's complaint can never provide a basis for a due process violation. At some point, delay in holding postreinstatement evidentiary hearings may become a constitutional violation. See *Loudermill*, 470 U. S., at 547; *Barry* v. *Barchi*, 443 U. S. 55, 66 (1979); *Mathews*, 424 U. S., at 341–342. The current implementing rules require the evidentiary hearing to take place within 30 days after an employer files objections to a preliminary reinstatement order, unless the employer and employee otherwise agree or good cause is shown. 51 Fed. Reg., at 42093 (proposed 29 CFR 1978.106(b)). The administrative law judge is allowed an additional 30 days to issue a decision, again unless the parties otherwise agree or good cause is shown.

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[3] We do not agree with JUSTICE STEVENS, *post*, at 274–275, that the length of a preliminary investigation deemed necessary by the Secretary in a complex case should become the rationale for extending it even further by making a full evidentiary hearing a constitutional requirement. Additional delay can only increase the financial hardship to the employee. The record here does not indicate what factors were responsible for the extended investigation. It was certainly not against Roadway's interest to delay the investigation. But even if the delay resulted solely from bureaucratic lethargy, it neither defines nor diminishes the importance of Hufstetler's interest in reinstatement.

51 Fed. Reg., at 42094 (proposed 29 CFR § 1978.109(a)). The Secretary then must issue a final order within 120 days. 51 Fed. Reg., at 42094 (proposed 29 CFR § 1978.109(c)). The Secretary interprets these time requirements not as mandatory but rather as "directory in nature." 51 Fed. Reg., at 42095 (proposed 29 CFR § 1978.114). Once the Secretary orders preliminary reinstatement, an incentive for delay lies naturally with the employee, and intentional foot dragging may entitle the employer to challenge the delay. In this case, however, due to the District Court's injunction, the Secretary's preliminary reinstatement order never became effective. Moreover, the record does not reflect why it took the Secretary 19 months to issue a final decision ordering reinstatement. The litigation before the District Court may have been a distraction, Roadway's natural incentive to delay may have played a part, and Labor Department personnel may have acted with extreme inefficiency. Because the procedural posture of this case has not allowed factual development on the issue, we decline to decide whether the delay Roadway has encountered, or the delays authorized in the Secretary's new regulations, are so excessive as to constitute a violation of due process.

IV

The District Court correctly held that the Secretary's preliminary reinstatement order was unconstitutionally imposed in this case because Roadway was not informed of the relevant evidence supporting Hufstetler's complaint and therefore was deprived of an opportunity to prepare a meaningful response. The court erred, however, in holding § 405 unconstitutional to the extent as interpreted by the Secretary it does not provide the employer an evidentiary hearing, complete with the right to confront and cross-examine witnesses, before the employee's temporary reinstatement can be ordered. Accordingly, the District Court's order of summary judgment is

Affirmed in part and reversed in part.

JUSTICE BRENNAN, concurring in part and dissenting in part.

I agree with the plurality's conclusion that the Secretary's procedures unconstitutionally deprived Roadway of procedural due process by failing to inform Roadway of the substance of the evidence supporting Hufstetler's complaint. I disagree, however, with the plurality's conclusion that the Secretary may order an indefinite preliminary reinstatement of discharged drivers without first affording employers an opportunity to present contrary testimony and evidence and to cross-examine witnesses.

Here Roadway contested the facts underlying the Secretary's preliminary determination that there was reasonable cause to believe that the discharge of Hufstetler was retaliatory. When there are *factual* disputes that pertain to the validity of a deprivation, due process "require[s] more than a simple opportunity to argue or deny." *Cleveland Board of Education* v. *Loudermill*, 470 U. S. 532, 552 (1985) (BRENNAN, J., concurring in part and dissenting in part). Predeprivation procedures must provide "an initial check against mistaken decisions—essentially, a determination of whether there are reasonable grounds to believe that the charges . . . are *true* and support the proposed action." *Id.*, at 545–546 (emphasis added). When, as here, the disputed question central to the deprivation is factual, and when, as here, there is no assurance that adequate final process will be prompt, predeprivation procedures are unreliable if they do not give the employer "an opportunity to test the strength of the evidence 'by confronting and cross-examining adverse witnesses and by presenting witnesses on [its] own behalf.'" *Id.*, at 548 (MARSHALL, J., concurring in part and concurring in judgment) (quoting *Arnett* v. *Kennedy*, 416 U. S. 134, 214 (1974) (MARSHALL, J., dissenting)). Thus, employers such as Roadway are entitled to a fair opportunity to confront the

accuser, to cross-examine witnesses, and to produce contrary records and testimony.*

The adequacy of predeprivation procedures is in significant part a function of the speed with which a postdeprivation or final determination is made. Previously the Court has recognized that "[t]he duration of any potentially wrongful deprivation of a property interest is an important factor in assessing the impact of official action on the private interest involved." *Mackey* v. *Montrym*, 443 U. S. 1, 12 (1979). See also *Loudermill*, *supra*, at 547 ("At some point, a delay in the post-termination hearing would become a constitutional violation"). Were there any guarantee that the final hearing would occur promptly—within a few weeks, for example—the procedure endorsed by the Court might suffice. No such guarantee exists.

The statute itself requires that the final hearing be "expeditiously conducted." 49 U. S. C. App. § 2305(c)(2)(A). But, as the plurality states, the Secretary's implementing rules expressly allow a total delay of six months between the order of preliminary reinstatement, the holding of the postdeprivation hearing, the issuance of the administrative law judge's opinion, and the final order of the Secretary. *Ante*, at 267–268. Moreover, the Secretary interprets the overly generous time requirements in the implementing rules as merely

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*The employer's property interest—its right to discharge an employee for cause under the collective-bargaining agreement—is less substantial than other interests which may not be impaired without confrontation and cross-examination. See, *e. g.*, *Goldberg* v. *Kelly*, 397 U. S. 254, 266–271 (1970). Moreover, the property interest is less weighty here because it must be balanced against the Government's interest in highway safety and the wrongfully discharged employee's interest in retaining his or her job. The less substantial weight of the property interest, however, is not dispositive. When the validity of *any* deprivation depends on the resolution of a factual dispute, the initial check against mistaken decisions is inadequate unless either a fair opportunity for confrontation, cross-examination, and presentation of testimony is provided or an evidentiary hearing and final disposition follow on the heels of the preliminary determination.

"directory in nature," rather than mandatory. One of these regulatory time requirements—that "[u]pon the conclusion of [the final] hearing, the Secretary of Labor shall issue a final order within one hundred and twenty days"—is found not only in the Secretary's implementing rules, but also in the statute. 49 U. S. C. App. § 2305(c)(2)(A). Leaving aside the dubious validity of this cavalier treatment of a statutory imperative, the fact that the Secretary regards the time periods governing final relief as directory reveals that the final decision will not be reached within six months, let alone promptly. The combination of uncertainty and delay inherent in the Secretary's regulatory scheme eliminates any possibility that it might compensate for the inadequacy of the predeprivation hearing.

Because I believe that the District Court correctly held that the Secretary may not order preliminary reinstatement without first providing the employer with a chance to confront its accuser, to cross-examine witnesses, and to present its own testimony, I would affirm its judgment. I therefore dissent in part from the plurality opinion and the judgment of the Court.

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

I agree that the District Court erred in holding that a full trial-type hearing was necessary prior to termination, so long as the employer was afforded an adequate posttermination hearing at a meaningful time. I also agree that respondent Roadway Express, Inc., was entitled to notice of Jerry Hufstetler's charges and an opportunity to respond to them prior to being ordered to temporarily reinstate him. But, with all respect, I disagree with the plurality's conclusion that Roadway was denied due process when it did not have access to the information on which the reinstatement order was based, including the names of witnesses.

The procedures the Due Process Clause requires prior to administrative action such as was taken in this case can vary,

depending upon the precise nature of the government function involved, the importance of the private interests that have been affected by governmental action, and the nature of subsequent proceedings. *Cleveland Board of Education* v. *Loudermill*, 470 U. S. 532, 545 (1985); *Cafeteria Workers* v. *McElroy*, 367 U. S. 886, 895 (1961). Thus, what may have been required in *Loudermill* or *Arnett* v. *Kennedy*, 416 U. S. 134, 170 (1974), is no sure guide to resolving the present case. The plurality ably articulates the Government's purpose underlying § 405: "Section 405 protects employee 'whistle-blowers' by forbidding discharge, discipline, or other forms of discrimination by the employer in response to an employee's complaining about or refusing to operate motor vehicles that do not meet the applicable safety standards." *Ante*, at 258. And the employee himself has substantial interest in not being terminated and in being paid his wages or the remuneration. On the other side of the scale is Roadway's interest in not having an unsatisfactory employee on the job pending a full evidentiary hearing. That interest, however, is protected by requiring a reasonable cause finding by the Secretary prior to the issuance of his order, by notice of the charges, and by the opportunity for Roadway to present its side of the case. That is the balance struck by the statute, and the Secretary's regulations and due process require no more, even though in most cases the Secretary may voluntarily reveal the evidence supporting the charge. Given the purpose of § 405, I would not ignore the strong interest the Government may have in particular cases in not turning over the supporting information, including the names of the employees who spoke to the Government and who corroborated Hufstetler's claims, prior to conducting the full administrative hearing.

Because I believe that withholding the witnesses' names and statements prior to ordering temporary reinstatement did not violate respondent's due process rights, I find myself in partial dissent from the plurality's opinion and judgment.

JUSTICE STEVENS, dissenting in part.

Section 405 of the Surface Transportation Assistance Act of 1982, 49 U. S. C. App. § 2305, is an extraordinary piece of legislation. In most organized industries employees are adequately protected against wrongful discharge by the arbitration machinery that has been established pursuant to collective-bargaining agreements, and by their unions. In the motor carrier industry, however, § 405 provides every driver with a special statutory right to reinstatement if an agent of the Secretary of Labor determines that there is "reasonable cause to believe" that the driver was discharged because he reported a safety violation. It was on the basis of this statute that the Department of Labor conducted an 11-month *ex parte* investigation which culminated in its ordering Roadway Express to reinstate Jerry Hufstetler to his job as a driver. The Department heard testimony of witnesses in the course of the investigation, but Roadway was never given a record of the evidence or a list of the witnesses, much less afforded the opportunity to confront the witnesses. Yet, based on a "preliminary" decision reached through these procedures, Roadway was required to continue employing Hufstetler, who it claims is a dishonest employee, for an indeterminate period pending an eventual hearing at which the truth might eventually be established.

The Government's compelling interest in highway safety adequately justifies the creation of a special statutory right to protect truck drivers who share the public's vital interest in strict enforcement of motor vehicle safety regulations. That interest, however, does not justify the use of patently unfair procedures to implement that right. Specifically, it does not justify the entry of reinstatement orders on the basis of secret evidence that is neither disclosed to the employer nor tested in an adversary proceeding before the order becomes effective.

The plurality attempts to legitimate this departure from the traditions of due process by asserting that it is essential

for the Department of Labor to be able to act swiftly; any delays in reinstatement, it is feared, will deter drivers from reporting safety violations. There are, of course, situations in which the threat of irreparable injury justifies the entry of temporary orders that are not preceded by an adequate hearing.[1] Similarly, government's special interest in the efficient management of programs that it administers sometimes makes it appropriate to briefly postpone an adjudication of the rights of an employee, a program beneficiary, or a licensee, until after an initial determination has been made.[2] In this case, however, it is ludicrous for the Secretary to rely on an "emergency" or "necessity" justification for a reinstatement order entered 14 months after the discharge. It is clear

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[1] See *Ewing* v. *Mytinger & Casselberry, Inc.*, 339 U. S. 594 (1950); *North American Cold Storage Co.* v. *Chicago*, 211 U. S. 306 (1908). Federal Rule of Civil Procedure 65(b) provides a sense of the narrow circumstances in which such action may be taken. That Rule allows a judge to grant a temporary restraining order (TRO) only "if it clearly appears" that "immediate and irreparable injury, loss, or damage will result" otherwise. The TRO expires after 10 days or less, and an adversarial hearing must be scheduled "at the earliest possible time," taking precedence over "all matters."

[2] See, *e. g.*, *Cleveland Board of Education* v. *Loudermill*, 470 U. S. 532 (1985); *Mathews* v. *Eldridge*, 424 U. S. 319 (1976); *Barry* v. *Barchi*, 443 U. S. 55 (1979); *Dixon* v. *Love*, 431 U. S. 105 (1977). Cases dealing with the pretermination procedures that must be made available to those deprived of employment, benefits, or other forms of "new property," are not necessarily controlling on the level of procedures required when the government exercises its classic police power to interfere with transactions and matters involving private parties. We have explained that "the precise nature of the governmental function involved" is a relevant factor in due process analysis, *Cafeteria Workers* v. *McElroy*, 367 U. S. 886, 895 (1961), and have recognized the unique burdens that face the Government in its roles as employer and distributor of benefits. See *Arnett* v. *Kennedy*, 416 U. S. 134, 168 (1974) (opinion of POWELL, J.). In expanding the type of property interests protected under the Due Process Clause, we must be cautious to avoid diluting the procedural protections the Clause has traditionally guaranteed when the Government takes action such as that under § 405.

that the Department of Labor does not attempt to take immediate action to reinstate fired employees. Rather, "preliminary" investigations often drag on for months and months. In the case of Jerry Hufstetler, for example, there was an 11-month delay between the filing of his complaint and the Department's decision that he deserved temporary reinstatement pending an eventual determination of why Roadway Express discharged him.[3] Obviously, ample time is available for full and fair predeprivation process under these circumstances,[4] and the plurality's reliance on the Secretary's vague assertion that providing a more meaningful hearing would cause delay is misguided.[5]

In conducting its balancing, the plurality concludes that allowing the parties to test the witnesses through cross-

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[3] The Secretary contends that this delay was unusual. According to the Secretary's statistics, § 405 investigations are now quicker—the average length of recent investigations has been 102 days. Moreover, recently promulgated regulations provide that a decision is to be reached within 60 days of the filing of the complaint. See 51 Fed. Reg. 42093 (1986) (proposed 29 CFR § 1978.104). No matter which of these figures is considered, these types of delay fly in the face of the Secretary's claim that immediate action is necessary to mitigate the impact of a wrongful termination.

[4] The Speedy Trial Act, for example, demands that a criminal defendant be tried within 70 days of his indictment, or his first appearance before a judge or magistrate. See 18 U. S. C. § 3161 *et seq.* (1982 ed. and Supp. III). Is it possible that expedited trials are feasible in the criminal context, but affording carriers a predeprivation confrontational hearing is impossible?

[5] The plurality is concerned about the financial implications that any delay may have on the discharged driver. *Ante*, at 267. While I share in this concern, the answer is for the Department of Labor to avoid these delays by devoting sufficient resources to its § 405 program. The carriers should not be forced to bear the burden of the agency's lethargy. It is also worth pointing out that short delays will not necessarily wreak havoc with a driver's ability to make do. In this case, for example, Hufstetler's annual earnings were in the $50,000 range, App. to Juris. Statement 37a, and a driver is, in any event, guaranteed full backpay with interest if the Department actually finds that he or she was discharged in violation of § 405.

examination would not "increase the reliability of the preliminary decision sufficiently to justify the additional delay." *Ante*, at 266. Aside from exaggerating the element of delay, this reasoning unduly minimizes the critical role that cross-examination plays in accurate factfinding. The plurality suggests that "the primary function of the investigator is not to make credibility determinations, but rather to determine simply whether reasonable cause exists to believe that the employee has been discharged for engaging in protected conduct." *Ibid.* Yet, how is the investigator possibly to decide between conflicting accounts of witnesses without making credibility determinations? Should the testimony of one witness who could easily be impeached (if cross-examination were allowed) be sufficient to establish "reasonable cause"?

Cross-examination is a critical element in the truth-determining process. This elementary proposition bears repetition:

> "Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty, or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy." *Greene* v. *McElroy*, 360 U. S. 474, 496 (1959).

See also *Morrissey* v. *Brewer*, 408 U. S. 471, 489 (1972); *Goldberg* v. *Kelly*, 397 U. S. 254, 269 (1970).[6] In the words of Dean Wigmore:

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[6] The cases in which this requirement has been relaxed have typically involved objective issues, where the Court has deemed cross-examination

> "The belief that no safeguard for testing the value of human statements is comparable to that furnished by cross-examination, and the conviction that no statement (unless by special exception) should be used as testimony until it has been probed and sublimated by that test, has found increasing strength in lengthening experience." 5 J. Wigmore, Evidence § 1367 (J. Chadbourn rev. 1974).

Even if there were merit in the plurality's novel view that the possibility of delay outweighs the value of confrontation, this reasoning does not justify the Department's refusal to provide the parties with a list of the witnesses and a summary of each witness' testimony, which would at least enable the parties to make oral or written arguments about why the investigator should not credit the witness' testimony. This would certainly not cause any intolerable delay. This type of hybrid safeguard, although not optimal, is far better than nothing. "Secrecy is not congenial to truth-seeking." *Anti-Fascist Committee* v. *McGrath*, 341 U. S. 123, 171 (1951) (Frankfurter, J., concurring). As I understand the plurality's holding, the requirement that the Department disclose the "substance of the evidence" certainly incorporates the disclosure of the witnesses' names and a summary of their testimony.

The plurality's willingness to sacrifice due process to the Secretary's obscure suggestion of necessity reveals the serious flaws in its due process analysis. It is wrong to approach the due process analysis in each case by asking anew what procedures seem worthwhile and not too costly. Unless a case falls within a recognized exception, we should

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a bit less essential than in other contexts, see *Dixon* v. *Love*, 431 U. S., at 113 (records of previous traffic convictions); *Mathews* v. *Eldridge*, 424 U. S., at 344–345 ("routine, standard, and unbiased medical reports"), or have involved contexts where cross-examination poses undue hazards to health and safety, see *Wolff* v. *McDonnell*, 418 U. S. 539, 567–568 (1974) (prison disciplinary hearings), or other unique institutional considerations, see *Goss* v. *Lopez*, 419 U. S. 565, 577–584 (1975) (school suspensions).

adhere to the strongest presumption that the Government may not take away life, liberty, or property before making a meaningful hearing available. The flexibility on the fringes of due process cannot

> "affect its root requirement that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." *Boddie* v. *Connecticut*, 401 U. S. 371, 379 (1971) (footnote omitted).

Such a hearing necessarily includes the creation of a public record developed in a proceeding in which hostile witnesses are confronted and cross-examined.

Traditions of fairness that have been long honored in American jurisprudence support the strongest possible presumption against *ex parte* proceedings. There is no support for the plurality's approval of the entry of a reinstatement order of indefinite duration[7] based on uncross-examined and untested evidence. Therefore, although I agree with the Court to the extent that it affirms the District Court, I, like JUSTICE BRENNAN, believe that the District Court's decision should be affirmed *in toto*.

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[7] Additionally, the Secretary offers no excuse for the inordinate delay that occurs between a preliminary finding (when an employee is temporarily reinstated) and an actual decision on the merits. In this case, the Administrative Law Judge did not even submit a recommended decision for over seven months, and a 19-month period elapsed before the Department of Labor announced its final decision. As JUSTICE BRENNAN explains, *ante*, at 270–271, this apparently routine and unjustified delay in the postdeprivation decision is an independent reason for striking down the scheme.

Syllabus

McCLESKEY *v.* KEMP, SUPERINTENDENT, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER

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

No. 84-6811. Argued October 15, 1986—Decided April 22, 1987

In 1978, petitioner, a black man, was convicted in a Georgia trial court of armed robbery and murder, arising from the killing of a white police officer during the robbery of a store. Pursuant to Georgia statutes, the jury at the penalty hearing considered the mitigating and aggravating circumstances of petitioner's conduct and recommended the death penalty on the murder charge. The trial court followed the recommendation, and the Georgia Supreme Court affirmed. After unsuccessfully seeking postconviction relief in state courts, petitioner sought habeas corpus relief in Federal District Court. His petition included a claim that the Georgia capital sentencing process was administered in a racially discriminatory manner in violation of the Eighth and Fourteenth Amendments. In support of the claim, petitioner proffered a statistical study (the Baldus study) that purports to show a disparity in the imposition of the death sentence in Georgia based on the murder victim's race and, to a lesser extent, the defendant's race. The study is based on over 2,000 murder cases that occurred in Georgia during the 1970's, and involves data relating to the victim's race, the defendant's race, and the various combinations of such persons' races. The study indicates that black defendants who killed white victims have the greatest likelihood of receiving the death penalty. Rejecting petitioner's constitutional claims, the court denied his petition insofar as it was based on the Baldus study, and the Court of Appeals affirmed the District Court's decision on this issue. It assumed the validity of the Baldus study but found the statistics insufficient to demonstrate unconstitutional discrimination in the Fourteenth Amendment context or to show irrationality, arbitrariness, and capriciousness under Eighth Amendment analysis.

Held:

1. The Baldus study does not establish that the administration of the Georgia capital punishment system violates the Equal Protection Clause. Pp. 291–299.

(a) To prevail under that Clause, petitioner must prove that the decisionmakers in *his* case acted with discriminatory purpose. Petitioner offered no evidence specific to his own case that would support an

inference that racial considerations played a part in his sentence, and the Baldus study is insufficient to support an inference that any of the decisionmakers in his case acted with discriminatory purpose. This Court has accepted statistics as proof of intent to discriminate in the context of a State's selection of the jury venire and in the context of statutory violations under Title VII of the Civil Rights Act of 1964. However, the nature of the capital sentencing decision and the relationship of the statistics to that decision are fundamentally different from the corresponding elements in the venire-selection or Title VII cases. Petitioner's statistical proffer must be viewed in the context of his challenge to decisions at the heart of the State's criminal justice system. Because discretion is essential to the criminal justice process, exceptionally clear proof is required before this Court will infer that the discretion has been abused. Pp. 292–297.

(b) There is no merit to petitioner's argument that the Baldus study proves that the State has violated the Equal Protection Clause by adopting the capital punishment statute and allowing it to remain in force despite its allegedly discriminatory application. For this claim to prevail, petitioner would have to prove that the Georgia Legislature enacted or maintained the death penalty statute *because of* an anticipated racially discriminatory effect. There is no evidence that the legislature either enacted the statute to further a racially discriminatory purpose, or maintained the statute because of the racially disproportionate impact suggested by the Baldus study. Pp. 297–299.

2. Petitioner's argument that the Baldus study demonstrates that the Georgia capital sentencing system violates the Eighth Amendment's prohibition of cruel and unusual punishment must be analyzed in the light of this Court's prior decisions under that Amendment. Decisions since *Furman* v. *Georgia*, 408 U. S. 238, have identified a constitutionally permissible range of discretion in imposing the death penalty. First, there is a required threshold below which the death penalty cannot be imposed, and the State must establish rational criteria that narrow the decisionmaker's judgment as to whether the circumstances of a particular defendant's case meet the threshold. Second, States cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the death penalty. In this respect, the State cannot channel the sentencer's discretion, but must allow it to consider any relevant information offered by the defendant. Pp. 299–306.

3. The Baldus study does not demonstrate that the Georgia capital sentencing system violates the Eighth Amendment. Pp. 306–313.

(a) Petitioner cannot successfully argue that the sentence in his case is disproportionate to the sentences in other murder cases. On the one

hand, he cannot base a constitutional claim on an argument that his case differs from other cases in which defendants *did* receive the death penalty. The Georgia Supreme Court found that his death sentence was not disproportionate to other death sentences imposed in the State. On the other hand, absent a showing that the Georgia capital punishment system operates in an arbitrary and capricious manner, petitioner cannot prove a constitutional violation by demonstrating that other defendants who may be similarly situated did *not* receive the death penalty. The opportunities for discretionary leniency under state law do not render the capital sentences imposed arbitrary and capricious. Because petitioner's sentence was imposed under Georgia sentencing procedures that focus discretion "on the particularized nature of the crime and the particularized characteristics of the individual defendant," it may be presumed that his death sentence was not "wantonly and freakishly" imposed, and thus that the sentence is not disproportionate within any recognized meaning under the Eighth Amendment. *Gregg* v. *Georgia*, 428 U. S. 153, 206, 207. Pp. 306–308.

(b) There is no merit to the contention that the Baldus study shows that Georgia's capital punishment system is arbitrary and capricious in *application*. The statistics do not *prove* that race enters into any capital sentencing decisions or that race was a factor in petitioner's case. The likelihood of racial prejudice allegedly shown by the study does not constitute the constitutional measure of an unacceptable risk of racial prejudice. The inherent lack of predictability of jury decisions does not justify their condemnation. On the contrary, it is the jury's function to make the difficult and uniquely human judgments that defy codification and that build discretion, equity, and flexibility into the legal system. Pp. 308–312.

(c) At most, the Baldus study indicates a discrepancy that appears to correlate with race, but this discrepancy does not constitute a major systemic defect. Any mode for determining guilt or punishment has its weaknesses and the potential for misuse. Despite such imperfections, constitutional guarantees are met when the mode for determining guilt or punishment has been surrounded with safeguards to make it as fair as possible. Pp. 312–313.

4. Petitioner's claim, taken to its logical conclusion, throws into serious question the principles that underlie the entire criminal justice system. His claim easily could be extended to apply to other types of penalties and to claims based on unexplained discrepancies correlating to membership in other minority groups and even to gender. The Constitution does not require that a State eliminate any demonstrable disparity that correlates with a potentially irrelevant factor in order to

operate a criminal justice system that includes capital punishment. Petitioner's arguments are best presented to the legislative bodies, not the courts. Pp. 314–319.

753 F. 2d 877, affirmed.

POWELL, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, O'CONNOR, and SCALIA, JJ., joined. BRENNAN, J., filed a dissenting opinion in which MARSHALL, J., joined, and in all but Part I of which BLACKMUN and STEVENS, JJ., joined, *post*, p. 320. BLACKMUN, J., filed a dissenting opinion in which MARSHALL and STEVENS, JJ., joined, and in all but Part IV–B of which BRENNAN, J., joined, *post*, p. 345. STEVENS, J., filed a dissenting opinion in which BLACKMUN, J., joined, *post*, p. 366.

John Charles Boger argued the cause for petitioner. With him on the briefs were *Julius L. Chambers*, *James M. Nabrit III*, *Vivian Berger*, *Robert H. Stroup*, *Timothy K. Ford*, and *Anthony G. Amsterdam*.

Mary Beth Westmoreland, Assistant Attorney General of Georgia, argued the cause for respondent. With her on the brief were *Michael J. Bowers*, Attorney General, *Marion O. Gordon*, First Assistant Attorney General, and *William B. Hill, Jr.*, Senior Assistant Attorney General.*

JUSTICE POWELL delivered the opinion of the Court.

This case presents the question whether a complex statistical study that indicates a risk that racial considerations enter

*Briefs of *amici curiae* urging reversal were filed for the Congressional Black Caucus et al. by *Seth P. Waxman*, *Harold R. Tyler, Jr.*, *James Robertson*, *Norman Redlich*, *William L. Robinson*, and *Grover Hankins;* and for the International Human Rights Law Group by *Ralph G. Steinhardt*.

Briefs of *amici curiae* urging affirmance were filed for the State of California et al. by *Ira Reiner*, *Harry B. Sondheim*, *John K. Van de Kamp*, Attorney General, *Michael C. Wellington*, Supervising Deputy Attorney General, and *Susan Lee Frierson*, Deputy Attorney General; and for the Washington Legal Foundation et al. by *Daniel J. Popeo* and *George C. Smith*.

Martin F. Richman filed a brief for Dr. Franklin M. Fisher et al. as *amici curiae*.

into capital sentencing determinations proves that petitioner McCleskey's capital sentence is unconstitutional under the Eighth or Fourteenth Amendment.

I

McCleskey, a black man, was convicted of two counts of armed robbery and one count of murder in the Superior Court of Fulton County, Georgia, on October 12, 1978. McCleskey's convictions arose out of the robbery of a furniture store and the killing of a white police officer during the course of the robbery. The evidence at trial indicated that McCleskey and three accomplices planned and carried out the robbery. All four were armed. McCleskey entered the front of the store while the other three entered the rear. McCleskey secured the front of the store by rounding up the customers and forcing them to lie face down on the floor. The other three rounded up the employees in the rear and tied them up with tape. The manager was forced at gunpoint to turn over the store receipts, his watch, and $6. During the course of the robbery, a police officer, answering a silent alarm, entered the store through the front door. As he was walking down the center aisle of the store, two shots were fired. Both struck the officer. One hit him in the face and killed him.

Several weeks later, McCleskey was arrested in connection with an unrelated offense. He confessed that he had participated in the furniture store robbery, but denied that he had shot the police officer. At trial, the State introduced evidence that at least one of the bullets that struck the officer was fired from a .38 caliber Rossi revolver. This description matched the description of the gun that McCleskey had carried during the robbery. The State also introduced the testimony of two witnesses who had heard McCleskey admit to the shooting.

The jury convicted McCleskey of murder.[1] At the penalty hearing,[2] the jury heard arguments as to the appropriate sentence. Under Georgia law, the jury could not consider imposing the death penalty unless it found beyond a reasonable doubt that the murder was accompanied by one of the statutory aggravating circumstances. Ga. Code Ann. § 17–10–30(c) (1982).[3] The jury in this case found two ag-

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[1] The Georgia Code has been revised and renumbered since McCleskey's trial. The changes do not alter the substance of the sections relevant to this case. For convenience, references in this opinion are to the current sections.

The Georgia Code contains only one degree of murder. A person commits murder "when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being." Ga. Code Ann. § 16–5–1(a) (1984). A person convicted of murder "shall be punished by death or by imprisonment for life." § 16–5–1(d).

[2] Georgia Code Ann. § 17–10–2(c) (1982) provides that when a jury convicts a defendant of murder, "the court shall resume the trial and conduct a presentence hearing before the jury." This subsection suggests that a defendant convicted of murder always is subjected to a penalty hearing at which the jury considers imposing a death sentence. But as a matter of practice, penalty hearings seem to be held only if the prosecutor affirmatively seeks the death penalty. If he does not, the defendant receives a sentence of life imprisonment. See Baldus, Pulaski, & Woodworth, Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience, 74 J. Crim. L. & C. 661, 674, n. 56 (1983).

[3] A jury cannot sentence a defendant to death for murder unless it finds that one of the following aggravating circumstances exists beyond a reasonable doubt:

"(1) The offense . . . was committed by a person with a prior record of conviction for a capital felony;

"(2) The offense . . . was committed while the offender was engaged in the commission of another capital felony or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree;

"(3) The offender, by his act of murder . . . knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person;

"(4) The offender committed the offense . . . for himself or another, for the purpose of receiving money or any other thing of monetary value;

gravating circumstances to exist beyond a reasonable doubt: the murder was committed during the course of an armed robbery, § 17–10–30(b)(2); and the murder was committed upon a peace officer engaged in the performance of his duties, § 17–10–30(b)(8). In making its decision whether to impose the death sentence, the jury considered the mitigating and aggravating circumstances of McCleskey's conduct. § 17–10–2(c). McCleskey offered no mitigating evidence. The jury recommended that he be sentenced to death on the murder charge and to consecutive life sentences on the armed robbery charges. The court followed the jury's recommendation and sentenced McCleskey to death.[4]

On appeal, the Supreme Court of Georgia affirmed the convictions and the sentences. *McCleskey* v. *State*, 245 Ga. 108, 263 S. E. 2d 146 (1980). This Court denied a petition for a writ of certiorari. *McCleskey* v. *Georgia*, 449 U. S. 891 (1980). The Superior Court of Fulton County denied McCleskey's extraordinary motion for a new trial. McCleskey then filed a petition for a writ of habeas corpus in the

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"(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor, or former district attorney or solicitor was commmitted during or because of the exercise of his official duties;

"(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person;

"(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim;

"(8) The offense . . . was committed against any peace officer, corrections employee, or fireman while engaged in the performance of his official duties;

"(9) The offense . . . was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement; or

"(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another." § 17–10–30(b).

[4] Georgia law provides that "[w]here a statutory aggravating circumstance is found and a recommendation of death is made, the court shall sentence the defendant to death." § 17–10–31.

Superior Court of Butts County. After holding an evidentiary hearing, the Superior Court denied relief. *McCleskey* v. *Zant*, No. 4909 (Apr. 8, 1981). The Supreme Court of Georgia denied McCleskey's application for a certificate of probable cause to appeal the Superior Court's denial of his petition, No. 81–5523, and this Court again denied certiorari. *McCleskey* v. *Zant*, 454 U. S. 1093 (1981).

McCleskey next filed a petition for a writ of habeas corpus in the Federal District Court for the Northern District of Georgia. His petition raised 18 claims, one of which was that the Georgia capital sentencing process is administered in a racially discriminatory manner in violation of the Eighth and Fourteenth Amendments to the United States Constitution. In support of his claim, McCleskey proffered a statistical study performed by Professors David C. Baldus, Charles Pulaski, and George Woodworth (the Baldus study) that purports to show a disparity in the imposition of the death sentence in Georgia based on the race of the murder victim and, to a lesser extent, the race of the defendant. The Baldus study is actually two sophisticated statistical studies that examine over 2,000 murder cases that occurred in Georgia during the 1970's. The raw numbers collected by Professor Baldus indicate that defendants charged with killing white persons received the death penalty in 11% of the cases, but defendants charged with killing blacks received the death penalty in only 1% of the cases. The raw numbers also indicate a reverse racial disparity according to the race of the defendant: 4% of the black defendants received the death penalty, as opposed to 7% of the white defendants.

Baldus also divided the cases according to the combination of the race of the defendant and the race of the victim. He found that the death penalty was assessed in 22% of the cases involving black defendants and white victims; 8% of the cases involving white defendants and white victims; 1% of the cases involving black defendants and black victims; and 3% of the cases involving white defendants and black victims.

Similarly, Baldus found that prosecutors sought the death penalty in 70% of the cases involving black defendants and white victims; 32% of the cases involving white defendants and white victims; 15% of the cases involving black defendants and black victims; and 19% of the cases involving white defendants and black victims.

Baldus subjected his data to an extensive analysis, taking account of 230 variables that could have explained the disparities on nonracial grounds. One of his models concludes that, even after taking account of 39 nonracial variables, defendants charged with killing white victims were 4.3 times as likely to receive a death sentence as defendants charged with killing blacks. According to this model, black defendants were 1.1 times as likely to receive a death sentence as other defendants. Thus, the Baldus study indicates that black defendants, such as McCleskey, who kill white victims have the greatest likelihood of receiving the death penalty.[5]

The District Court held an extensive evidentiary hearing on McCleskey's petition. Although it believed that McCleskey's Eighth Amendment claim was foreclosed by the Fifth Circuit's decision in *Spinkellink* v. *Wainwright*, 578 F. 2d 582, 612–616 (1978), cert. denied, 440 U. S. 976 (1979), it nevertheless considered the Baldus study with care. It con-

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[5] Baldus' 230-variable model divided cases into eight different ranges, according to the estimated aggravation level of the offense. Baldus argued in his testimony to the District Court that the effects of racial bias were most striking in the midrange cases. "[W]hen the cases become tremendously aggravated so that everybody would agree that if we're going to have a death sentence, these are the cases that should get it, the race effects go away. It's only in the mid-range of cases where the decision-makers have a real choice as to what to do. If there's room for the exercise of discretion, then the [racial] factors begin to play a role." App. 36. Under this model, Baldus found that 14.4% of the black-victim midrange cases received the death penalty, and 34.4% of the white-victim cases received the death penalty. See Exhibit DB 90, reprinted in Supplemental Exhibits 54. According to Baldus, the facts of McCleskey's case placed it within the midrange. App. 45–46.

cluded that McCleskey's "statistics do not demonstrate a prima facie case in support of the contention that the death penalty was imposed upon him because of his race, because of the race of the victim, or because of any Eighth Amendment concern." *McCleskey* v. *Zant*, 580 F. Supp. 338, 379 (ND Ga. 1984). As to McCleskey's Fourteenth Amendment claim, the court found that the methodology of the Baldus study was flawed in several respects.[6] Because of these de-

[6] Baldus, among other experts, testified at the evidentiary hearing. The District Court "was impressed with the learning of all of the experts." 580 F. Supp., at 353 (emphasis omitted). Nevertheless, the District Court noted that in many respects the data were incomplete. In its view, the questionnaires used to obtain the data failed to capture the full degree of the aggravating or mitigating circumstances. *Id.*, at 356. The court criticized the researcher's decisions regarding unknown variables. *Id.*, at 357–358. The researchers could not discover whether penalty trials were held in many of the cases, thus undercutting the value of the study's statistics as to prosecutorial decisions. *Id.*, at 359. In certain cases, the study lacked information on the race of the victim in cases involving multiple victims, on whether or not the prosecutor offered a plea bargain, and on credibility problems with witnesses. *Id.*, at 360. The court concluded that McCleskey had failed to establish by a preponderance of the evidence that the data were trustworthy. "It is a major premise of a statistical case that the data base numerically mirrors reality. If it does not in substantial degree mirror reality, any inferences empirically arrived at are untrustworthy." *Ibid.*

The District Court noted other problems with Baldus' methodology. First, the researchers assumed that all of the information available from the questionnaires was available to the juries and prosecutors when the case was tried. The court found this assumption "questionable." *Id.*, at 361. Second, the court noted the instability of the various models. Even with the 230-variable model, consideration of 20 further variables caused a significant drop in the statistical significance of race. In the court's view, this undermined the persuasiveness of the model that showed the greatest racial disparity, the 39-variable model. *Id.*, at 362. Third, the court found that the high correlation between race and many of the nonracial variables diminished the weight to which the study was entitled. *Id.*, at 363–364.

Finally, the District Court noted the inability of any of the models to predict the outcome of actual cases. As the court explained, statisticians use

fects, the court held that the Baldus study "fail[ed] to contribute anything of value" to McCleskey's claim. *Id.*, at 372 (emphasis omitted). Accordingly, the court denied the petition insofar as it was based upon the Baldus study.

The Court of Appeals for the Eleventh Circuit, sitting en banc, carefully reviewed the District Court's decision on McCleskey's claim. 753 F. 2d 877 (1985). It assumed the validity of the study itself and addressed the merits of McCleskey's Eighth and Fourteenth Amendment claims. That is, the court assumed that the study "showed that systematic and substantial disparities existed in the penalties imposed upon homicide defendants in Georgia based on race of the homicide victim, that the disparities existed at a less substantial rate in death sentencing based on race of defendants, and that the factors of race of the victim and defendant were at work in Fulton County." *Id.*, at 895. Even assuming the study's validity, the Court of Appeals found the statistics "insufficient to demonstrate discriminatory intent or unconstitutional discrimination in the Fourteenth Amendment context, [and] insufficient to show irrationality, arbitrariness and capriciousness under any kind of Eighth Amendment analysis." *Id.*, at 891. The court noted:

> "The very exercise of discretion means that persons exercising discretion may reach different results from exact duplicates. Assuming each result is within the range of discretion, all are correct in the eyes of the law. It would not make sense for the system to require the exercise of discretion in order to be facially constitu-

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a measure called an "r^2" to measure what portion of the variance in the dependent variable (death sentencing rate, in this case) is accounted for by the independent variables of the model. A perfectly predictive model would have an r^2 value of 1.0. A model with no predictive power would have an r^2 value of 0. The r^2 value of Baldus' most complex model, the 230-variable model, was between .46 and .48. Thus, as the court explained, "the 230-variable model does not predict the outcome in half of the cases." *Id.*, at 361.

tional, and at the same time hold a system unconstitutional in application where that discretion achieved different results for what appear to be exact duplicates, absent the state showing the reasons for the difference. . . .

"The Baldus approach . . . would take the cases with different results on what are contended to be duplicate facts, where the differences could not be otherwise explained, and conclude that the different result was based on race alone. . . . This approach ignores the realities. . . . There are, in fact, no exact duplicates in capital crimes and capital defendants. The type of research submitted here tends to show which of the directed factors were effective, but is of restricted use in showing what undirected factors control the exercise of constitutionally required discretion." *Id.*, at 898–899.

The court concluded:

"Viewed broadly, it would seem that the statistical evidence presented here, assuming its validity, confirms rather than condemns the system. . . . The marginal disparity based on the race of the victim tends to support the state's contention that the system is working far differently from the one which *Furman* [v. *Georgia*, 408 U. S. 238 (1972)] condemned. In pre-*Furman* days, there was no rhyme or reason as to who got the death penalty and who did not. But now, in the vast majority of cases, the reasons for a difference are well documented. That they are not so clear in a small percentage of the cases is no reason to declare the entire system unconstitutional." *Id.*, at 899.

The Court of Appeals affirmed the denial by the District Court of McCleskey's petition for a writ of habeas corpus insofar as the petition was based upon the Baldus study, with three judges dissenting as to McCleskey's claims based on

the Baldus study. We granted certiorari, 478 U. S. 1019 (1986), and now affirm.

II

McCleskey's first claim is that the Georgia capital punishment statute violates the Equal Protection Clause of the Fourteenth Amendment.[7] He argues that race has infected the administration of Georgia's statute in two ways: persons who murder whites are more likely to be sentenced to death than persons who murder blacks, and black murderers are more likely to be sentenced to death than white murderers.[8]

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[7] Although the District Court rejected the findings of the Baldus study as flawed, the Court of Appeals assumed that the study is valid and reached the constitutional issues. Accordingly, those issues are before us. As did the Court of Appeals, we assume the study is valid statistically without reviewing the factual findings of the District Court. Our assumption that the Baldus study is statistically valid does not include the assumption that the study shows that racial considerations actually enter into any sentencing decisions in Georgia. Even a sophisticated multiple-regression analysis such as the Baldus study can only demonstrate a *risk* that the factor of race entered into some capital sentencing decisions and a necessarily lesser risk that race entered into any particular sentencing decision.

[8] Although McCleskey has standing to claim that he suffers discrimination because of his own race, the State argues that he has no standing to contend that he was discriminated against on the basis of his victim's race. While it is true that we are reluctant to recognize "standing to assert the rights of third persons," *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252, 263 (1977), this does not appear to be the nature of McCleskey's claim. He does not seek to assert some right of his victim, or the rights of black murder victims in general. Rather, McCleskey argues that application of the State's statute has created a classification that is "an irrational exercise of governmental power," Brief for Petitioner 41, because it is not "necessary to the accomplishment of some permissible state objective." *Loving* v. *Virginia*, 388 U. S. 1, 11 (1967). See *McGowan* v. *Maryland*, 366 U. S. 420, 425 (1961) (statutory classification cannot be "wholly irrelevant to the achievement of the State's objective"). It would violate the Equal Protection Clause for a State to base enforcement of its criminal laws on "an unjustifiable standard such as race, religion, or other arbitrary classification." *Oyler* v. *Boles*, 368 U. S. 448, 456 (1962). See

As a black defendant who killed a white victim, McCleskey claims that the Baldus study demonstrates that he was discriminated against because of his race and because of the race of his victim. In its broadest form, McCleskey's claim of discrimination extends to every actor in the Georgia capital sentencing process, from the prosecutor who sought the death penalty and the jury that imposed the sentence, to the State itself that enacted the capital punishment statute and allows it to remain in effect despite its allegedly discriminatory application. We agree with the Court of Appeals, and every other court that has considered such a challenge,[9] that this claim must fail.

A

Our analysis begins with the basic principle that a defendant who alleges an equal protection violation has the burden of proving "the existence of purposeful discrimination." *Whitus* v. *Georgia*, 385 U. S. 545, 550 (1967).[10] A corollary to this principle is that a criminal defendant must prove that the purposeful discrimination "had a discriminatory effect" on him. *Wayte* v. *United States*, 470 U. S. 598, 608 (1985). Thus, to prevail under the Equal Protection Clause, McCleskey must prove that the decisionmakers in *his* case acted with discriminatory purpose. He offers no evidence specific to his own case that would support an inference that racial

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Cleveland Bd. of Ed. v. *Lafleur*, 414 U. S. 632, 652–653 (1974) (POWELL, J., concurring). Because McCleskey raises such a claim, he has standing.

[9] See, *e. g.*, *Shaw* v. *Martin*, 733 F. 2d 304, 311–314 (CA4), cert. denied, 469 U. S. 873 (1984); *Adams* v. *Wainwright*, 709 F. 2d 1443 (CA11 1983) *(per curiam)*, cert. denied, 464 U. S. 1063 (1984); *Smith* v. *Balkcom*, 660 F. 2d 573, 584–585, modified, 671 F. 2d 858, 859–860 (CA5 Unit B 1981) *(per curiam)*, cert. denied, 459 U. S. 882 (1982); *Spinkellink* v. *Wainwright*, 578 F. 2d 582, 612–616 (CA5 1978), cert. denied, 440 U. S. 976 (1979).

[10] See *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, *supra*, at 265; *Washington* v. *Davis*, 426 U. S. 229, 240 (1976).

considerations played a part in his sentence. Instead, he relies solely on the Baldus study.[11] McCleskey argues that the Baldus study compels an inference that his sentence rests on purposeful discrimination. McCleskey's claim that these statistics are sufficient proof of discrimination, without regard to the facts of a particular case, would extend to all capital cases in Georgia, at least where the victim was white and the defendant is black.

The Court has accepted statistics as proof of intent to discriminate in certain limited contexts. First, this Court has accepted statistical disparities as proof of an equal protection violation in the selection of the jury venire in a particular district. Although statistical proof normally must present a "stark" pattern to be accepted as the sole proof of discriminatory intent under the Constitution,[12] *Arlington Heights* v.

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[11] McCleskey's expert testified:

"Models that are developed talk about the effect on the average. They do not depict the experience of a single individual. What they say, for example, [is] that on the average, the race of the victim, if it is white, increases on the average the probability . . . (that) the death sentence would be given.

"Whether in a given case that is the answer, it cannot be determined from statistics." 580 F. Supp., at 372.

[12] *Gomillion* v. *Lightfoot*, 364 U. S. 339 (1960), and *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886), are examples of those rare cases in which a statistical pattern of discriminatory impact demonstrated a constitutional violation. In *Gomillion*, a state legislature violated the Fifteenth Amendment by altering the boundaries of a particular city "from a square to an uncouth twenty-eight-sided figure." 364 U. S., at 340. The alterations excluded 395 of 400 black voters without excluding a single white voter. In *Yick Wo*, an ordinance prohibited operation of 310 laundries that were housed in wooden buildings, but allowed such laundries to resume operations if the operator secured a permit from the government. When laundry operators applied for permits to resume operation, all but one of the white applicants received permits, but none of the over 200 Chinese applicants were successful. In those cases, the Court found the statistical disparities "to warrant and require," *Yick Wo* v. *Hopkins*, *supra*, at 373, a "conclusion [that

Metropolitan Housing Dev. Corp., 429 U. S. 252, 266 (1977), "[b]ecause of the nature of the jury-selection task, . . . we have permitted a finding of constitutional violation even when the statistical pattern does not approach [such] extremes." *Id.*, at 266, n. 13.[13] Second, this Court has accepted statistics in the form of multiple-regression analysis to prove statutory violations under Title VII of the Civil Rights Act of 1964. *Bazemore* v. *Friday*, 478 U. S. 385, 400–401 (1986) (opinion of BRENNAN, J., concurring in part).

But the nature of the capital sentencing decision, and the relationship of the statistics to that decision, are fundamentally different from the corresponding elements in the venire-selection or Title VII cases. Most importantly, each particular decision to impose the death penalty is made by a petit jury selected from a properly constituted venire. Each jury is unique in its composition, and the Constitution requires that its decision rest on consideration of innumerable factors that vary according to the characteristics of the individual defendant and the facts of the particular capital offense. See *Hitchcock* v. *Dugger*, *post*, at 398–399; *Lockett* v. *Ohio*, 438 U. S. 586, 602–605 (1978) (plurality opinion of Burger, C. J.). Thus, the application of an inference drawn from the general statistics to a specific decision in a trial and sentencing simply is not comparable to the application of an inference drawn from general statistics to a specific venire-

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was] irresistible, tantamount for all practical purposes to a mathematical demonstration," *Gomillion* v. *Lightfoot*, *supra*, at 341, that the State acted with a discriminatory purpose.

[13] See, *e. g.*, *Castaneda* v. *Partida*, 430 U. S. 482, 495 (1977) (2-to-1 disparity between Mexican-Americans in county population and those summoned for grand jury duty); *Turner* v. *Fouche*, 396 U. S. 346, 359 (1970) (1.6-to-1 disparity between blacks in county population and those on grand jury lists); *Whitus* v. *Georgia*, 385 U. S. 545, 552 (1967) (3-to-1 disparity between eligible blacks in county and blacks on grand jury venire).

selection or Title VII case. In those cases, the statistics relate to fewer entities,[14] and fewer variables are relevant to the challenged decisions.[15]

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[14] In venire-selection cases, the factors that may be considered are limited, usually by state statute. See *Castaneda* v. *Partida*, *supra*, at 485 ("A grand juror must be a citizen of Texas and of the county, be a qualified voter in the county, be 'of sound mind and good moral character,' be literate, have no prior felony conviction, and be under no pending indictment 'or other legal accusation for theft or of any felony'"); *Turner* v. *Fouche*, *supra*, at 354 (jury commissioners may exclude any not "upright" and "intelligent" from grand jury service); *Whitus* v. *Georgia*, *supra*, at 548 (same). These considerations are uniform for all potential jurors, and although some factors may be said to be subjective, they are limited and, to a great degree, objectively verifiable. While employment decisions may involve a number of relevant variables, these variables are to a great extent uniform for all employees because they must all have a reasonable relationship to the employee's qualifications to perform the particular job at issue. Identifiable qualifications for a single job provide a common standard by which to assess each employee. In contrast, a capital sentencing jury may consider *any* factor relevant to the defendant's background, character, and the offense. See *Eddings* v. *Oklahoma*, 455 U. S. 104, 112 (1982). There is no common standard by which to evaluate all defendants who have or have not received the death penalty.

[15] We refer here not to the number of entities involved in any particular decision, but to the number of entities whose decisions necessarily are reflected in a statistical display such as the Baldus study. The decisions of a jury commission or of an employer over time are fairly attributable to the commission or the employer. Therefore, an unexplained statistical discrepancy can be said to indicate a consistent policy of the decisionmaker. The Baldus study seeks to deduce a state "policy" by studying the combined effects of the decisions of hundreds of juries that are unique in their composition. It is incomparably more difficult to deduce a consistent policy by studying the decisions of these many unique entities. It is also questionable whether any consistent policy can be derived by studying the decisions of prosecutors. The District Attorney is elected by the voters in a particular county. See Ga. Const., Art. 6, § 8, ¶ 1. Since decisions whether to prosecute and what to charge necessarily are individualized and involve infinite factual variations, coordination among district attorney offices across a State would be relatively meaningless. Thus, any inference from statewide statistics to a prosecutorial "policy" is of doubtful rele-

Another important difference between the cases in which we have accepted statistics as proof of discriminatory intent and this case is that, in the venire-selection and Title VII contexts, the decisionmaker has an opportunity to explain the statistical disparity. See *Whitus* v. *Georgia*, 385 U. S., at 552; *Texas Dept. of Community Affairs* v. *Burdine*, 450 U. S. 248, 254 (1981); *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, 802 (1973). Here, the State has no practical opportunity to rebut the Baldus study. "[C]ontrolling considerations of . . . public policy," *McDonald* v. *Pless*, 238 U. S. 264, 267 (1915), dictate that jurors "cannot be called . . . to testify to the motives and influences that led to their verdict." *Chicago, B. & Q. R. Co.* v. *Babcock*, 204 U. S. 585, 593 (1907). Similarly, the policy considerations behind a prosecutor's traditionally "wide discretion"[16] suggest the impropriety of our requiring prosecutors to defend their decisions to seek death penalties, "often years after they were made."[17] See *Imbler* v. *Pachtman*, 424 U. S. 409, 425–426 (1976).[18] Moreover, absent far stronger proof, it is unnec-

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vance. Moreover, the statistics in Fulton County alone represent the disposition of far fewer cases than the statewide statistics. Even assuming the statistical validity of the Baldus study as a whole, the weight to be given the results gleaned from this small sample is limited.

[16] See *Wayte* v. *United States*, 470 U. S. 598, 607 (1985); *United States* v. *Goodwin*, 457 U. S. 368, 380, n. 11 (1982); *Bordenkircher* v. *Hayes*, 434 U. S. 357, 365 (1978). See also ABA Standards for Criminal Justice 3–3.8, 3–3.9 (2d ed. 1982).

[17] Requiring a prosecutor to rebut a study that analyzes the past conduct of scores of prosecutors is quite different from requiring a prosecutor to rebut a contemporaneous challenge to his own acts. See *Batson* v. *Kentucky*, 476 U. S. 79 (1986).

[18] Although *Imbler* was decided in the context of damages actions under 42 U. S. C. § 1983 brought against prosecutors, the considerations that led the Court to hold that a prosecutor should not be required to explain his decisions apply in this case as well: "[I]f the prosecutor could be made to answer in court each time . . . a person charged him with wrongdoing, his energy and attention would be diverted from the pressing duty of enforcing the criminal law." 424 U. S., at 425. Our refusal to require that the prosecutor provide an explanation for his decisions in this case is completely consistent with this Court's longstanding precedents that hold that a prosecutor

essary to seek such a rebuttal, because a legitimate and unchallenged explanation for the decision is apparent from the record: McCleskey committed an act for which the United States Constitution and Georgia laws permit imposition of the death penalty.[19]

Finally, McCleskey's statistical proffer must be viewed in the context of his challenge. McCleskey challenges decisions at the heart of the State's criminal justice system. "[O]ne of society's most basic tasks is that of protecting the lives of its citizens and one of the most basic ways in which it achieves the task is through criminal laws against murder." *Gregg* v. *Georgia*, 428 U. S. 153, 226 (1976) (WHITE, J., concurring). Implementation of these laws necessarily requires discretionary judgments. Because discretion is essential to the criminal justice process, we would demand exceptionally clear proof before we would infer that the discretion has been abused. The unique nature of the decisions at issue in this case also counsels against adopting such an inference from the disparities indicated by the Baldus study. Accordingly, we hold that the Baldus study is clearly insufficient to support an inference that any of the decisionmakers in McCleskey's case acted with discriminatory purpose.

B

McCleskey also suggests that the Baldus study proves that the State as a whole has acted with a discriminatory purpose. He appears to argue that the State has violated the Equal

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need not explain his decisions unless the criminal defendant presents a prima facie case of unconstitutional conduct with respect to his case. See, *e. g.*, *Batson* v. *Kentucky*, *supra*; *Wayte* v. *United States*, *supra*.

[19] In his dissent, JUSTICE BLACKMUN misreads this statement. See *post*, at 348–349. We do not suggest that McCleskey's conviction and sentencing by a jury bears on the prosecutor's motivation. Rather, the fact that the United States Constitution and the laws of Georgia authorized the prosecutor to seek the death penalty under the circumstances of this case *is* a relevant factor to be weighed in determining whether the Baldus study demonstrates a constitutionally significant risk that this decision was motivated by racial considerations.

Protection Clause by adopting the capital punishment statute and allowing it to remain in force despite its allegedly discriminatory application. But "'[d]iscriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U. S. 256, 279 (1979) (footnote and citation omitted). See *Wayte* v. *United States*, 470 U. S., at 608–609. For this claim to prevail, McCleskey would have to prove that the Georgia Legislature enacted or maintained the death penalty statute *because of* an anticipated racially discriminatory effect. In *Gregg* v. *Georgia*, *supra*, this Court found that the Georgia capital sentencing system could operate in a fair and neutral manner. There was no evidence then, and there is none now, that the Georgia Legislature enacted the capital punishment statute to further a racially discriminatory purpose.[20]

Nor has McCleskey demonstrated that the legislature maintains the capital punishment statute because of the racially disproportionate impact suggested by the Baldus study. As legislatures necessarily have wide discretion in the choice of criminal laws and penalties, and as there were

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[20] McCleskey relies on "historical evidence" to support his claim of purposeful discrimination by the State. This evidence focuses on Georgia laws in force during and just after the Civil War. Of course, the "historical background of the decision is one evidentiary source" for proof of intentional discrimination. *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S., at 267. But unless historical evidence is reasonably contemporaneous with the challenged decision, it has little probative value. Cf. *Hunter* v. *Underwood*, 471 U. S. 222, 228–233 (1985) (relying on legislative history to demonstrate discriminatory motivation behind state statute). Although the history of racial discrimination in this country is undeniable, we cannot accept official actions taken long ago as evidence of current intent.

legitimate reasons for the Georgia Legislature to adopt and maintain capital punishment, see *Gregg* v. *Georgia*, *supra*, at 183–187 (joint opinion of Stewart, POWELL, and STEVENS, JJ.), we will not infer a discriminatory purpose on the part of the State of Georgia.[21] Accordingly, we reject McCleskey's equal protection claims.

III

McCleskey also argues that the Baldus study demonstrates that the Georgia capital sentencing system violates the Eighth Amendment.[22] We begin our analysis of this claim by reviewing the restrictions on death sentences established by our prior decisions under that Amendment.

A

The Eighth Amendment prohibits infliction of "cruel and unusual punishments." This Court's early Eighth Amendment cases examined only the "particular methods of execution to determine whether they were too cruel to pass constitutional muster." *Gregg* v. *Georgia*, *supra*, at 170. See *In re Kemmler*, 136 U. S. 436 (1890) (electrocution);

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[21] JUSTICE BLACKMUN suggests that our "reliance on legitimate interests underlying the Georgia Legislature's enactment of its capital punishment statute is . . . inappropriate [because] it has no relevance in a case dealing with a challenge to the Georgia capital sentencing system *as applied* in McCleskey's case." *Post*, at 349 (emphasis in original). As the dissent suggests, this evidence is not particularly probative when assessing the application of Georgia's capital punishment system through the actions of prosecutors and juries, as we did in Part II–A, *supra*. But that is not the challenge that we are addressing here. As indicated above, the question we are addressing is whether the legislature maintains its capital punishment statute because of the racially disproportionate impact suggested by the Baldus study. McCleskey has introduced no evidence to support this claim. It is entirely appropriate to rely on the legislature's legitimate reasons for enacting and maintaining a capital punishment statute to address a challenge to the *legislature's* intent.

[22] The Eighth Amendment applies to the States through the Due Process Clause of the Fourteenth Amendment. *Robinson* v. *California*, 370 U. S. 660, 667 (1962).

Wilkerson v. *Utah*, 99 U. S. 130 (1879) (public shooting). Subsequently, the Court recognized that the constitutional prohibition against cruel and unusual punishments "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." *Weems* v. *United States*, 217 U. S. 349, 378 (1910). In *Weems*, the Court identified a second principle inherent in the Eighth Amendment, "that punishment for crime should be graduated and proportioned to offense." *Id.*, at 367.

Chief Justice Warren, writing for the plurality in *Trop* v. *Dulles*, 356 U. S. 86, 99 (1958), acknowledged the constitutionality of capital punishment. In his view, the "basic concept underlying the Eighth Amendment" in this area is that the penalty must accord with "the dignity of man." *Id.*, at 100. In applying this mandate, we have been guided by his statement that "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Id.*, at 101. Thus, our constitutional decisions have been informed by "contemporary values concerning the infliction of a challenged sanction," *Gregg* v. *Georgia*, 428 U. S., at 173. In assessing contemporary values, we have eschewed subjective judgment, and instead have sought to ascertain "objective indicia that reflect the public attitude toward a given sanction." *Ibid.* First among these indicia are the decisions of state legislatures, "because the . . . legislative judgment weighs heavily in ascertaining" contemporary standards, *id.*, at 175. We also have been guided by the sentencing decisions of juries, because they are "a significant and reliable objective index of contemporary values," *id.*, at 181. Most of our recent decisions as to the constitutionality of the death penalty for a particular crime have rested on such an examination of contemporary values. *E. g.*, *Enmund* v. *Florida*, 458 U. S. 782, 789–796 (1982) (felony murder); *Coker* v. *Georgia*, 433 U. S. 584, 592–597 (1977) (plurality opinion of WHITE, J.) (rape); *Gregg* v. *Georgia*, *supra*, at 179–182 (murder).

B

Two principal decisions guide our resolution of McCleskey's Eighth Amendment claim. In *Furman* v. *Georgia*, 408 U. S. 238 (1972), the Court concluded that the death penalty was so irrationally imposed that any particular death sentence could be presumed excessive. Under the statutes at issue in *Furman*, there was no basis for determining in any particular case whether the penalty was proportionate to the crime: "[T]he death penalty [was] exacted with great infrequency even for the most atrocious crimes and . . . there [was] no meaningful basis for distinguishing the few cases in which it [was] imposed from the many cases in which it [was] not." *Id.*, at 313 (WHITE, J., concurring).

In *Gregg*, the Court specifically addressed the question left open in *Furman*—whether the punishment of death for murder is "under all circumstances, 'cruel and unusual' in violation of the Eighth and Fourteenth Amendments of the Constitution." 428 U. S., at 168. We noted that the imposition of the death penalty for the crime of murder "has a long history of acceptance both in the United States and in England." *Id.*, at 176 (joint opinion of Stewart, POWELL, and STEVENS, JJ.). "The most marked indication of society's endorsement of the death penalty for murder [was] the legislative response to *Furman*." *Id.*, at 179. During the 4-year period between *Furman* and *Gregg*, at least 35 States had reenacted the death penalty, and Congress had authorized the penalty for aircraft piracy. 428 U. S., at 179–180.[23] The "actions of juries" were "fully compatible with the legislative judgments." *Id.*, at 182. We noted that any punishment might be unconstitutionally severe if inflicted without penological justification, but concluded:

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[23] Thirty-seven States now have capital punishment statutes that were enacted since our decision in *Furman*. Thirty-three of these States have imposed death sentences under the new statutes. NAACP Legal Defense and Educational Fund, Death Row, U. S. A. 1 (Oct. 1, 1986). A federal statute, amended in relevant part in 1974, authorizes the death penalty for aircraft piracy in which a death occurs. 49 U. S. C. App. § 1472(i)(1)(b).

> "Considerations of federalism, as well as respect for the ability of a legislature to evaluate, in terms of its particular State, the moral consensus concerning the death penalty and its social utility as a sanction, require us to conclude, in the absence of more convincing evidence, that the infliction of death as a punishment for murder is not without justification and thus is not unconstitutionally severe." *Id.*, at 186–187.

The second question before the Court in *Gregg* was the constitutionality of the particular procedures embodied in the Georgia capital punishment statute. We explained the fundamental principle of *Furman*, that "where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." 428 U. S., at 189. Numerous features of the then new Georgia statute met the concerns articulated in *Furman*.[24] The Georgia system bifurcates guilt and sentencing proceedings so that the jury can receive all relevant information for sentencing without the risk that evidence irrelevant to the defendant's guilt will influence the jury's consideration of that issue. The statute narrows the class of murders subject to the death penalty to cases in which the jury finds at least one statutory aggravating circumstance beyond a reasonable doubt. Conversely, it allows the defendant to introduce any relevant mitigating evidence that might influence the jury not to impose a death sentence. See 428 U. S., at 163–164. The procedures also require a particularized inquiry into "'the circumstances of the offense together with the character and propensities of the offender.'" *Id.*, at 189 (quoting *Pennsylvania ex rel. Sullivan* v. *Ashe*, 302 U. S. 51, 55 (1937)). Thus, "while some jury discretion still exists, 'the

[24] We have noted that the Georgia statute generally follows the standards of the ALI Model Penal Code § 201.6 (Proposed Official Draft No. 13, 1961). *Gregg* v. *Georgia*, 428 U. S., at 194, n. 44.

discretion to be exercised is controlled by clear and objective standards so as to produce non-discriminatory application.'" 428 U. S., at 197–198 (quoting *Coley* v. *State*, 231 Ga. 829, 834, 204 S. E. 2d 612, 615 (1974)). Moreover, the Georgia system adds "an important additional safeguard against arbitrariness and caprice" in a provision for automatic appeal of a death sentence to the State Supreme Court. 428 U. S., at 198. The statute requires that court to review each sentence to determine whether it was imposed under the influence of passion or prejudice, whether the evidence supports the jury's finding of a statutory aggravating circumstance, and whether the sentence is disproportionate to sentences imposed in generally similar murder cases. To aid the court's review, the trial judge answers a questionnaire about the trial, including detailed questions as to "the quality of the defendant's representation [and] whether race played a role in the trial." *Id.*, at 167.

C

In the cases decided after *Gregg*, the Court has imposed a number of requirements on the capital sentencing process to ensure that capital sentencing decisions rest on the individualized inquiry contemplated in *Gregg*. In *Woodson* v. *North Carolina*, 428 U. S. 280 (1976), we invalidated a mandatory capital sentencing system, finding that the "respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Id.*, at 304 (plurality opinion of Stewart, POWELL, and STEVENS, JJ.) (citation omitted). Similarly, a State must "narrow the class of murderers subject to capital punishment," *Gregg* v. *Georgia*, *supra*, at 196, by providing "specific and detailed guidance" to the sentencer.[25]

[25] Although the Court has recognized that jury sentencing in a capital case "can perform an important societal function," *Proffitt* v. *Florida*, 428

Proffitt v. *Florida*, 428 U. S. 242, 253 (1976) (joint opinion of Stewart, POWELL, and STEVENS, JJ.).

In contrast to the carefully defined standards that must narrow a sentencer's discretion to *impose* the death sentence, the Constitution limits a State's ability to narrow a sentencer's discretion to consider relevant evidence that might cause it to *decline to impose* the death sentence.[26] "[T]he sentencer . . . [cannot] be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett* v. *Ohio*, 438 U. S., at 604 (plurality opinion of Burger, C. J.) (emphasis in original; footnote omitted). See *Skipper* v. *South Carolina*, 476 U. S. 1 (1986). Any exclusion of the "compassionate or mitigating factors stemming from the diverse frailties of humankind" that are relevant to the sentencer's decision would fail to treat all persons as "uniquely individual human beings." *Woodson* v. *North Carolina*, *supra*, at 304.

Although our constitutional inquiry has centered on the procedures by which a death sentence is imposed, we have not stopped at the face of a statute, but have probed the appli-

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U. S. 242, 252 (1976) (joint opinion of Stewart, POWELL, and STEVENS, JJ.) (citing *Witherspoon* v. *Illinois*, 391 U. S. 510, 519, n. 15 (1968)), it "has never suggested that jury sentencing [in a capital case] is constitutionally required." 428 U. S., at 252. Under the Florida capital punishment system at issue in *Proffitt*, the jury's verdict is only advisory. The trial judge determines the final sentence. Unlike in Georgia, a Florida trial judge may impose the death penalty even when the jury recommends otherwise. In *Proffitt*, we found that the Florida capital sentencing procedures adequately channeled the trial judge's discretion so that the Florida system, like the Georgia system, on its face "satisfie[d] the constitutional deficiencies identified in *Furman*." *Id.*, at 253.

[26] We have not yet decided whether the Constitution permits a mandatory death penalty in certain narrowly defined circumstances, such as when an inmate serving a life sentence without possibility of parole commits murder. See *Shuman* v. *Wolff*, 791 F. 2d 788 (CA9), cert. granted *sub nom. Sumner* v. *Shuman*, 479 U. S. 948 (1986).

cation of statutes to particular cases. For example, in *Godfrey* v. *Georgia*, 446 U. S. 420 (1980), the Court invalidated a Georgia Supreme Court interpretation of the statutory aggravating circumstance that the murder be "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." Ga. Code § 27–2534.1(b)(7) (1978).[27] Although that court had articulated an adequate limiting definition of this phrase, we concluded that its interpretation in *Godfrey* was so broad that it may have vitiated the role of the aggravating circumstance in guiding the sentencing jury's discretion.

Finally, where the objective indicia of community values have demonstrated a consensus that the death penalty is disproportionate as applied to a certain class of cases, we have established substantive limitations on its application. In *Coker* v. *Georgia*, 433 U. S. 584 (1977), the Court held that a State may not constitutionally sentence an individual to death for the rape of an adult woman. In *Enmund* v. *Florida*, 458 U. S. 782 (1982), the Court prohibited imposition of the death penalty on a defendant convicted of felony murder absent a showing that the defendant possessed a sufficiently culpable mental state. Most recently, in *Ford* v. *Wainwright*, 477 U. S. 399 (1986), we prohibited execution of prisoners who are insane.

D

In sum, our decisions since *Furman* have identified a constitutionally permissible range of discretion in imposing the death penalty. First, there is a required threshold below which the death penalty cannot be imposed. In this context, the State must establish rational criteria that narrow the decisionmaker's judgment as to whether the circumstances of a particular defendant's case meet the threshold. Moreover, a societal consensus that the death penalty is disproportion-

[27] This section is substantially identical to the current Georgia Code Ann. § 17–10–30(b)(7) (1982), which is reprinted in n. 3, *supra*.

ate to a particular offense prevents a State from imposing the death penalty for that offense. Second, States cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the penalty. In this respect, the State cannot channel the sentencer's discretion, but must allow it to consider any relevant information offered by the defendant.

IV

A

In light of our precedents under the Eighth Amendment, McCleskey cannot argue successfully that his sentence is "disproportionate to the crime in the traditional sense." See *Pulley* v. *Harris*, 465 U. S. 37, 43 (1984). He does not deny that he committed a murder in the course of a planned robbery, a crime for which this Court has determined that the death penalty constitutionally may be imposed. *Gregg* v. *Georgia*, 428 U. S., at 187. His disproportionality claim "is of a different sort." *Pulley* v. *Harris*, *supra*, at 43. McCleskey argues that the sentence in his case is disproportionate to the sentences in other murder cases.

On the one hand, he cannot base a constitutional claim on an argument that his case differs from other cases in which defendants *did* receive the death penalty. On automatic appeal, the Georgia Supreme Court found that McCleskey's death sentence was not disproportionate to other death sentences imposed in the State. *McCleskey* v. *State*, 245 Ga. 108, 263 S. E. 2d 146 (1980). The court supported this conclusion with an appendix containing citations to 13 cases involving generally similar murders. See Ga. Code Ann. § 17–10–35(e) (1982). Moreover, where the statutory procedures adequately channel the sentencer's discretion, such proportionality review is not constitutionally required. *Pulley* v. *Harris*, *supra*, at 50–51.

On the other hand, absent a showing that the Georgia capital punishment system operates in an arbitrary and capricious manner, McCleskey cannot prove a constitutional

violation by demonstrating that other defendants who may be similarly situated did *not* receive the death penalty. In *Gregg*, the Court confronted the argument that "the opportunities for discretionary action that are inherent in the processing of any murder case under Georgia law," 428 U. S., at 199, specifically the opportunities for discretionary leniency, rendered the capital sentences imposed arbitrary and capricious. We rejected this contention:

> "The existence of these discretionary stages is not determinative of the issues before us. At each of these stages an actor in the criminal justice system makes a decision which may remove a defendant from consideration as a candidate for the death penalty. *Furman*, in contrast, dealt with the decision to impose the death sentence on a specific individual who had been convicted of a capital offense. Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution. *Furman* held only that, in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant." *Ibid.*[28]

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[28] The Constitution is not offended by inconsistency in results based on the objective circumstances of the crime. Numerous legitimate factors may influence the outcome of a trial and a defendant's ultimate sentence, even though they may be irrelevant to his actual guilt. If sufficient evidence to link a suspect to a crime cannot be found, he will not be charged. The capability of the responsible law enforcement agency can vary widely. Also, the strength of the available evidence remains a variable throughout the criminal justice process and may influence a prosecutor's decision to offer a plea bargain or to go to trial. Witness availability, credibility, and memory also influence the results of prosecutions. Finally, sentencing in state courts is generally discretionary, so a defendant's ultimate sentence necessarily will vary according to the judgment of the sentenc-

Because McCleskey's sentence was imposed under Georgia sentencing procedures that focus discretion "on the particularized nature of the crime and the particularized characteristics of the individual defendant," *id.*, at 206, we lawfully may presume that McCleskey's death sentence was not "wantonly and freakishly" imposed, *id.*, at 207, and thus that the sentence is not disproportionate within any recognized meaning under the Eighth Amendment.

B

Although our decision in *Gregg* as to the facial validity of the Georgia capital punishment statute appears to foreclose McCleskey's disproportionality argument, he further contends that the Georgia capital punishment system is arbitrary and capricious in *application*, and therefore his sentence is excessive, because racial considerations may influence capital sentencing decisions in Georgia. We now address this claim.

To evaluate McCleskey's challenge, we must examine exactly what the Baldus study may show. Even Professor Baldus does not contend that his statistics *prove* that race enters into any capital sentencing decisions or that race was a factor in McCleskey's particular case.[29] Statistics at most may show only a likelihood that a particular factor entered into some decisions. There is, of course, some risk of racial prejudice influencing a jury's decision in a criminal case. There are similar risks that other kinds of prejudice will influence other criminal trials. See *infra*, at 315–318. The question

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ing authority. The foregoing factors necessarily exist in varying degrees throughout our criminal justice system.

[29] According to Professor Baldus:

"McCleskey's case falls in [a] grey area where . . . you would find the greatest likelihood that some inappropriate consideration may have come to bear on the decision.

"In an analysis of this type, obviously one cannot say that we can say to a moral certainty what it was that influenced the decision. We can't do that." App. 45–46.

"is at what point that risk becomes constitutionally unacceptable," *Turner* v. *Murray*, 476 U. S. 28, 36, n. 8 (1986). McCleskey asks us to accept the likelihood allegedly shown by the Baldus study as the constitutional measure of an unacceptable risk of racial prejudice influencing capital sentencing decisions. This we decline to do.

Because of the risk that the factor of race may enter the criminal justice process, we have engaged in "unceasing efforts" to eradicate racial prejudice from our criminal justice system. *Batson* v. *Kentucky*, 476 U. S. 79, 85 (1986).[30] Our efforts have been guided by our recognition that "the inestimable privilege of trial by jury . . . is a vital principle, underlying the whole administration of criminal justice," *Ex parte Milligan*, 4 Wall. 2, 123 (1866). See *Duncan* v.

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[30] This Court has repeatedly stated that prosecutorial discretion cannot be exercised on the basis of race. *Wayte* v. *United States*, 470 U. S., at 608; *United States* v. *Batchelder*, 442 U. S. 114 (1979); *Oyler* v. *Boles*, 368 U. S. 448 (1962). Nor can a prosecutor exercise peremptory challenges on the basis of race. *Batson* v. *Kentucky*, 476 U. S. 79 (1986); *Swain* v. *Alabama*, 380 U. S. 202 (1965). More generally, this Court has condemned state efforts to exclude blacks from grand and petit juries. *Vasquez* v. *Hillery*, 474 U. S. 254 (1986); *Alexander* v. *Louisiana*, 405 U. S. 625, 628–629 (1972); *Whitus* v. *Georgia*, 385 U. S., at 549–550; *Norris* v. *Alabama*, 294 U. S. 587, 589 (1935); *Neal* v. *Delaware*, 103 U. S. 370, 394 (1881); *Strauder* v. *West Virginia*, 100 U. S. 303, 308 (1880); *Ex parte Virginia*, 100 U. S. 339 (1880).

Other protections apply to the trial and jury deliberation process. Widespread bias in the community can make a change of venue constitutionally required. *Irvin* v. *Dowd*, 366 U. S. 717 (1961). The Constitution prohibits racially biased prosecutorial arguments. *Donnelly* v. *DeChristoforo*, 416 U. S. 637, 643 (1974). If the circumstances of a particular case indicate a significant likelihood that racial bias may influence a jury, the Constitution requires questioning as to such bias. *Ristaino* v. *Ross*, 424 U. S. 589, 596 (1976). Finally, in a capital sentencing hearing, a defendant convicted of an interracial murder is entitled to such questioning without regard to the circumstances of the particular case. *Turner* v. *Murray*, 476 U. S. 28 (1986).

Louisiana, 391 U. S. 145, 155 (1968).[31] Thus, it is the jury that is a criminal defendant's fundamental "protection of life and liberty against race or color prejudice." *Strauder* v. *West Virginia*, 100 U. S. 303, 309 (1880). Specifically, a capital sentencing jury representative of a criminal defendant's community assures a "'diffused impartiality,'" *Taylor* v. *Louisiana*, 419 U. S. 522, 530 (1975) (quoting *Thiel* v. *Southern Pacific Co.*, 328 U. S. 217, 227 (1946) (Frankfurter, J., dissenting)), in the jury's task of "express[ing] the conscience of the community on the ultimate question of life or death," *Witherspoon* v. *Illinois*, 391 U. S. 510, 519 (1968).[32]

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[31] In advocating the adoption of the Constitution, Alexander Hamilton stated:

"The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them, it consists in this: the former regard it as a valuable safeguard to liberty, the latter represent it as the very palladium of free government." The Federalist No. 83, p. 519 (J. Gideon ed. 1818).

[32] In *Witherspoon*, JUSTICE BRENNAN joined the opinion of the Court written by Justice Stewart. The Court invalidated a statute that permitted a prosecutor to eliminate prospective jurors by challenging all who expressed qualms about the death penalty. The Court expressly recognized that the purpose of the "broad discretion" given to a sentencing jury is "to decide whether or not death is 'the proper penalty' in a given case," noting that "a juror's general views about capital punishment play an inevitable role in any such decision." 391 U. S., at 519 (emphasis omitted). Thus, a sentencing jury must be composed of persons capable of expressing the "conscience of the community on the ultimate question of life or death." *Ibid.* The Court referred specifically to the plurality opinion of Chief Justice Warren in *Trop* v. *Dulles*, 356 U. S. 86 (1958), to the effect that it is the jury that must "maintain a link between contemporary community values and the penal system . . . ." 391 U. S., at 519, n. 15.

JUSTICE BRENNAN's condemnation of the results of the Georgia capital punishment system must be viewed against this background. As to community values and the constitutionality of capital punishment in general, we have previously noted, n. 23, *supra*, that the elected representatives of the people in 37 States and the Congress have enacted capital punishment statutes, most of which have been enacted or amended to conform generally to the *Gregg* standards, and that 33 States have imposed death sen-

Individual jurors bring to their deliberations "qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable." *Peters* v. *Kiff*, 407 U. S. 493, 503 (1972) (opinion of MARSHALL, J.). The capital sentencing decision requires the individual jurors to focus their collective judgment on the unique characteristics of a particular criminal defendant. It is not surprising that such collective judgments often are difficult to explain. But the inherent lack of predictability of jury decisions does not justify their condemnation. On the contrary, it is the jury's function to make the difficult and uniquely human judgments that defy codification and that "buil[d] discretion, equity, and flexibility into a legal system." H. Kalven & H. Zeisel, The American Jury 498 (1966).

McCleskey's argument that the Constitution condemns the discretion allowed decisionmakers in the Georgia capital sentencing system is antithetical to the fundamental role of discretion in our criminal justice system. Discretion in the criminal justice system offers substantial benefits to the criminal defendant. Not only can a jury decline to impose the death sentence, it can decline to convict or choose to convict of a lesser offense. Whereas decisions against a defendant's interest may be reversed by the trial judge or on appeal, these discretionary exercises of leniency are final and unreviewable.[33] Similarly, the capacity of prosecutorial dis-

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tences thereunder. In the individual case, a jury sentence reflects the conscience of the community as applied to the circumstances of a particular offender and offense. We reject JUSTICE BRENNAN's contention that this important standard for assessing the constitutionality of a death penalty should be abandoned.

[33] In the guilt phase of a trial, the Double Jeopardy Clause bars reprosecution after an acquittal, even if the acquittal is " 'based upon an egregiously erroneous foundation.' " *United States* v. *DiFrancesco*, 449 U. S. 117, 129 (1980) (quoting *Fong Foo* v. *United States*, 369 U. S. 141, 143 (1962)). See Powell, Jury Trial of Crimes, 23 Wash. & Lee L. Rev. 1, 7–8 (1966) (Despite the apparent injustice of such an acquittal, "[t]he founding

cretion to provide individualized justice is "firmly entrenched in American law." 2 W. LaFave & J. Israel, Criminal Procedure § 13.2(a), p. 160 (1984). As we have noted, a prosecutor can decline to charge, offer a plea bargain,[34] or decline to seek a death sentence in any particular case. See n. 28, *supra*. Of course, "the power to be lenient [also] is the power to discriminate," K. Davis, Discretionary Justice 170 (1973), but a capital punishment system that did not allow for discretionary acts of leniency "would be totally alien to our notions of criminal justice." *Gregg* v. *Georgia*, 428 U. S., at 200, n. 50.

C

At most, the Baldus study indicates a discrepancy that appears to correlate with race. Apparent disparities in sentencing are an inevitable part of our criminal justice system.[35]

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fathers, in light of history, decided that the balance here should be struck in favor of the individual").

In the penalty hearing, Georgia law provides that "unless the jury . . . recommends the death sentence in its verdict, the court shall not sentence the defendant to death." Georgia Code Ann. § 17–10–31 (1982). In *Bullington* v. *Missouri*, 451 U. S. 430 (1981), this Court held that the Double Jeopardy Clause of the Constitution prohibits a State from asking for a sentence of death at a second trial when the jury at the first trial recommended a lesser sentence.

[34] In this case, for example, McCleskey declined to enter a guilty plea. According to his trial attorney: "[T]he Prosecutor was indicating that we might be able to work out a life sentence if he were willing to enter a plea. But we never reached any concrete stage on that because Mr. McCleskey's attitude was that he didn't want to enter a plea. So it never got any further than just talking about it." Tr. in No. 4909, p. 56 (Jan. 30, 1981).

[35] Congress has acknowledged the existence of such discrepancies in criminal sentences, and in 1984 created the United States Sentencing Commission to develop sentencing guidelines. The objective of the guidelines "is to avoid *unwarranted* sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct, while maintaining sufficient flexibility to permit individualized sentencing when warranted by mitigating or aggravating factors not taken into account in the guidelines." 52 Fed. Reg. 3920 (1987) (emphasis added). No one contends that all sentencing disparities can be eliminated. The

The discrepancy indicated by the Baldus study is "a far cry from the major systemic defects identified in *Furman*," *Pulley* v. *Harris*, 465 U. S., at 54.[36] As this Court has recognized, any mode for determining guilt or punishment "has its weaknesses and the potential for misuse." *Singer* v. *United States*, 380 U. S. 24, 35 (1965). See *Bordenkircher* v. *Hayes*, 434 U. S. 357, 365 (1978). Specifically, "there can be 'no perfect procedure for deciding in which cases governmental authority should be used to impose death.'" *Zant* v. *Stephens*, 462 U. S. 862, 884 (1983) (quoting *Lockett* v. *Ohio*, 438 U. S., at 605 (plurality opinion of Burger, C. J.)). Despite these imperfections, our consistent rule has been that constitutional guarantees are met when "the mode [for determining guilt or punishment] itself has been surrounded with safeguards to make it as fair as possible." *Singer* v. *United States*, *supra*, at 35. Where the discretion that is fundamental to our criminal process is involved, we decline to assume that what is unexplained is invidious. In light of the safeguards designed to minimize racial bias in the process, the fundamental value of jury trial in our criminal justice system, and the benefits that discretion provides to criminal defendants, we hold that the Baldus study does not demonstrate a constitutionally significant risk of racial bias affecting the Georgia capital sentencing process.[37]

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guidelines, like the safeguards in the *Gregg*-type statute, further an essential need of the Anglo-American criminal justice system—to balance the desirability of a high degree of uniformity against the necessity for the exercise of discretion.

[36] The Baldus study in fact confirms that the Georgia system results in a reasonable level of proportionality among the class of murderers eligible for the death penalty. As Professor Baldus confirmed, the system sorts out cases where the sentence of death is highly likely and highly unlikely, leaving a midrange of cases where the imposition of the death penalty in any particular case is less predictable. App. 35–36. See n. 5, *supra*.

[37] JUSTICE BRENNAN's eloquent dissent of course reflects his often repeated opposition to the death sentence. His views, that also are shared by JUSTICE MARSHALL, are principled and entitled to respect. Neverthe-

V

Two additional concerns inform our decision in this case. First, McCleskey's claim, taken to its logical conclusion,

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less, since *Gregg* was decided in 1976, seven Members of this Court consistently have upheld sentences of death under *Gregg*-type statutes providing for meticulous review of each sentence in both state and federal courts. The ultimate thrust of JUSTICE BRENNAN's dissent is that *Gregg* and its progeny should be overruled. He does not, however, expressly call for the overruling of any prior decision. Rather, relying on the Baldus study, JUSTICE BRENNAN, joined by JUSTICES MARSHALL, BLACKMUN, and STEVENS, questions the very heart of our criminal justice system: the traditional discretion that prosecutors and juries necessarily must have.

We have held that discretion in a capital punishment system is necessary to satisfy the Constitution. *Woodson* v. *North Carolina*, 428 U. S. 280 (1976). See *supra*, at 303–306. Yet, the dissent now claims that the "discretion afforded prosecutors and jurors in the Georgia capital sentencing system" violates the Constitution by creating "opportunities for racial considerations to influence criminal proceedings." *Post*, at 333. The dissent contends that in Georgia "[n]o guidelines govern prosecutorial decisions . . . and [that] Georgia provides juries with no list of aggravating and mitigating factors, nor any standard for balancing them against one another." *Ibid.* Prosecutorial decisions necessarily involve both judgmental and factual decisions that vary from case to case. See ABA Standards for Criminal Justice 3–3.8, 3–3.9 (2d ed. 1982). Thus, it is difficult to imagine guidelines that would produce the predictability sought by the dissent without sacrificing the discretion essential to a humane and fair system of criminal justice. Indeed, the dissent suggests no such guidelines for prosecutorial discretion.

The reference to the failure to provide juries with the list of aggravating and mitigating factors is curious. The aggravating circumstances are set forth in detail in the Georgia statute. See n. 3, *supra*. The jury is not provided with a list of aggravating circumstances because not all of them are relevant to any particular crime. Instead, the prosecutor must choose the relevant circumstances and the State must prove to the jury that at least one exists beyond a reasonable doubt before the jury can even consider imposing the death sentence. It would be improper and often prejudicial to allow jurors to speculate as to aggravating circumstances wholly without support in the evidence.

The dissent's argument that a list of mitigating factors is required is particularly anomalous. We have held that the Constitution requires that juries be allowed to consider "any relevant mitigating factor," even if it is not

throws into serious question the principles that underlie our entire criminal justice system. The Eighth Amendment is not limited in application to capital punishment, but applies to all penalties. *Solem* v. *Helm*, 463 U. S. 277, 289–290 (1983); see *Rummel* v. *Estelle*, 445 U. S. 263, 293 (1980) (POWELL, J., dissenting). Thus, if we accepted McCleskey's claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty.[38] Moreover, the claim that his sen-

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included in a statutory list. *Eddings* v. *Oklahoma*, 455 U. S., at 112. See *Lockett* v. *Ohio*, 438 U. S. 586 (1978). The dissent does not attempt to harmonize its criticism with this constitutional principle. The dissent also does not suggest any standard, much less a workable one, for balancing aggravating and mitigating factors. If capital defendants are to be treated as "uniquely individual human beings," *Woodson* v. *North Carolina*, *supra*, at 304, then discretion to evaluate and weigh the circumstances relevant to the particular defendant and the crime he committed is essential.

The dissent repeatedly emphasizes the need for "a uniquely high degree of rationality in imposing the death penalty." *Post*, at 335. Again, no suggestion is made as to how greater "rationality" could be achieved under any type of statute that authorizes capital punishment. The *Gregg*-type statute imposes unprecedented safeguards in the special context of capital punishment. These include: (i) a bifurcated sentencing proceeding; (ii) the threshold requirement of one or more aggravating circumstances; and (iii) mandatory State Supreme Court review. All of these are administered pursuant to this Court's decisions interpreting the limits of the Eighth Amendment on the imposition of the death penalty, and all are subject to ultimate review by this Court. These ensure a degree of care in the imposition of the sentence of death that can be described only as unique. Given these safeguards already inherent in the imposition and review of capital sentences, the dissent's call for greater rationality is no less than a claim that a capital punishment system cannot be administered in accord with the Constitution. As we reiterate, *infra*, the requirement of heightened rationality in the imposition of capital punishment does not "plac[e] totally unrealistic conditions on its use." *Gregg* v. *Georgia*, 428 U. S., at 199, n. 50.

[38] Studies already exist that allegedly demonstrate a racial disparity in the length of prison sentences. See, *e. g.*, Spohn, Gruhl, & Welch, The Effect of Race on Sentencing: A Reexamination of an Unsettled Question, 16 Law & Soc. Rev. 71 (1981–1982); Unnever, Frazier, & Henretta, Race Differences in Criminal Sentencing, 21 Sociological Q. 197 (1980).

tence rests on the irrelevant factor of race easily could be extended to apply to claims based on unexplained discrepancies that correlate to membership in other minority groups,[39] and

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[39] In *Regents of the University of California* v. *Bakke*, 438 U. S. 265, 295 (1978) (opinion of POWELL, J.), we recognized that the national "majority" "is composed of various minority groups, most of which can lay claim to a history of prior discrimination at the hands of the State and private individuals." See *id.*, at 292 (citing *Strauder* v. *West Virginia*, 100 U. S., at 308 (Celtic Irishmen) (dictum); *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886) (Chinese); *Truax* v. *Raich*, 239 U. S. 33, 36, 41–42 (1915) (Austrian resident aliens); *Korematsu* v. *United States*, 323 U. S. 214, 216 (1944) (Japanese); *Hernandez* v. *Texas*, 347 U. S. 475 (1954) (Mexican-Americans)). See also Uniform Guidelines on Employee Selection Procedures (1978), 29 CFR § 1607.4(B) (1986) (employer must keep records as to the "following races and ethnic groups: Blacks, American Indians (including Alaskan Natives), Asians (including Pacific Islanders), Hispanics (including persons of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish origin or culture regardless of race), and whites (Caucasians) other than Hispanics"); U. S. Bureau of the Census, 1980 Census of the Population, Vol. 1, ch. B (PC80–1–B), reprinted in 1986 Statistical Abstract of the United States 29 (dividing United States population by "race and Spanish origin" into the following groups: White, Black, American Indian, Chinese, Filipino, Japanese, Korean, Vietnamese, Spanish origin, and all other races); U. S. Bureau of the Census, 1980 Census of the Population, Supplementary Report, series PC80–S1–10, reprinted in 1986 Statistical Abstract of the United States 34 (listing 44 ancestry groups and noting that many individuals reported themselves to belong to multiple ancestry groups).

We also have recognized that the ethnic composition of the Nation is ever shifting. *Crawford* v. *Board of Ed. of Los Angeles*, 458 U. S. 527 (1982), illustrates demographic facts that we increasingly find in our country, namely, that populations change in composition, and may do so in relatively short timespans. We noted: "In 1968 when the case went to trial, the [Los Angeles] District was 53.6% white, 22.6% black, 20% Hispanic, and 3.8% Asian and other. By October 1980, the demographic composition had altered radically: 23.7% white, 23.3% black, 45.3% Hispanic, and 7.7% Asian and other." *Id.*, at 530, n. 1. Increasingly whites are becoming a minority in many of the larger American cities. There appears to be no reason why a white defendant in such a city could not make a claim similar to McCleskey's if racial disparities in sentencing arguably are shown by a statistical study.

Finally, in our heterogeneous society the lower courts have found the boundaries of race and ethnicity increasingly difficult to determine. See

even to gender.[40] Similarly, since McCleskey's claim relates to the race of his victim, other claims could apply with equally logical force to statistical disparities that correlate with the race or sex of other actors in the criminal justice system, such as defense attorneys[41] or judges.[42] Also, there is no logical reason that such a claim need be limited to racial or sexual bias. If arbitrary and capricious punishment is the touchstone under the Eighth Amendment, such a claim could—at least in theory—be based upon any arbitrary variable, such as the defendant's facial characteristics,[43] or the physical attractiveness of the defendant or the victim,[44] that some sta-

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Shaare Tefila Congregation v. *Cobb*, 785 F. 2d 523 (CA4), cert. granted, 479 U. S. 812 (1986), and *Al-Khazraji* v. *Saint Francis College*, 784 F. 2d 505 (CA3), cert. granted, 479 U. S. 812 (1986) (argued Feb. 25, 1987) (presenting the questions whether Jews and Arabs, respectively, are "races" covered by 42 U. S. C. §§ 1981 and 1982).

[40] See Chamblin, The Effect of Sex on the Imposition of the Death Penalty (speech given at a symposium of the American Psychological Association, entitled "Extra-legal Attributes Affecting Death Penalty Sentencing," New York City, Sept., 1979); Steffensmeier, Effects of Judge's and Defendant's Sex on the Sentencing of Offenders, 14 Psychology, Journal of Human Behavior, 3 (Aug. 1977).

[41] See Johnson, Black Innocence and the White Jury, 83 Mich. L. Rev. 1611, 1625–1640, and n. 115 (1985) (citing Cohen & Peterson, Bias in the Courtroom: Race and Sex Effects of Attorneys on Juror Verdicts, 9 Social Behavior & Personality 81 (1981)); Hodgson & Pryor, Sex Discrimination in the Courtroom: Attorney's Gender and Credibility, 55 Psychological Rep. 483 (1984).

[42] See Steffensmeier, *supra*, at 7.

[43] See Kerr, Bull, MacCoun, & Rathborn, Effects of victim attractiveness, care and disfigurement on the judgements of American and British mock jurors, 24 Brit. J. Social Psych. 47 (1985); Johnson, *supra*, at 1638, n. 128 (citing Shoemaker, South, & Lowe, Facial Stereotypes of Deviants and Judgments of Guilt or Innocence, 51 Social Forces 427 (1973)).

[44] Some studies indicate that physically attractive defendants receive greater leniency in sentencing than unattractive defendants, and that offenders whose victims are physically attractive receive harsher sentences than defendants with less attractive victims. Smith & Hed, Effects of Offenders' Age and Attractiveness on Sentencing by Mock Juries, 44 Psy-

tistical study indicates may be influential in jury decision-making. As these examples illustrate, there is no limiting principle to the type of challenge brought by McCleskey.[45]

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chological Rep. 691 (1979); Kerr, Beautiful and Blameless: Effects of Victim Attractiveness and Responsibility on Mock Jurors' Verdicts, 4 Personality and Social Psych. Bull. 479 (1978). But see Baumeister & Darley, Reducing the Biasing Effect of Perpetrator Attractiveness in Jury Simulation, 8 Personality and Social Psych. Bull. 286 (1982); Schwibbe & Schwibbe, Judgment and Treatment of People of Varied Attractiveness, 48 Psychological Rep. 11 (1981); Weiten, The Attraction-Leniency Effect in Jury Research: An Examination of External Validity, 10 J. Applied Social Psych. 340 (1980).

[45] JUSTICE STEVENS, who would not overrule *Gregg*, suggests in his dissent that the infirmities alleged by McCleskey could be remedied by narrowing the class of death-eligible defendants to categories identified by the Baldus study where "prosecutors consistently seek, and juries consistently impose, the death penalty without regard to the race of the victim or the race of the offender." *Post*, at 367. This proposed solution is unconvincing. First, "consistently" is a relative term, and narrowing the category of death-eligible defendants would simply shift the borderline between those defendants who received the death penalty and those who did not. A borderline area would continue to exist and vary in its boundaries. Moreover, because the discrepancy between borderline cases would be difficult to explain, the system would likely remain open to challenge on the basis that the lack of explanation rendered the sentencing decisions unconstitutionally arbitrary.

Second, even assuming that a category with theoretically consistent results could be identified, it is difficult to imagine how JUSTICE STEVENS' proposal would or could operate on a case-by-case basis. Whenever a victim is white and the defendant is a member of a different race, what steps would a prosecutor be required to take—in addition to weighing the customary prosecutorial considerations—before concluding in the particular case that he lawfully could prosecute? In the absence of a current, Baldus-type study focused particularly on the community in which the crime was committed, where would he find a standard? Would the prosecutor have to review the prior decisions of community prosecutors and determine the types of cases in which juries in his jurisdiction "consistently" had imposed the death penalty when the victim was white and the defendant was of a different race? And must he rely solely on statistics? Even if such a study were feasible, would it be unlawful for the prosecutor, in making his

The Constitution does not require that a State eliminate any demonstrable disparity that correlates with a potentially irrelevant factor in order to operate a criminal justice system that includes capital punishment. As we have stated specifically in the context of capital punishment, the Constitution does not "plac[e] totally unrealistic conditions on its use." *Gregg* v. *Georgia*, 428 U. S., at 199, n. 50.

Second, McCleskey's arguments are best presented to the legislative bodies. It is not the responsibility—or indeed even the right—of this Court to determine the appropriate punishment for particular crimes. It is the legislatures, the elected representatives of the people, that are "constituted to respond to the will and consequently the moral values of the people." *Furman* v. *Georgia*, 408 U. S., at 383 (Burger, C. J., dissenting). Legislatures also are better qualified to weigh and "evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts," *Gregg* v. *Georgia*, *supra*, at 186. Capital punishment is now the law in more than two-thirds of our States. It is the ultimate duty of courts to determine on a case-by-case basis whether these laws are applied consistently with the Constitution. Despite McCleskey's wide-ranging arguments that basically challenge the validity of capital punishment in our multiracial society, the only question before us is whether in his case, see *supra*, at 283–285, the law of Georgia was properly applied. We agree with the District Court and the Court of Appeals for the Eleventh Circuit that this was carefully and correctly done in this case.

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final decision in a particular case, to consider the evidence of guilt and the presence of aggravating and mitigating factors? However conscientiously a prosecutor might attempt to identify death-eligible defendants under the dissent's suggestion, it would be a wholly speculative task at best, likely to result in less rather than more fairness and consistency in the imposition of the death penalty.

VI

Accordingly, we affirm the judgment of the Court of Appeals for the Eleventh Circuit.

It is so ordered.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, and with whom JUSTICE BLACKMUN and JUSTICE STEVENS join in all but Part I, dissenting.

I

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments, I would vacate the decision below insofar as it left undisturbed the death sentence imposed in this case. *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976) (BRENNAN, J., dissenting). The Court observes that "[t]he *Gregg*-type statute imposes unprecedented safeguards in the special context of capital punishment," which "ensure a degree of care in the imposition of the death penalty that can be described only as unique." *Ante*, at 315, n. 37. Notwithstanding these efforts, murder defendants in Georgia with white victims are more than four times as likely to receive the death sentence as are defendants with black victims. Petitioner's Exhibit DB 82. Nothing could convey more powerfully the intractable reality of the death penalty: "that the effort to eliminate arbitrariness in the infliction of that ultimate sanction is so plainly doomed to failure that it—and the death penalty—must be abandoned altogether." *Godfrey* v. *Georgia*, 446 U. S. 420, 442 (1980) (MARSHALL, J., concurring in judgment).

Even if I did not hold this position, however, I would reverse the Court of Appeals, for petitioner McCleskey has clearly demonstrated that his death sentence was imposed in violation of the Eighth and Fourteenth Amendments. While I join Parts I through IV–A of JUSTICE BLACKMUN's dissenting opinion discussing petitioner's Fourteenth Amendment claim, I write separately to emphasize how conclusively

McCleskey has also demonstrated precisely the type of risk of irrationality in sentencing that we have consistently condemned in our Eighth Amendment jurisprudence.

II

At some point in this case, Warren McCleskey doubtless asked his lawyer whether a jury was likely to sentence him to die. A candid reply to this question would have been disturbing. First, counsel would have to tell McCleskey that few of the details of the crime or of McCleskey's past criminal conduct were more important than the fact that his victim was white. Petitioner's Supplemental Exhibits (Supp. Exh.) 50. Furthermore, counsel would feel bound to tell McCleskey that defendants charged with killing white victims in Georgia are 4.3 times as likely to be sentenced to death as defendants charged with killing blacks. Petitioner's Exhibit DB 82. In addition, frankness would compel the disclosure that it was more likely than not that the race of McCleskey's victim would determine whether he received a death sentence: 6 of every 11 defendants convicted of killing a white person would not have received the death penalty if their victims had been black, Supp. Exh. 51, while, among defendants with aggravating and mitigating factors comparable to McCleskey's, 20 of every 34 would not have been sentenced to die if their victims had been black. *Id.*, at 54. Finally, the assessment would not be complete without the information that cases involving black defendants and white victims are more likely to result in a death sentence than cases featuring any other racial combination of defendant and victim. *Ibid.* The story could be told in a variety of ways, but McCleskey could not fail to grasp its essential narrative line: there was a significant chance that race would play a prominent role in determining if he lived or died.

The Court today holds that Warren McCleskey's sentence was constitutionally imposed. It finds no fault in a system in which lawyers must tell their clients that race casts a

large shadow on the capital sentencing process. The Court arrives at this conclusion by stating that the Baldus study cannot "*prove* that race enters into any capital sentencing decisions or that race was a factor in McCleskey's particular case." *Ante*, at 308 (emphasis in original). Since, according to Professor Baldus, we cannot say "to a moral certainty" that race influenced a decision, *ante*, at 308, n. 29, we can identify only "a likelihood that a particular factor entered into some decisions," *ante*, at 308, and "a discrepancy that appears to correlate with race." *Ante*, at 312. This "likelihood" and "discrepancy," holds the Court, is insufficient to establish a constitutional violation. The Court reaches this conclusion by placing four factors on the scales opposite McCleskey's evidence: the desire to encourage sentencing discretion, the existence of "statutory safeguards" in the Georgia scheme, the fear of encouraging widespread challenges to other sentencing decisions, and the limits of the judicial role. The Court's evaluation of the significance of petitioner's evidence is fundamentally at odds with our consistent concern for rationality in capital sentencing, and the considerations that the majority invokes to discount that evidence cannot justify ignoring its force.

III

A

It is important to emphasize at the outset that the Court's observation that McCleskey cannot prove the influence of race on any particular sentencing decision is irrelevant in evaluating his Eighth Amendment claim. Since *Furman* v. *Georgia*, 408 U. S. 238 (1972), the Court has been concerned with the *risk* of the imposition of an arbitrary sentence, rather than the proven fact of one. *Furman* held that the death penalty "may not be imposed under sentencing procedures that create a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner." *Godfrey* v. *Georgia*, *supra*, at 427. As JUSTICE O'CONNOR observed

in *Caldwell* v. *Mississippi*, 472 U. S. 320, 343 (1985), a death sentence must be struck down when the circumstances under which it has been imposed "creat[e] an unacceptable *risk* that 'the death penalty [may have been] meted out arbitrarily or capriciously' or through 'whim or mistake'" (emphasis added) (quoting *California* v. *Ramos*, 463 U. S. 992, 999 (1983)). This emphasis on risk acknowledges the difficulty of divining the jury's motivation in an individual case. In addition, it reflects the fact that concern for arbitrariness focuses on the rationality of the system as a whole, and that a system that features a significant probability that sentencing decisions are influenced by impermissible considerations cannot be regarded as rational.[1] As we said in *Gregg* v. *Georgia*, 428 U. S., at 200, "the petitioner looks to the sentencing system as a whole (as the Court did in *Furman* and we do today)": a constitutional violation is established if a plaintiff demonstrates a "*pattern* of arbitrary and capricious sentencing." *Id.*, at 195, n. 46 (emphasis added) (joint opinion of Stewart, POWELL, and STEVENS, JJ.).

As a result, our inquiry under the Eighth Amendment has not been directed to the validity of the individual sentences before us. In *Godfrey*, for instance, the Court struck down the petitioner's sentence because the vagueness of the statutory definition of heinous crimes created a *risk* that prejudice

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[1] Once we can identify a pattern of arbitrary sentencing outcomes, we can say that a defendant runs a risk of being sentenced arbitrarily. It is thus immaterial whether the operation of an impermissible influence such as race is intentional. While the Equal Protection Clause forbids racial discrimination, and intent may be critical in a successful claim under that provision, the Eighth Amendment has its own distinct focus: whether punishment comports with social standards of rationality and decency. It may be, as in this case, that on occasion an influence that makes punishment arbitrary is also proscribed under another constitutional provision. That does not mean, however, that the standard for determining an Eighth Amendment violation is superseded by the standard for determining a violation under this other provision. Thus, the fact that McCleskey presents a viable equal protection claim does not require that he demonstrate intentional racial discrimination to establish his Eighth Amendment claim.

or other impermissible influences *might have infected* the sentencing decision. In vacating the sentence, we did not ask whether it was likely that Godfrey's own sentence reflected the operation of irrational considerations. Nor did we demand a demonstration that such considerations had actually entered into other sentencing decisions involving heinous crimes. Similarly, in *Roberts* v. *Louisiana*, 428 U. S. 325 (1976), and *Woodson* v. *North Carolina*, 428 U. S. 280 (1976), we struck down death sentences in part because mandatory imposition of the death penalty created the *risk* that a jury *might* rely on arbitrary considerations in deciding which persons should be convicted of capital crimes. Such a risk would arise, we said, because of the likelihood that jurors reluctant to impose capital punishment on a particular defendant would refuse to return a conviction, so that the effect of mandatory sentencing would be to recreate the unbounded sentencing discretion condemned in *Furman*. *Roberts*, *supra*, at 334–335 (plurality opinion); *Woodson*, *supra*, at 303 (plurality opinion). We did not ask whether the death sentences in the cases before us could have reflected the jury's rational consideration and rejection of mitigating factors. Nor did we require proof that juries had actually acted irrationally in other cases.

Defendants challenging their death sentences thus never have had to prove that impermissible considerations have actually infected sentencing decisions. We have required instead that they establish that the system under which they were sentenced posed a significant risk of such an occurrence. McCleskey's claim does differ, however, in one respect from these earlier cases: it is the first to base a challenge not on speculation about how a system *might* operate, but on empirical documentation of how it *does* operate.

The Court assumes the statistical validity of the Baldus study, and acknowledges that McCleskey has demonstrated a risk that racial prejudice plays a role in capital sentencing in Georgia, *ante*, at 291, n. 7. Nonetheless, it finds the probability of prejudice insufficient to create constitutional con-

cern. *Ante*, at 313. Close analysis of the Baldus study, however, in light of both statistical principles and human experience, reveals that the risk that race influenced McCleskey's sentence is intolerable by any imaginable standard.

B

The Baldus study indicates that, after taking into account some 230 nonracial factors that might legitimately influence a sentencer, the jury *more likely than not* would have spared McCleskey's life had his victim been black. The study distinguishes between those cases in which (1) the jury exercises virtually no discretion because the strength or weakness of aggravating factors usually suggests that only one outcome is appropriate;[2] and (2) cases reflecting an "intermediate" level of aggravation, in which the jury has considerable discretion in choosing a sentence.[3] McCleskey's case falls into the intermediate range. In such cases, death is imposed in 34% of white-victim crimes and 14% of black-victim crimes, a difference of 139% in the rate of imposition of the death penalty. Supp. Exh. 54. In other words, just under 59%—almost 6 in 10—defendants comparable to McCleskey would not have received the death penalty if their victims had been black.[4]

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[2] The first two and the last of the study's eight case categories represent those cases in which the jury typically sees little leeway in deciding on a sentence. Cases in the first two categories are those that feature aggravating factors so minimal that juries imposed no death sentences in the 88 cases with these factors during the period of the study. Supp. Exh. 54. Cases in the eighth category feature aggravating factors so extreme that the jury imposed the death penalty in 88% of the 58 cases with these factors in the same period. *Ibid.*

[3] In the five categories characterized as intermediate, the rate at which the death penalty was imposed ranged from 8% to 41%. The overall rate for the 326 cases in these categories was 20%. *Ibid.*

[4] The considerable racial disparity in sentencing rates among these cases is consistent with the "liberation hypothesis" of H. Kalven and H. Zeisel in their landmark work, The American Jury (1966). These authors found

Furthermore, even examination of the sentencing system as a whole, factoring in those cases in which the jury exercises little discretion, indicates the influence of race on capital sentencing. For the Georgia system as a whole, race accounts for a six percentage point difference in the rate at which capital punishment is imposed. Since death is imposed in 11% of all white-victim cases, the rate in comparably aggravated black-victim cases is 5%. The rate of capital sentencing in a white-victim case is thus 120% greater than the rate in a black-victim case. Put another way, over half—55%—of defendants in white-victim crimes in Georgia would not have been sentenced to die if their victims had been black. Of the more than 200 variables potentially relevant to a sentencing decision, race of the victim is a powerful explanation for variation in death sentence rates—as powerful as nonracial aggravating factors such as a prior murder conviction or acting as the principal planner of the homicide.[5]

These adjusted figures are only the most conservative indication of the risk that race will influence the death sentences of defendants in Georgia. Data unadjusted for the mitigating or aggravating effect of other factors show an even more pronounced disparity by race. The capital sentencing rate for all white-victim cases was almost *11 times* greater than

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that, in close cases in which jurors were most often in disagreement, "[t]he closeness of the evidence makes it possible for the jury to respond to sentiment by *liberating it* from the discipline of the evidence." *Id.*, at 165. While "the jury does not often consciously and explicitly yield to sentiment in the teeth of the law . . . it yields to sentiment in the apparent process of resolving doubts as to evidence. The jury, therefore, is able to conduct its revolt from the law within the etiquette of resolving issues of fact." *Ibid.* Thus, it is those cases in which sentencing evidence seems to dictate neither life imprisonment nor the death penalty that impermissible factors such as race play the most prominent role.

[5] The fact that a victim was white accounts for a nine percentage point difference in the rate at which the death penalty is imposed, which is the same difference attributable to a prior murder conviction or the fact that the defendant was the "prime mover" in planning a murder. Supp. Exh. 50.

the rate for black-victim cases. Supp. Exh. 47. Furthermore, blacks who kill whites are sentenced to death at nearly *22 times* the rate of blacks who kill blacks, and more than *7 times* the rate of whites who kill blacks. *Ibid.* In addition, prosecutors seek the death penalty for 70% of black defendants with white victims, but for only 15% of black defendants with black victims, and only 19% of white defendants with black victims. *Id.*, at 56. Since our decision upholding the Georgia capital sentencing system in *Gregg*, the State has executed seven persons. All of the seven were convicted of killing whites, and six of the seven executed were black.[6] Such execution figures are especially striking in light of the fact that, during the period encompassed by the Baldus study, only 9.2% of Georgia homicides involved black defendants and white victims, while 60.7% involved black victims.

McCleskey's statistics have particular force because most of them are the product of sophisticated multiple-regression analysis. Such analysis is designed precisely to identify patterns in the aggregate, even though we may not be able to reconstitute with certainty any individual decision that goes to make up that pattern. Multiple-regression analysis is particularly well suited to identify the influence of impermissible considerations in sentencing, since it is able to control for permissible factors that may explain an apparent arbitrary pattern.[7] While the decisionmaking process of a body such as a jury may be complex, the Baldus study provides a massive compilation of the details that are most relevant to that decision. As we held in the context of Title VII of the Civil Rights Act of 1964 last Term in *Bazemore* v. *Friday*, 478 U. S. 385 (1986), a multiple-regression analysis need not include every conceivable variable to establish a party's case, as long as it includes those variables that account for the

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[6] NAACP Legal Defense and Educational Fund, Death Row, U. S. A. 4 (Aug. 1, 1986).

[7] See generally Fisher, Multiple Regression in Legal Proceedings, 80 Colum. L. Rev. 701 (1980).

major factors that are likely to influence decisions. In this case, Professor Baldus in fact conducted additional regression analyses in response to criticisms and suggestions by the District Court, all of which confirmed, and some of which even strengthened, the study's original conclusions.

The statistical evidence in this case thus relentlessly documents the risk that McCleskey's sentence was influenced by racial considerations. This evidence shows that there is a better than even chance in Georgia that race will influence the decision to impose the death penalty: a majority of defendants in white-victim crimes would not have been sentenced to die if their victims had been black. In determining whether this risk is acceptable, our judgment must be shaped by the awareness that "[t]he risk of racial prejudice infecting a capital sentencing proceeding is especially serious in light of the complete finality of the death sentence," *Turner* v. *Murray*, 476 U. S. 28, 35 (1986), and that "[i]t is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion," *Gardner* v. *Florida*, 430 U. S. 349, 358 (1977). In determining the guilt of a defendant, a State must prove its case beyond a reasonable doubt. That is, we refuse to convict if the chance of error is simply less likely than not. Surely, we should not be willing to take a person's life if the chance that his death sentence was irrationally imposed is *more* likely than not. In light of the gravity of the interest at stake, petitioner's statistics on their face are a powerful demonstration of the type of risk that our Eighth Amendment jurisprudence has consistently condemned.

C

Evaluation of McCleskey's evidence cannot rest solely on the numbers themselves. We must also ask whether the conclusion suggested by those numbers is consonant with our understanding of history and human experience. Georgia's legacy of a race-conscious criminal justice system, as well as

this Court's own recognition of the persistent danger that racial attitudes may affect criminal proceedings, indicates that McCleskey's claim is not a fanciful product of mere statistical artifice.

For many years, Georgia operated openly and formally precisely the type of dual system the evidence shows is still effectively in place. The criminal law expressly differentiated between crimes committed by and against blacks and whites, distinctions whose lineage traced back to the time of slavery. During the colonial period, black slaves who killed whites in Georgia, regardless of whether in self-defense or in defense of another, were automatically executed. A. Higginbotham, In the Matter of Color: Race in the American Legal Process 256 (1978).[8]

By the time of the Civil War, a dual system of crime and punishment was well established in Georgia. See Ga. Penal Code (1861). The state criminal code contained separate sections for "Slaves and Free Persons of Color," Pt. 4, Tit. 3, Ch. 1, and for all other persons, Pt. 4, Tit. 1, Divs. 1–16. The code provided, for instance, for an automatic death sentence for murder committed by blacks, Pt. 4, Tit. 1, Art. II, § 4704, but declared that anyone else convicted of murder might receive life imprisonment if the conviction were founded solely on circumstantial testimony *or* simply if the jury so recommended. Pt. 4, Tit. 1, Div. 4, § 4220. The code established that the rape of a free white female by a black "shall be" punishable by death. § 4704. However, rape by anyone else of a free white female was punishable by

[8] Death could also be inflicted upon a slave who "grievously wound[ed], maim[ed], or bruis[ed] any white person," who was convicted for the third time of striking a white person, or who attempted to run away out of the province. A. Higginbotham, In the Matter of Color: Race in the American Legal Process 256 (1978). On the other hand, a person who willfully murdered a slave was not punished until the second offense, and then was responsible simply for restitution to the slave owner. Furthermore, conviction for willful murder of a slave was subject to the difficult requirement of the oath of two white witnesses. *Id.*, at 253–254, and n. 190.

a prison term not less than 2 nor more than 20 years. The rape of *blacks* was punishable "by fine and imprisonment, at the discretion of the court." § 4249. A black convicted of assaulting a free white person with intent to murder could be put to death at the discretion of the court, § 4708, but the same offense committed against a black, slave or free, was classified as a "minor" offense whose punishment lay in the discretion of the court, as long as such punishment did not "extend to life, limb, or health." Art. III, §§ 4714, 4718. Assault with intent to murder by a white person was punishable by a prison term of from 2 to 10 years. Div. 4, § 4258. While sufficient provocation could reduce a charge of murder to manslaughter, the code provided that "[o]bedience and submission being the duty of a slave, much greater provocation is necessary to reduce a homicide of a white person by him to voluntary manslaughter, than is prescribed for white persons." Art. II, § 4711.

In more recent times, some 40 years ago, Gunnar Myrdal's epochal study of American race relations produced findings mirroring McCleskey's evidence:

> "As long as only Negroes are concerned and no whites are disturbed, great leniency will be shown in most cases . . . . The sentences for even major crimes are ordinarily reduced when the victim is another Negro.
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> . . . . .
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> "For offenses which involve any actual or potential danger to whites, however, Negroes are punished more severely than whites.
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> . . . . .
>
> "On the other hand, it is quite common for a white criminal to be set free if his crime was against a Negro." G. Myrdal, An American Dilemma 551–553 (1944).

This Court has invalidated portions of the Georgia capital sentencing system three times over the past 15 years. The specter of race discrimination was acknowledged by the Court in striking down the Georgia death penalty statute in *Furman*.

Justice Douglas cited studies suggesting imposition of the death penalty in racially discriminatory fashion, and found the standardless statutes before the Court "pregnant with discrimination." 408 U. S., at 257 (concurring opinion). JUSTICE MARSHALL pointed to statistics indicating that "Negroes [have been] executed far more often than whites in proportion to their percentage of the population. Studies indicate that while the higher rate of execution among Negroes is partially due to a higher rate of crime, there is evidence of racial discrimination." *Id.*, at 364 (concurring opinion). Although Justice Stewart declined to conclude that racial discrimination had been plainly proved, he stated that "[m]y concurring Brothers have demonstrated that, if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race." *Id.*, at 310 (concurring opinion). In dissent, Chief Justice Burger acknowledged that statistics "suggest, at least as a historical matter, that Negroes have been sentenced to death with greater frequency than whites in several States, particularly for the crime of interracial rape." *Id.*, at 289, n. 12. Finally, also in dissent, JUSTICE POWELL intimated that an Equal Protection Clause argument would be available for a black "who could demonstrate that members of his race were being singled out for more severe punishment than others charged with the same offense." *Id.*, at 449. He noted that although the Eighth Circuit had rejected a claim of discrimination in *Maxwell* v. *Bishop*, 398 F. 2d 138 (1968), vacated and remanded on other grounds, 398 U. S. 262 (1970), the statistical evidence in that case "tend[ed] to show a pronounced disproportion in the number of Negroes receiving death sentences for rape in parts of Arkansas and elsewhere in the South." 408 U. S., at 449. It is clear that the Court regarded the opportunity for the operation of racial prejudice a particularly troublesome aspect of the unbounded discretion afforded by the Georgia sentencing scheme.

Five years later, the Court struck down the imposition of the death penalty in Georgia for the crime of rape. *Coker* v. *Georgia*, 433 U. S. 584 (1977). Although the Court did not explicitly mention race, the decision had to have been informed by the specific observations on rape by both the Chief Justice and JUSTICE POWELL in *Furman*. Furthermore, evidence submitted to the Court indicated that black men who committed rape, particularly of white women, were considerably more likely to be sentenced to death than white rapists. For instance, by 1977 Georgia had executed 62 men for rape since the Federal Government began compiling statistics in 1930. Of these men, 58 were black and 4 were white. See Brief for Petitioner in *Coker* v. *Georgia*, O. T. 1976, No. 75–5444, p. 56; see also Wolfgang & Riedel, Rape, Race, and the Death Penalty in Georgia, 45 Am. J. Orthopsychiatry 658 (1975).

Three years later, the Court in *Godfrey* found one of the State's statutory aggravating factors unconstitutionally vague, since it resulted in "standardless and unchanneled imposition of death sentences in the uncontrolled discretion of a basically uninstructed jury . . . ." 446 U. S., at 429. JUSTICE MARSHALL, concurring in the judgment, noted that "[t]he disgraceful distorting effects of racial discrimination and poverty continue to be painfully visible in the imposition of death sentences." *Id.*, at 439 (footnote omitted).

This historical review of Georgia criminal law is not intended as a bill of indictment calling the State to account for past transgressions. Citation of past practices does not justify the automatic condemnation of current ones. But it would be unrealistic to ignore the influence of history in assessing the plausible implications of McCleskey's evidence. "[A]mericans share a historical experience that has resulted in individuals within the culture ubiquitously attaching a significance to race that is irrational and often outside their awareness." Lawrence, The Id, The Ego, and Equal Protection: Reckoning With Unconscious Racism, 39 Stan. L.

Rev. 327 (1987). See generally *id.*, at 328–344 (describing the psychological dynamics of unconscious racial motivation). As we said in *Rose* v. *Mitchell*, 443 U. S. 545, 558–559 (1979):

> "[W]e . . . cannot deny that, 114 years after the close of the War Between the States and nearly 100 years after *Strauder*, racial and other forms of discrimination still remain a fact of life, in the administration of justice as in our society as a whole. Perhaps today that discrimination takes a form more subtle than before. But it is not less real or pernicious."

The ongoing influence of history is acknowledged, as the majority observes, by our "'unceasing efforts' to eradicate racial prejudice from our criminal justice system." *Ante*, at 309 (quoting *Batson* v. *Kentucky*, 476 U. S. 79, 85 (1986)). These efforts, however, signify not the elimination of the problem but its persistence. Our cases reflect a realization of the myriad of opportunities for racial considerations to influence criminal proceedings: in the exercise of peremptory challenges, *Batson* v. *Kentucky*, *supra;* in the selection of the grand jury, *Vasquez* v. *Hillery*, 474 U. S. 254 (1986); in the selection of the petit jury, *Whitus* v. *Georgia*, 385 U. S. 545 (1967); in the exercise of prosecutorial discretion, *Wayte* v. *United States*, 470 U. S. 598 (1985); in the conduct of argument, *Donnelly* v. *DeChristoforo*, 416 U. S. 637 (1974); and in the conscious or unconscious bias of jurors, *Turner* v. *Murray*, 476 U. S. 28 (1986), *Ristaino* v. *Ross*, 424 U. S. 589 (1976).

The discretion afforded prosecutors and jurors in the Georgia capital sentencing system creates such opportunities. No guidelines govern prosecutorial decisions to seek the death penalty, and Georgia provides juries with no list of aggravating and mitigating factors, nor any standard for balancing them against one another. Once a jury identifies one aggravating factor, it has complete discretion in choosing life or death, and need not articulate its basis for selecting life imprisonment. The Georgia sentencing system there-

fore provides considerable opportunity for racial considerations, however subtle and unconscious, to influence charging and sentencing decisions.[9]

History and its continuing legacy thus buttress the probative force of McCleskey's statistics. Formal dual criminal laws may no longer be in effect, and intentional discrimination may no longer be prominent. Nonetheless, as we acknowledged in *Turner*, "subtle, less consciously held racial attitudes" continue to be of concern, 476 U. S., at 35, and the Georgia system gives such attitudes considerable room to operate. The conclusions drawn from McCleskey's statistical evidence are therefore consistent with the lessons of social experience.

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[9] The Court contends that it is inappropriate to take into account the wide latitude afforded actors in the Georgia capital sentencing system, since "[w]e have held that discretion in a capital punishment system is necessary to satisfy the Constitution," *ante*, at 314, n. 37, and "no suggestion is made as to how greater 'rationality' could be achieved under any type of statute that authorizes capital punishment." *Ibid.* The first point is true, but of course the Court struck down the death penalty in *Furman* v. *Georgia*, 408 U. S. 238 (1972), because the sentencing systems before it provided *too much* discretion. Since *Gregg* v. *Georgia*, 428 U. S. 153 (1976), the Court's death penalty jurisprudence has rested on the premise that it is possible to establish a system of *guided discretion* that will both permit individualized moral evaluation and prevent impermissible considerations from being taken into account. As JUSTICE BLACKMUN has persuasively demonstrated, *post*, at 357–358, Georgia provides *no* systematic guidelines for prosecutors to utilize in determining for which defendants the death penalty should be sought. Furthermore, whether a State has chosen an effective combination of guidance and discretion in its capital sentencing system as a whole cannot be established in the abstract, as the Court insists on doing, but must be determined empirically, as the Baldus study has done.

With respect to the Court's criticism that McCleskey has not shown how Georgia could do a better job, *ante*, at 315, n. 37, once it is established that the particular system of guided discretion chosen by a State is not achieving its intended purpose, the burden is on the *State*, not the defendant, to devise a more rational system if it wishes to continue to impose the death penalty.

The majority thus misreads our Eighth Amendment jurisprudence in concluding that McCleskey has not demonstrated a degree of risk sufficient to raise constitutional concern. The determination of the significance of his evidence is at its core an exercise in human moral judgment, not a mechanical statistical analysis. It must first and foremost be informed by awareness of the fact that death is irrevocable, and that as a result "the qualitative difference of death from all other punishments requires a greater degree of scrutiny of the capital sentencing determination." *California* v. *Ramos*, 463 U. S., at 998–999. For this reason, we have demanded a uniquely high degree of rationality in imposing the death penalty. A capital sentencing system in which race more likely than not plays a role does not meet this standard. It is true that every nuance of decision cannot be statistically captured, nor can any individual judgment be plumbed with absolute certainty. Yet the fact that we must always act without the illumination of complete knowledge cannot induce paralysis when we confront what is literally an issue of life and death. Sentencing data, history, and experience all counsel that Georgia has provided insufficient assurance of the heightened rationality we have required in order to take a human life.

IV

The Court cites four reasons for shrinking from the implications of McCleskey's evidence: the desirability of discretion for actors in the criminal justice system, the existence of statutory safeguards against abuse of that discretion, the potential consequences for broader challenges to criminal sentencing, and an understanding of the contours of the judicial role. While these concerns underscore the need for sober deliberation, they do not justify rejecting evidence as convincing as McCleskey has presented.

The Court maintains that petitioner's claim "is antithetical to the fundamental role of discretion in our criminal justice

system." *Ante*, at 311. It states that "[w]here the discretion that is fundamental to our criminal process is involved, we decline to assume that what is unexplained is invidious." *Ante*, at 313.

Reliance on race in imposing capital punishment, however, is antithetical to the very rationale for granting sentencing discretion. Discretion is a means, not an end. It is bestowed in order to permit the sentencer to "trea[t] each defendant in a capital case with that degree of respect due the uniqueness of the individual." *Lockett* v. *Ohio*, 438 U. S. 586, 605 (1978). The decision to impose the punishment of death must be based on a "particularized consideration of relevant aspects of the character and record of each convicted defendant." *Woodson* v. *North Carolina*, 428 U. S., at 303. Failure to conduct such an individualized moral inquiry "treats all persons convicted of a designated offense not as unique individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death." *Id.*, at 304.

Considering the race of a defendant or victim in deciding if the death penalty should be imposed is completely at odds with this concern that an individual be evaluated as a unique human being. Decisions influenced by race rest in part on a categorical assessment of the worth of human beings according to color, insensitive to whatever qualities the individuals in question may possess. Enhanced willingness to impose the death sentence on black defendants, or diminished willingness to render such a sentence when blacks are victims, reflects a devaluation of the lives of black persons. When confronted with evidence that race more likely than not plays such a role in a capital sentencing system, it is plainly insufficient to say that the importance of discretion demands that the risk be higher before we will act—for in such a case the very end that discretion is designed to serve is being undermined.

Our desire for individualized moral judgments may lead us to accept some inconsistencies in sentencing outcomes. Since such decisions are not reducible to mathematical formulae, we are willing to assume that a certain degree of variation reflects the fact that no two defendants are completely alike. There is thus a presumption that actors in the criminal justice system exercise their discretion in responsible fashion, and we do not automatically infer that sentencing patterns that do not comport with ideal rationality are suspect.

As we made clear in *Batson* v. *Kentucky*, 476 U. S. 79 (1986), however, that presumption is rebuttable. *Batson* dealt with another arena in which considerable discretion traditionally has been afforded, the exercise of peremptory challenges. Those challenges are normally exercised without any indication whatsoever of the grounds for doing so. The rationale for this deference has been a belief that the unique characteristics of particular prospective jurors may raise concern on the part of the prosecution or defense, despite the fact that counsel may not be able to articulate that concern in a manner sufficient to support exclusion for cause. As with sentencing, therefore, peremptory challenges are justified as an occasion for particularized determinations related to specific individuals, and, as with sentencing, we presume that such challenges normally are not made on the basis of a factor such as race. As we said in *Batson*, however, such features do not justify imposing a "crippling burden of proof," *id.*, at 92, in order to rebut that presumption. The Court in this case apparently seeks to do just that. On the basis of the need for individualized decisions, it rejects evidence, drawn from the most sophisticated capital sentencing analysis ever performed, that reveals that race more likely than not infects capital sentencing decisions. The Court's position converts a rebuttable presumption into a virtually conclusive one.

The Court also declines to find McCleskey's evidence sufficient in view of "the safeguards designed to minimize racial bias in the [capital sentencing] process." *Ante*, at 313. *Gregg* v. *Georgia*, 428 U. S., at 226, upheld the Georgia capital sentencing statute against a facial challenge which JUSTICE WHITE described in his concurring opinion as based on "simply an assertion of lack of faith" that the system could operate in a fair manner (opinion concurring in judgment). JUSTICE WHITE observed that the claim that prosecutors might act in an arbitrary fashion was "unsupported by any facts," and that prosecutors must be assumed to exercise their charging duties properly "[a]bsent facts to the contrary." *Id.*, at 225. It is clear that *Gregg* bestowed no permanent approval on the Georgia system. It simply held that the State's statutory safeguards were assumed sufficient to channel discretion without evidence otherwise.

It has now been over 13 years since Georgia adopted the provisions upheld in *Gregg*. Professor Baldus and his colleagues have compiled data on almost 2,500 homicides committed during the period 1973–1979. They have taken into account the influence of 230 nonracial variables, using a multitude of data from the State itself, and have produced striking evidence that the odds of being sentenced to death are significantly greater than average if a defendant is black or his or her victim is white. The challenge to the Georgia system is not speculative or theoretical; it is empirical. As a result, the Court cannot rely on the statutory safeguards in discounting McCleskey's evidence, for it is the very effectiveness of those safeguards that such evidence calls into question. While we may hope that a model of procedural fairness will curb the influence of race on sentencing, "we cannot simply assume that the model works as intended; we must critique its performance in terms of its results." Hubbard, "Reasonable Levels of Arbitrariness" in Death Sentencing Patterns: A Tragic Perspective on Capital Punishment, 18 U. C. D. L. Rev. 1113, 1162 (1985).

The Court next states that its unwillingness to regard petitioner's evidence as sufficient is based in part on the fear that recognition of McCleskey's claim would open the door to widespread challenges to all aspects of criminal sentencing. *Ante*, at 314–315. Taken on its face, such a statement seems to suggest a fear of too much justice. Yet surely the majority would acknowledge that if striking evidence indicated that other minority groups, or women, or even persons with blond hair, were disproportionately sentenced to death, such a state of affairs would be repugnant to deeply rooted conceptions of fairness. The prospect that there may be more widespread abuse than McCleskey documents may be dismaying, but it does not justify complete abdication of our judicial role. The Constitution was framed fundamentally as a bulwark against governmental power, and preventing the arbitrary administration of punishment is a basic ideal of any society that purports to be governed by the rule of law.[10]

In fairness, the Court's fear that McCleskey's claim is an invitation to descend a slippery slope also rests on the realization that any humanly imposed system of penalties will exhibit some imperfection. Yet to reject McCleskey's powerful evidence on this basis is to ignore both the qualitatively different character of the death penalty and the particular repugnance of racial discrimination, considerations which may

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[10] As Maitland said of the provision of the Magna Carta regulating the discretionary imposition of fines, "[v]ery likely there was no clause in Magna Carta more grateful to the mass of the people." F. Maitland, Pleas of the Crown For the County of Gloucester xxxiv (1884). In our own country, the point is underscored by Patrick Henry's remarks in support of the adoption of a Bill of Rights:

"Congress, from their general powers, may fully go into business of human legislation. They may legislate, in criminal cases, from treason to the lowest offence—petty larceny. They may define crimes and prescribe punishments. In the definition of crimes, I trust they will be directed by what wise representatives ought to be governed by. But when we come to punishments, no latitude ought to be left, nor dependence put on the virtue of representatives." 3 J. Elliot's Debates on the Constitution 447 (1854).

properly be taken into account in determining whether various punishments are "cruel and unusual." Furthermore, it fails to take account of the unprecedented refinement and strength of the Baldus study.

It hardly needs reiteration that this Court has consistently acknowledged the uniqueness of the punishment of death. "Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment." *Woodson*, 428 U. S., at 305. Furthermore, the relative interests of the state and the defendant differ dramatically in the death penalty context. The marginal benefits accruing to the state from obtaining the death penalty rather than life imprisonment are considerably less than the marginal difference to the defendant between death and life in prison. Such a disparity is an additional reason for tolerating scant arbitrariness in capital sentencing. Even those who believe that society can impose the death penalty in a manner sufficiently rational to justify its continuation must acknowledge that the level of rationality that *is* considered satisfactory must be *uniquely* high. As a result, the degree of arbitrariness that may be adequate to render the death penalty "cruel and unusual" punishment may not be adequate to invalidate lesser penalties. What these relative degrees of arbitrariness might be in other cases need not concern us here; the point is that the majority's fear of wholesale invalidation of criminal sentences is unfounded.

The Court also maintains that accepting McCleskey's claim would pose a threat to all sentencing because of the prospect that a correlation might be demonstrated between sentencing outcomes and other personal characteristics. Again, such a view is indifferent to the considerations that enter into a determination whether punishment is "cruel and unusual." Race is a consideration whose influence is expressly constitu-

tionally proscribed. We have expressed a moral commitment, as embodied in our fundamental law, that this specific characteristic should not be the basis for allotting burdens and benefits. Three constitutional amendments, and numerous statutes, have been prompted specifically by the desire to address the effects of racism. "Over the years, this Court has consistently repudiated '[d]istinctions between citizens solely because of their ancestry' as being 'odious to a free people whose institutions are founded upon the doctrine of equality.'" *Loving* v. *Virginia*, 388 U. S. 1, 11 (1967) (quoting *Hirabayashi* v. *United States*, 320 U. S. 81, 100 (1943)). Furthermore, we have explicitly acknowledged the illegitimacy of race as a consideration in capital sentencing, *Zant* v. *Stephens*, 462 U. S. 862, 885 (1983). That a decision to impose the death penalty could be influenced by *race* is thus a particularly repugnant prospect, and evidence that race may play even a modest role in levying a death sentence should be enough to characterize that sentence as "cruel and unusual."

Certainly, a factor that we would regard as morally irrelevant, such as hair color, at least theoretically could be associated with sentencing results to such an extent that we would regard as arbitrary a system in which that factor played a significant role. As I have said above, however, *supra*, at 328–329, the evaluation of evidence suggesting such a correlation must be informed not merely by statistics, but by history and experience. One could hardly contend that this Nation has on the basis of hair color inflicted upon persons deprivation comparable to that imposed on the basis of race. Recognition of this fact would necessarily influence the evaluation of data suggesting the influence of hair color on sentencing, and would require evidence of statistical correlation even more powerful than that presented by the Baldus study.

Furthermore, the Court's fear of the expansive ramifications of a holding for McCleskey in this case is unfounded because it fails to recognize the uniquely sophisticated nature of the Baldus study. McCleskey presents evidence that is

far and away the most refined data ever assembled on any system of punishment, data not readily replicated through casual effort. Moreover, that evidence depicts not merely arguable tendencies, but striking correlations, all the more powerful because nonracial explanations have been eliminated. Acceptance of petitioner's evidence would therefore establish a remarkably stringent standard of statistical evidence unlikely to be satisfied with any frequency.

The Court's projection of apocalyptic consequences for criminal sentencing is thus greatly exaggerated. The Court can indulge in such speculation only by ignoring its own jurisprudence demanding the highest scrutiny on issues of death and race. As a result, it fails to do justice to a claim in which both those elements are intertwined—an occasion calling for the most sensitive inquiry a court can conduct. Despite its acceptance of the validity of Warren McCleskey's evidence, the Court is willing to let his death sentence stand because it fears that we cannot successfully define a different standard for lesser punishments. This fear is baseless.

Finally, the Court justifies its rejection of McCleskey's claim by cautioning against usurpation of the legislatures' role in devising and monitoring criminal punishment. The Court is, of course, correct to emphasize the gravity of constitutional intervention and the importance that it be sparingly employed. The fact that "[c]apital punishment is now the law in more than two thirds of our States," *ante*, at 319, however, does not diminish the fact that capital punishment is the most awesome act that a State can perform. The judiciary's role in this society counts for little if the use of governmental power to extinguish life does not elicit close scrutiny. It is true that society has a legitimate interest in punishment. Yet, as Alexander Bickel wrote:

> "It is a premise we deduce not merely from the fact of a written constitution but from the history of the race, and ultimately as a moral judgment of the good society, that government should serve not only what we conceive

from time to time to be our immediate material needs but also certain enduring values. This in part is what is meant by government under law." The Least Dangerous Branch 24 (1962).

Our commitment to these values requires fidelity to them even when there is temptation to ignore them. Such temptation is especially apt to arise in criminal matters, for those granted constitutional protection in this context are those whom society finds most menacing and opprobrious. Even less sympathetic are those we consider for the sentence of death, for execution "is a way of saying, 'You are not fit for this world, take your chance elsewhere.'" *Furman*, 408 U. S., at 290 (BRENNAN, J., concurring) (quoting Stephen, Capital Punishments, 69 Fraser's Magazine 753, 763 (1864)).

For these reasons, "[t]he methods we employ in the enforcement of our criminal law have aptly been called the measures by which the quality of our civilization may be judged." *Coppedge* v. *United States*, 369 U. S. 438, 449 (1962). Those whom we would banish from society or from the human community itself often speak in too faint a voice to be heard above society's demand for punishment. It is the particular role of courts to hear these voices, for the Constitution declares that the majoritarian chorus may not alone dictate the conditions of social life. The Court thus fulfills, rather than disrupts, the scheme of separation of powers by closely scrutinizing the imposition of the death penalty, for no decision of a society is more deserving of "sober second thought." Stone, The Common Law in the United States, 50 Harv. L. Rev. 4, 25 (1936).

V

At the time our Constitution was framed 200 years ago this year, blacks "had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect." *Dred Scott* v. *Sandford*,

19 How. 393, 407 (1857). Only 130 years ago, this Court relied on these observations to deny American citizenship to blacks. *Ibid.* A mere three generations ago, this Court sanctioned racial segregation, stating that "[i]f one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane." *Plessy* v. *Ferguson*, 163 U. S. 537, 552 (1896).

In more recent times, we have sought to free ourselves from the burden of this history. Yet it has been scarcely a generation since this Court's first decision striking down racial segregation, and barely two decades since the legislative prohibition of racial discrimination in major domains of national life. These have been honorable steps, but we cannot pretend that in three decades we have completely escaped the grip of a historical legacy spanning centuries. Warren McCleskey's evidence confronts us with the subtle and persistent influence of the past. His message is a disturbing one to a society that has formally repudiated racism, and a frustrating one to a Nation accustomed to regarding its destiny as the product of its own will. Nonetheless, we ignore him at our peril, for we remain imprisoned by the past as long as we deny its influence in the present.

It is tempting to pretend that minorities on death row share a fate in no way connected to our own, that our treatment of them sounds no echoes beyond the chambers in which they die. Such an illusion is ultimately corrosive, for the reverberations of injustice are not so easily confined. "The destinies of the two races in this country are indissolubly linked together," *id.*, at 560 (Harlan, J., dissenting), and the way in which we choose those who will die reveals the depth of moral commitment among the living.

The Court's decision today will not change what attorneys in Georgia tell other Warren McCleskeys about their chances of execution. Nothing will soften the harsh message they must convey, nor alter the prospect that race undoubtedly will continue to be a topic of discussion. McCleskey's evi-

dence will not have obtained judicial acceptance, but that will not affect what is said on death row. However many criticisms of today's decision may be rendered, these painful conversations will serve as the most eloquent dissents of all.

JUSTICE BLACKMUN, with whom JUSTICE MARSHALL and JUSTICE STEVENS join, and with whom JUSTICE BRENNAN joins in all but Part IV–B, dissenting.

The Court today sanctions the execution of a man despite his presentation of evidence that establishes a constitutionally intolerable level of racially based discrimination leading to the imposition of his death sentence. I am disappointed with the Court's action not only because of its denial of constitutional guarantees to petitioner McCleskey individually, but also because of its departure from what seems to me to be well-developed constitutional jurisprudence.

JUSTICE BRENNAN has thoroughly demonstrated, *ante*, that, if one assumes that the statistical evidence presented by petitioner McCleskey is valid, as we must in light of the Court of Appeals' assumption,[1] there exists in the Georgia capital sentencing scheme a risk of racially based discrimination that is so acute that it violates the Eighth Amendment. His analysis of McCleskey's case in terms of the Eighth Amendment is consistent with this Court's recognition that because capital cases involve the State's imposition of a punishment that is unique both in kind and degree, the decision in such cases must reflect a heightened degree of reliability under the Amendment's prohibition of the infliction of cruel and unusual punishments. See *Woodson* v. *North Carolina*, 428 U. S. 280, 305 (1976) (plurality opinion). I therefore join Parts II through V of JUSTICE BRENNAN's dissenting opinion.

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[1] I agree with JUSTICE STEVENS' position that the proper course is to remand this case to the Court of Appeals for determination of the validity of the statistical evidence presented. *Post*, at 367. Like JUSTICE STEVENS, however, I am persuaded that the Baldus study is valid and would remand merely in the interest of orderly procedure.

Yet McCleskey's case raises concerns that are central not only to the principles underlying the Eighth Amendment, but also to the principles underlying the Fourteenth Amendment. Analysis of his case in terms of the Fourteenth Amendment is consistent with this Court's recognition that racial discrimination is fundamentally at odds with our constitutional guarantee of equal protection. The protections afforded by the Fourteenth Amendment are not left at the courtroom door. *Hill* v. *Texas*, 316 U. S. 400, 406 (1942). Nor is equal protection denied to persons convicted of crimes. *Lee* v. *Washington*, 390 U. S. 333 (1968) *(per curiam)*. The Court in the past has found that racial discrimination within the criminal justice system is particularly abhorrent: "Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice." *Rose* v. *Mitchell*, 443 U. S. 545, 555 (1979). Disparate enforcement of criminal sanctions "destroys the appearance of justice and thereby casts doubt on the integrity of the judicial process." *Id.*, at 555–556. And only last Term JUSTICE POWELL, writing for the Court, noted: "Discrimination within the judicial system is most pernicious because it is 'a stimulant to that race prejudice which is an impediment to securing to [black citizens] that equal justice which the law aims to secure to all others.'" *Batson* v. *Kentucky*, 476 U. S. 79, 87–88 (1986), quoting *Strauder* v. *West Virginia*, 100 U. S. 303, 308 (1880).

Moreover, the legislative history of the Fourteenth Amendment reminds us that discriminatory enforcement of States' criminal laws was a matter of great concern for the drafters. In the introductory remarks to its Report to Congress, the Joint Committee on Reconstruction, which reported out the Joint Resolution proposing the Fourteenth Amendment, specifically noted: "This deep-seated prejudice against color . . . leads to acts of cruelty, oppression, and murder, which the local authorities are at no pains to prevent or punish." H. R. Joint Comm. Rep. No. 30, 39th Cong., 1st Sess., p. XVII (1866). Witnesses who testified before

the Committee presented accounts of criminal acts of violence against black persons that were not prosecuted despite evidence as to the identity of the perpetrators.[2]

I

A

The Court today seems to give a new meaning to our recognition that death is different. Rather than requiring

[2] See, *e. g.*, H. R. Joint Comm. Rep. No. 30, 39th Cong., 1st Sess., pt. II, p. 25 (1866) (testimony of George Tucker, Virginia attorney) ("They have not any idea of prosecuting white men for offenses against colored people; they do not appreciate the idea"); *id.*, at 209 (testimony of Dexter H. Clapp) ("Of the thousand cases of murder, robbery, and maltreatment of freedmen that have come before me, . . . I have never yet known a single case in which the local authorities or police or citizens made any attempt or exhibited any inclination to redress any of these wrongs or to protect such persons"); *id.*, at 213 (testimony of J. A. Campbell) (although identities of men suspected of killing two blacks known, no arrest or trial had occurred); *id.*, pt. III, p. 141 (testimony of Brev. Maj. Gen. Wager Swayne) ("I have not known, after six months' residence at the capital of the State, a single instance of a white man being convicted and hung or sent to the penitentiary for crime against a negro, while many cases of crime warranting such punishment have been reported to me"); *id.*, pt. IV, p. 75 (testimony of Maj. Gen. George A. Custer) ("[I]t is of weekly, if not of daily, occurrence that freedmen are murdered. . . . [S]ometimes it is not known who the perpetrators are; but when that is known no action is taken against them. I believe a white man has never been hung for murder in Texas, although it is the law").

In *Brown* v. *Board of Education*, 347 U. S. 483 (1954), this Court held that, despite the fact that the legislative history of the Fourteenth Amendment indicated that Congress did *not* view racial discrimination in public education as a specific target, the Amendment nevertheless prohibited such discrimination. The Court today holds that even though the Fourteenth Amendment *was* aimed specifically at eradicating discrimination in the enforcement of criminal sanctions, allegations of such discrimination supported by substantial evidence are *not* constitutionally cognizable. But see *Batson* v. *Kentucky*, 476 U. S. 79, 85 (1986) (allegations of racially discriminatory exercise of peremptory challenges by prosecutor subject to review under Fourteenth Amendment because "[e]xclusion of black citizens from service as jurors constitutes a primary example of the evil the Fourteenth Amendment was designed to cure").

"a correspondingly greater degree of scrutiny of the capital sentencing determination," *California* v. *Ramos*, 463 U. S. 992, 998–999 (1983), the Court relies on the very fact that this is a case involving capital punishment to apply a *lesser* standard of scrutiny under the Equal Protection Clause. The Court concludes that "legitimate" explanations outweigh McCleskey's claim that his death sentence reflected a constitutionally impermissible risk of racial discrimination. The Court explains that McCleskey's evidence is too weak to require rebuttal "because a legitimate and unchallenged explanation for the decision is apparent from the record: McCleskey committed an act for which the United States Constitution and Georgia laws permit imposition of the death penalty." *Ante*, at 297. The Court states that it will not infer a discriminatory purpose on the part of the state legislature because "there were legitimate reasons for the Georgia Legislature to adopt and maintain capital punishment." *Ante*, at 298–299.

The Court's assertion that the fact of McCleskey's conviction undermines his constitutional claim is inconsistent with a long and unbroken line of this Court's case law. The Court on numerous occasions during the past century has recognized that an otherwise legitimate basis for a conviction does not outweigh an equal protection violation. In cases where racial discrimination in the administration of the criminal justice system is established, it has held that setting aside the conviction is the appropriate remedy. See, *e. g.*, *Rose* v. *Mitchell*, 443 U. S., at 559; *Whitus* v. *Georgia*, 385 U. S. 545, 549–550 (1967); *Strauder* v. *West Virginia*, 100 U. S. 303 (1880). The Court recently reaffirmed the propriety of invalidating a conviction in order to vindicate federal constitutional rights. *Vasquez* v. *Hillery*, 474 U. S. 254 (1986). Invalidation of a criminal conviction on federal constitutional grounds does not necessarily preclude retrial and resentencing of the defendant by the State. *Hill* v. *Texas*, 316 U. S., at 406. The Court has maintained a *per se* reversal

rule rejecting application of harmless-error analysis in cases involving racial discrimination that "strikes at the fundamental values of our judicial system and our society as a whole." *Rose* v. *Mitchell*, 443 U. S., at 556. We have noted that a conviction "in no way suggests that the discrimination did not impermissibly infect" earlier phases of the criminal prosecution "and, consequently, the nature or very existence of the proceedings to come." *Vasquez* v. *Hillery*, 474 U. S., at 263. Hence, McCleskey's conviction and the imposition of his death sentence by the jury do not suggest that discrimination did not impermissibly infect the earlier steps in the prosecution of his case, such as the prosecutor's decision to seek the death penalty.

The Court's reliance on legitimate interests underlying the Georgia Legislature's enactment of its capital punishment statute is likewise inappropriate. Although that reasoning may be relevant in a case involving a facial challenge to the constitutionality of a statute, it has no relevance in a case dealing with a challenge to the Georgia capital sentencing system *as applied* in McCleskey's case. In *Batson* v. *Kentucky*, *supra*, we rejected such reasoning: "The Constitution requires . . . that we look beyond the face of the statute . . . and also consider challenged selection practices to afford 'protection against action of the State through its administrative officers in effecting the prohibited discrimination.'" 476 U. S., at 88, quoting *Norris* v. *Alabama*, 294 U. S. 587, 589 (1935).

B

In analyzing an equal protection claim, a court must first determine the nature of the claim and the responsibilities of the state actors involved to determine what showing is required for the establishment of a prima facie case. *Castaneda* v. *Partida*, 430 U. S. 482, 493–494 (1977). The Court correctly points out: "In its broadest form, McCleskey's claim of discrimination extends to every actor in the Georgia capital sentencing process, from the prosecutor who

sought the death penalty and the jury that imposed the sentence, to the State itself that enacted the capital punishment statute and allows it to remain in effect despite its allegedly discriminatory application." *Ante*, at 292. Having recognized the complexity of McCleskey's claim, however, the Court proceeds to ignore a significant element of that claim. The Court treats the case as if it is limited to challenges to the actions of two specific decisionmaking bodies—the petit jury and the state legislature. *Ante*, at 294–295, 297–298. This self-imposed restriction enables the Court to distinguish this case from the venire-selection cases and cases under Title VII of the Civil Rights Act of 1964 in which it long has accepted statistical evidence and has provided an easily applicable framework for review. See *e. g.*, *Castaneda* v. *Partida*, *supra*; *Bazemore* v. *Friday*, 478 U. S. 385 (1986) (BRENNAN, J., joined by all other Members of the Court, concurring in part). Considering McCleskey's claim in its entirety, however, reveals that the claim fits easily within that same framework. A significant aspect of his claim is that racial factors impermissibly affected numerous steps in the Georgia capital sentencing scheme between his indictment and the jury's vote to sentence him to death. The primary decisionmaker at each of the intervening steps of the process is the prosecutor, the quintessential state actor in a criminal proceeding.[3] The District Court expressly stated

[3] The Court refers to the prosecutor's role in the capital sentencing process without analyzing the import of the statistical evidence concerning the steps of the process at which the prosecutor determines the future of the case. The Court recognizes that the prosecutor determines whether a case even will proceed to the penalty phase. If the prosecutor does not pursue the death penalty, a mandatory sentence of life imprisonment is imposed. See *ante*, at 284, n. 2. It lists many of the factors that prosecutors take into account in making their decisions, *ante*, at 307–308, n. 28, and recognizes that in each case the prosecutor can decline to charge, or to offer a plea bargain, or to seek a death sentence, *ante*, at 312. It also notes that the Baldus study "found that prosecutors sought the death penalty in 70% of the cases involving black defendants and white victims; 32%

that there were "two levels of the system that matter to [McCleskey], the decision to seek the death penalty and the decision to impose the death penalty." 580 F. Supp. 338, 379–380 (ND Ga. 1984). I agree with this statement of McCleskey's case. Hence, my analysis in this dissenting opinion takes into account the role of the prosecutor in the Georgia capital sentencing system. I certainly do not address all the alternative methods of proof in the Baldus study. Nor do I review each step in the process which McCleskey challenges. I concentrate on the decisions within the prosecutor's office through which the State decided to seek the death penalty and, in particular, the point at which the State proceeded to the penalty phase after conviction. This is a step at which the evidence of the effect of the racial factors was especially strong, see Supplemental Exhibits (Supp. Exh.) 56, 57; Transcript of Federal Habeas Corpus Hearing in No. C81–2434A (Tr.) 894–926, but is ignored by the Court.

II

A

A criminal defendant alleging an equal protection violation must prove the existence of purposeful discrimination. *Washington* v. *Davis*, 426 U. S. 229, 239–240 (1976); *Whitus* v. *Georgia*, 385 U. S., at 550. He may establish a prima facie case[4] of purposeful discrimination "by showing that the

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of the cases involving white defendants and white victims; 15% of the cases involving black defendants and black victims; and 19% of the cases involving white defendants and black victims," *ante*, at 287.

The Court relies heavily on its assertion that prosecutorial discretion should not be reviewed, *ante*, at 296–297, 311–312, but elsewhere concedes that such discretion may not be exercised in a racially discriminatory manner, *ante*, at 309, n. 30. It nowhere explains why this limitation on prosecutorial discretion does not require the same analysis that we apply in other cases involving equal protection challenges to the exercise of prosecutorial discretion. See, *e. g.*, *Batson* v. *Kentucky*, 476 U. S. 79 (1986).

[4]The use of the prima facie case method to structure proof in cases charging racial discrimination is appropriate because it "progressively . . .

totality of the relevant facts gives rise to an inference of discriminatory purpose." *Batson* v. *Kentucky*, 476 U. S., at 94.[5] Once the defendant establishes a prima facie case, the burden shifts to the prosecution to rebut that case. "The State cannot meet this burden on mere general assertions that its officials did not discriminate or that they properly performed their official duties." *Ibid.* The State must demonstrate that the challenged effect was due to "'permissible racially neutral selection criteria.'" *Ibid.*, quoting *Alexander* v. *Louisiana*, 405 U. S. 625, 632 (1972).

Under *Batson* v. *Kentucky* and the framework established in *Castaneda* v. *Partida*, McCleskey must meet a three-factor standard. First, he must establish that he is a member of a group "that is a recognizable, distinct class, singled out for different treatment." 430 U. S., at 494. Second, he must make a showing of a substantial degree of differential treatment.[6] Third, he must establish that the allegedly

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sharpen[s] the inquiry into the elusive factual question of intentional discrimination." *Texas Dept. of Community Affairs* v. *Burdine*, 450 U. S. 248, 255, n. 8 (1981); see *McCleskey* v. *Kemp*, 753 F. 2d 877, 912 (CA11 1985) (Johnson, J., dissenting in part and concurring in part) (where the "prosecutor has considerable discretion and the jury has bounded but irreducible discretion," the discretion could easily mask conscious or unconscious racial discrimination and indirect methods of proof are therefore required as outlined in *Washington* v. *Davis*, 426 U. S. 229, 241–242 (1976), and *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. 252, 266, n. 13 (1977)).

[5] The Court recently explained: "In deciding if the defendant has carried his burden of persuasion, a court must undertake 'a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.' *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S., at 266. Circumstantial evidence of invidious intent may include proof of disproportionate impact. *Washington* v. *Davis*, 426 U. S., at 242. We have observed that under some circumstances proof of discriminatory impact 'may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds.' *Ibid.*" *Batson* v. *Kentucky*, 476 U. S., at 93.

[6] In *Castaneda*, we explained that in jury-selection cases where the criminal defendant is attempting to prove that there was discriminatory

discriminatory procedure is susceptible to abuse or is not racially neutral. *Ibid.*

B

There can be no dispute that McCleskey has made the requisite showing under the first prong of the standard. The Baldus study demonstrates that black persons are a distinct group that are singled out for different treatment in the Georgia capital sentencing system. The Court acknowledges, as it must, that the raw statistics included in the Baldus study and presented by petitioner indicate that it is much less likely that a death sentence will result from a murder of a black person than from a murder of a white person. *Ante*, at 286. White-victim cases are nearly 11 times more likely to yield a death sentence than are black-victim cases. Supp. Exh. 46. The raw figures also indicate that even within the group of defendants who are convicted of killing white persons and are thereby more likely to receive a death sentence, black defendants are more likely than white defendants to be sentenced to death. Supp. Exh. 47.

With respect to the second prong, McCleskey must prove that there is a substantial likelihood that his death sentence is due to racial factors. See *Hunter* v. *Underwood*, 471 U. S. 222, 228 (1985). The Court of Appeals assumed the validity of the Baldus study and found that it "showed that systemic and substantial disparities existed in the penalties imposed upon homicide defendants in Georgia based on race of the homicide victim, that the disparities existed at a less substantial rate in death sentencing based on race of defendants, and that the factors of race of the victim and defendant were at work in Fulton County." 753 F. 2d 877, 895 (CA11 1985).

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exclusion of potential jurors we apply the "rule of exclusion" method of proof. 430 U. S., at 494. The underlying rationale is that "[i]f a disparity is sufficiently large, then it is unlikely that it is due solely to chance or accident, and, in the absence of evidence to the contrary, one must conclude that racial or other class-related factors entered into the selection process." *Id.*, at 494, n. 13.

The question remaining therefore is at what point does that disparity become constitutionally unacceptable. See *Turner* v. *Murray*, 476 U. S. 28, 36, n. 8 (1986) (plurality opinion). Recognizing that additional factors can enter into the decisionmaking process that yields a death sentence, the authors of the Baldus study collected data concerning the presence of other relevant factors in homicide cases in Georgia during the time period relevant to McCleskey's case. They then analyzed the data in a manner that would permit them to ascertain the independent effect of the racial factors.[7]

McCleskey demonstrated the degree to which his death sentence was affected by racial factors by introducing multiple-

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[7] Although the Court states that it assumes the validity of the Baldus study for purposes of its analysis, because of its detailed discussion of the District Court's reasons for rejecting its validity I am compelled to record my disagreement with the District Court's reasoning. As a member of the United States Court of Appeals, I was confronted in 1968 with a challenge to the constitutionality of a State's capital sentencing system based on allegations of racial discrimination supported by statistical evidence. Writing for a panel of the court, I rejected that challenge for reasons similar to those espoused by the Court today. *Maxwell* v. *Bishop*, 398 F. 2d 138 (CA8), vacated and remanded, *sua sponte*, on grounds not raised below, 398 U. S. 262 (1970) *(per curiam)*.

The Court of Appeals found the evidence presented by Maxwell incomplete, not directly relevant to his individual claim, and statistically insufficient. McCleskey's evidence, however, is of such a different level of sophistication and detail that it simply cannot be rejected on those grounds. Unlike the evidence presented by Maxwell, which did not contain data from the jurisdiction in which he was tried and sentenced, McCleskey's evidence includes data from the relevant jurisdiction. Whereas the analyses presented by Maxwell did not take into account a significant number of variables and were based on a universe of 55 cases, the analyses presented by McCleskey's evidence take into account more than 400 variables and are based on data concerning all offenders arrested for homicide in Georgia from 1973 through 1978, a total of 2,484 cases. Moreover, the sophistication of McCleskey's evidence permits consideration of the existence of racial discrimination at various decision points in the process, not merely at the jury decision. It is this experience, in part, that convinces me of the significance of the Baldus study.

regression analyses that explain how much of the statistical distribution of the cases analyzed is attributable to the racial factors. McCleskey established that because he was charged with killing a white person he was 4.3 times as likely to be sentenced to death as he would have been had he been charged with killing a black person. Petitioner's Exhibit DB 82. McCleskey also demonstrated that it was more likely than not that the fact that the victim he was charged with killing was white determined that he received a sentence of death—20 out of every 34 defendants in McCleskey's mid-range category would not have been sentenced to be executed if their victims had been black. Supp. Exh. 54.[8] The most persuasive evidence of the constitutionally significant effect of racial factors in the Georgia capital sentencing system is McCleskey's proof that the race of the victim is more important in explaining the imposition of a death sentence than is the factor whether the defendant was a prime mover in the homicide. Petitioner's Exhibit DB 82.[9] Similarly, the race-of-victim factor is nearly as crucial as the statutory aggravating circumstance whether the defendant had a prior record of a conviction for a capital crime.[10] *Ibid.* See Ga. Code Ann. § 17–10–30(b) (1982), *ante*, at 284–285, n. 3. The Court has noted elsewhere that Georgia could not attach "the 'aggravating' label to factors that are constitutionally impermissible or totally irrelevant to the sentencing process, such as for example the race, religion, or political affiliation of the defendant." *Zant* v. *Stephens*, 462 U. S. 862, 885 (1983). What we have held to be unconstitutional if included in the

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[8] See Brief for Dr. Franklin M. Fisher et al. as *Amici Curiae* 19.

[9] A defendant's chances of receiving a death sentence increase by a factor of 4.3 if the victim is white, but only by 2.3 if the defendant was the prime mover behind the homicide.

[10] A prior record of a conviction for murder, armed robbery, rape, or kidnaping with bodily injury increases the chances of a defendant's receiving a death sentence by a factor of 4.9.

language of the statute surely cannot be constitutional because it is a *de facto* characteristic of the system.

McCleskey produced evidence concerning the role of racial factors at the various steps in the decisionmaking process, focusing on the prosecutor's decision as to which cases merit the death sentence. McCleskey established that the race of the victim is an especially significant factor at the point where the defendant has been convicted of murder and the prosecutor must choose whether to proceed to the penalty phase of the trial and create the possibility that a death sentence may be imposed or to accept the imposition of a sentence of life imprisonment. McCleskey demonstrated this effect at both the statewide level, see Supp. Exh. 56, 57, Tr. 897–910, and in Fulton County where he was tried and sentenced, see Supp. Exh. 59, 60, Tr. 978–981. The statewide statistics indicated that black-defendant/white-victim cases advanced to the penalty trial at nearly five times the rate of the black-defendant/black-victim cases (70% v. 15%), and over three times the rate of white-defendant/black-victim cases (70% v. 19%). See Supp. Exh. 56. The multiple-regression analysis demonstrated that racial factors had a readily identifiable effect at a statistically significant level. See *id.*, at 57; Tr. 905. The Fulton County statistics were consistent with this evidence although they involved fewer cases. See Supp. Exh. 59, 60.[11]

Individualized evidence relating to the disposition of the Fulton County cases that were most comparable to McCleskey's case was consistent with the evidence of the race-of-victim effect as well. Of the 17 defendants, including

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[11] The universe of cases from Fulton County analyzed by Baldus included 629 killings, 581 of which yielded murder indictments. Supp. Exh. 59, 60; Tr. 978–981. The evidence indicated that at each step in the process from indictment to sentence, there is a differential treatment in the disposition of white-victim and black-victim cases, with the white-victim cases having a higher likelihood of being retained in the system and risking a death sentence. Supp. Exh. 60; Tr. 978–981.

McCleskey, who were arrested and charged with homicide of a police officer in Fulton County during the 1973–1979 period, McCleskey, alone, was sentenced to death. The only other defendant whose case even proceeded to the penalty phase received a sentence of life imprisonment. That defendant had been convicted of killing a black police officer. See *id.*, at 61–63; Tr. 1050–1062.

As to the final element of the prima facie case, McCleskey showed that the process by which the State decided to seek a death penalty in his case and to pursue that sentence throughout the prosecution was susceptible to abuse. Petitioner submitted the deposition of Lewis R. Slaton, who, as of the date of the deposition, had been the District Attorney for 18 years in the county in which McCleskey was tried and sentenced. Deposition in No. 84–8176 of Lewis R. Slaton, Aug. 4, 1983, p. 5; see *McCleskey* v. *Zant*, 580 F. Supp. 338, 377, n. 15 (1984); Tr. 1316. As Mr. Slaton explained, the duties and responsibilities of that office are the prosecution of felony charges within the Atlanta Judicial Circuit that comprises Fulton County. Deposition 7–8. He testified that during his years in the office, there were no guidelines informing the Assistant District Attorneys who handled the cases how they should proceed at any particular stage of the prosecution. There were no guidelines as to when they should seek an indictment for murder as opposed to lesser charges, *id.*, at 10–11; when they should recommend acceptance of a guilty plea to murder, acceptance of a guilty plea to a lesser charge, reduction of charges, or dismissal of charges at the postindictment-preconviction stage, *id.*, at 25–26, 31; or when they should seek the death penalty, *id.*, at 31. Slaton testified that these decisions were left to the discretion of the individual attorneys who then informed Slaton of their decisions as they saw fit. *Id.*, at 13, 24–25, 37–38.

Slaton's deposition proves that, at every stage of a prosecution, the Assistant District Attorney exercised much discretion. The only guidance given was "on-the-job training."

Id., at 20. Addressing plea bargaining, for example, Slaton stated that "through the training that the assistant DA's get, I think we pretty much think alike on the cases, on what we suggest." *Id.*, at 25. The sole effort to provide any consistency was Slaton's periodic pulling of files at random to check on the progress of cases. *Id.*, at 28–29. Slaton explained that as far as he knew, he was the only one aware of this checking. *Id.*, at 28. The files contained information only as to the evidence in the case, not any indication as to why an attorney made a particular decision. The attorneys were not required to record why they sought an indictment for murder as opposed to a lesser charge, *id.*, at 19, or why they recommended a certain plea, *id.*, at 29–30.[12] The attorneys were not required to report to Slaton the cases in which they decided not to seek the death penalty, *id.*, at 34–36, 38, or the cases in which they did seek the death penalty, *id.*, at 41.

When questioned directly as to how the office decided whether to seek the death penalty, Slaton listed several factors he thought relevant to that decision, including the strength of the evidence, the atrociousness of the crime, and the likelihood that a jury would impose the death sentence. *Id.*, at 59. He explained that the attorneys did not seek the death penalty in every case in which statutory aggravating factors existed. *Id.*, at 38–39. Slaton testified that his office still operated in the same manner as it did when he took office in 1965, except that it has not sought the death penalty in any rape cases since this Court's decision in *Coker* v. *Georgia*, 433 U. S. 584 (1977). Deposition 60.

In addition to this showing that the challenged system was susceptible to abuse, McCleskey presented evidence of the

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[12] In his deposition, Russell Parker, the Assistant District Attorney who prosecuted McCleskey's case, contradicted the statement cited by the Court, *ante*, at 312, n. 34, concerning plea negotiations during McCleskey's trial. Parker testified that he never discussed a plea with McCleskey. Deposition in No. 84–8176 of Russell Parker, Feb. 16, 1981, p. 15.

history of prior discrimination in the Georgia system. JUSTICE BRENNAN has reviewed much of this history in detail in his dissenting opinion, *ante*, at 328–334, including the history of Georgia's racially based dual system of criminal justice. This historical background of the state action challenged "is one evidentiary source" in this equal protection case. *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. 252, 267 (1977); see also *Rogers* v. *Lodge*, 458 U. S. 613, 618, 623–625 (1982). Although I would agree that evidence of "official actions taken long ago" could not alone establish that the current system is applied in an unconstitutionally discriminatory manner, I disagree with the Court's statement that such evidence is now irrelevant. *Ante*, at 298, n. 20.

The above-described evidence, considered in conjunction with the other record evidence outlined by JUSTICE BRENNAN, *ante*, at 325–328, and discussed in opinions dissenting from the judgment of the Court of Appeals, 753 F. 2d, at 919 (Hatchett, J., dissenting in part and concurring in part); *id.*, at 920–923 (Clark, J., dissenting in part and concurring in part), gives rise to an inference of discriminatory purpose. See *Washington* v. *Davis*, 426 U. S., at 239–242. As in the context of the rule of exclusion, see n. 6, *supra*, McCleskey's showing is of sufficient magnitude that, absent evidence to the contrary, one must conclude that racial factors entered into the decisionmaking process that yielded McCleskey's death sentence. See *Castaneda* v. *Partida*, 430 U. S., at 494, n. 13. The burden, therefore, shifts to the State to explain the racial selections. It must demonstrate that legitimate racially neutral criteria and procedures yielded this racially skewed result.

In rebuttal, the State's expert suggested that if the Baldus thesis was correct then the aggravation level in black-victim cases where a life sentence was imposed would be higher than in white-victim cases. See 580 F. Supp., at 373. The expert analyzed aggravating and mitigating circumstances

"one by one, demonstrating that in life sentence cases, to the extent that any aggravating circumstance is more prevalent in one group than the other, there are more aggravating features in the group of white-victim cases than in the group of black-victim cases. Conversely, there were more mitigating circumstances in which black-victim cases had a higher proportion of that circumstance than in white-victim cases." *Ibid.* The District Court found that the State's suggestion was plausible. It concluded, however, that the State did not conclusively disprove McCleskey's case; yet it reasoned that the State's theory "stands to contradict any prima facie case." *Ibid.* I find that reasoning wrong as a matter of law, and the conclusion clearly erroneous.

The State did not test its hypothesis to determine if white-victim and black-victim cases at the same level of aggravating circumstances were similarly treated. Tr. 1613–1614, 1664. McCleskey's experts, however, performed this test on their data. *Id.*, at 1297, 1729–1732, 1756–1761. They demonstrated that the racial disparities in the system were not the result of the differences in the average aggravation levels between white-victim and black-victim cases. See Supp. Exh. 72; Tr. 1291–1296; Petitioner's Exhibit DB 92. The State's meager and unsophisticated evidence cannot withstand the extensive scrutiny given the Baldus evidence.[13]

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[13] As a result of McCleskey's discovery efforts, the record also contains relevant testimonial evidence by two state officials. The Fulton County District Attorney testified that he did not recall any instance in which race was a factor in a death penalty case in his office. Deposition in No. 84-8176 of Lewis R. Slaton, Aug. 4, 1983, p. 78. He later recalled one case that was in the office when he first began, in which the office set aside the death penalty because of the possibility that race had been involved. *Id.*, at 79–80. The Assistant District Attorney who prosecuted McCleskey's case testified that race did not influence his decision to seek the death penalty in the present case. Deposition of Russell Parker, Feb. 16, 1981, p. 17.

These general assertions by state officials that they did not discriminate or that they properly performed their official duties, however, cannot meet

Here, as in *Bazemore* v. *Friday*, the State did not "demonstrate that when th[e] factors were properly organized and accounted for there was no significant disparity" between the death sentences imposed on defendants convicted of killing white victims and those imposed on defendants convicted of killing black victims. 478 U. S., at 403–404, n. 14. In *Castaneda*, we rejected a similar effort by the State to rely on an unsupported countervailing theory to rebut the evidence. 430 U. S., at 500. In sum, McCleskey has demonstrated a clear pattern of differential treatment according to race that is "unexplainable on grounds other than race." *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S., at 266.

III

The Court's explanations for its failure to apply this well-established equal protection analysis to this case are not persuasive. It first reasons that "each particular decision to impose the death penalty is made by a petit jury" and that the "application of an inference drawn from the general statistics to a specific decision in a trial and sentencing simply is not comparable to the application of an inference drawn from general statistics to a specific venire-selection or Title VII

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the State's burden of rebuttal of the prima facie case. See *Alexander* v. *Louisiana*, 405 U. S. 625, 631–632 (1972); *Whitus* v. *Georgia*, 385 U. S. 545, 551–552 (1967). Moreover, there are many ways in which racial factors can enter indirectly into prosecutorial decisions. For example, the authors of a study similar to that of Baldus explained: "Since death penalty prosecutions require large allocations of scarce prosecutorial resources, prosecutors must choose a small number of cases to receive this expensive treatment. In making these choices they may favor homicides that are visible and disturbing to the majority of the community, and these will tend to be white-victim homicides." Gross & Mauro, Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization, 37 Stan. L. Rev. 27, 106–107 (1984); see generally Johnson, Race and the Decision to Detain a Suspect, 93 Yale L. J. 214 (1983); Lawrence, The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 Stan. L. Rev. 317 (1987).

case." *Ante*, at 294–295. According to the Court, the statistical evidence is less relevant because, in the two latter situations, there are fewer variables relevant to the decision and the "statistics relate to fewer entities." *Ante*, at 295.

I disagree with the Court's assertion that there are fewer variables relevant to the decisions of jury commissioners or prosecutors in their selection of jurors, or to the decisions of employers in their selection, promotion, or discharge of employees. Such decisions involve a multitude of factors, some rational, some irrational. Second, I disagree with the comment that the venire-selection and employment decisions are "made by fewer entities." Certainly in the employment context, personnel decisions are often the product of several levels of decisionmaking within the business or government structure. The Court's statement that the decision to impose death is made by the petit jury also disregards the fact that the prosecutor screens the cases throughout the pretrial proceedings and decides to seek the death penalty and to pursue a capital case to the penalty phase where a death sentence can be imposed. McCleskey's claim in this regard lends itself to analysis under the framework we apply in assessing challenges to other prosecutorial actions. See *Batson* v. *Kentucky*, 476 U. S. 79 (1986); see also *Wayte* v. *United States*, 470 U. S. 598, 608, n. 10 (1985) (applying *Castaneda* framework in challenge to prosecutor's allegedly selective enforcement of criminal sanction). It is appropriate to judge claims of racially discriminatory prosecutorial selection of cases according to ordinary equal protection standards. 470 U. S., at 608.

The Court's other reason for treating this case differently from venire-selection and employment cases is that in these latter contexts, "the decisionmaker has an opportunity to explain the statistical disparity," but in the instant case the State had no practical opportunity to rebut the Baldus study. *Ante*, at 296. According to the Court, this is because jurors cannot be called to testify about their verdict and because

policy considerations render it improper to require "prosecutors to defend their decisions to seek death penalties, 'often years after they were made.'" *Ibid.*, quoting *Imbler* v. *Pachtman*, 424 U. S. 409, 425 (1976).

I agree with the Court's observation as to the difficulty of examining the jury's decisionmaking process. There perhaps is an inherent tension between the discretion accorded capital sentencing juries and the guidance for use of that discretion that is constitutionally required. In his dissenting opinion, JUSTICE BRENNAN demonstrates that the Eighth Amendment analysis is well suited to address that aspect of the case. *Ante*, at 323. The Court's refusal to require that the prosecutor provide an explanation for his actions, however, is completely inconsistent with this Court's longstanding precedents. The Court misreads *Imbler* v. *Pachtman*. In that case, the Court held that a prosecutor who acted within the scope of his duties was entitled to absolute immunity in an action under 42 U. S. C. § 1983 for *damages*. We recognized that immunity from damages actions was necessary to prevent harassing litigation and to avoid the threat of civil litigation undermining the prosecutor's independence of judgment. We clearly specified, however, that the policy considerations that compelled civil immunity did not mean that prosecutors could not be called to answer for their actions. We noted the availability of both criminal sanctions and professional ethical discipline. 424 U. S., at 429. Prosecutors undoubtedly need adequate discretion to allocate the resources of their offices and to fulfill their responsibilities to the public in deciding how best to enforce the law, but this does not place them beyond the constraints imposed on state action under the Fourteenth Amendment. Cf. *Ex parte Virginia*, 100 U. S. 339 (1880) (upholding validity of conviction of state judge for discriminating on the basis of race in his selection of jurors).

The Court attempts to distinguish the present case from *Batson* v. *Kentucky*, in which we recently reaffirmed the fact

that prosecutors' actions are not unreviewable. See *ante*, at 296, n. 17. I agree with the Court's observation that this case is "quite different" from the *Batson* case. *Ibid.* The irony is that McCleskey presented proof in this case that would have satisfied the more burdensome standard of *Swain* v. *Alabama*, 380 U. S. 202 (1965), a standard that was described in *Batson* as having placed on defendants a "crippling burden of proof." 476 U. S., at 92. As discussed above, McCleskey presented evidence of numerous decisions impermissibly affected by racial factors over a significant number of cases. The exhaustive evidence presented in this case certainly demands an inquiry into the prosecutor's actions.

The Court's assertion that, because of the necessity of discretion in the criminal justice system, it "would demand exceptionally clear proof," *ante*, at 297, before inferring abuse of that discretion thus misses the point of the constitutional challenge in this case. Its conclusory statement that "the capacity of prosecutorial discretion to provide individualized justice is 'firmly entrenched in American law,'" *ante*, at 311–312, quoting 2 W. LaFave & J. Israel, Criminal Procedure § 13.2(a), p. 160 (1984), is likewise not helpful. The issue in this case is the extent to which the constitutional guarantee of equal protection limits the discretion in the Georgia capital sentencing system. As the Court concedes, discretionary authority can be discriminatory authority. *Ante*, at 312. Prosecutorial decisions may not be "'deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.'" *Bordenkircher* v. *Hayes*, 434 U. S. 357, 364 (1978), quoting *Oyler* v. *Boles*, 368 U. S. 448, 456 (1962). Judicial scrutiny is particularly appropriate in McCleskey's case because "[m]ore subtle, less consciously held racial attitudes could also influence" the decisions in the Georgia capital sentencing system. *Turner* v. *Murray*, 476 U. S. 28, 35 (1986); see n. 13, *supra*. The Court's rejection of McCleskey's equal protection claims is

a far cry from the "sensitive inquiry" mandated by the Constitution.

IV

A

One of the final concerns discussed by the Court may be the most disturbing aspect of its opinion. Granting relief to McCleskey in this case, it is said, could lead to further constitutional challenges. *Ante*, at 314–319. That, of course, is no reason to deny *McCleskey* his rights under the Equal Protection Clause. If a grant of relief to him were to lead to a closer examination of the effects of racial considerations throughout the criminal justice system, the system, and hence society, might benefit. Where no such factors come into play, the integrity of the system is enhanced. Where such considerations are shown to be significant, efforts can be made to eradicate their impermissible influence and to ensure an evenhanded application of criminal sanctions.

B

Like JUSTICE STEVENS, I do not believe acceptance of McCleskey's claim would eliminate capital punishment in Georgia. *Post*, at 367. JUSTICE STEVENS points out that the evidence presented in this case indicates that in extremely aggravated murders the risk of discriminatory enforcement of the death penalty is minimized. *Ibid.* I agree that narrowing the class of death-eligible defendants is not too high a price to pay for a death penalty system that does not discriminate on the basis of race. Moreover, the establishment of guidelines for Assistant District Attorneys as to the appropriate basis for exercising their discretion at the various steps in the prosecution of a case would provide at least a measure of consistency. The Court's emphasis on the procedural safeguards in the system ignores the fact that there are none whatsoever during the crucial process leading up to trial. As JUSTICE WHITE stated for the plurality in *Turner* v. *Murray*, I find "the risk that racial prejudice may

have infected petitioner's capital sentencing unacceptable in light of the ease with which that risk could have been minimized." 476 U. S., at 36. I dissent.

JUSTICE STEVENS, with whom JUSTICE BLACKMUN joins, dissenting.

There "is a qualitative difference between death and any other permissible form of punishment," and hence, "'a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.'" *Zant* v. *Stephens*, 462 U. S. 862, 884–885 (1983), quoting *Woodson* v. *North Carolina*, 428 U. S. 280, 305 (1976) (plurality opinion of Stewart, POWELL, and STEVENS, JJ.). Even when considerations far less repugnant than racial discrimination are involved, we have recognized the "vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." *Gardner* v. *Florida*, 430 U. S. 349, 358 (1977). "[A]lthough not every imperfection in the deliberative process is sufficient, even in a capital case, to set aside a state-court judgment, the severity of the sentence mandates careful scrutiny in the review of any colorable claim of error." *Zant*, *supra*, at 885.

In this case it is claimed—and the claim is supported by elaborate studies which the Court properly assumes to be valid—that the jury's sentencing process was likely distorted by racial prejudice. The studies demonstrate a strong probability that McCleskey's sentencing jury, which expressed "the community's outrage—its sense that an individual has lost his moral entitlement to live," *Spaziano* v. *Florida*, 468 U. S. 447, 469 (1984) (STEVENS, J., dissenting)—was influenced by the fact that McCleskey is black and his victim was white, and that this same outrage would not have been generated if he had killed a member of his own race. This sort of disparity is constitutionally intolerable. It flagrantly violates the Court's prior "insistence that capital punishment be

imposed fairly, and with reasonable consistency, or not at all." *Eddings* v. *Oklahoma*, 455 U. S. 104, 112 (1982).

The Court's decision appears to be based on a fear that the acceptance of McCleskey's claim would sound the death knell for capital punishment in Georgia. If society were indeed forced to choose between a racially discriminatory death penalty (one that provides heightened protection against murder "for whites only") and no death penalty at all, the choice mandated by the Constitution would be plain. *Eddings* v. *Oklahoma*, *supra*. But the Court's fear is unfounded. One of the lessons of the Baldus study is that there exist certain categories of extremely serious crimes for which prosecutors consistently seek, and juries consistently impose, the death penalty without regard to the race of the victim or the race of the offender. If Georgia were to narrow the class of death-eligible defendants to those categories, the danger of arbitrary and discriminatory imposition of the death penalty would be significantly decreased, if not eradicated. As JUSTICE BRENNAN has demonstrated in his dissenting opinion, such a restructuring of the sentencing scheme is surely not too high a price to pay.

Like JUSTICE BRENNAN, I would therefore reverse the judgment of the Court of Appeals. I believe, however, that further proceedings are necessary in order to determine whether McCleskey's death sentence should be set aside. First, the Court of Appeals must decide whether the Baldus study is valid. I am persuaded that it is, but orderly procedure requires that the Court of Appeals address this issue before we actually decide the question. Second, it is necessary for the District Court to determine whether the particular facts of McCleskey's crime and his background place this case within the range of cases that present an unacceptable risk that race played a decisive role in McCleskey's sentencing.

Accordingly, I respectfully dissent.

LUKHARD, COMMISSIONER, VIRGINIA DEPARTMENT OF SOCIAL SERVICES *v.* REED ET AL.

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

No. 85–1358. Argued January 14, 1987—Decided April 22, 1987

The federal statute governing the Aid to Families With Dependent Children (AFDC) program requires participating States to consider a family's "income and resources" in determining whether it is needy, and prohibits the payment of benefits in any month in which either income or resources exceed state-prescribed limits. Because income and resources are separately computed and generally subject to different state limits, whether and for how long a family that acquires a sum of money is rendered ineligible for AFDC benefits may depend on whether the sum is classified as income or as a resource. Prior to 1981, the Department of Health and Human Services (HHS) required that States treat any income acquired in a given month as a resource in following months. However, because of HHS' concern that recipients that acquired a large amount of income had an incentive to spend it as quickly as possible in order to reduce their resources to a level beneath the state limit, Congress amended the AFDC statute to provide that recipients who receive income exceeding the State's standard of need are ineligible for benefits for as many months as that income would last if the recipients spent an amount equal to the State's standard each month. In response to this amendment, the Virginia Department of Social Services (VDSS) revised its AFDC regulations to treat various lump-sum payments, including personal injury awards, as income rather than resources, although the regulations continued to treat property damage awards as resources. Respondents, personal injury award recipients who were thereby rendered ineligible for AFDC benefits under Virginia's revised regulations, filed a class action in Federal District Court against the Secretary of HHS and petitioner Commissioner of VDSS. The District Court granted summary judgment to the class, holding that the common meaning of "income" precluded application of the term to personal injury awards, and that it was irrational to treat personal injury awards as income while treating property damage awards as resources. The Court of Appeals affirmed.

Held: The judgment is reversed.

774 F. 2d 1270, reversed.

JUSTICE SCALIA, joined by THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE STEVENS, concluded that respondents have not demonstrated

that Virginia's policy of treating personal injury awards as income is inconsistent with the AFDC statute or HHS' regulations. Pp. 374–383.

(a) Virginia's revised regulations are consistent with the meaning of "income" as used in the AFDC statute. Respondents' premise that the common usage of "income" as involving gain excludes personal injury awards because of their purely compensatory nature is false, since such awards often compensate for the loss of gain in the form of lost wages, and, to that extent at least, must be considered income. More importantly, the AFDC statute itself contradicts respondents' contention, as is demonstrated by *Heckler* v. *Turner*, 470 U. S. 184, in which it was held that, under a provision not involved here, the part of an employee's salary that is allocated to work-related expenses—clearly not a "gain" in the sense that respondents use that term—is properly treated as "income" under the statute. Pp. 374–376.

(b) The fact that personal injury awards are expressly excluded from income under the Internal Revenue Code, the Food Stamp Program, and the HHS poverty guidelines does not mean that such awards are automatically excluded from "income" but, in fact, supports the opposite proposition that they are included when, as in the AFDC statute, Congress is silent on the subject. Moreover, no presumption of a common definition of "income" can be inferred from the fact that the AFDC statute, the Food Stamp Program, and the HHS poverty guidelines all attempt to define who is needy, since the explicit differences in the three programs' treatment of "income" are too great. Pp. 376–377.

(c) Virginia's treatment of personal injury awards is consistent with the administrative and legislative history of the AFDC statute. Contrary to respondents' contention, the evidence indicates that HHS has for many years interpreted the statute at least to *permit* the inclusion of such awards in "income," which interpretation is entitled to deference. Pp. 377–380.

(d) There is no merit to the contention that personal injury awards must be treated as resources because healthy bodies are resources and personal injury awards merely compensate for healthy bodies. The AFDC statute and regulations count only real and personal property as "resources." Pp. 380–381.

(e) Treating property damage awards as resources does not violate an HHS regulation requiring that eligibility conditions not result in arbitrary exclusions or inequitable treatment, since property damage awards can be distinguished from personal injury awards on the ground that they merely restore resources to previous levels. Moreover, HHS' conclusion that Virginia's regulations are consistent with HHS' regulations is entitled to substantial deference. Pp. 381–383.

JUSTICE BLACKMUN concluded that the Virginia regulations should not be upheld on an endorsement of the Virginia interpretation but,

flatly, on the deference owed the Secretary of HHS in his interpretation of the complex governing statutes. Pp. 383–384.

SCALIA, J., announced the judgment of the Court and delivered an opinion in which REHNQUIST, C. J., and WHITE and STEVENS, JJ., joined. BLACKMUN, J., filed an opinion concurring in the judgment, *post*, p. 383. POWELL, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and O'CONNOR, JJ., joined, *post*, p. 384.

Thomas J. Czelusta, Assistant Attorney General of Virginia, argued the cause for petitioner. With him on the briefs were *Mary Sue Terry*, Attorney General, *R. Claire Guthrie*, Deputy Attorney General, and *John A. Rupp*, Senior Assistant Attorney General.

Glen D. Nager argued the cause *pro hac vice* for the Secretary of Health and Human Services, as respondent under this Court's Rule 19.6, in support of petitioner. With him on the brief were *Solicitor General Fried*, *Assistant Attorney General Willard*, *Deputy Solicitor General Wallace*, and *Marleigh D. Dover*.

Jill A. Hanken argued the cause for respondents. With her on the brief were *Martin Wegbreit* and *Claire Curry*.*

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*A brief of *amici curiae* urging reversal was filed for the State of Illinois et al. by *Neil F. Hartigan*, Attorney General of Illinois, *Roma Jones Stewart*, Solicitor General, *James C. O'Connell*, *Steven V. Hogroian*, and *Owen M. Field*, Special Assistant Attorneys General, *Linley E. Pearson*, Attorney General of Indiana, *Charles G. Brown*, Attorney General of West Virginia, *Silas B. Taylor*, Deputy Attorney General, *Mary Beth Kershner*, Assistant Attorney General, *Michael J. Bowers*, Attorney General of Georgia, *William C. Joy*, Senior Assistant Attorney General, *Lacy H. Thornburg*, Attorney General of North Carolina, *Cathy J. Rosenthal*, Assistant Attorney General, *T. Travis Medlock*, Attorney General of South Carolina, *Brian McKay*, Attorney General of Nevada, *LeRoy S. Zimmerman*, Attorney General of Pennsylvania, and *Allen C. Warshaw*, Deputy Attorney General.

Briefs of *amici curiae* urging affirmance were filed for Legal Services of North Carolina by *David H. Harris, Jr.*, *Susan M. Perry*, and *Richard M. Taylor, Jr.*; and for Jeannette Rochford by *Robert Mann*.

JUSTICE SCALIA announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE STEVENS join.

In this case, the United States Court of Appeals for the Fourth Circuit held that a state social-services agency could not lawfully treat personal injury awards as income when determining the eligibility of families seeking Aid to Families with Dependent Children (AFDC) benefits. *Reed* v. *Health & Human Services*, 774 F. 2d 1270 (1985). The United States Court of Appeals for the Seventh Circuit has reached the opposite conclusion. *Watkins* v. *Blinzinger*, 789 F. 2d 474 (1986). We granted certiorari to resolve the conflict. 477 U. S. 903 (1986).

I

Under the AFDC program, participating States that provide financial assistance to families with needy, dependent children are partially reimbursed by the Federal Government. 49 Stat. 627, as amended, 42 U. S. C. §§ 601–615 (1982 ed. and Supp. III). Although the States are largely free to determine the appropriate standard of need and the level of assistance, they must administer their assistance plans in conformity with applicable federal statutes and with regulations promulgated by the United States Department of Health and Human Services (HHS). Those statutes require States to consider a family's "income and resources" when determining whether or not it is needy, 53 Stat. 1379, as amended, 42 U. S. C. § 602(a)(7)(A) (1982 ed., Supp. III), and prohibit them from providing AFDC benefits for any month in which either income or resources exceed state-prescribed limits (subject to a federal ceiling), 95 Stat. 844, as amended, 42 U. S. C. §§ 602(a)(7)(B), 602(a)(17), 602(a)(18) (1982 ed., Supp. III).

Because income eligibility and resource eligibility are separately computed (and also because state limits for the two generally differ), whether and for how long a family that acquires a sum of money is rendered ineligible for AFDC bene-

fits may depend on whether the sum is classified as income or as a resource. Prior to 1981, however, the importance of the classification was minimized by an HHS requirement that States treat any income received in a given month as a resource in following months. Thus, a family that received an amount of income that exceeded the State's income limit would be automatically ineligible for one month; whether or not it remained ineligible in subsequent months would depend on whether the amount of that income that had not yet been spent, combined with the value of the family's other resources, exceeded the State's resource limit. The Secretary of HHS became concerned that AFDC recipients who acquired a large amount of income had an incentive to spend it as rapidly as possible, in order to regain eligibility by reducing their resources to a level beneath the State's resource limit. To solve this problem, the Secretary proposed and Congress passed an amendment to the AFDC statute. Under that amendment, AFDC recipients who receive an amount of income that exceeds the State's standard of need are rendered ineligible for as many months as that income would last if the recipients spent an amount equal to the State's standard of need each month. Section 2304 of the Omnibus Budget Reconciliation Act of 1981 (OBRA), 95 Stat. 845, as amended, 42 U. S. C. § 602(a)(17) (1982 ed., Supp. III).

Because the OBRA amendment applies by its terms only to income, the distinction between income and resources took on new importance. If a given sum of money were treated as a resource, the family that received the sum would be ineligible only until it spent enough of the sum to bring its resources down to the State's resource limit; but if the sum were treated as income, no matter how much was spent, the family would remain ineligible for the statutory period. In response to the OBRA amendment, the Virginia Department of Social Services (the agency responsible for administering Virginia's AFDC program) revised its regulations to

treat various lump-sum payments, including personal injury awards, as income rather than as resources. Virginia Department of Social Services, ADC Manual (Va. ADC Manual) § 305.4C (Jan. 1983), App. to Pet. for Cert. 71.[1] It did not, however, alter its policy of treating the proceeds of the sale or conversion of real or personal property—including property damage awards—as resources. § 303.3, App. 25.

Respondents, who had received personal injury awards and were disqualified from Virginia's AFDC program for varying periods pursuant to Virginia's revised regulations, filed a class action against the Secretary and petitioner Lukhard, the Commissioner of the Virginia Department of Social Services, in the United States District Court for the District of Western Virginia. They alleged that treating personal injury awards as income was inconsistent with the federal AFDC statute, and they sought monetary, injunctive, and declaratory relief under Rev. Stat. § 1979, as amended, 42 U. S. C. § 1983, 5 U. S. C. §§ 701–706, and 28 U. S. C. §§ 2201–2202. After certifying a class of those whose AFDC benefits had been or would be decreased as a result of Virginia's revised regulations, the District Court granted summary judgment in the class' favor. It held that the common meaning of the term "income" precluded application of that term to personal injury awards, and that it was irrational for Virginia to treat personal injury awards as income but at the same time treat awards for property loss as

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[1] The revised regulations also permitted recipients to deduct from such a payment any directly related expenses that were incurred prior to or within 30 days after receipt of the payment. Va. ADC Manual § 305.4C (Jan. 1983), App. to Pet. for Cert. 72. During the pendency of this lawsuit, Congress amended the OBRA amendment to give States the option of reducing the period of ineligibility otherwise mandated so as to take into account various expenditures related to the lump-sum payment. Section 2632(a) of the Deficit Reduction Act of 1984, 98 Stat. 1141, 42 U. S. C. § 602(a)(17) (1982 ed., Supp. III). Virginia has since availed itself of this option. Va. ADC Manual § 305.4C (Oct. 1984), App. to Pet. for Cert. 83–86.

resources. The District Court therefore issued an injunction forbidding Lukhard to apply the revised regulations to recipients of personal injury awards, ordering him to begin paying AFDC benefits to the named plaintiffs and other class members who would presently have been receiving them but for application of the revised regulations, and requiring him to notify AFDC recipients who had been deprived of past AFDC benefits as a result of the revised regulations. The court declined, however, to order Lukhard to pay retroactive AFDC benefits, and stayed the injunction pending appeal except insofar as it required Lukhard to begin paying AFDC benefits to the named plaintiffs. Lukhard and the Secretary appealed and the respondents cross-appealed. After the Court of Appeals for the Fourth Circuit affirmed the judgment in all respects, *Reed* v. *Health & Human Services*, 774 F. 2d 1270 (1985), Lukhard filed this petition. The Secretary did not file a separate petition but supported Lukhard's petition and supports Lukhard's position on the merits.

II

Respondents' principal contention is that Virginia's revised regulations are inconsistent with the meaning of "income" and "resources" as those terms are used in the AFDC statute. To support this argument they first advance the broader proposition that it does violence to common usage to interpret "income" to include personal injury awards. This argument begins from the premise that since personal injury awards are purely compensatory, they do not result in any gain to their recipients. And since both general and legal sources define "income" as involving gain, see, *e. g.*, Webster's Third New International Dictionary 1143 (1976) ("a gain or recurrent benefit that is usu. measured in money . . ."); 42 C. J. S., Income, p. 531 (1944) ("In common speech 'income' generally is understood as gain or profit . . ." (footnote omitted)); *Eisner* v. *Macomber*, 252 U. S. 189, 207

(1920) ("'Income may be defined as the gain derived from capital, from labor, or from both combined,' provided it be understood to include profit gained through a sale or conversion of capital assets . . ." (quoting *Stratton's Independence, Ltd.* v. *Howbert*, 231 U. S. 399, 415 (1913); *Doyle* v. *Mitchell Brothers Co.*, 247 U. S. 179, 185 (1918))), respondents conclude that personal injury awards cannot fairly be characterized as income. But the premise that personal injury awards cannot involve gain is obviously false, since they often are intended in significant part to compensate for the loss of gain, *e. g.*, lost wages. See *Watkins* v. *Blinzinger*, 789 F. 2d, at 476. Since the gain would have been income, surely at least that part of a personal injury award that replaces it must also be income.[2] More importantly, however, as Lukhard and the Secretary point out, general and legal sources also commonly define "income" to mean "any money that comes in," without regard to any related expenses incurred and without any requirement that the transactions producing the money result in a net gain. See, *e. g.*, 5 Oxford English Dictionary 162 (1933) ("That which comes in . . . (considered in reference to its amount, and commonly expressed in money); . . . receipts . . ."); 42 C. J. S., Income, p. 529 (1944) ("Generally or ordinarily the term means all that comes in; . . . something which is paid over and delivered to the recipient; . . . without reference to the outgoing expenditures . . ." (footnotes omitted)); *Heckler* v. *Turner*, 470 U. S. 184 (1985) ("income" under the AFDC statute means gross income, without reference to expenses reasonably attributable to its earning). *Heckler* is particularly significant, since there we indicated that the part of an employee's salary that is allocated to work-related expenses—clearly not a gain in the sense that term is used by respondents—is properly treated as "income" under the AFDC statute. *Id.*, at 202. Although that con-

[2] Moreover, as we discuss below, see *infra*, at 380–383, other typical components of personal injury awards, including compensation for pain and suffering, can reasonably be treated as gain under the AFDC statute.

clusion was based in part on a provision not involved in this case, it demonstrates that the AFDC statute itself contradicts the theory that payments that do not constitute gain (as respondents use the term) to their recipients cannot reasonably be described as "income." Thus, contrary to respondents' assertion, Virginia's revised regulations are consistent with a perfectly natural use of "income."

Respondents also seek to derive support from the fact that personal injury awards are not treated as income under the Internal Revenue Code, the Food Stamp program, or the HHS poverty guidelines. See 26 U. S. C. § 104(a); 91 Stat. 962, 7 U. S. C. § 2014(d)(8); 48 Fed. Reg. 7010, 7011 (1983). But in each of these instances there is an *express* provision that personal injury awards are not to be treated as income—which causes them not only to fail to support the proposition that the term "income" automatically excludes personal injury awards, but to support the opposite proposition that absent express exclusion it embraces them. Moreover, the fact that Congress was silent in the AFDC statute but has elsewhere been explicit when it wished to exclude personal injury awards from income tends to refute rather than support a legislative intent to exclude them from AFDC computations.[3] Cf. *Russello* v. *United States*, 464 U. S. 16, 23

[3] The dissent apparently thinks it appropriate to speculate upon what Congress *would* have said if it *had* spoken. *Post*, at 389 ("[I]f Congress had considered the question, it is reasonable to believe that it would have . . . excluded [personal injury awards] from income"). As we demonstrate below, it also is reasonable to believe that Congress would have included personal injury awards in income. More importantly, however, the legality of Virginia's policy must be measured against the AFDC statute Congress passed, not against the hypothetical statute it is most "reasonable to believe" Congress would have passed had it considered the question of personal injury awards. For the purpose of determining the application of an existing agency-interpreted statute to a point on which "Congress did not actually have an intent," *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 845 (1984), we have held that "a court may not substitute its own construction . . . for a reasonable interpretation made by the administrator of an agency." *Id.*, at 844. As we note below,

(1983). Nor is there any merit to respondents' slightly different argument that since the relevant provisions of the Food Stamp program, the HHS poverty guidelines, and the AFDC statute have the common goal of defining who is needy, they should be presumed to have a common definition of "income"—one that necessarily excludes personal injury awards. The explicit differences between the definition of "income" in the Food Stamp program and the HHS poverty guidelines on the one hand and the AFDC statute on the other are simply too great to permit any such presumption. Compare 91 Stat. 962, 7 U. S. C. §2014(d)(8) (Food Stamp program excludes all nonrecurring lump-sum payments, including retroactive lump-sum Social Security benefits), and 48 Fed. Reg. 7010, 7011 (1983) (HHS poverty guidelines exclude capital gains, gifts, and lump-sum inheritances), with Brief for Respondents 47 (conceding that retroactive Social Security benefits and other lump-sum payments that represent a true gain are income under the AFDC statute).

Respondents' next contention is that Virginia's treatment of personal injury awards is inconsistent with the administrative and legislative history of the AFDC statute. They first argue that for many years, and at least until 1981, HHS in fact took the position that personal injury awards were not "income" under the AFDC statute. But the materials upon which respondents rely do not support this contention, and indicate at most that HHS took no position on the question. See HHS Handbook of Public Assistance Administration, Part IV, S–3120, Supplement for Administrative Use (Sept. 6, 1957), App. 58 (retroactive Social Security payments are income, but an award to compensate for the loss of a hand or foot might not be); HHS Memorandum of June 7, 1973, App. 55–56 (retroactive Social Security payments are income); Brief for United States as *Amicus Curiae* in *Lockhart* v. *Harden*, No. C74–390A (ND Ga.), App. 61 (HHS regula-

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see *infra* this page and 378–379, Virginia's policy is consistent with the Secretary's interpretation.

tions require that retroactive Social Security payments be treated as income but do not require that awards for damages be so treated). In fact, as Lukhard and the Secretary point out, there is evidence that HHS has for many years interpreted the AFDC statute to at least *permit* States to treat personal injury awards as income. See, *e. g.*, 51 Fed. Reg. 9191, 9196 (1986) ("[U]nder longstanding federal policy . . . , a State agency has had the option to treat [*e. g.*, personal injury awards] as resources instead of as income"); HHS Letter of October 17, 1983, App. 66 ("Based on longstanding precedent, States have historically had the option to consider nonrecurring lump-sum payments as either unearned income or resources. With the implementation of [the OBRA amendment], States continued to exercise this latitude"); HHS Memorandum of July 6, 1983, App. 47 (under current HHS policy, States are free to treat insurance settlements either as income or as resources; California apparently treats them as income); HHS Letter of April 8, 1982, App. 62–63 (States are free to treat damage claim settlements as income or as resources). See also Brief for State of Illinois *et al.* as *Amici Curiae* 5 (HHS has permitted States to treat personal injury awards as income under the OBRA amendment).[4] Thus, the Secretary's interpretation of the AFDC statute—which is entitled to deference, see, *e. g.*, *Chemical Manufacturers Assn.* v. *Natural Resources Defense Council, Inc.*,

[4] Respondents observe that none of the evidence relied upon by Lukhard and the Secretary antedates the passage of the OBRA amendment. Although true, the observation is of dubious significance. Older documents *demonstrating* the existence of a longstanding interpretation would of course be better evidence than are recent documents *asserting* its existence. But in the absence of any contrary evidence, the latter form of evidence is certainly sufficient to support a conclusion that the interpretation existed. Similarly, although respondents observe that the record does not reveal whether any States actually availed themselves of the option allegedly given them prior to passage of the OBRA amendment, we see no reason to draw any inference at all from that lacuna.

470 U. S. 116, 125 (1985)[5]—actually undermines rather than supports respondents' claim that Virginia cannot lawfully treat personal injury awards as income.

Respondents also make two arguments based upon the legislative history of the 1981 OBRA amendment. First, they argue that the Congress that passed the OBRA amendment must have been aware of HHS' longstanding position that "income" excluded personal injury awards, and that its use of "income" in the OBRA amendment therefore necessarily indicated an intent that the term be interpreted in that manner. It is of course not true that whenever Congress enacts legislation using a word that has a given administrative interpretation it means to freeze that administrative interpretation in place. See *Helvering* v. *Wilshire Oil Co.*, 308 U. S. 90, 100–101 (1939). But if that were the case here, it would damage rather than aid respondents' cause, since, as we have seen, HHS' position at the time of the OBRA amendment was that it was permissible for States to treat personal injury awards as income.

At oral argument, respondents sought to derive support from a legislative hearing conducted while the OBRA amendment was under consideration, in which the Secretary submitted to the House Ways and Means Committee a document estimating that the amendment would eliminate 5,000 families from the AFDC rolls each year. Hearings on Tax Aspects of the President's Economic Program before the House Committee on Ways and Means, 97th Cong., 1st Sess., pt. 1, pp. 265–266 (1981), App. 75–76. The record suggests

[5] After this suit was filed, the Secretary proposed a rule *requiring* States to treat all lump-sum payments as income. 49 Fed. Reg. 45558, 45568 (1984). Such a rule has since been promulgated. 45 CFR § 233.20(a)(3)(ii)(F) (1986). Lukhard and the Secretary argue that the Secretary's determination that this rule is consistent with the AFDC statute and the OBRA amendment is entitled to deference, while respondents argue that the rule was invalidly promulgated and is in any event due no deference. Since we uphold Virginia's practice without reference to the new HHS regulation, we need not reach these questions.

that Virginia has been terminating over 400 families each year under the revised regulations it promulgated to implement the OBRA amendment. Since Virginia has only 1.6% of the national AFDC caseload, respondents argue, it should only be terminating 80 families each year according to the Secretary's estimate. But even granting the accuracy of respondents' numerical analysis—which petitioner and the Secretary have had no opportunity to contest—and ignoring the dubious authority of an unexplained forecast made during a committee hearing, the disparity respondents note does not provide the faintest support for an inference that the Congress which passed the OBRA amendment understood the AFDC statute to exclude personal injury awards from income. The record indicates that only about one-third of the families removed from the rolls in Virginia were removed as a result of personal injury awards; since the number of remaining terminations still far exceeds the Secretary's forecast (about 270 instead of 80), the disparity certainly is not explicable by Virginia's decision to treat personal injury awards as income. One is left with the suspicion that the error was in the Secretary's forecast. Nothing respondents have identified in the legislative history of the OBRA amendment supports the conclusion that Virginia's revised regulations are unlawful.

Respondents' penultimate argument is that logic requires personal injury awards to be treated as resources rather than income. The argument rests upon the following syllogism: (1) healthy bodies are resources; (2) personal injury awards merely compensate for damage to healthy bodies; and therefore (3) personal injury awards necessarily are resources too. We have already noted that the minor premise of this syllogism is false, see *supra*, at 375–376. More importantly, however, so is the major premise. Although there is a sense in which a healthy body can be said to be a resource, it certainly is not one within the meaning of the AFDC statute and regulations, which count only real and personal property (including liquid assets). See 95 Stat. 844,

as amended, 42 U. S. C. § 602(a)(7)(B) (1982 ed., Supp. III); 45 CFR §§ 233.20(a)(3)(i)(B), (ii)(E) (1986). Since healthy bodies are worth far more than the statute's $1,000 family resource limit, 42 U. S. C. § 602(a)(7)(B), acceptance of respondents' major premise would render every family ineligible for AFDC benefits. The fact that the AFDC statute and its implementing regulations consider only real and personal property in determining families' resources permits (if it does not indeed require) the conclusion that personal injury awards are compensation for diminution of well-being of a kind not covered by the AFDC statute, except to the extent they compensate for lost wages (to which extent they clearly are gain, see *supra*, at 375) or for economic expenses caused by the injury (to which extent Virginia permits them to be in large part offset, see n. 1, *supra*). Thus, personal injury awards are almost entirely a gain in well-being, as well-being is measured under the AFDC statute, and can reasonably be treated as income even on respondents' definition of the term.

Once this is understood, it is clear that Virginia's policy of treating personal injury awards as income but property damages awards as resources is also reasonable. The former can be viewed as increasing their recipients' pecuniary well-being, and the latter as merely restoring resources to previous levels. The existence of this distinction, coupled with the substantial deference owed to the Secretary's conclusion that Virginia's revised regulations are consistent with HHS' regulations, see, *e. g.*, *Lyng* v. *Payne*, 476 U. S. 926, 939 (1986), leads us to reject respondents' argument that the difference in treatment violates HHS' regulation requiring that "eligibility conditions imposed must not exclude individuals or groups on an arbitrary or unreasonable basis, and must not result in inequitable treatment of individuals or groups . . . ." 45 CFR § 233.10(a)(1) (1986).[6]

[6] As has already been noted, since this suit was filed Virginia has altered its treatment of personal injury awards by adopting a regulation

It is of course true that, by considering only real and personal property as the measure of well-being, the AFDC program evaluates need in a way that does not reflect the fullness of life. That portion of a personal injury award which constitutes compensation for loss of earnings will not result in a loss of eligibility, since it merely replaces future income that would otherwise have been earned; but the portion attributable to pain and suffering replaces no other economic income, and will reduce AFDC payments. It can reasonably be urged that a family with monthly pain-and-suffering-award income but with a family member in physical and emotional pain is *not* better off than the family without that additional income but also without that suffering. Physical and emotional well-being, however, is not what the AFDC statute is designed to take into account—as is evident from the fact that there is no argument for increasing AFDC payments above the normal income limit where pain and suffering exists *without* a tortfeasor who is compensating it. Compensating for the noneconomic inequities of life is a task

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reducing the ineligibility period established by the OBRA amendment to take into account various expenditures related to the award and other equitable considerations. Va. ADC Manual § 305.4C (Oct. 1984), App. to Pet. for Cert. 83–86. Moreover, the Secretary contends that a new regulation he has promulgated, 45 CFR § 233.20(a)(3)(ii)(F) (1986), requires Virginia to treat property damages awards as income, thus rendering prospectively moot respondents' claim that Virginia's disparate treatment violates the HHS regulation. Respondents claim, however, that the new regulation is invalid because improperly promulgated, that it does not require Virginia to alter its treatment of property damages awards, and that even if it did it would not result in equal treatment of personal injury awards and property damages awards. We need not consider the consequences of these subsequent developments. The legality of the original disparity in treatment is still a live issue, since its resolution will determine whether respondents were entitled to the AFDC benefits they have received under the injunction issued by the District Court. And our conclusion that the original disparity was not unreasonable necessarily implies that the diminished disparity created by Virginia's subsequently more lenient treatment of personal injury awards is not unreasonable.

daunting in its complexity, and the AFDC statute is neither designed nor interpreted unreasonably if it leaves them untouched.

Finally, we do not agree with the dissent's contention that our holding "'override[s] the States' traditional power to define the measure of damages applicable to state-created causes of action.'" *Post*, at 389 (quoting *Norfolk & Western R. Co.* v. *Liepelt*, 444 U. S. 490, 500, n. 3 (1980) (BLACKMUN, J., dissenting)). That could not possibly be so, since in this case Virginia *wants* to treat the proceeds of personal injury awards as income. It is a peculiar solicitude for States' prerogatives that would prevent Virginia from striking its own balance between directing limited AFDC funds to the least wealthy and compensating tort victims. It is true that the Secretary has now promulgated a regulation requiring States to treat personal injury awards as income under the AFDC statute. See n. 5, *supra*. But since this is not a case in which a State challenges that regulation, the dissent's objection is simply irrelevant.

III

Respondents have not demonstrated that Virginia's policy of treating personal injury awards as income is inconsistent with the AFDC statute or HHS' regulations. The contrary judgment of the Court of Appeals is

Reversed.

JUSTICE BLACKMUN, concurring in the judgment.

I join the judgment of the Court but not the opinion of the plurality, for I would base my vote to reverse not on an endorsement of the original Virginia interpretation but, flatly, on the deference that is due the Secretary of Health and Human Services in his interpretation of the governing statutes. In a statutory area as complicated as this one, the administrative authorities are far more able than this Court to determine congressional intent in the light of experience in the field. If the result is unacceptable to Congress, it has

only to clarify the situation with language that unambiguously specifies its intent.

JUSTICE POWELL, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE O'CONNOR join, dissenting.

Today the Court holds that personal injury awards may be treated as income for the purpose of determining whether a family is eligible for Aid to Families with Dependent Children (AFDC). Because such treatment is inconsistent with the compensatory nature of personal injury awards, and may work a substantial hardship on needy families that Congress intended to assist through the AFDC program, I dissent.

I

Congress established the AFDC program, 42 U. S. C. §§ 601–615 (1982 ed. and Supp. III), to assist needy children and those who care for them. *Shea* v. *Vialpando*, 416 U. S. 251, 253 (1974). The AFDC statute provides that a family is eligible for AFDC benefits if its income and resources are not sufficient to maintain it at a subsistence level established by the State. The statute does not define either "income" or "resources."[1] Prior to 1981, excess income received in one month was counted as a resource in succeeding months. The Secretary of Health and Human Services (HHS) concluded that needy families receiving lump sums of nonrecurring income might spend the money as rapidly as possible to reduce their resources and regain eligibility for AFDC benefits. In 1981, Congress responded to the Secretary's concern by amending the statute to provide that a family receiving ex-

[1] The AFDC statute provides that the States must exclude from resources the family home and one automobile worth up to $1,500. 42 U. S. C. § 602(a)(7)(B); 45 CFR § 233.20(a)(3)(i) (1986). The States also are required to disregard certain earnings of family members and relatives in determining income. 42 U. S. C. §§ 602(a)(8)(A), 602(a)(31). Congress provided no further guidance to the Secretary and the States in defining "income" and "resources."

cess income in one month is ineligible for AFDC benefits for the number of months that the excess income would support the family at a subsistence level. Omnibus Budget Reconciliation Act of 1981, 95 Stat. 845, 42 U. S. C. § 602(a)(17) (1982 ed., Supp. III). Although the 1981 amendments changed the treatment of excess income, "neither the language of [the amendment] nor its legislative history indicates that Congress intended to change the meaning of 'income' in 1981." Brief for Secretary of HHS 15. Accordingly, the Secretary advised the States to adhere to their existing definitions of income. 47 Fed. Reg. 5648, 5656 (1982).

Virginia responded to the 1981 amendments by promulgating a rule that payments for personal injuries must be counted as income in determining eligibility for AFDC benefits. Virginia Department of Social Services, ADC Manual (Va. ADC Manual) § 305.4C (Jan. 1983), App. to Pet. for Cert. 71. Under the Virginia regulation at issue in this case, medical and legal expenses incurred prior to or within 30 days after the receipt of the award were not counted in income. The remainder of the personal injury award, "representing pain and suffering, loss of earning capacity, future medical expenses, and punitive damages," was included in income. Brief for Petitioner 5, n. 5.[2] The named re-

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[2] Virginia subsequently modified its rule in response to a congressional amendment giving States the option of reducing the period of ineligibility to account for expenditures related to a lump-sum payment. Section 2632 of the Deficit Reduction Act of 1984, 98 Stat. 1141, 42 U. S. C. § 602(a)(17) (1982 ed., Supp. III). The State now provides that the period of ineligibility must be reduced to reflect future medical expenses. Va. ADC Manual § 305.4C (Oct. 1984), App. to Pet. for Cert. 84.

In addition, the Secretary recently promulgated a rule requiring the States to treat personal injury awards as income. 45 CFR § 233.20 (a)(3)(ii)(F) (1986). The plurality declines to consider the Secretary's new rule. *Ante*, at 379, n. 5. It nevertheless concludes that Virginia's decision to treat personal injury awards as income during the period at issue in this case was in accord with the Secretary's prior interpretation

spondents, who had been entitled to AFDC benefits ranging from $181 to $255 per month, received personal injury or worker's compensation awards of between $700 and about $10,250. App. 13–19; Brief for Respondents 3–5. As a result, the Virginia Department of Social Services ruled them ineligible for AFDC benefits for periods of from 2 months to 27 months. The respondents spent the awards primarily on basic living expenses, repayment of debts, and items such as used automobiles and appliances. App. 13–19. In each case, the families exhausted the modest awards long before they regained eligibility for AFDC benefits.

II

The AFDC statute, as noted above, does not define "income." "A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin* v. *United States*, 444 U. S. 37, 42 (1979). The plurality recognizes that income commonly is defined as "'"the gain derived from capital, from labor, or from both combined," provided it be understood to include profit gained through a

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of the AFDC statute, and so is entitled to deference. *Ante*, at 378–379. See *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842–845 (1984). Prior to the passage of the 1981 amendments, however, the Secretary's only comment on this subject was that "a settlement of industrial compensation as the result of loss of hand or foot *might* represent a 'lump sum' payment." HHS Handbook of Public Assistance Administration, Part IV, S–3120, Supplement for Administrative Use (Sept. 6, 1957), App. 58 (emphasis added). Moreover, as the plurality concedes, there is no evidence in the record that any State included personal injury awards in income prior to the 1981 amendments. *Ante*, at 378, n. 4. Based on this record, I conclude that the Secretary took no position on the treatment of personal injury awards prior to 1981.

JUSTICE BLACKMUN would defer to the Secretary's interpretation of the statute. Because I conclude that the Secretary's interpretation is inconsistent with the statute, I do not think it is entitled to the customary deference.

sale or conversion of capital assets . . . .'" *Ante*, at 375 (quoting *Eisner* v. *Macomber*, 252 U. S. 189, 207 (1920) (quoting *Stratton's Independence, Ltd.* v. *Howbert*, 231 U. S. 399, 415 (1913); *Doyle* v. *Mitchell Brothers Co.*, 247 U. S. 179, 185 (1918))). In light of *Macomber*, which held that stock dividends are not taxable income, the Solicitor of Internal Revenue concluded:

> "If an individual is possessed of a personal right that is not assignable and not susceptible of any appraisal in relation to market values, and thereafter receives either damages or payment in compromise for an invasion of that right, it can not be held that he thereby derives any gain or profit. It is clear, therefore, that the Government can not tax him on any portion of the sum received." I–1 Cum. Bull. 93 (1922).

In a later tax case, the Court defined income as "accessions to wealth, clearly realized, and over which the taxpayers have complete dominion." *Commissioner* v. *Glenshaw Glass Co.*, 348 U. S. 426, 431 (1955). In *Glenshaw Glass*, the Court observed that "[d]amages for personal injury are by definition compensatory only," *id.*, at 432, n. 8, and cited "[t]he long history of departmental rulings holding personal injury recoveries nontaxable on the theory that they roughly correspond to a return of capital . . . ," *ibid.* (citing 2 Cum. Bull. 71 (1920); I–1 Cum. Bull. 92, 93 (1922); VII–2 Cum. Bull. 123 (1928); 1954–1 Cum. Bull. 179, 180).

Congress continues to exclude personal injury awards from income under the Internal Revenue Code. 26 U. S. C. § 104(a). Congress also excludes personal injury awards from income for the purpose of determining eligibility for food stamps, 7 U. S. C. § 2014(d)(8), and under the HHS poverty guidelines, 48 Fed. Reg. 7010, 7010–7011 (1983).[3] In-

[3] The plurality concludes that "[t]he explicit differences between the definition of 'income' in the Food Stamp program and the HHS poverty

deed, the plurality does not cite a single statute in which Congress has defined income to include personal injury awards, and I am aware of none.

The plurality nevertheless concludes that Virginia reasonably interpreted the AFDC statute to include personal injury awards in income, even if such awards do not result in any gain to the recipient. *Ante*, at 375–376. The plurality observes that the Internal Revenue Code, the Food Stamp statute, and the HHS poverty guidelines *expressly* exclude personal injury awards from income. In the plurality's view, "the fact that Congress was silent in the AFDC statute but has elsewhere been explicit when it wished to exclude personal injury awards from income tends to refute rather than support a legislative intent to exclude them from AFDC computations." *Ante*, at 376 (citation omitted; footnote omitted). This inference from congressional silence is unwarranted. Congress made a considered decision to exclude personal injury awards from income for purposes of the Internal Revenue Code and the Food Stamp statute. In contrast, as the Court of Appeals for the Seventh Circuit observed, "The inescapable fact is that Congress wanted to compel recipients of AFDC to budget lump-sum receipts of 'income' but did not consider what 'income' might be." *Watkins* v. *Blinzinger*, 789 F. 2d 474, 480 (1986).

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guidelines on the one hand and the AFDC statute on the other are simply too great" to allow a presumption that they share a common definition of income. *Ante*, at 377. It is true that "income" is defined to exclude all nonrecurring lump-sum payments for purposes of the Food Stamp program, 7 U. S. C. § 2014(d)(8), and that the HHS poverty guidelines exclude capital gains, gifts, and lump-sum inheritances, 48 Fed. Reg. 7010, 7011 (1983). It also is undisputed that lump-sum payments representing a gain to the family, such as retroactive Social Security payments, must be included in income under the AFDC program. But the decision to include some lump-sum gains under the AFDC program that are excluded under other poverty programs does not indicate that Congress also intended to include payments that do *not* represent a gain, and that Congress has not included in income under *any* program.

The fact that Congress did not define income for purposes of the AFDC statute hardly justifies an assumption that it considered the narrower question whether personal injury awards should be included in income. On the contrary, if Congress had considered the question, it is reasonable to believe that it would have treated personal injury awards as it has in a variety of other circumstances and excluded them from income. Finally, as discussed below, the effect of including personal injury awards in income is to deprive AFDC families of the benefits of tort and worker's compensation remedies, most of which are provided by state law. I would not infer from the silence of Congress a "purpose to override the States' traditional power to define the measure of damages applicable to state-created causes of action." *Norfolk & Western R. Co.* v. *Liepelt*, 444 U. S. 490, 500, n. 3 (1980) (BLACKMUN, J., dissenting).[4]

The plurality also concludes that personal injury awards "can reasonably be treated as gain." *Ante*, at 374–375, and n. 2. To be sure, some components of personal injury awards do result in gain to the plaintiff. Punitive damages, in the exceptional case in which they are awarded, are a windfall to the plaintiff rather than compensation. See *Commissioner* v. *Glenshaw Glass Co.*, *supra* (punitive damages are taxable income). As a practical matter, an impoverished family is unlikely to receive a large award for lost income. If it does, however, it is reasonable to treat such an award as income. See *ante*, at 375. I cannot agree, however, that it is reasonable to treat the entire personal injury award as income. Damages for pain and suffering, physical injury, dis-

[4]The plurality asserts that this objection is "simply irrelevant," *ante*, at 383, because Virginia officials chose to treat personal injury awards as income. But Congress could not know in advance whether the treatment of personal injury awards would be left to the States. Indeed, as noted above, the Secretary now *requires* the States to include personal injury awards in income. See n. 2, *supra*. In my view, the possibility that AFDC families would be deprived of state tort remedies is sufficient to preclude inclusion of personal injury awards in income.

figurement, loss of consortium, and the like are intended to compensate the recipient for nonpecuniary losses. In other contexts, Congress excludes the full amount of personal injury awards from income, to avoid the necessity for "a complex and administratively burdensome system" or to "confer a humanitarian benefit on the victim or victims of the tort." *Norfolk & Western R. Co.* v. *Liepelt*, *supra*, at 501 (BLACKMUN, J., dissenting).

The plurality recognizes the elementary fact that "a family with monthly pain-and-suffering-award income but with a family member in physical and emotional pain is *not* better off than the family without that additional income but also without that suffering." *Ante*, at 382 (emphasis in original). The plurality nevertheless concludes that the AFDC program is not designed to take into account physical and emotional well-being. But tort law and workers' compensation statutes *are* designed to take these into account. The AFDC statute surely is not designed to deprive impoverished families of remedies for personal injury, most of which are provided by state law. To be sure, "there is no argument for increasing AFDC payments above the normal limit where pain and suffering exists *without* a tortfeasor who is compensating it." *Ibid.* (emphasis in original). By the same token, there is no argument for *decreasing* AFDC payments for families who are free of pain and suffering.[5]

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[5] In my view, Virginia's treatment of personal injury awards was inconsistent with the Secretary's "equitable treatment regulation," which states that "the eligibility conditions imposed must not exclude individuals or groups on an arbitrary or unreasonable basis, and must not result in inequitable treatment." 45 CFR § 233.10(a)(1) (1986). During the period at issue in this case, Virginia treated money received as a result of a property loss as a resource rather than income. Va. ADC Manual § 303.3 (Jan. 1983), App. 25. Thus, if an AFDC family received compensation for a damaged automobile it could spend the money as it wished, but if it received compensation for an injury to a family member, it was obliged to use the money to meet basic needs. The plurality concludes that casualty awards do not increase their recipients' well-being, since they "merely re-

During the period at issue in this case, the Virginia Department of Social Services also included in income moneys intended for continuing medical and rehabilitative expenses. See Brief for Petitioner 5, n. 5.[6] Thus, the Virginia regulation put impoverished families to a hard choice between obtaining medical care and providing for the basic needs of their children. One of the named respondents, Ona Mae Reed, actually faced this choice: She could not afford to see a physician while her family was ineligible for AFDC benefits. App. 15. I cannot accept the Court's conclusion that Congress intended to permit such a harsh result.

III

It is beyond dispute that "[c]ompensating for the noneconomic inequities of life is a task daunting in its complexity . . . ." *Ante*, at 382–383. As I view this case, however, the issue presented is relatively straightforward. Our legal system compensates individuals for personal injuries by awarding damages in tort actions and workers' compensation proceedings. In a variety of circumstances, Congress has

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stor[e] resources to previous levels." *Ante*, at 381. Because personal injury awards are designed to compensate individuals rather than to increase their level of well-being, I conclude that it is unreasonable to treat personal injuries less favorably than property losses. Virginia's treatment of awards for property losses also demonstrates that it failed to adhere consistently to a definition of income as "any money that comes in." See *ante*, at 375.

[6] During this period, Virginia excluded from income only those amounts of the award used for medical care, rehabilitation, and legal services incurred prior to or within 30 days after the receipt of the award. See *supra*, at 385; Va. ADC Manual § 305.4C (Jan. 1983), App. to Pet. for Cert. 72. Petitioner concedes that "the amount of a lump sum personal injury award subject to the rule is that portion representing pain and suffering, loss of earning capacity, *future medical expenses*, and punitive damages." Brief for Petitioner 5, n. 5 (emphasis added). As noted above, n. 2, *supra*, Virginia has amended its rules to provide that the period of ineligibility must be reduced to reflect medical expenses incurred subsequent to receipt of the lump sum. Va. ADC Manual § 305.4C (Oct. 1984), App. to Pet. for Cert. 84.

recognized that injured persons and their families should be permitted to retain the full amount of these awards, awards that for the most part are compensatory in nature. It is unjust, and inconsistent with the basic purposes of the AFDC statute, to deny needy families the compensation our legal system affords to the rest of society. Accordingly, I dissent.

HITCHCOCK *v.* DUGGER, FLORIDA DEPARTMENT OF CORRECTIONS

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

No. 85–6756. Argued October 15, 1986—Decided April 22, 1987

Petitioner was convicted of first-degree murder and sentenced to death in a separate postconviction proceeding. In that proceeding, the trial judge instructed the advisory jury not to consider, and himself refused to consider, evidence of mitigating circumstances not specifically enumerated in the Florida death penalty statute. Following unsuccessful appeals and state and federal collateral proceedings, petitioner filed an application for a writ of habeas corpus in Federal District Court, claiming that the advisory jury and the sentencing judge had been precluded by law from considering evidence of nonstatutory mitigating circumstances. The District Court denied the application, and the Court of Appeals affirmed.

Held: Petitioner was sentenced to death in proceedings that did not comport with the requirement that the sentencer may neither refuse to consider nor be precluded from considering any relevant mitigating evidence. *Skipper* v. *South Carolina*, 476 U. S. 1; *Eddings* v. *Oklahoma*, 455 U. S. 104; *Lockett* v. *Ohio*, 438 U. S. 586. Under the circumstances of this case, petitioner's death sentence cannot stand. Pp. 395–399.

770 F. 2d 1514, reversed and remanded.

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

Craig S. Barnard argued the cause for petitioner. With him on the briefs were *Richard L. Jorandby* and *Richard H. Burr III*.

Sean Daly, Assistant Attorney General of Florida, argued the cause for respondent. With him on the brief were *Jim Smith*, Attorney General, and *Richard Prospect*, Assistant Attorney General.*

**Ira Reiner*, *Harry B. Sondheim*, *John K. Van de Kamp*, Attorney General of California, *Michael C. Wellington*, Supervising Deputy Attorney General, and *Susan Lee Frierson*, Deputy Attorney General, filed a brief for the State of California et al. as *amici curiae* urging affirmance.

JUSTICE SCALIA delivered the opinion of the Court.

We have held that in capital cases, "'the sentencer'" may not refuse to consider or "'be precluded from considering'" any relevant mitigating evidence. *Skipper* v. *South Carolina*, 476 U. S. 1, 4 (1986) (quoting *Eddings* v. *Oklahoma*, 455 U. S. 104, 114 (1982)). See also *Lockett* v. *Ohio*, 438 U. S. 586, 604 (1978) (plurality opinion). Certiorari was granted in the present case to consider petitioner's contention that he was sentenced to death under a Florida statute that operated in a manner inconsistent with this requirement.[1] 476 U. S. 1168 (1986).

I

On July 31, 1976, 13-year-old Cynthia Driggers was strangled to death. At the time of the murder, both Cynthia and petitioner resided with Richard Hitchcock, who was Cynthia's stepfather and petitioner's brother. Petitioner initially confessed to the murder, stating that he had killed Cynthia after she threatened to tell her parents that she and petitioner had engaged in consensual sexual intercourse. At his trial for first-degree murder, however, petitioner recanted and testified that it was his brother Richard who murdered Cynthia, after finding out about the intercourse. The State contended that petitioner had sexually assaulted Cynthia and then murdered her to avoid discovery.

Petitioner was convicted of first-degree murder and sentenced to death. After unsuccessful appeals and state and federal collateral proceedings, he filed an application for a writ of habeas corpus in the United States District Court for the Middle District of Florida. He argued, among other

[1] Certiorari was also granted on petitioner's claim that the Florida death penalty statute discriminates against capital defendants who murder whites and against black capital defendants, in violation of the Eighth and Fourteenth Amendments. Because we hold petitioner's death sentence invalid on other grounds, we decline to reach this claim. We today decide a similar challenge to the Georgia death penalty statute. See *McCleskey* v. *Kemp*, *ante*, p. 279.

things, that the advisory jury and sentencing judge had been precluded by law from considering certain evidence of mitigating circumstances that had been introduced, and that additional evidence of mitigating circumstances had been withheld by his counsel in the reasonable belief that it could not be considered under the Florida death penalty statute. The District Court denied petitioner's application, without granting an evidentiary hearing. A panel of the Eleventh Circuit affirmed, 745 F. 2d 1332 (1984), and the Eleventh Circuit affirmed en banc, 770 F. 2d 1514 (1985). This petition followed.

II

Petitioner claims that the advisory jury and the sentencing judge were precluded by law from considering some of the evidence of mitigating circumstances before them. The Florida death penalty statute in effect at the time (which has since been amended in various respects) provided for separate postconviction proceedings to determine whether those convicted of capital felonies should be sentenced to death or to life imprisonment. Those proceedings were typically held before the trial jury, which heard evidence "as to any matter that the court deem[ed] relevant to sentence." Fla. Stat. § 921.141(1) (1975). After hearing that evidence, the jury was to render an advisory verdict by determining "(a) [w]hether sufficient aggravating circumstances exist as enumerated in [§ 921.141(5)];[2] (b) [w]hether sufficient miti-

[2] Section 921.141(5) provided that the aggravating circumstances "shall be limited to the following": that the crime was committed while the defendant was under sentence of imprisonment; that the defendant had previously been convicted of a felony involving the use or threat of violence; that the defendant knowingly created a great risk of death to many persons; that the crime was committed while the defendant was involved in the commission of specified other felonies; that the crime was committed for the purpose of avoiding arrest or escaping from custody; that the crime was committed for pecuniary gain; that the crime was intended to disrupt the government or the enforcement of the laws; and that the crime was especially heinous, atrocious, or cruel.

gating circumstances exist as enumerated in [§ 921.141(6)],[3] which outweigh the aggravating circumstances found to exist; and (c) [b]ased on these considerations, whether the defendant should be sentenced to life [imprisonment] or death." § 921.141(2). The trial court then was to weigh the aggravating and mitigating circumstances itself and enter a sentence of life imprisonment or death. If it imposed a sentence of death, it was required to set forth in writing its findings "(a) [t]hat sufficient aggravating circumstances exist as enumerated in [§ 921.141(5)], and (b) [t]hat there are insufficient mitigating circumstances, as enumerated in [§ 921.141(6)], to outweigh the aggravating circumstances." § 921.141(3).

Petitioner argues that, at the time he was sentenced, these provisions had been authoritatively interpreted by the Florida Supreme Court to prohibit the sentencing jury and judge from considering mitigating circumstances not specifically enumerated in the statute. See, *e. g.*, *Cooper* v. *State*, 336 So. 2d 1133, 1139 (1976) ("The sole issue in a sentencing hearing under Section 921.141, Florida Statutes (1975), is to examine in each case the itemized aggravating and mitigating circumstances. Evidence concerning other matters have *[sic]* no place in that proceeding . . ."), cert. denied, 431 U. S. 925 (1977). Respondent contends that petitioner has misconstrued *Cooper*, pointing to the Florida Supreme Court's subsequent decision in *Songer* v. *State*, 365 So. 2d 696 (1978) *(per curiam)*, which expressed the view that *Cooper*

[3] Section 921.141(6) provided that the mitigating circumstances "shall be the following": that the defendant had no significant history of prior criminal activity; that the crime was committed while the defendant was under the influence of extreme mental or emotional disturbance; that the victim participated in or consented to the crime; that defendant was merely an accomplice whose participation in the crime was relatively minor; that the defendant acted under duress or domination; that the capacity of the defendant to appreciate the criminality of his conduct or to conform that conduct to the requirements of law was substantially impaired; and the age of the defendant at the time of the crime.

had not prohibited sentencers from considering mitigating circumstances not enumerated in the statute. Because our examination of the sentencing proceedings actually conducted in this case convinces us that the sentencing judge assumed such a prohibition and instructed the jury accordingly, we need not reach the question whether that was in fact the requirement of Florida law. We do note, however, that other Florida judges conducting sentencing proceedings during roughly the same period believed that Florida law precluded consideration of nonstatutory mitigating circumstances. At least three death sentences have been overturned for this reason. See *Songer* v. *Wainwright*, 769 F. 2d 1488 (CA11 1985) (en banc) *(per curiam)*, cert. pending, No. 85–567; *Lucas* v. *State*, 490 So. 2d 943, 946 (Fla. 1986); *Harvard* v. *State*, 486 So. 2d 537 (Fla.) *(per curiam)*, cert. denied, 479 U. S. 863 (1986). We also note that the Florida Legislature has since removed the phrase "as enumerated [in the statutory list]" from the provisions requiring the advisory jury and the sentencing judge to consider mitigating circumstances. See Fla. Stat. §§ 921.141(2)(b), (3)(b) (1985).

In the sentencing phase of this case, petitioner's counsel introduced before the advisory jury evidence that as a child petitioner had the habit of inhaling gasoline fumes from automobile gas tanks; that he had once passed out after doing so; that thereafter his mind tended to wander; that petitioner had been one of seven children in a poor family that earned its living by picking cotton; that his father had died of cancer; and that petitioner had been a fond and affectionate uncle to the children of one of his brothers. Tr. of Advisory Sentence 7–10. In argument to the advisory jury, petitioner's counsel referred to various considerations, some of which were the subject of factual dispute, making a sentence of death inappropriate: petitioner's youth (he was 20 at the time of the murder), his innocence of significant prior criminal activity or violent behavior, the difficult circumstances of his upbringing, his potential for rehabilitation, and his voluntary sur-

render to authorities. *Id.*, at 13–17, 21–26. Although petitioner's counsel stressed the first two considerations, which related to mitigating circumstances specifically enumerated in the statute, he told the jury that in reaching its sentencing decision it was to "look at the overall picture . . . consider everything together . . . consider the whole picture, the whole ball of wax." *Id.*, at 50–52. In contrast, the prosecutor told the jury that it was "to consider the mitigating circumstances and consider those by number," *id.*, at 28, and then went down the statutory list item by item, arguing that only one (petitioner's youth) was applicable. Before proceeding to their deliberations, the members of the jury were told by the trial judge that he would instruct them "on the factors in aggravation and mitigation that you may consider under our law." *Id.*, at 5. He then instructed them that "[t]he mitigating circumstances which you may consider shall be the following . . ." (listing the statutory mitigating circumstances). *Id.*, at 56.

After receiving the advisory jury's recommendation (by majority vote) of death, and despite the argument of petitioner's counsel that the court should take into account the testimony concerning petitioner's family background and his capacity for rehabilitation, the sentencing judge found that "there [were] insufficient mitigating circumstances *as enumerated in Florida Statute 921.141(6)* to outweigh the aggravating circumstances." Tr. of Sentencing Proceedings 7 (emphasis added). He described the process by which he reached his sentencing judgment as follows: "In determining whether the defendant should be sentenced to death or life imprisonment, this Court is mandated to apply the facts to *certain enumerated* 'aggravating' and 'mitigating' circumstances." 10 Record 195 (emphasis added). The only mitigating circumstance he found was petitioner's youth. *Id.*, at 197.

We think it could not be clearer that the advisory jury was instructed not to consider, and the sentencing judge refused

to consider, evidence of nonstatutory mitigating circumstances, and that the proceedings therefore did not comport with the requirements of *Skipper* v. *South Carolina*, 476 U. S. 1 (1986), *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982), and *Lockett* v. *Ohio*, 438 U. S. 586 (1978) (plurality opinion). Respondent has made no attempt to argue that this error was harmless, or that it had no effect on the jury or the sentencing judge. In the absence of such a showing our cases hold that the exclusion of mitigating evidence of the sort at issue here renders the death sentence invalid. See *Skipper*, *supra* (evidence that defendant had adapted well to prison life); *Eddings*, *supra* (evidence of 16-year-old defendant's troubled family history and emotional disturbance). As in those cases, however, the State is not precluded from seeking to impose a death sentence upon petitioner, "provided that it does so through a new sentencing hearing at which petitioner is permitted to present any and all relevant mitigating evidence that is available." *Skipper*, *supra*, at 8.

We reverse the judgment and remand the case to the Court of Appeals. That court is instructed to remand to the District Court with instructions to enter an order granting the application for a writ of habeas corpus, unless the State within a reasonable period of time either resentences petitioner in a proceeding that comports with the requirements of *Lockett* or vacates the death sentence and imposes a lesser sentence consistent with law.

It is so ordered.

MONTANA *v.* HALL

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

No. 86–1381. Decided April 27, 1987

An information charging respondent with felony sexual assault upon his ex-wife's 12-year-old daughter was dismissed, on respondent's motion, on the ground that he could be prosecuted only for incest under state law because the victim was his stepdaughter. Respondent was then tried, convicted, and sentenced upon a new information charging him with incest. On his appeal to the Montana Supreme Court, it was discovered that at the time of the assault in question the incest statute did not apply to sexual assaults against stepchildren, and that the amended statute under which respondent was tried had not become effective until after the assault. After concluding that the conviction was void under the Montana Constitution's *ex post facto* law prohibition, the court held that the Federal Constitution's Double Jeopardy Clause prohibited retrial on the ground that sexual assault and incest are the "same [offense] in law and fact," *Brown* v. *Ohio*, 432 U. S. 161, 167, n. 6. As an alternative ground of decision, the court noted that respondent "was convicted of a crime which did not exist on the date of the charged offense," and held that a retrial after such a conviction also would subject respondent to double jeopardy.

Held: Although Montana's *ex post facto* law clause prevents the State from convicting respondent of incest, the Double Jeopardy Clause does not prevent his trial on the related charge of sexual assault, where his incest conviction was reversed on grounds unrelated to guilt or innocence and there is no suggestion that the evidence introduced at trial was insufficient to convict him, see *Burks* v. *United States*, 437 U. S. 1, and where the State originally sought to try him for sexual assault, but, at his behest, tried him instead for incest. *Brown* v. *Ohio*, *supra*, distinguished. Moreover, the Clause does not forbid retrial because respondent was convicted of a nonexistent crime, but, in fact, permits retrial after a conviction is reversed because of a defect in the charging instrument. Under the Montana court's reading of the sexual assault statute, respondent's conduct apparently was criminal at the time he engaged in it,

and, thus, the State simply relied on the wrong statute in its second information.

Certiorari granted; 224 Mont. 187, 728 P. 2d 1339, reversed and remanded.

PER CURIAM.

In 1984 the State of Montana filed an information in the Yellowstone County District Court charging respondent with felony sexual assault in violation of Mont. Code Ann. § 45–5–502 (1981). The affidavit in support of the information indicated that the assault took place during the summer of 1983, and that the victim was the daughter of respondent's ex-wife. The victim was 12 years old at the time of the offense. Four days before trial, respondent filed a motion to dismiss the information, arguing that because the victim was his stepdaughter he could be prosecuted only for incest, under Mont. Code Ann. § 45–5–507 (1983), not sexual assault. Respondent argued that incest was merely a specific instance of sexual assault, and that the Montana Legislature had not intended incestuous acts to be subject to prosecution under the more general sexual assault statute. On the morning of the trial, the State District Court held a hearing and then granted the motion. The State promptly filed a new information charging respondent with incest, and proceeded to trial. A jury convicted respondent. The judge sentenced respondent to 10 years' imprisonment, but suspended 5 years of the sentence.

Respondent appealed his conviction to the Montana Supreme Court, raising a number of claims not directly relevant to the issue before this Court. One of respondent's claims was that he could not lawfully be convicted of incest because the victim was not his stepdaughter within the meaning of the Montana incest statute. In the course of considering this claim, the State discovered that at the time of the assault the incest statute had not applied to sexual assaults against stepchildren. The amended statute under which respondent was tried had not become effective until

October 1, 1983, three months after the assault in question. On March 5, 1986, the State filed a motion bringing this matter to the attention of the Montana Supreme Court.

After briefing on the questions raised by the State's motion, the Montana Supreme Court concluded that the conviction was void because retroactive application of the amended statute would violate the *ex post facto* law prohibition of the Montana Constitution, Art. II, § 31. It also held that the Double Jeopardy Clause of the Fifth Amendment to the Federal Constitution prohibited retrial of respondent. It stated that "[i]f the offense charged in the second trial is the same in law and fact as the offense charged in the first trial, the double jeopardy clause prohibits successive trials." 224 Mont. 187, 190, 728 P. 2d 1339, 1340 (1986) (citing *Brown* v. *Ohio*, 432 U. S. 161, 167, n. 6 (1977)). The court then analyzed the elements of sexual assault and incest and concluded that they were the same offense for double jeopardy purposes. Relying on this conclusion and *Brown* v. *Ohio*, it held that the Double Jeopardy Clause barred retrial. As an alternative ground of decision, it noted that respondent "was convicted of a crime which did not exist on the date of the charged offense." 224 Mont., at 192, 728 P. 2d, at 1342. In the court's view, a retrial after a conviction for committing a nonexistent crime also would subject respondent to double jeopardy.

It is a "venerable princip[e] of double jeopardy jurisprudence" that "[t]he successful appeal of a judgment of conviction, on any ground other than the insufficiency of the evidence to support the verdict, *Burks* v. *United States*, [437 U. S. 1 (1978)], poses no bar to further prosecution on the same charge." *United States* v. *Scott*, 437 U. S. 82, 90–91 (1978). See generally 3 W. LaFave & J. Israel, Criminal Procedure § 24.4 (1984). Justice Harlan explained the basis for this rule:

> "Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose

> guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction. From the standpoint of a defendant, it is at least doubtful that appellate courts would be as zealous as they now are in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution. In reality, therefore, the practice of retrial serves defendants' rights as well as society's interest." *United States* v. *Tateo*, 377 U. S. 463, 466 (1964).

See *Burks* v. *United States*, *supra*, at 15.

Although Montana's *ex post facto* law clause prevents Montana from convicting respondent of incest, we see no reason why the State should not be allowed to put respondent to a trial on the related charge of sexual assault. There is no suggestion that the evidence introduced at trial was insufficient to convict respondent. See *Burks* v. *United States*, *supra*.[1] Montana originally sought to try respondent for sexual assault. At respondent's behest, Montana tried him instead for incest. In these circumstances, trial of respondent for sexual assault, after reversal of respondent's incest conviction on grounds unrelated to guilt or innocence, does not offend the Double Jeopardy Clause.

The principal federal authority relied on by the Montana Supreme Court was our decision in *Brown* v. *Ohio*, *supra*. The petitioner in that case had been convicted of joyriding. After serving a term of imprisonment on that conviction, he was charged with auto theft. We concluded that the charges

[1] Nor was the jury's conviction of respondent on the charge of incest an implied acquittal of the offense of sexual assault; there would have been an implied acquittal only if the jury had been presented with charges of both sexual assault and incest and had chosen to convict respondent of incest. See *Green* v. *United States*, 355 U. S. 184 (1957).

of joyriding and theft punished a single offense, and thus that retrial was impermissible. But the *Brown* analysis is not apposite in this case.[2] In *Brown*, the defendant did not overturn the first conviction; indeed, he served the prison sentence assessed as punishment for that crime. Thus, when the State sought to try him for auto theft, it actually was seeking a second conviction for the same offense. By contrast, respondent in this case sought, and secured, invalidation of his first conviction. This case falls squarely within the rule that retrial is permissible after a conviction is reversed on appeal.

The Montana court also suggested that the Double Jeopardy Clause would forbid retrial because respondent was convicted of an offense that did not exist when respondent had committed the acts in question. But, under the Montana court's reading of the Montana sexual assault statute, respondent's conduct apparently was criminal at the time he engaged in it. If that is so, the State simply relied on the wrong statute in its second information. It is clear that the Constitution permits retrial after a conviction is reversed because of a defect in the charging instrument. *E. g.*, *United States* v. *Ball*, 163 U. S. 662, 672 (1896).

We grant Montana's petition for a writ of certiorari[3] and reverse the judgment of the Montana Supreme Court.[4] The

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[2] We explicitly noted in *Brown* that the case did not raise "the double jeopardy questions that may arise . . . after a conviction is reversed on appeal." 432 U. S., at 165, n. 5.

[3] As JUSTICE STEVENS implicitly acknowledges, we have jurisdiction over this petition under 28 U. S. C. § 1257(3). The Montana court's decision "fairly appears to rest primarily on federal law, or to be interwoven with the federal law," and "the adequacy and independence of any possible state law ground is not clear from the face of the opinion." *Michigan* v. *Long*, 463 U. S. 1032, 1040–1041 (1983).

[4] We express no opinion on the correctness, as a matter of federal constitutional law, of the Montana Supreme Court's conclusion that sexual assault and incest are the "same" offenses.

case is remanded to that court for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE BRENNAN would deny the petition for certiorari.

JUSTICE MARSHALL, dissenting.

For years, I have been troubled by our disposition of appeals and petitions for certiorari through summary *per curiam* opinions, without plenary briefing on the merits of the issues decided.[1] Other Justices have registered similar objections, disputing the Court's application of the criteria that supposedly determine when a summary disposition is clearly justified.[2] Our persistent indulgence in this practice over the objections of our colleagues has tarnished what has long been considered one of this judicial institution's greatest qualities, the fairness and integrity of its decisionmaking process.

Through summary dispositions, we deprive the litigants of a fair opportunity to be heard on the merits. Our Rules tell the petitioner and respondent that we will grant review on

[1] See, *e. g.*, *Allen* v. *Hardy*, 478 U. S. 255, 261 (1986) (MARSHALL, J., dissenting); *Maggio* v. *Fulford*, 462 U. S. 111, 120 (1983) (MARSHALL, J., dissenting); *Griggs* v. *Provident Consumer Discount Co.*, 459 U. S. 56, 62 (1982) (MARSHALL, J., dissenting); *Wyrick* v. *Fields*, 459 U. S. 42, 50 (1982) (MARSHALL, J., dissenting); *Harris* v. *Rivera*, 454 U. S. 339, 349 (1981) (MARSHALL, J., dissenting); *Schweiker* v. *Hansen*, 450 U. S. 785, 791 (1981) (MARSHALL, J., dissenting); *Harris* v. *Rosario*, 446 U. S. 651, 652 (1980) (MARSHALL, J., dissenting); *Smith* v. *Arkansas State Highway Employees*, 441 U. S. 463, 466 (1979) (MARSHALL, J., dissenting).

[2] See, *e. g.*, *Board of Education of Rogers, Ark.* v. *McCluskey*, 458 U. S. 966, 971–972 (1982) (STEVENS, J., dissenting); *United States* v. *Hollywood Motor Car Co.*, 458 U. S. 263, 271 (1982) (BLACKMUN, J., dissenting); *Hutto* v. *Davis*, 454 U. S. 370, 387 (1982) (BRENNAN, J., dissenting); *Stone* v. *Graham*, 449 U. S. 39, 47 (1980) (REHNQUIST, J., dissenting); *Oregon State Penitentiary* v. *Hammer*, 434 U. S. 945, 947 (1977) (STEVENS, J., dissenting); *Eaton* v. *Tulsa*, 415 U. S. 697, 707 (1974) (REHNQUIST, J., dissenting); cf. *Shipley* v. *California*, 395 U. S. 818, 821 (1969) (WHITE, J., dissenting).

writ of certiorari "when there are special and important reasons therefor."[3] In listing the considerations that are important in deciding whether review should be granted, we mention such things as conflicting decisions from other courts and unsettled questions of federal law. We do *not* indicate that the parties should address the merits of the lower court's decision beyond what is necessary to demonstrate whether the case is important enough to receive plenary review.[4] Our 30-page limit for petitions and responses, and the command that they be "as short as possible,"[5] unmistakably indicate that these papers should not contain detailed discussions of the merits. If we find the case sufficiently important, the Rules inform the parties that the petition will be granted and "[t]he case then will stand for briefing and oral argument."[6] Yet when we issue a summary disposition we ignore these instructions and proceed to decide the case as if it has been fully briefed on the merits. In my view, simply put, this is not fair.[7]

Admittedly, the Rules indicate that summary dispositions on the merits are possible,[8] but in light of our instructions regarding the preparation of petitions and responses this places the litigants in a difficult dilemma. If they venture

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[3] This Court's Rule 17.1.

[4] At our direction the respondent focuses instead on "disclosing any matter or ground why the cause should not be reviewed." Rule 22.1.

[5] Rules 21.4 and 22.2. In this case, petitioner devoted 12 pages to the merits of the double jeopardy issue decided by the Court today, respondent only 7. Pet. for Cert. 10–21; Respondent's Brief in Opposition 8–14. An *amicus curiae* brief submitted on behalf of 17 States devoted a total of five pages to the merits. Brief for the States and Commonwealths of Indiana et al. as *Amici Curiae* 2–6.

[6] Rule 23.2.

[7] This lack of fairness has not escaped the notice of commentators. See, *e. g.*, E. Brown, The Supreme Court 1957 Term—Forward: Process of Law, 72 Harv. L. Rev. 77, 80, 82, (1958); R. Stern, E. Gressman, & S. Shapiro, Supreme Court Practice 284–285 (6th ed. 1986).

[8] Rule 23.1. This Rule was not codified until 1980. Stern, Gressman, & Shapiro, Supreme Court Practice, *supra*, at 277.

beyond arguments for granting or denying certiorari, they risk violating the Rules; but if they fail to cover the merits of the lower court's decision *in full*, they risk summary disposition without having been heard.[9] In response to these pressures, counsel may tend to extend their arguments in petitions and responses beyond the purposes defined in the Rules. Apart from increasing the litigants' costs, this tendency can only increase our workload, thereby giving those who favor uncounseled summary dispositions additional justification for not allowing full briefing on the merits.[10]

Not only do we reach these summary dispositions without the benefit of thorough briefing, but the Court often acts without obtaining the complete record of the proceedings below. Records are no longer automatically certified and delivered to us for every petition.[11] In fact, we expressly discourage transmission of the record at this stage of the proceedings,[12] which again indicates that the focus of certiorari is on whether a case is important enough to warrant plenary review and not whether, after abbreviated review, we are able to conclude that the case was rightly or wrongly decided below. Of course, we may call for the record where we think a summary disposition might be proper, and our Clerk notifies the parties of this development, but we do not provide for supplemental briefing on the merits.[13] All too often, as in the case decided today, the Court does not even bother to call

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[9] Cf. *United States* v. *Hollywood Motor Car Co.*, *supra*, at 271 (BLACKMUN, J., dissenting).

[10] See *Hutto* v. *Davis*, *supra*, at 387, n. 6 (BRENNAN, J., dissenting); Stern, Gressman, & Shapiro, Supreme Court Practice, *supra*, at 286.

[11] See generally Stern, Gressman, & Shapiro, Supreme Court Practice, *supra*, at 329–333.

[12] Rule 19.1.

[13] A party may, at any time, file a supplemental brief not exceeding 10 pages, but these briefs can only address a "new matter" not available at the time of the party's last filing. Rule 22.6. This Rule does not envision supplemental briefing when the Court calls for the record. See also Rule 21.3 (supplemental brief in support of petition will not be received).

for the record. Again, counsel face a dilemma: they may routinely request that records be transmitted, thus protecting the interests of their clients at the risk of violating the Rules, or they may fail to request transmission and risk summary disposition based on less than complete review.

I cannot accept the proposition that additional briefing and review of the full record will increase the workload of this Court unbearably. Our duty to litigants today is to consider carefully every petition and response filed in this Court. But our duty extends to future litigants as well, and it is heightened when we issue written opinions. To reduce the incidence of mistakes and to avoid delivering conflicting or confusing opinions, our decisions in these cases should be made only after we have had an opportunity to consider comprehensive briefs and review the records in their entirety. We are not infallible, as is evidenced, for example, by the number of cases each Term that are dismissed *after* plenary briefing and oral argument as having been improvidently granted. The time and effort required to read supplemental briefs in cases for which we are considering summary dispositions would be minimal,[14] and the relative gains substantial.

More is at stake, however, than offsetting the litigants' entitlement to be heard on the merits against our desires to avoid increasing the workload. Summary dispositions often do not accord proper respect for the judgments of the lower

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[14] To put matters in perspective, were we to shorten the acceptable length of petitions and responses merely by one-fifth of a single page, it would free up at least 2,000 pages worth of our reading time to consider full briefs for the relatively few summary dispositions we issue each year. That comes to 40 briefs, at 50 pages each, or 20 cases decided in which the parties and the Court would have the benefit of full briefing. This assumes that 5,000 petitions are filed each year, and that on the average litigants use the complete 30 pages allowed. The former assumption is conservative and is a matter of record; based on my personal observation the latter assumption is more than fair.

courts, particularly when these judgments are reversed.[15] The judges below *have had* the benefit of full briefing on the merits and review of the entire record. They must perceive—correctly—that our cavalier reversals are inherently less well informed.

I believe, moreover, that summary dispositions in many instances display insufficient respect for the views of dissenting colleagues on *this* Court. The tendency is to forget that we are equally uninformed. What troubles a single Justice about a particular case may become, after full briefing, a decisive factor in the judgment of the Court. As it is, we forge ahead issuing *per curiam* opinions as if the issue were crystal clear, at times over objection from as many as four other Justices.[16] It is not unreasonable to believe, as I do, that the integrity of a summary decision from a divided Court would benefit from additional briefing on the merits by those who have litigated the issues of the case from its inception.

"*Per curiam*" is a Latin phrase meaning "[b]y the court,"[17] which should distinguish an opinion of the *whole* Court from an opinion written by any one Justice. Our use of a lengthy *per curiam* opinion, over the dissent of those who would set the case for briefing, to resolve the merits of a case without devoting the usual time or consideration to the issues presented, is wrong. Such an opinion does not speak for the entire Court on a matter so clear that the Court can and should speak with one voice. Instead, it speaks for a majority of Justices who take it upon themselves to resolve the merits of a dispute solely on the basis of preliminary petitions and responses.

I can think of no compelling reason, and to date none has been suggested, why we should nurture a practice that can

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[15] See, *e. g.*, *Stone* v. *Graham*, 449 U. S., at 47 (REHNQUIST, J., dissenting); *Oregon State Penitentiary* v. *Hammer*, 434 U. S., at 947 (STEVENS, J., dissenting).

[16] See, *e. g.*, *Newport* v. *Iacobucci*, 479 U. S. 92 (1986).

[17] Black's Law Dictionary 1023 (5th ed. 1979) (emphasis added).

only foster resentment, uncertainty, and error. Rather, I believe that when the Court contemplates a summary disposition it should, at the very least, invite the parties to file supplemental briefs on the merits, *at their option*. This simple accommodation to the reasonable expectations of the litigants, to the integrity of the lower courts, and to the desires of other Justices for a more studied decision would go a long way toward achieving the fairness and accuracy that the Nation rightfully expects from its Court of last resort. Until this, or some other, reasonable accommodation is implemented, I remain in dissent.

JUSTICE STEVENS, dissenting.

"Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground." *Michigan* v. *Long*, 463 U. S. 1032, 1040 (1983).

Perhaps the Court is correct in assuming that the decision of the Supreme Court of Montana does not rest on an adequate and independent state ground. Nevertheless, it is worthy of note that the state court expressly relied on Article II, § 25, of the Montana Constitution[1] and cited four decisions of the Montana Supreme Court in support of its double jeopardy holding.[2] Furthermore, after concluding that "the double jeopardy clause prohibits [respondent's] retrial," 224 Mont. 187, 192, 728 P. 2d 1339, 1342 (1986), the Montana court advanced an alternative ground for its decision that is supported only by the Montana case of *State* v. *Hembd*, 197 Mont. 438, 643 P. 2d 567 (1982), namely that retrial would be impermissible because respondent was convicted of an of-

[1] Article II, § 25, of the Montana Constitution provides: "No person shall be again put in jeopardy for the same offense previously tried in any jurisdiction."

[2] *State* v. *Lindseth*, 203 Mont. 115, 659 P. 2d 844 (1983); *State* v. *Wells*, 202 Mont. 337, 658 P. 2d 381 (1983); *State* v. *Hembd*, 197 Mont. 438, 643 P. 2d 567 (1982); *State* v. *Parmenter*, 112 Mont. 312, 116 P. 2d 879 (1941).

fense that did not exist when he committed the acts in question; this state-law doctrine has no federal counterpart of which I am aware.

My respect for the independence of state courts, as well as the desirability of not rendering opinions that may turn out to be wholly advisory, therefore persuades me that the Court's summary disposition is unwise. See, *e. g.*, *People* v. *P. J. Video, Inc.*, 68 N. Y. 2d 296, 501 N. E. 2d 556 (1986) (declining to follow *New York* v. *P. J. Video, Inc.*, 475 U. S. 868 (1986)), cert. denied, 479 U. S. 1091 (1987); *Commonwealth* v. *Upton*, 394 Mass. 363, 476 N. E. 2d 548 (1985) (declining to follow *Massachusetts* v. *Upton*, 466 U. S. 727 (1984)); *Bellanca* v. *New York State Liquor Authority*, 54 N. Y. 2d 228, 429 N. E. 2d 765 (1981) (declining to follow *New York State Liquor Authority* v. *Bellanca*, 452 U. S. 714 (1981)), cert. denied, 456 U. S. 1006 (1982); *State* v. *Opperman*, 247 N. W. 2d 673 (S. D. 1976) (declining to follow *South Dakota* v. *Opperman*, 428 U. S. 364 (1976)).

I would simply deny Montana's petition for a writ of certiorari.

TULL *v.* UNITED STATES

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

No. 85–1259. Argued January 21, 1987—Decided April 28, 1987

The Clean Water Act (Act) authorizes injunctive relief against violators (33 U. S. C. § 1319(b)) and subjects them to a civil penalty not to exceed $10,000 per day (§ 1319(d)). After denying petitioner's timely demand for a jury trial in the Government's suit for relief under §§ 1319(b) and 1319(d), the District Court imposed civil penalties and granted injunctive relief against petitioner. The Court of Appeals affirmed, rejecting petitioner's argument that the Seventh Amendment entitled him to a jury trial on the civil penalties claim. The court held, *inter alia*, that the District Court had exercised statutorily conferred equitable power in assessing monetary penalties.

Held:

1. The Seventh Amendment guarantees a jury trial to determine liability in actions by the Government seeking civil penalties and injunctive relief under the Act. An examination of the nature of such actions and of the remedies sought demonstrates that they are more analogous to "Suits at common law" within the meaning of the Amendment than they are to cases traditionally tried in courts of equity. Pp. 417–425.

(a) A Government suit under § 1319(d) is analogous to an action in debt within the jurisdiction of English courts of law prior to the Seventh Amendment's enactment, and therefore should be tried by a jury. The Government's argument that the action is more analogous to an action by the English sovereign to abate a public nuisance is debatable but irrelevant for Seventh Amendment purposes, since that Amendment requires trial by jury in actions unheard of at common law. Both a public nuisance action and an action in debt could be asserted by the sovereign to seek relief for an injury to the public in numerous contexts. The conclusion that both are appropriate analogies to a § 1319(d) action is sufficient here, particularly in light of the Court's characterization of the relief sought, *infra*. Pp. 418–421.

(b) Unlike public nuisance actions which relied on the injunctive relief provided by equity courts, the text and legislative history of § 1319(d) demonstrate that suits thereunder are intended to punish culpable individuals, and thus yield a type of remedy that at common law could only be enforced in a court of law. The contention that a § 1319(d) suit is similar to an equitable action for disgorgement of profits is not persuasive, since the latter is a remedy only for restitution, a more lim-

ited form of relief than a civil penalty. The Government's contention that its § 1319(b) injunction action provides jurisdiction for incidental monetary relief without the necessity of a jury trial also fails, since equity courts may not enforce civil penalties, and the Government knew when it filed suit that relief would be limited primarily to civil penalties because petitioner had already sold most of the property at issue. The potential penalty of $23 million could hardly be considered "incidental" to the modest equitable relief sought. Moreover, the Government was free to pursue its § 1319(b) claim independent of its § 1319(d) claim. By choosing to combine them, it preserved petitioner's right to a jury trial on the legal claim and all issues common to both claims, and cannot abridge that right by characterizing the legal claim as "incidental." Pp. 422–425.

2. The Seventh Amendment does not guarantee a jury trial to assess civil penalties under the Act. The fact that trial judges assess those penalties does not violate the Amendment, since assessment cannot be said to involve the substance of a common-law right to, nor a fundamental element of, a jury trial, as is necessary to implicate the Amendment. Congress has an unquestioned right to fix civil penalties, and may delegate that right to trial judges, particularly where, as here, highly discretionary calculations that take into account multiple factors are necessary. Pp. 425–427.

769 F. 2d 182, reversed and remanded.

BRENNAN, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, MARSHALL, BLACKMUN, POWELL, and O'CONNOR, JJ., joined, and in Parts I and II of which STEVENS and SCALIA, JJ., joined. SCALIA, J., filed an opinion concurring in part and dissenting in part, in which STEVENS, J., joined, *post*, p. 427.

Richard R. Nageotte argued the cause for petitioner. With him on the briefs was *E. Barrett Prettyman, Jr.*

Deputy Solicitor General Wallace argued the cause for the United States. With him on the brief were *Solicitor General Fried, Assistant Attorney General Habicht, Charles A. Rothfeld, Anne S. Almy,* and *Claire L. McGuire.**

*Briefs of *amici curiae* urging reversal were filed for the Chamber of Commerce of the United States by *Herbert L. Fenster, Stanley W. Landfair,* and *Robin S. Conrad;* for the Virginia Trial Lawyers Association et al. by *Mary Lynn Tate;* and for the Washington Legal Foundation by *Daniel J. Popeo* and *Paul D. Kamenar.*

Robert H. Whaley and *Bryan P. Harnetiaux* filed a brief for the Washington State Trial Lawyers Association as *amicus curiae.*

JUSTICE BRENNAN delivered the opinion of the Court.

The question for decision is whether the Seventh Amendment guaranteed petitioner a right to a jury trial on both liability and amount of penalty in an action instituted by the Federal Government seeking civil penalties and injunctive relief under the Clean Water Act, 62 Stat. 1155, as amended, 33 U. S. C. § 1251 *et seq.*

I

The Clean Water Act prohibits discharging, without a permit, dredged or fill material into "navigable waters," including the wetlands adjacent to the waters. 33 U. S. C. §§ 1311, 1344, and 1362(7); 33 CFR §§ 323.2(a)(1)–(7) (1986). "Wetlands" are "swamps, marshes, bogs and similar areas." 33 CFR § 323.2(c) (1986). The Government sued petitioner, a real estate developer, for dumping fill on wetlands on the island of Chincoteague, Virginia. The Government alleged in the original complaint that petitioner dumped fill on three sites: Ocean Breeze Mobile Homes Sites, Mire Pond Properties, and Eel Creek. The Government later amended the complaint to allege that petitioner also placed fill in a manmade waterway, named Fowling Gut Extended, on the Ocean Breeze property.[1]

Section 1319 enumerates the remedies available under the Clean Water Act. Subsection (b) authorizes relief in the form of temporary or permanent injunctions. Subsection (d) provides that violators of certain sections of the Act "shall be subject to a civil penalty not to exceed $10,000 per day" during the period of the violation. The Government sought in

[1] Additionally, the Government alleged that petitioner's dumping of fill in Fowling Gut Extended violated another statute, the Rivers and Harbors Act, which prohibits the placement of fill in navigable waters without the authorization of the Secretary of the Army. 33 U. S. C. § 403. Petitioner does not base his Seventh Amendment claim on the Government's prosecution under this statute, which provides for injunctive relief but not for civil penalties.

this case both injunctive relief and civil penalties. When the complaint was filed, however, almost all of the property at issue had been sold by petitioner to third parties. Injunctive relief was therefore impractical except with regard to a small portion of the land.[2] App. 110, 119. The Government's complaint demanded the imposition of the maximum civil penalty of $22,890,000 under subsection (d). App. 31–34.

Petitioner's timely demand for a trial by jury was denied by the District Court. During the 15-day bench trial, petitioner did not dispute that he had placed fill at the locations alleged and did not deny his failure to obtain a permit. Petitioner contended, however, that the property in question did not constitute "wetlands." 615 F. Supp. 610, 615–618 (ED Va. 1983). The Government concedes that triable issues of fact were presented by disputes between experts involving the composition and nature of the fillings. Tr. of Oral Arg. 44.

The District Court concluded that petitioner had illegally filled in wetland areas on all properties in question, but drastically reduced the amount of civil penalties sought by the Government. With respect to the Ocean Breeze Mobile Homes Sites, the court imposed a civil fine of $35,000, noting that petitioner had sold seven lots at a profit of $5,000 per lot. 615 F. Supp., at 626. The court fined petitioner another $35,000 for illegal fillings on the Mire Pond Properties, *ibid.*, and $5,000 for filling that affected a single lot in Eel Creek, *ibid.*, although petitioner had realized no profit from filling in these properties. In addition, the court imposed on petitioner a $250,000 fine to be suspended, however, "on the specific condition that he restore the extension of Fowling Gut to its former navigable condition . . . ." *Id.*, at 627. Although petitioner argued that such restoration required purchasing

[2] The Government's complaint alleged violations involving over 1 million square feet of land. The Government obtained injunctive relief, however, relating to only 6,000 square feet. Brief for Petitioner 5.

the land from third parties at a cost of over $700,000, thus leaving him no choice but to pay the fine, the court refused to alter this order. App. 107a–108a. The court also granted separate injunctive relief: it ordered the restoration of wetlands on the portions of Mire Pond and Eel Creek still owned by petitioner, 615 F. Supp., at 627, and further ordered the removal of fillings on five lots of the Ocean Breeze Mobile Home Sites unless petitioner were granted an "after-the-fact permit" validating the fillings. *Id.*, at 626.

The Court of Appeals affirmed over a dissent, rejecting petitioner's argument that, under the Seventh Amendment, he was entitled to a jury trial. 769 F. 2d 182 (CA4 1985). The court expressly declined to follow the decision of the Court of Appeals for the Second Circuit in *United States* v. *J. B. Williams Co.*, 498 F. 2d 414 (1974), which held that there was a Seventh Amendment "'right of jury trial when the United States sues . . . to collect a [statutory civil] penalty, even though the statute is silent on the right of jury trial.'" 498 F. 2d, at 422–423 (quoting 5 J. Moore, Federal Practice ¶38.–31[1], pp. 232–233 (2d ed. 1971)). The Court of Appeals in this case also found unpersuasive the dictum in *Hepner* v. *United States*, 213 U. S. 103, 115 (1909), and in *United States* v. *Regan*, 232 U. S. 37, 46–47 (1914), that the Seventh Amendment's guarantee applies to civil actions to collect a civil penalty. The court concluded that, while in *Hepner* and *Regan* the civil penalties were statutorily prescribed fixed amounts, the District Court in the present case exercised "statutorily conferred equitable power in determining the amount of the fine." 769 F. 2d, at 187. The Court of Appeals also noted that the District Court fashioned a "'package' of remedies" containing both equitable and legal relief with "one part of the package affecting assessment of the others." *Ibid.*

In *Atlas Roofing Co.* v. *Occupational Safety and Health Review Comm'n*, 430 U. S. 442, 449, n. 6 (1977), we explicitly declined to decide whether the dictum of *Hepner* and

Regan "correctly divines the intent of the Seventh Amendment." To resolve this question and the conflict between Circuits, we granted certiorari. 476 U. S. 1139 (1986). We reverse.

II

The Seventh Amendment provides that, "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . ."[3] The Court has construed this language to require a jury trial on the merits in those actions that are analogous to "Suits at common law." Prior to the Amendment's adoption, a jury trial was customary in suits brought in the English *law* courts. In contrast, those actions that are analogous to 18th-century cases tried in courts of equity or admiralty do not require a jury trial. See *Parsons* v. *Bedford*, 3 Pet. 433 (1830). This analysis applies not only to common-law forms of action, but also to causes of action created by congressional enactment. See *Curtis* v. *Loether*, 415 U. S. 189, 193 (1974).

To determine whether a statutory action is more similar to cases that were tried in courts of law than to suits tried in courts of equity or admiralty, the Court must examine both the nature of the action and of the remedy sought. First, we compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity. See, *e. g.*, *Pernell* v. *Southall Realty*, 416 U. S. 363, 378 (1974); *Dairy Queen, Inc.* v. *Wood*, 369 U. S. 469, 477 (1962). Second, we examine the remedy sought and

[3] Before initiating the inquiry into the applicability of the Seventh Amendment, "[w]e recognize, of course, the 'cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided.'" *Curtis* v. *Loether*, 415 U. S. 189, 192, n. 6 (1974) (citation omitted); see also *Pernell* v. *Southall Realty*, 416 U. S. 363, 365 (1974). Nothing in the language of the Clean Water Act or its legislative history implies any congressional intent to grant defendants the right to a jury trial during the liability or penalty phase of the civil suit proceedings. Given this statutory silence, we must answer the constitutional question presented.

determine whether it is legal or equitable in nature. See, *e. g.*, *Curtis* v. *Loether*, *supra*, at 196; *Ross* v. *Bernhard*, 396 U. S. 531, 542 (1970).[4]

A

Petitioner analogizes this Government suit under § 1319(d) to an action in debt within the jurisdiction of English courts of law. Prior to the enactment of the Seventh Amendment, English courts had held that a civil penalty suit was a particular species of an action in debt that was within the jurisdiction of the courts of law. See, *e. g.*, *Atcheson* v. *Everitt*, 1 Cowper 382, 98 Eng. Rep. 1142 (K. B. 1776) (characterizing civil penalty suit as a type of action in debt); *Calcraft* v. *Gibbs*, 5 T. R. 19, 101 Eng. Rep. 11 (K. B. 1792) (granting new jury trial in an action in debt for a civil penalty).

After the adoption of the Seventh Amendment, federal courts followed this English common law in treating the civil penalty suit as a particular type of an action in debt, requiring a jury trial. See, *e. g.*, *United States* v. *Mundell*, 27 F. Cas. 23 (No. 15,834) (CC Va. 1795) (bail not required in a civil penalty case tried by a jury because it was an action in debt); *Jacob* v. *United States*, 13 F. Cas. 267 (No. 7,157) (CC Va. 1821) (action in debt by United States to recover civil penalty of $500 and costs of violation of an Act of Congress); *Lees* v. *United States*, 150 U. S. 476, 479 (1893) ("[A]lthough the recovery of a penalty is a proceeding criminal in nature, yet in this class of cases it may be enforced in a civil action, and in the same manner that debts are recovered in the ordinary civil courts"). Actions by the Government to recover civil

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[4] The Court has also considered the practical limitations of a jury trial and its functional compatibility with proceedings outside of traditional courts of law in holding that the Seventh Amendment is not applicable to administrative proceedings. See, *e. g.*, *Atlas Roofing Co.* v. *Occupational Safety and Health Review Comm'n*, 430 U. S. 442, 454 (1977); *Pernell* v. *Southall Realty*, *supra*, at 383. But the Court has not used these considerations as an independent basis for extending the right to a jury trial under the Seventh Amendment.

penalties under statutory provisions therefore historically have been viewed as one type of action in debt requiring trial by jury.

It was against this historical background that the Court in *Hepner* v. *United States*, 213 U. S. 103 (1909), considered the propriety of a directed verdict by a District Court Judge in favor of the Government where there was undisputed evidence that a defendant had committed an offense under § 8 of the Alien Immigration Act of 1903, which provided for a $1,000 civil penalty. The Court held that a directed verdict was permissible and did not violate the defendant's right to a jury trial under the Seventh Amendment. The Court said:

> "The objection made in behalf of the defendant, that an affirmative answer to the question certified could be used so as to destroy the constitutional right of trial by jury, is without merit and need not be discussed. *The defendant was, of course, entitled to have a jury summoned in this case*, but that right was subject to the condition, fundamental in the conduct of civil actions, that the court may withdraw a case from the jury and direct a verdict, according to the law if the evidence is uncontradicted and raises only a question of law." 213 U. S., at 115 (emphasis added).

In *United States* v. *Regan*, 232 U. S. 37 (1914), the Court assumed that a jury trial was required in civil penalty actions. In that case, the Court upheld the validity of a jury instruction in an action brought by the Government under the Alien Immigration Act of 1907. The Court stated that the instruction requiring proof beyond a reasonable doubt was incorrect because:

> "While the defendant was entitled to have the issues tried before a jury, this right did not arise from Article III of the Constitution or from the Sixth Amendment, for both relate to prosecutions which are strictly criminal in their nature, but it derives out of the fact that in a civil

action of debt involving more than twenty dollars a jury trial is demandable." 232 U. S., at 47 (citation omitted).

In the instant case, the Government sought penalties of over $22 million for violation of the Clean Water Act and obtained a judgment in the sum of $325,000. This action is clearly analogous to the 18th-century action in debt, and federal courts have rightly assumed that the Seventh Amendment required a jury trial.

The Government argues, however, that—rather than an action in debt—the closer historical analog is an action to abate a public nuisance. In 18th-century English law, a public nuisance was "an act or omission 'which obstructs or causes inconvenience or damage to the public in the exercise of rights common to all Her Majesty's subjects.'" W. Prosser, Law of Torts 583 (4th ed. 1971) (hereinafter Prosser) (footnote omitted). The Government argues that the present suit is analogous to two species of public nuisances. One is the suit of the sovereign in the English courts of equity for a "purpresture" to enjoin or order the repair of an enclosure or obstruction of public waterways; the other is the suit of the sovereign to enjoin "offensive trades and manufactures" that polluted the environment. 4 W. Blackstone, Commentaries *167.

It is true that the subject matter of this Clean Water Act suit—the placement of fill into navigable waters—resembles these two species of public nuisance. Whether, as the Government argues, a public nuisance action is a better analogy than an action in debt is debatable. But we need not decide the question. As *Pernell* v. *Southall Realty*, 416 U. S., at 375, cautioned, the fact that the subject matter of a modern statutory action and an 18th-century English action are close equivalents "is irrelevant for Seventh Amendment purposes," because "that Amendment requires trial by jury in actions unheard of at common law." It suffices that we conclude that both the public nuisance action and the action in debt are appropriate analogies to the instant statutory action.

The essential function of an action to abate a public nuisance was to provide a civil means to redress "a miscellaneous and diversified group of minor criminal offenses, based on some interference with the interests of the community, or the comfort or convenience of the general public." Prosser 583.[5] Similarly, the essential function of an action in debt was to recover money owed under a variety of statutes or under the common law. Both of these 18th-century actions, then, could be asserted by the sovereign to seek relief for an injury to the public in numerous contexts.

We need not rest our conclusion on what has been called an "abstruse historical" search for the nearest 18th-century analog. See *Ross* v. *Bernhard*, 396 U. S., at 538, n. 10. We reiterate our previously expressed view that characterizing the relief sought is "[m]ore important" than finding a precisely analogous common-law cause of action in determining whether the Seventh Amendment guarantees a jury trial. *Curtis* v. *Loether*, 415 U. S., at 196.[6]

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[5] Public nuisances included "interferences with the public health, as in the case of a hogpen, the keeping of diseased animals, or a malarial pond; with the public safety, as in the case of the storage of explosives, the shooting of fireworks in the streets, harboring a vicious dog, or the practice of medicine by one not qualified; with public morals, as in the case of houses of prostitution, illegal liquor establishments, gambling houses, indecent exhibitions, bullfights, unlicensed prize fights, or public profanity; with the publice *[sic]* peace, as by loud and disturbing noises, or an opera performance which threatens to cause a riot; with the public comfort, as in the case of bad odors, smoke, dust and vibration; with public convenience, as by obstructing a highway or a navigable stream, or creating a condition which makes travel unsafe or highly disagreeable, or the collection of an inconvenient crowd; and in addition, such unclassified offenses as eavesdropping on a jury, or being a common scold." Prosser 583–585 (footnotes omitted).

[6] The Government contends that both the cause of action and the remedy must be legal in nature before the Seventh Amendment right to a jury trial attaches. It divides the Clean Water Act action for civil penalties into a cause of action and a remedy, and analyzes each component as if the other were irrelevant. Thus, the Government proposes that a public nuisance action is the better historical analog for the cause of action, and that

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A civil penalty was a type of remedy at common law that could only be enforced in courts of law. Remedies intended to punish culpable individuals, as opposed to those intended simply to extract compensation or restore the status quo, were issued by courts of law, not courts of equity. See, *e. g.*, *Curtis* v. *Loether*, *supra*, at 197 (punitive damages remedy is legal, not equitable, relief); *Ross* v. *Bernhard*, *supra*, at 536 (treble-damages remedy for securities violation is a penalty, which constitutes legal relief).[7] The action authorized by § 1319(d) is of this character. Subsection (d) does not direct that the "civil penalty" imposed be calculated solely on the basis of equitable determinations, such as the profits gained from violations of the statute, but simply imposes a maximum penalty of $10,000 per day of violation. The legislative history of the Act reveals that Congress wanted the district court to consider the need for retribution and deterrence, in addition to restitution, when it imposed civil penalties. 123 Cong. Rec. 39191 (1977) (remarks of Sen. Muskie citing Environmental Protection Agency (EPA) memorandum outlining enforcement policy).[8] A court can

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an action for disgorgement is the proper analogy for the remedy. We reject this novel approach. Our search is for a single historical analog, taking into consideration the nature of the cause of action and the remedy as two important factors. See *Pernell* v. *Southall Realty*, 416 U. S., at 375; *Curtis* v. *Loether*, 415 U. S., at 195–196.

[7] The Government distinguishes this suit from other actions to collect a statutory penalty on the basis that the statutory penalty here is not fixed or readily calculable from a fixed formula. We do not find this distinction to be significant. The more important characteristic of the remedy of civil penalties is that it exacts punishment—a kind of remedy available only in courts of law. Thus, the remedy of civil penalties is similar to the remedy of punitive damages, another legal remedy that is not a fixed fine. See, *e. g.*, *Curtis* v. *Loether*, *supra*, at 189–190 (defendant entitled to jury trial in an action based on a statute authorizing actual damages and punitive damages of not more than $1,000).

[8] When Congress enacted the 1977 amendments to the Clean Water Act, it endorsed the EPA's then-existing penalty calculation policy. 123 Cong.

require retribution for wrongful conduct based on the seriousness of the violations, the number of prior violations, and the lack of good-faith efforts to comply with the relevant requirements. *Ibid.* It may also seek to deter future violations by basing the penalty on its economic impact. *Ibid.* Subsection 1319(d)'s authorization of punishment to further retribution and deterrence clearly evidences that this subsection reflects more than a concern to provide equitable relief. In the present case, for instance, the District Court acknowledged that petitioner received no profits from filling in properties in Mire Pond and Eel Creek, but still imposed a $35,000 fine. App. to Pet. for Cert. 60a. Thus, the District Court intended not simply to disgorge profits but also to impose punishment. Because the nature of the relief authorized by § 1319(d) was traditionally available only in a court of law, petitioner in this present action is entitled to a jury trial on demand.

The punitive nature of the relief sought in this present case is made apparent by a comparison with the relief sought in an action to abate a public nuisance. A public nuisance action was a classic example of the kind of suit that relied on the injunctive relief provided by courts in equity. Prosser 603. "Injunctive relief [for enjoining a public nuisance at the request of the Government] is traditionally given by equity upon a showing of [peril to health and safety]." *Steelworkers* v. *United States*, 361 U. S. 39, 61 (1959) (Frankfurter, J., concurring). The Government, in fact, concedes that public

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Rec. 39190–39191 (1977) (remarks of Sen. Muskie). This policy was developed to guide EPA negotiators in reaching settlements with violators of the Act. The policy instructed negotiators to consider a number of factors: the seriousness of the violations, the economic benefits accrued from the violations, prior violations, good-faith efforts to comply with the relevant requirements, and the economic impact of the penalty. After the Court heard argument in this case, § 1319(d) was amended to require the trial court to consider these factors in determining the amount of a civil penalty along with "such other matters as justice may require." § 313(d), Water Quality Act of 1987, Pub. L. 100–4, 101 Stat. 47.

nuisance cases brought in equity sought injunctive relief, not monetary penalties. Brief for United States 24, n. 17. Indeed, courts in equity refused to enforce such penalties. See James, Right to a Jury Trial in Civil Actions, 72 Yale L. J. 655, 672 (1963).

The Government contends, however, that a suit enforcing civil penalties under the Clean Water Act is similar to an action for disgorgement of improper profits, traditionally considered an equitable remedy. It bases this characterization upon evidence that the District Court determined the amount of the penalties by multiplying the number of lots sold by petitioner by the profit earned per lot. Tr. of Oral Arg. 27. An action for disgorgement of improper profits is, however, a poor analogy. Such an action is a remedy only for restitution—a more limited form of penalty than a civil fine. Restitution is limited to "restoring the status quo and ordering the return of that which rightfully belongs to the purchaser or tenant." *Porter* v. *Warner Holding Co.*, 328 U. S. 395, 402 (1946). As the above discussion indicates, however, § 1319(d)'s concerns are by no means limited to restoration of the status quo.

The Government next contends that, even if the civil penalties under § 1319(d) are deemed legal in character, a jury trial is not required. A court in equity was empowered to provide monetary awards that were incidental to or intertwined with injunctive relief. The Government therefore argues that its claim under § 1319(b), which authorizes injunctive relief, provides jurisdiction for monetary relief in equity. Brief for United States 38. This argument has at least three flaws. First, while a court in equity may award monetary restitution as an adjunct to injunctive relief, it may not enforce civil penalties. See *Porter* v. *Warner Holding Co.*, *supra*, at 399. Second, the Government was aware when it filed suit that relief would be limited primarily to civil penalties, since petitioner had already sold most of the properties at issue. App. 110, 119. A potential penalty of $22 million

hardly can be considered incidental to the modest equitable relief sought in this case.

Finally, the Government was free to seek an equitable remedy in addition to, or independent of, legal relief. Section 1319 does not intertwine equitable relief with the imposition of civil penalties. Instead each kind of relief is separably authorized in a separate and distinct statutory provision. Subsection (b), providing injunctive relief, is independent of subsection (d), which provides only for civil penalties. In such a situation, if a "legal claim is joined with an equitable claim, the right to jury trial on the legal claim, including all issues common to both claims, remains intact. The right cannot be abridged by characterizing the legal claim as 'incidental' to the equitable relief sought." *Curtis* v. *Loether*, 415 U. S., at 196, n. 11. Thus, petitioner has a constitutional right to a jury trial to determine his liability on the legal claims.

III

The remaining issue is whether petitioner additionally has a Seventh Amendment right to a jury assessment of the civil penalties. At the time this case was tried, § 1319(d) did not explicitly state whether juries or trial judges were to fix the civil penalties. The legislative history of the 1977 Amendments to the Clean Water Act shows, however, that Congress intended that trial judges perform the highly discretionary calculations necessary to award civil penalties after liability is found. 123 Cong. Rec. 39190–39191 (1977) (remarks of Sen. Muskie citing letter from EPA Assistant Administrators of Enforcement of Dec. 14, 1977) ("[P]enalties assessed by judges should be sufficiently higher than penalties to which the Agency would have agreed in settlement to encourage violators to settle"). We must decide therefore whether Congress can, consistent with the Seventh Amendment, authorize judges to assess civil penalties.

The Seventh Amendment is silent on the question whether a jury must determine the remedy in a trial in which it must

determine liability.[9] The answer must depend on whether the jury must shoulder this responsibility as necessary to preserve the "substance of the common-law right of trial by jury." *Colgrove* v. *Battin*, 413 U. S. 149, 157 (1973). Is a jury role necessary for that purpose? We do not think so. "'Only those incidents which are regarded as fundamental, as inherent in and of the essence of the system of trial by jury, are placed beyond the reach of the legislature.'" *Id.*, at 156, n. 11 (quoting Scott, Trial by Jury and the Reform of Civil Procedure, 31 Harv. L. Rev. 669, 671 (1918)). See also *Galloway* v. *United States*, 319 U. S. 372, 392 (1943) ("[T]he Amendment was designed to preserve the basic institution of jury trial in only its most fundamental elements"). The assessment of a civil penalty is not one of the "most fundamental elements." Congress' authority to fix the penalty by statute has not been questioned, and it was also the British practice, see, *e. g.*, *Atcheson* v. *Everitt*, 1 Cowper 382, 98 Eng. Rep. 1142 (K. B. 1776). In the United States, the action to recover civil penalties usually seeks the amount fixed by Congress. See, *e. g.*, *United States* v. *Regan*, 232 U. S., at 40; *Hepner* v. *United States*, 213 U. S., at 109. The assessment of civil penalties thus cannot be said to involve the "substance of a common-law right to a trial by jury," nor a "fundamental element of a jury trial."

Congress' assignment of the determination of the amount of civil penalties to trial judges therefore does not infringe on

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[9] Nothing in the Amendment's language suggests that the right to a jury trial extends to the remedy phase of a civil trial. Instead, the language "defines the kind of cases for which jury trial is preserved, namely 'suits at common law.'" *Colgrove* v. *Battin*, 413 U. S. 149, 152 (1973). Although "'[w]e have almost no direct evidence concerning the intention of the framers of the seventh amendment itself,' the historical setting in which the Seventh Amendment was adopted highlighted a controversy that was generated . . . by fear that the civil jury itself would be abolished." *Ibid.* (footnote and citation omitted). We have been presented with no evidence that the Framers meant to extend the right to a jury to the remedy phase of a civil trial.

the constitutional right to a jury trial. Since Congress itself may fix the civil penalties, it may delegate that determination to trial judges. In this case, highly discretionary calculations that take into account multiple factors are necessary in order to set civil penalties under the Clean Water Act. These are the kinds of calculations traditionally performed by judges. See *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 442–443 (1975) (REHNQUIST, J., concurring). We therefore hold that a determination of a civil penalty is not an essential function of a jury trial, and that the Seventh Amendment does not require a jury trial for that purpose in a civil action.

IV

We conclude that the Seventh Amendment required that petitioner's demand for a jury trial be granted to determine his liability, but that the trial court and not the jury should determine the amount of penalty, if any. The judgment of the Court of Appeals is therefore reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE SCALIA, with whom JUSTICE STEVENS joins, concurring in part and dissenting in part.

I join the Court's disposition, and Parts I and II of its opinion. I do not join Part III because in my view the right to trial by jury on whether a civil penalty of unspecified amount is assessable also involves a right to trial by jury on what the amount should be. The fact that the Legislature could elect to fix the amount of penalty has nothing to do with whether, if it chooses not to do so, that element comes within the jury-trial guarantee. Congress could, I suppose, create a private cause of action by one individual against another for a fixed amount of damages, but it surely does not follow that if it creates such a cause of action *without* prescribing the amount of damages, that issue could be taken from the jury.

While purporting to base its determination (quite correctly) upon historical practice, the Court creates a form of civil adjudication I have never encountered. I can recall no precedent for judgment of civil liability by jury but assessment of amount by the court. Even punitive damages are assessed by the jury when liability is determined in that fashion. One is of course tempted to make an exception in a case like this, where the Government is imposing a noncompensatory remedy to enforce direct exercise of its regulatory authority, because there comes immediately to mind the role of the sentencing judge in a criminal proceeding. If criminal trials are to be the model, however, determination of liability by the jury should be on a standard of proof requiring guilt beyond a reasonable doubt. Having chosen to proceed in civil fashion, with the advantages which that mode entails, it seems to me the Government must take the bitter with the sweet. Since, as the Court correctly reasons, the proper analogue to a civil-fine action is the common-law action for debt, the Government need only prove liability by a preponderance of the evidence; but must, as in any action for debt, accept the amount of award determined not by its own officials but by 12 private citizens. If that tends to discourage the Government from proceeding in this fashion, I doubt that the Founding Fathers would be upset.

I would reverse and remand for jury determination of both issues.

Syllabus

BURLINGTON NORTHERN RAILROAD CO. ET AL. *v.* BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES ET AL.

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

No. 86-39. Argued February 23, 1987—Decided April 28, 1987

Respondent Brotherhood of Maintenance of Way Employes (BMWE), which represents railroad employees nationwide, had a dispute over renewal of a collective-bargaining agreement with a small railroad that is a subsidiary of Guilford Transportation Industries, Inc. (Guilford), which also owns other railroads. After exhausting the settlement procedures mandated by the Railway Labor Act (RLA), BMWE instituted a lawful strike against the Guilford railroads. BMWE later extended its picketing to other railroads (including petitioners) with which Guilford interchanged traffic. In petitioners' consolidated actions, the Federal District Court entered a preliminary injunction against BMWE's picketing of any railroads other than those involved in the primary dispute. The court held that the "substantial alignment" test governs interpretation of the Norris-LaGuardia Act, §§ 1 and 4 of which bar federal courts from issuing injunctions against activities "growing out of" a "labor dispute." Under the test, the scope of lawful strike activity is confined to activities that further the union's economic interests in a labor dispute, and that are directed at the primary employer and other substantially aligned employers—those having an ownership interest in, or providing essential services or facilities to, the primary employer. The court concluded that none of the petitioners were "substantially aligned" with Guilford, and that thus BMWE's secondary activity did not grow out of a labor dispute under the Norris-LaGuardia Act and could be enjoined. The Court of Appeals reversed, concluding that the District Court had no jurisdiction to enter an injunction.

Held: Under the Norris-LaGuardia Act, a federal court does not have jurisdiction to enjoin secondary picketing in railway labor disputes. Pp. 437-453.

(a) The historical background of the Norris-LaGuardia Act—particularly the legislative history showing that Congress was responding to what it considered to be unduly restrictive judicial construction of the anti-injunction provisions of § 20 of the Clayton Act—reveals that Congress intended to preclude courts from enjoining secondary as well as

primary activity, and that railroads were to be treated no differently from other industries in such regard. Pp. 437–440.

(b) Section 13(c) of the Norris-LaGuardia Act defines "labor dispute" as including "any controversy concerning terms or conditions of employment . . . regardless of whether or not the disputants stand in the proximate relation of employer and employee," and § 13(a) provides that a case shall be held to "grow out of a labor dispute when the case involves persons who are engaged in the same industry." Under the plain meaning of this language, BMWE's dispute with the primary employer here was unquestionably a labor dispute, and the secondary activity against petitioners grew out of that dispute. Section 13(c)'s definition of "labor dispute" should not be narrowed by adoption of a test of "substantial alignment" of a picketed secondary employer with the primary employer. Congress intended the definition of "labor dispute" to be broad, and adoption of the substantial-alignment test would require courts, contrary to Congress' intent, to second-guess which activities are truly in a union's economic interest in a labor dispute. Moreover, nothing in the Norris-LaGuardia Act or the RLA distinguishes permissible from impermissible secondary activities, and any judicial attempt to limit § 13(c)'s language would make the lawfulness of a strike depend upon judicial views of social and economic policy, which is what the Norris-LaGuardia Act was designed to forestall. Pp. 440–443.

(c) Petitioners' contention that the injunction here was valid because, under the RLA, it is illegal for a union to resort to secondary picketing after the parties have exhausted the RLA's major dispute resolution procedures, is without merit. Although the Norris-LaGuardia Act does not deprive a federal court of jurisdiction to enjoin compliance with the RLA's major dispute resolution provisions—involving negotiation, mediation, voluntary arbitration, and conciliation—the RLA does not expressly limit the scope of self-help available to a union once its resolution provisions have been exhausted. The RLA's silence in this regard does not indicate that Congress viewed an express prohibition of secondary picketing to be superfluous and intended to prohibit such picketing. Cf. *Trainmen* v. *Jacksonville Terminal Co.*, 394 U. S. 369. There is no merit to petitioners' contentions that the prohibition in the National Labor Relations Act (NLRA) against some forms of secondary activity should govern construction of the RLA. Congressional policy, as expressed in the NLRA, remains that neither employers nor the NLRB are permitted to seek injunctions against the secondary conduct of railway employees. Nor is there any merit to the argument that a ban on secondary picketing may be inferred from the general language of § 2

First of the RLA, which places on employees the duty to attempt to settle disputes and thereby avoid any interruption to interstate commerce. Nothing in the RLA indicates that Congress intended to permit federal courts to enjoin secondary activity as a means to settle strikes and avoid interruptions to commerce. Furthermore, the RLA provides a mechanism for the Executive Branch to intervene and interrupt any self-help measures by invoking an Emergency Board, thereby imposing a minimum 60-day cooling-off period. If the Board's recommendations are not initially accepted by the parties, Congress may enforce the Board's recommendation by statute, as was done in this case. Allowing secondary picketing in the self-help period is not inconsistent with the structure or purpose of the Act, and may in fact increase the likelihood of settlement prior to self-help. Pp. 444–453.

793 F. 2d 795, affirmed.

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

Rex E. Lee argued the cause for petitioners. With him on the briefs were *Carter G. Phillips*, *Ronald S. Flagg*, *James S. Whitehead*, *Lawrence I. Kipperman*, *Richard J. Schreiber*, *Mark B. Goodwin*, and *Ronald A. Lane*.

John O'B. Clarke, Jr., argued the cause and filed a brief for respondents.*

JUSTICE BRENNAN delivered the opinion of the Court.

What began as a dispute over renewal of a collective-bargaining agreement between a small railroad in Maine and some of its employees expanded to picketing and threats of strike activity at railroad facilities around the country. A Federal District Court then enjoined the picketing of any railroads other than those involved in the primary dispute. The question we must decide is whether a federal court has jurisdiction to issue such an injunction.

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*Briefs of *amici curiae* urging reversal were filed for the National Industrial Transportation League by *John F. Donelan* and *Frederic L. Wood;* and for the National Railway Labor Conference by *Harry A. Rissetto* and *Thomas E. Reinert, Jr.*

I

Respondent Brotherhood of Maintenance of Way Employes (BMWE) represents railroad employees nationwide. Its members include employees of the Maine Central Railroad and the Portland Terminal Company, subsidiaries of Guilford Transportation Industries, Inc. (Guilford). Guilford also owns two other railroads, the Delaware Hudson Railway Company, and the Boston and Maine Corporation. The Guilford system covers some 4,000 miles of track in the northeast United States, east from Buffalo to Maine, and north from Washington, D. C., to Montreal. The Guilford system is not as large, however, as some other railroads, and Guilford depends on other railroads to carry much of its traffic.

The crux of the dispute between Maine Central and BMWE was Maine Central's decision, following its acquisition by Guilford in 1981, to abolish over a 5-year period the jobs of roughly 300 out of 400 employees represented by BMWE. The collective-bargaining agreement between BMWE and Maine Central expired in 1984, before the parties were able to reach agreement either on the problem of job losses or on various questions of wages, hours, and working conditions. A dispute "over the formation of collective agreements or efforts to secure them" is a "major dispute" in the parlance of railway labor law, *Elgin, J. & E. R. Co.* v. *Burley*, 325 U. S. 711, 723 (1945), and is governed by the Railway Labor Act (RLA), 44 Stat. 577, as amended, 45 U. S. C. § 151 *et seq.* For over a year, the parties attempted to reach a settlement by following the detailed settlement procedures mandated by the RLA. On March 3, 1986, having exhausted these procedures, BMWE began a lawful strike against Maine Central and Portland Terminal. Two days later, BMWE lawfully extended the strike to Guilford's other two railroad subsidiaries.[1]

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[1] Guilford unsuccessfully attempted to enjoin this extension of the strike. *BMWE* v. *Guilford Industries, Inc.*, No. 86–0084–P (D Me. Apr. 2, 1986).

It first appeared to BMWE that its strike was having the desired effect of slowing traffic on Guilford's lines. But Guilford's supervisors took on some of the responsibilities of the striking workers, and after several weeks the volume of traffic on Guilford's lines began to increase. BMWE received information that led it to believe that Guilford was receiving financial assistance from other railroads (a belief that later proved mistaken), and observed non-Guilford locomotives moving on Guilford lines. BMWE also perceived that Maine Central had become less willing to negotiate.

In early April, BMWE decided to extend its strike beyond Guilford's subsidiaries. It first attempted to picket other railroads in the east with which Guilford interchanged a significant volume of traffic. This picketing was enjoined by two federal-court orders.[2] On April 8, 1986, BMWE notified the president of the American Association of Railroads of its plans to picket the facilities of other carriers and to ask other carriers' employees to withdraw from service until Maine Central's willingness to bargain increased. In addition, BMWE began to picket "strategic locations through which Guilford's traffic flowed, such as Chicago," Brief for Respondents 4, and to picket the Los Angeles facilities of the Union Pacific Railroad Company, based on the belief (again later proved mistaken) that Union Pacific supervisors were assisting on Guilford lines.

On April 9, 62 railroads (not including petitioner Burlington Northern Railroad Company (Burlington Northern)), filed suit in the United States District Court for the District of Columbia, seeking a temporary restraining order against the picketing. Their request was denied the next day. *Alton & Southern R. Co.* v. *BMWE*, Civ. No. 86–0977 (1986). Meanwhile, also on April 9, Burlington Northern sought and

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[2] *Consolidated Rail Corp.* v. *BMWE*, Civ. No. 86–0318T (WDNY Apr. 6, 1986), vacated, 792 F. 2d 303 (CA2 1986), cert. pending, No. 86–353; *Richmond, Fredericksburg & Potomac R. Co.* v. *BMWE*, No. 86–3544 (CA4 Apr. 12, 1986), aff'd, 795 F. 2d 1161 (CA4 1986), cert. pending, No. 86–503.

obtained *ex parte* a temporary restraining order from the District Court for the Northern District of Illinois, enjoining BMWE from picketing or striking Burlington Northern. The six other railroad petitioners here quickly filed notices of dismissal in the District of Columbia and then filed new actions against BMWE on April 10 and 11 in the Northern District of Illinois. On April 11, that District Court issued temporary restraining orders in each of these cases enjoining BMWE from picketing and striking the facilities of these seven railroads.

The Illinois District Court then consolidated the cases and held a single hearing on the railroads' motion for a preliminary injunction on April 21, 1986. On April 23, the District Court entered a preliminary injunction. The court noted that §§ 1 and 4 of the Norris-LaGuardia Act, 47 Stat. 70, 29 U. S. C. §§ 101, 104, bar federal courts from issuing injunctions against secondary activity "growing out of any labor dispute." App. to Pet. for Cert. 27a–28a. The court held that these sections were inapplicable, however, because this case did not "grow out of a labor dispute" as that phrase is defined in § 13(a) of the Act, 29 U. S. C. § 113(a). In limiting the range of activity that could be considered to grow out of a labor dispute, the court employed the "substantial alignment" test of *Ashley, Drew & N. R. Co.* v. *United Transportation Union and Its Affiliated Local No. 1121*, 625 F. 2d 1357 (CA8 1980). Under this test, the scope of lawful strike activity (and hence of a labor dispute) is confined to activities that the *court* concludes will "furthe[r] the union's economic interest in a labor dispute." *Id.*, at 1363. Only activities directed at the primary employer and other employers that are substantially aligned with it pass the test. A railroad is substantially aligned with the primary railroad if it has an ownership interest in the primary railroad, or if it provides essential services or facilities to the primary railroad or otherwise shares with it a "'significant commonality of interest.'" App. to Pet. for Cert. 31a (quoting *Ashley, Drew,*

supra, at 1365). Because none of the railroad petitioners here were "substantially aligned" with Guilford, the court concluded that BMWE's secondary activity did not grow out of a labor dispute for purposes of the Norris-LaGuardia Act and therefore could be enjoined.[3]

The Court of Appeals reversed. 793 F. 2d 795 (CA7 1986). The court rejected the *Ashley*, *Drew* substantial-alignment test as inconsistent with both the plain language of the Norris-LaGuardia Act and with this Court's construction of it. The court then turned to an argument raised in but not addressed by the District Court—that secondary picketing is illegal under the RLA, and that the Norris-LaGuardia Act does not prevent courts from enjoining conduct that violates other labor statutes. The court concluded, however, that the RLA does not prohibit secondary picketing. It also observed that, even assuming that the RLA does contain such a prohibition, "the Norris-LaGuardia Act prevents the use of injunctions against economic self-help" once the major dispute resolution process is complete. *Id.*, at 804–805. The court concluded that the District Court had no jurisdiction to enter an injunction, and ordered the District Court to dismiss petitioners' complaints.

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[3] In the alternative, the District Court ruled that it had jurisdiction to issue an injunction because BMWE's activity violated the Interstate Commerce Act. 49 U. S. C. § 11101(a). As the Court of Appeals explained, 793 F. 2d 795, 800 (CA7 1986), this alternative holding is without merit because "the Norris-LaGuardia Act's ban on federal injunctions is not lifted because the conduct of the union is unlawful under some other, nonlabor statute." *Telegraphers* v. *Chicago & N. W. R. Co.*, 362 U. S. 330, 339 (1960).

In addition, the District Court held that even if the secondary picketing grew out of a labor dispute for purposes of the Norris-LaGuardia Act, the secondary picketing could also be viewed as a major dispute under the RLA between BMWE and *the secondary railroads;* the picketing could then be enjoined because BMWE and these railroads had not yet exhausted the RLA's major dispute procedures. The Court of Appeals rejected this argument, 793 F. 2d, at 799, and petitioners have not pursued it here.

While these judicial proceedings were pending, Congress and the Executive Branch took steps to resolve the controversy. On May 16, 1986, pursuant to § 10 of the RLA, 45 U. S. C. § 160, the President issued Executive Order No. 12557, 51 Fed. Reg. 18429 (1986). Under this Order, Presidential Emergency Board No. 209 was convened and given the task of investigating the dispute and reporting to the President within 30 days. Section 10 provides that during this 30-day period, and for 30 days after the report is delivered, the parties to the controversy must return to and maintain the status quo prior to the dispute. The Presidential Emergency Board issued its report and recommendations on June 20, 1986. Its recommendations are not binding, however, and the parties did not accept them. On August 21, 1986, Congress passed a joint resolution establishing an advisory board to perform a second investigation and make a report. Four weeks later, on September 8, this board advised Congress that it should enact legislation binding the parties to the recommendation of Presidential Emergency Board No. 209. Congress promptly passed a joint resolution to this effect on September 23, 1986, and seven days later the President signed the bill into law. Pub. L. 99–431, 100 Stat. 987.[4]

We granted certiorari, 479 U. S. 812 (1986), to resolve the Circuit conflict over the propriety of using the substantial-alignment test to narrow the definition of labor disputes under the Norris-LaGuardia Act, and to address, if necessary, the applicability of the RLA and §§ 1 and 4 of the Norris-LaGuardia Act to secondary picketing.

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[4] These developments do not moot this controversy. Because these same parties are reasonably likely to find themselves again in dispute over the issues raised in this petition, and because such disputes typically are resolved quickly by executive or legislative action, this controversy is one that is capable of repetition yet evading review. See *Weinstein* v. *Bradford*, 423 U. S. 147 (1975) *(per curiam)*; *Sosna* v. *Iowa*, 419 U. S. 393 (1975).

II

"The Norris-LaGuardia Act . . . expresses a basic policy against the injunction of activities of labor unions." *Machinists* v. *Street*, 367 U. S. 740, 772 (1961). Section 1 of the Act states that "[n]o court of the United States . . . shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this chapter." 29 U. S. C. § 101. Section 4 enumerates specific acts that shall not be subject to any restraining order or injunction; these include:

> "(a) Ceasing or refusing to perform any work or to remain in any relation of employment;
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> . . . . . .
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> "(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence." 29 U. S. C. §§ 104(a), 104(e).

The congressional debates over the Norris-LaGuardia Act disclose that the Act's sponsors were convinced that the extraordinary step of divesting federal courts of equitable jurisdiction was necessary to remedy an extraordinary problem. According to the sponsors, federal courts had refused to abide by the clear command of § 20 of the Clayton Act, which stated in part:

> "[N]o . . . restraining order or injunction shall prohibit any person or persons, whether singly or in concert, . . . from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of [so recommending and persuading]; . . . or from peaceably assembling in a lawful manner, and for lawful purposes . . . ." 29 U. S. C. § 52.

The language of the Clayton Act was broad enough to encompass all peaceful strike activity, whether directed at the primary employer or at neutral "secondary" employers. Nevertheless, in *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443 (1921), the Court held that § 20 did not prevent courts from enjoining secondary activity. In *Duplex*, the employees' primary dispute was with a manufacturer of printing presses in Battle Creek, Michigan. Because a strike by only the employees of the manufacturer was unlikely to succeed, the international union representing the employees expanded the strike to those employers who transported, installed, and serviced the presses. The Court held that Congress did not intend § 20 to protect such an expansion. In reaching this conclusion, the Court appeared to rely not only on certain remarks made during the legislative debates, see *id.*, at 475–477, n. 1, but also on its more general intuition about the political and economic significance of secondary picketing. Federal courts could enjoin secondary picketing, the Court stated, because "Congress had in mind [the protection of] particular industrial controversies, not a general class war." *Id.*, at 472. See also *Bedford Co.* v. *Stone Cutters Assn.*, 274 U. S. 37, 60 (1927) (Brandeis, J., dissenting).

The Norris-LaGuardia Act responded directly to the construction of the Clayton Act in *Duplex*, and to the pattern of injunctions entered by federal judges. "The underlying aim of the Norris-LaGuardia Act was to restore the broad purpose which Congress thought it had formulated in the Clayton Act but which was frustrated, so Congress believed, by unduly restrictive judicial construction." *United States* v. *Hutcheson*, 312 U. S. 219, 235–236 (1941). Representative LaGuardia's description of the need for the Act is typical of those offered in the House debate:

> "Gentlemen, there is one reason why this legislation is before Congress, and that one reason is disobedience of the law on the part of whom? On the part of organized

> labor? No. Disobedience of the law on the part of a few Federal judges. If the courts had been satisfied to construe the law as enacted by Congress, there would not be any need of legislation of this kind. If the courts had administered even justice to both employers and employees, there would be no need of considering a bill of this kind now. If the courts had not emasculated and purposely misconstrued the Clayton Act, we would not today be discussing an anti-injunction bill." 75 Cong. Rec. 5478 (1932).[5]

The Act thus reflects Congress' decision to "abolis[h], for purposes of labor immunity, the distinction between primary activity between the 'immediate disputants' and secondary activity in which the employer and the members of the union do not stand 'in the proximate relation of employer and employee.'" *Woodwork Manufacturers* v. *NLRB*, 386 U. S. 612, 623 (1967) (quoting H. R. Rep. No. 669, 72d Cong., 1st Sess., 8 (1932)).[6] Moreover, the legislative history leaves no doubt that Congress intended the Norris-LaGuardia Act to cover the railroads. After lengthy debate, punctuated with numerous references to the notorious Pullman Strike of 1894, the House refused an amendment proposed by Represent-

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[5] See also 75 Cong. Rec. 5470 (1932) (statement of Rep. Browning) ("[I]nstead of that [Clayton] act . . . being construed as what the Congress intended, it was denatured, emasculated, and tortured into an instrument for further oppression of those whom we sought to relieve. . . . As an example . . . I refer you to the famous Duplex case"); *id.*, at 5468 (statement of Rep. Beedy); *id.*, at 5464 (statement of Rep. O'Connor); *id.*, at 5488 (statement of Rep. Celler); H. R. Rep. No. 669, 72d Cong., 1st Sess., 2–11 (1932); S. Rep. No. 163, 72d Cong., 1st Sess., 7–14, 16–18 (1932); *United States* v. *Hutcheson*, 312 U. S. 219, 229–237 (1941); *Allen Bradley Co.* v. *Electrical Workers*, 325 U. S. 797, 803–805 (1945); *Meat Cutters* v. *Jewel Tea Co.*, 381 U. S. 676, 701–711 (1965) (opinion of Goldberg, J.).

[6] See also *United States* v. *Hutcheson*, *supra*, at 231 ("[T]he Act . . . established that the allowable area of union activity was not to be restricted, as it had been in the *Duplex* case, to an immediate employer-employee relation").

ative Beck that would have exempted railroads from the coverage of the Act. See 75 Cong. Rec. 5471–5480, 5501–5512 (1932). The historical background of the Norris-LaGuardia Act thus reveals that Congress intended to preclude courts from enjoining secondary as well as primary activity, and that the railroads were to be treated no differently from other industries in this regard.[7]

III

We first consider petitioners' argument that § 4's ban on injunctions is inapplicable to this case because the controversy is not one "involving or growing out of" a "labor dispute" under § 4 of the Norris-LaGuardia Act.

Section 13(c) of the Norris-LaGuardia Act states that "[t]he term 'labor dispute' includes any controversy concerning terms or conditions of employment . . . regardless of whether or not the disputants stand in the proximate relation of employer and employee." 29 U. S. C. § 113(c). Section 13(a) provides in pertinent part that: "[a] case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry . . . ." § 113(a). If this statutory language is accorded its plain meaning, BMWE's dispute with Maine Central over the terms and conditions of employment is unquestionably a labor dispute, and the secondary activity against petitioners grows out of that dispute.

Petitioners argue, however, that this Court should adopt a test of "substantial alignment" to narrow the scope of labor

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[7] The Norris-LaGuardia Act was not Congress' last word on secondary picketing. The 1947 Taft-Hartley and 1959 Landrum-Griffin amendments to the National Labor Relations Act provided the National Labor Relations Board with exclusive authority to seek injunctions in federal court against some forms of secondary activity. 29 U. S. C. §§ 158(b)(4), 160. But as we explain *infra*, at 448–449, Congress exempted railroad employers and employees from these amendments, § 152, and so the Norris-LaGuardia Act's prohibition on injunctions applies to railway disputes today, as it did in 1932.

disputes under § 13(c). Petitioners rely on several lower court decisions in which the term "labor dispute" has been applied only to disputes where the picketed employer is "substantially aligned" with the primary employer. See *Ashley, Drew & N. R. Co.* v. *United Transportation Union*, 625 F. 2d, at 1363–1364 (citing cases). In *Ashley, Drew*, the court held that secondary picketing "grows out of" a labor dispute only when a court independently determines that the secondary employer is linked economically or otherwise to the primary employer, and that the picketing therefore furthers the union's interests in its primary dispute. Although petitioners endorse *Ashley, Drew*, they also propose an even narrower definition of substantial alignment: "a secondary employer is substantially aligned with a primary employer—and therefore subject to strikes or picketing—only if the secondary employer has 'joined the fray' and thus, in effect, has assumed a role in the primary dispute." Brief for Petitioners 48. Under either test, petitioner railroads argue that they are not substantially aligned with Guilford, and therefore that this controversy cannot be said to involve or grow out of BMWE's primary dispute with Guilford.

We reject these narrow constructions of § 13(c) for several reasons. First, we have long recognized that "Congress made the definition [of "labor dispute"] broad because it wanted it to be broad. . . . Congress attempted to write its bill in unmistakable language because it believed previous measures looking toward the same policy against nonjudicial intervention in labor disputes had been given unduly limited constructions by the Courts." *Telegraphers* v. *Chicago & N. W. R. Co.*, 362 U. S. 330, 335–336 (1960); see also *Marine Cooks & Stewards* v. *Panama S.S. Co.*, 362 U. S. 365, 369 (1960) ("The [Act's] language is broad because Congress was intent upon taking the federal courts out of the labor injunction business except in the very limited circumstances left open for federal jurisdiction under the Norris-LaGuardia Act").

Accordingly, we have consistently declined to construe § 13(c) narrowly. For example, we have interpreted § 13(c) to embrace disputes "having their genesis in political protests" as opposed to economic self-interest. *Jacksonville Bulk Terminals, Inc.* v. *Longshoremen*, 457 U. S. 702, 711 (1982).[8] It would be particularly anomalous to adopt a narrowing construction of the phrase "growing out of a labor dispute" in the context of secondary picketing, because Congress' primary motivation in passing the Norris-LaGuardia Act was to immunize such picketing from federal-court injunctions. Were we to limit the scope of § 13(c) as petitioners suggest, we would again commit precisely the error that prompted Congress to pass the Act.

Adoption of some variant of the substantial-alignment test would be contrary to the Act in yet another way. The focus of the substantial-alignment test—whether labor activity will "furthe[r] the union's economic interest in a labor dispute," *Ashley, Drew, supra*, at 1363—requires courts to second-guess which activities are truly in the union's interest. As the Court of Appeals explained:

> "No union engages in secondary conduct without expecting to advance its economic interests. . . . Unions do not lightly call in their chips and impose burdens on other workers who find their own pay and working conditions satisfactory. . . . Under the 'substantial alignment' test of *Ashley, Drew* the court must . . . weig[h] the economic gains to the union's members from secondary pressure against the losses the secondary conduct imposes on others in society. It is only a small exaggeration to say that this is exactly what courts were doing

[8] See also *Marine Cooks & Stewards* v. *Panama S.S. Co.*, 362 U. S. 365 (1960) (picketing by American seamen of foreign ship with foreign crew to protest loss of American jobs to foreign competition held to grow out of a labor dispute); *New Negro Alliance* v. *Sanitary Grocery Co.*, 303 U. S. 552 (1938) (picketing by civic group to induce store to hire Negro employees held to grow out of a labor dispute).

before 1932, exactly why Congress passed the Norris-LaGuardia Act." 793 F. 2d, at 806.

Finally, nothing in the Norris-LaGuardia Act or the RLA distinguishes permissible from impermissible secondary activity. As we observed in *Trainmen* v. *Jacksonville Terminal Co.*, 394 U. S. 369, 386–387 (1969):

> "No cosmic principles announce the existence of secondary conduct, condemn it as an evil, or delimit its boundaries. These tasks were first undertaken by judges, intermixing metaphysics with their notions of social and economic policy. And the common law of labor relations . . . has drawn no lines more arbitrary, tenuous, and shifting than those separating 'primary' from 'secondary' activities."

For the railway industry, unlike other industries covered by the National Labor Relations Act (NLRA), Congress has provided "neither usable standards nor access to administrative expertise" to facilitate the difficult task of distinguishing primary and secondary activity. *Id.*, at 392. Given the inherent indeterminacy of these concepts and the lack of congressional guidance, it is obvious that any judicial attempt to limit the language of § 13 would make "the lawfulness of a strike . . . depend upon judicial views of social and economic policy." *Jacksonville Bulk Terminals, Inc.*, *supra*, at 715. Even if we were confident that our mixture of metaphysics and social policy, unlike that of our predecessors earlier in this century, would produce a construction of § 13(c) that would substantially align with Congress' contemporary views, the fact remains that Congress passed the Norris-LaGuardia Act to forestall judicial attempts to narrow labor's statutory protection. Accordingly, we refuse to narrow the definition of "labor dispute" under § 13(c) to exclude those battles involving secondary activity.

IV

In certain limited circumstances, the Norris-LaGuardia Act does not prevent a court from enjoining violations of the specific mandate of another labor statute. Petitioners claim that the injunction here was valid because, under the RLA, it is illegal for a union to resort to secondary picketing after the parties have exhausted the major dispute resolution procedures. To evaluate this argument, we must briefly review the RLA.

The Railway Labor Act "cannot be appreciated apart from the environment out of which it came and the purposes which it was designed to serve." *Elgin, J. & E. R. Co.* v. *Burley*, 325 U. S. 711, 751 (1945) (Frankfurter, J., dissenting). Following decades of labor unrest that persistently revealed the shortcomings of every legislative attempt to address the problems, representatives of railroad labor and management created a system for dispute resolution that Congress enacted as the RLA in 1926.[9] The RLA subjects all railway disputes to virtually endless "negotiation, mediation, voluntary arbitration, and conciliation."[10] *Detroit & Toledo*

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[9] See, *e. g.*, G. Eggert, Railroad Labor Disputes (1967); L. Lecht, Experience Under Railway Labor Legislation 14–57 (1955); *Machinists* v. *Street*, 367 U. S. 740, 755–758, and nn. 11, 12 (1961); *Elgin, J. & E. R. Co.* v. *Burley*, 325 U. S. 711, 751–753 (1945) (Frankfurter, J., dissenting); *Virginian R. Co.* v. *Railway Employees*, 300 U. S. 515, 542–543 (1937).

[10] The RLA's procedures for resolving a major dispute, such as the one between BMWE and Guilford, were summarized by the Court in *Trainmen* v. *Jacksonville Terminal Co.*, 394 U. S. 369, 378 (1969):

"The Act provides a detailed framework to facilitate the voluntary settlement of major disputes. A party desiring to effect a change of rates of pay, rules, or working conditions must give advance written notice. § 6. The parties must confer, § 2 Second, and if conference fails to resolve the dispute, either or both may invoke the services of the National Mediation Board, which may also proffer its services *sua sponte* if it finds a labor emergency to exist. § 5 First. If mediation fails, the Board must endeavor to induce the parties to submit the controversy to binding arbitration, which can take place, however, only if both consent. §§ 5 First, 7. If arbitration is rejected and the dispute threatens 'substantially to inter-

Shore Line R. Co. v. *Transportation Union*, 396 U. S. 142, 148–149 (1969) *(Shore Line)*. Moreover, the RLA requires all parties both "to exert every reasonable effort to make and maintain" collectively bargained agreements, § 2 First, and to abide by the terms of the most recent collective-bargaining agreement until all the settlement procedures provided by the RLA have been exhausted, §§ 5, 6, 10; see *Shore Line*, *supra*, at 150–153. Nevertheless, if the parties exhaust these procedures and remain at loggerheads, they may resort to self-help in attempting to resolve their dispute, subject only to such restrictions as may follow from the invocation of an Emergency Board under § 10 of the RLA. See *Trainmen* v. *Jacksonville Terminal Co.*, *supra*, at 378–379 (citing "long line of decisions" upholding parties' right to self-help following exhaustion).

If the RLA is to function as its framers intended, compliance with its mandates obviously is essential. To accommodate the competing demands of the RLA and the Norris-LaGuardia Act, our cases establish that the Norris-LaGuardia Act

> "does not deprive the federal court of jurisdiction to enjoin compliance with various mandates of the Railway Labor Act. *Virginian R. Co.* v. *[Railway Employees]*, 300 U. S. 515; *Graham* v. *Brotherhood of Locomotive Firemen & Enginemen*, 338 U. S. 232." *Machinists* v. *Street*, 367 U. S., at 772–773; see also *Chicago & N. W. R. Co.* v. *Transportation Union*, 402 U. S. 570, 581–582 (1971).[11]

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rupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President,' who may create an emergency board to investigate and report on the dispute. § 10. While the dispute is working its way through these stages, neither party may unilaterally alter the *status quo*. §§ 2 Seventh, 5 First, 6, 10."

[11] In *Virginian R. Co.*, for example, the Court held that § 2 Ninth of the Act was a "command to the employer to 'treat with' the authorized representative of the employees," and that this legal obligation was enforceable

This exception is necessarily a limited one. Even when a violation of a specific mandate of the RLA is shown, "[c]ourts should hesitate to fix upon the injunctive remedy . . . unless that remedy alone can effectively guard the plaintiff's right." *Machinists*, *supra*, at 773.

Petitioners concede, as they must, that the RLA does not contain an express mandate limiting the scope of self-help available to a union once the RLA's major dispute resolution procedures have been exhausted. They argue, however, that the drafters of the RLA did not need to insert an express prohibition of secondary picketing because in 1926 federal law clearly prohibited such picketing. Because language banning that which was already illegal would have been superfluous, petitioners construe the RLA to adopt the limits on self-help that existed at the time the RLA became law.[12]

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in equity notwithstanding the Norris-LaGuardia Act. 300 U. S., at 546–547, 562–563. In *Graham*, the Court held that federal courts may enjoin compliance with the "Railway Labor Act provisions insuring [employees'] right to nondiscriminatory representation by their bargaining agent." 338 U. S., at 240; see also *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192, 199–203 (1944). Similarly, in *Detroit & Toledo Shore Line R. Co.* v. *Transportation Union*, 396 U. S. 142 (1969), the Court held that federal courts could enjoin parties to adhere to the status quo requirement embodied in the specific language of §§ 5, 6, and 10 of the RLA.

[12] Petitioners argue that the legislative history of the Norris-LaGuardia Act supports this view. As we noted *supra*, at 439–440, however, Congress rejected Representative Beck's amendment exempting railroads from the Norris-LaGuardia Act. Petitioners argue that Congress did so on the understanding that secondary picketing was already illegal under the Railway Labor Act and that nothing in the Norris-LaGuardia Act would change that. Reply Brief for Petitioners 14–17. But nowhere in the legislative debates does any Representative state that secondary activity is illegal under the RLA. Rather, in response to Representative Beck's proposed amendment, Representative LaGuardia stressed that the RLA "provided the machinery . . . for settling labor disputes," and that the RLA "takes care of the whole labor situation pertaining to the railroads." 75 Cong. Rec. 5499 (1932). These statements do not necessarily imply that the RLA bans secondary activity, but rather suggest that the

Petitioners read too much, however, into the silence of the Act. The RLA's silence could just as easily signify an intent to allow the parties to resort to whatever self-help is legally available at the time a dispute arises. Faced with a choice between the ambiguity in the RLA and the unambiguous mandate of the Norris-LaGuardia Act, we choose the latter.[13]

Indeed, this Court has already refused to find in the silence of the RLA an intent to prohibit secondary picketing. In *Trainmen* v. *Jacksonville Terminal Co.*, *supra*, we held that state courts may not enjoin secondary picketing in a railway dispute after parties exhaust the RLA's procedures. We noted that Congress had not provided the courts with the standards needed to distinguish primary from secondary picketing, and that "parties who have unsuccessfully exhausted the Railway Labor Act's procedures for resolution of a major dispute . . . [may] employ the full range of whatever peaceful economic power they can muster, so long as its use conflicts with no other obligation imposed by federal law." 394 U. S., at 392. We concluded that, in railway disputes, "until Congress acts, picketing—whether characterized as

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RLA's dispute resolution procedures already provided a mechanism by which to avoid secondary activity in the railway industry. We thus are not persuaded that Congress rejected Representative Beck's amendment on the understanding that courts had the power under the RLA to enjoin secondary picketing during the period of self-help.

[13] The circumstances surrounding the passage of the RLA suggest another reason to reject petitioners' construction. Unlike the legislation that preceded it, the RLA was negotiated and agreed to by the railroads and the Brotherhoods, and is "probably unique in having been frankly accepted as such by the President and Congress." *Elgin, J. & E. R. Co.* v. *Burley*, 325 U. S., at 753 (Frankfurter, J., dissenting). There was substantial disagreement in the 1920's between Congress and the courts over the legal status of secondary activity, and the unions at that time were exerting substantial efforts to persuade Congress to override the courts' construction of the Clayton Act. Given these circumstances, it is unwise to read into the RLA's silence on self-help an expression of enduring allegiance to the labor law of 1926. See *Trainmen* v. *Jacksonville Terminal Co.*, 394 U. S., at 382; n. 5, *supra*.

primary or secondary—must be deemed conduct protected against state proscription." *Id.*, at 392–393.

Petitioners note that our decision in *Trainmen* v. *Jacksonville Terminal Co.* did not require us to determine the scope of federal-court injunctive power under the RLA, nor to assess the applicability of the Norris-LaGuardia Act to either the state- or federal-court injunctive power. See *id.*, at 382, n. 18. Nevertheless, the primary rationale for our decision—that "we have been furnished by Congress neither usable standards nor access to administrative expertise" in evaluating the lawfulness of secondary picketing—remains equally persuasive today, for in the 18 years since our decision Congress has provided no guidance on the subject. Where the Judiciary lacks manageable standards, federal courts should not enter where state courts are forbidden to tread.

Petitioners next maintain that when, as here, the RLA does not provide a clear answer to a particular problem, this Court has looked to the NLRA "for assistance in construing" the RLA. *Trainmen* v. *Jacksonville Terminal Co.*, 394 U. S., at 383. Petitioners argue that the NLRA embodies Congress' view that secondary activity is an unfair labor practice, and that this view should govern our construction of the RLA.

The NLRA does not contain a "sweeping prohibition" of secondary activity; instead it "describes and condemns specific union conduct directed to specific objectives." *Carpenters* v. *NLRB*, 357 U. S. 93, 98 (1958). Moreover, the NLRA does not permit employers to seek injunctions against the activity that it does prohibit. It grants to the National Labor Relations Board (NLRB) exclusive authority to seek injunctions against some forms of secondary activity. 29 U. S. C. §§ 158(b)(4), 160(j), 160(l). Thus, congressional policy, as expressed in the NLRA, remains that employers are not permitted to obtain injunctions of secondary activity. Finally, it is significant that Congress excluded rail carriers

and rail employees from the coverage of the NLRA: even the NLRB has no authority to seek injunctions in railway disputes. §§ 152(2), 152(3). We conclude that the NLRA could not make clearer Congress' intent to prohibit federal courts from issuing the injunctions sought in this case.

Petitioners next argue that in some cases the Court has allowed an injunction to issue to enforce a duty that is merely *inferred* from the language and structure of the RLA. In *Trainmen* v. *Chicago R. & I. R. Co.*, 353 U. S. 30 (1957) *(Chicago River)*, for example, the Court held that federal courts may enjoin a strike over a minor dispute in order to enforce compliance with § 3 First of the RLA, which provides for compulsory arbitration of minor disputes before the National Railroad Adjustment Board. Petitioners note that nothing in § 3 First expressly forbids a union to strike over a minor dispute, and argue that the Court necessarily *inferred* the prohibition against strikes during compulsory arbitration from the language and legislative history of the RLA. Similarly, in *Chicago & N. W. R. Co.* v. *Transportation Union*, 402 U. S. 570 (1971) *(Chicago & North Western)*, the Court held that a federal court may enjoin a strike following the exhaustion of major dispute resolution procedures if a union does not comply with its obligation under § 2 First of the RLA "to exert every reasonable effort" to resolve the dispute. 45 U. S. C. § 152 First. Petitioners note that nothing in § 2 First expressly declares that its obligations are enforceable during the period of self-help, and therefore argue that in *Chicago & North Western*, as in *Chicago River*, the Court allowed federal courts to enforce by injunction a duty that was merely inferred from the Act.[14]

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[14] Petitioners also rely on a third case, *Railway Clerks* v. *Florida E. C. R. Co.*, 384 U. S. 238 (1966) *(Florida East Coast)*, in which the Court held that a carrier's right to self-help following the exhaustion of major dispute resolution procedures included a right to deviate from the terms of the preexisting collective-bargaining agreement in engaging supervisors and nonunion employees to replace the striking employees, and that this right

Turning to this case, petitioners argue that a ban on secondary picketing may be inferred from the general language of § 2 First. Section 2 First states that:

> "It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof." 45 U. S. C. § 152 First.

Petitioners place particular emphasis on the duty this section places on employees to attempt to settle disputes and thereby avoid any interruption to interstate commerce. This duty, petitioners correctly note, is consistent with the major purpose of Congress in passing the RLA: "'[T]o prevent, if possible, wasteful strikes and interruptions of interstate commerce.'" Brief for Petitioners 14, quoting *Shore Line*, 396 U. S., at 148. See also H. R. Rep. No. 328, 69th Cong., 1st Sess., 1 (1926). Petitioners conclude that con-

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could be enforced by an injunction approving the change in terms and specifying that the deviations would be abandoned at the conclusion of the strike. Petitioners argue that, in light of the express language of § 2 Seventh prohibiting carriers from unilaterally altering the terms of an agreement, the basis for the Court's ruling must be an inference from the structure and purposes of the Act. But in *Florida East Coast* the Court was not confronted with a question whether § 4 of the Norris-LaGuardia Act would prohibit the injunction, for the injunction at issue there did not prohibit the sort of strike activity that § 4 protects. Instead, the Court's task was to construe the scope of the employer's right to self-help with reference simply to the RLA itself. The Court's conclusion—that a right to deviate from the requirements of § 2 Seventh was essential lest the employer's right to self-help become "academic"—was one that rested solely on a construction of the RLA. *Id.*, at 246. Because the anti-injunction mandate of § 4 was neither mentioned nor implicated by *Florida East Coast*, that decision does not bear on the question presented here.

struing the RLA to allow unions to resort to secondary activity is manifestly inconsistent with the major purpose of the RLA.[15]

Although we agree with petitioners that the primary goal of the RLA is to settle strikes and avoid interruptions to commerce, we see nothing in the RLA to indicate that Congress intended to permit federal courts to enjoin secondary activity as a means toward that end. An injunction does not settle a dispute—it simply disables one of the parties. Moreover, "in view of the interests of both parties in avoiding a strike," *Virginian R. Co.* v. *Railway Employees*, 300 U. S., 515, 552 (1937), the availability of such self-help measures as secondary picketing may increase the effectiveness of the RLA in

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[15] It is of course appropriate to construe a particular provision of an Act in light of the Act's structure and purpose. *United States* v. *Heirs of Boisdoré*, 8 How. 113, 122 (1849); *United States* v. *Hutcheson*, 312 U. S., at 235. The inference that petitioners ask us to make, however, is different in character from inferences we have made in past cases involving the RLA and the Norris-LaGuardia Act.

In *Chicago River*, for example, our point of departure was the express language of § 3 First, which unambiguously compelled arbitration of minor disputes; the only inference drawn was that a strike was incompatible with this explicit obligation. "[T]he *Chicago River* case [thus] held that a strike could be enjoined to prevent a plain violation of a basic command of the Railway Labor Act . . . ." *Telegraphers* v. *Chicago & N. W. R. Co.*, 362 U. S., at 338–339. In the instant case, by contrast, there is no "basic command" of the RLA which the union can be said plainly to have violated. We are asked in this case to infer not only that a union's duty to refrain from secondary activity is so crucial to the operation of the Act that it may be enforced by injunction, but also that such a duty exists.

In *Chicago & North Western*, we began by noting that the express language of § 2 First creates a duty to "exert every reasonable effort" to settle disputes. The only inference we drew here was that this duty was a legal obligation enforceable by injunction under certain circumstances. The language of § 2 First does not contain, however, either an express proscription of secondary activity or a suggestion that the scope of self-help is limited. Our currently narrow exception to the Norris-LaGuardia Act's prohibition on injunctions would expand to swallow the rule were we to permit courts to enforce by injunction the obligation petitioners infer here.

settling major disputes by creating an incentive for the parties to settle prior to exhaustion of the statutory procedures:

> "Underlying the entire statutory framework is the pressure born of the knowledge that in the final instance traditional self-help economic pressure may be brought to bear if the statutory mechanism does not produce agreement. . . . As the statutory machinery nears termination without achieving settlement, the threat of economic self-help and the pressures of informed public opinion create new impetus toward compromise and agreement." *Chicago & North Western*, 402 U. S., at 597–598 (BRENNAN, J., dissenting).

Furthermore, as this case illustrates, § 10 of the RLA provides a ready mechanism for the Executive Branch to intervene and interrupt any self-help measures by invoking an Emergency Board and thereby imposing at a minimum a 60-day cooling-off period. If the Board's recommendations are not initially accepted by the parties, Congress has the power to enforce the Board's recommendation by statute, as it has done here. Allowing secondary picketing in the self-help period is thus not inconsistent with the structure or purpose of the Act, and may in fact increase the likelihood of settlement prior to self-help. This is therefore not a case in which "the scheme of the Railway Labor Act could not begin to work without judicial involvement." *Chicago & North Western, supra*, at 595 (BRENNAN, J., dissenting).

While opinions regarding the RLA's success in meeting its goals have varied over time, it does appear that under the RLA labor and management have been able to resolve most conflicts without resort to secondary picketing.[16] We de-

[16] "In the history of the Railway Labor Act there have been only three widely-known labor disputes in which rail unions have undertaken any secondary economic activity." Brief for National Railway Labor Conference as *Amicus Curiae* 27. In making this statement, *amicus* refers to the Florida East Coast Railway dispute of the early 1960's, see *Trainmen* v. *Jacksonville Terminal Co.*, 394 U. S. 369 (1969); the 1978 dispute between

cline, at this advanced stage of the RLA's development, to find in it an implied limit on a union's resort to secondary activity. Instead, "if Congress should now find that abuses in the nature of secondary activities have arisen in the railroad industry . . . it is for the Congress, and not the Courts, to strike the balance 'between the uncontrolled power of management and labor to further their respective interests.'" *Trainmen* v. *Jacksonville Terminal Co.*, 394 U. S., at 392.

V

"Th[e] judge-made law of the late 19th and early 20th centuries was based on self-mesmerized views of economic and social theory . . . and on statutory misconstruction." *Trainmen* v. *Jacksonville Terminal Co.*, *supra*, at 382. It may be that the evolution of judicial attitudes toward labor in "the decades since the Norris-LaGuardia Act was passed has dissipated any legitimate concern about the impartiality of federal judges in disputes between labor and management." *Buffalo Forge Co.* v. *Steelworkers*, 428 U. S. 397, 432 (1976) (STEVENS, J., dissenting). But our decision in this case ultimately turns not on concerns of partiality, but on questions of power. In the Norris-LaGuardia Act, Congress divested federal courts of the power to enjoin secondary picketing in railway labor disputes. Congress has not seen fit to restore that power. Accordingly, we affirm the decision of the Court of Appeals.

It is so ordered.

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the Norfolk and Western Railway and the Brotherhood of Railway and Airline Clerks, see *Consolidated Rail Corp.* v. *Railway Clerks*, 99 BNA LRRM 2607 (WDNY 1978), appeal dism'd as moot, 595 F. 2d 1208 (CA2 1979); and the dispute at issue here involving Guilford and BMWE. Brief for *Amicus Curiae*, *supra*, at 27.

BURLINGTON NORTHERN RAILROAD CO. *v.* OKLAHOMA TAX COMMISSION ET AL.

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

No. 86–337. Argued March 25, 1987—Decided April 28, 1987

Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976—which prohibits discriminatory state taxation of railroad property—provides, in § 306(b)(1), that a State may not "assess rail transportation property at a value that has a higher ratio to the true market value . . . than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property." Section 306(c) includes, *inter alia*, provisions declaring an exception from the provisions of the Tax Injunction Act, conferring jurisdiction on district courts to prevent violations of § 306(b), and stating that "[t]he burden of proof in determining assessed value and true market value is governed by State law." Petitioner railroad filed this action in the Federal District Court, alleging that respondents, Oklahoma taxation authorities and their members, had discriminated against petitioner in the assessment of state property taxes for the 1982 tax year, particularly by overvaluing petitioner's property. In Oklahoma, the determination of tax liability involves determining the value of the entire railroad system and allocating a portion of that value to Oklahoma, and then assessing the taxable value of the railroad's property at only a certain percentage of true market value, which, during the tax year in question, was concededly the same assessment ratio employed with respect to all other commercial and industrial property in the State. Petitioner's claim of discriminatory taxation was based solely upon the State's overvaluation of the "true market value" of petitioner's entire railroad system. Holding that § 306 does not permit the exercise of federal jurisdiction to review such claims of discriminatory state taxation unless the railroad shows purposeful overvaluation with discriminatory intent, the District Court found that no such showing had been made here and dismissed the case for lack of subject-matter jurisdiction. The Court of Appeals affirmed.

Held: Section 306 permits federal-court review of petitioner's claim of alleged overvaluation of its property. Pp. 460–464.

(a) Respondents' contention that § 306 *never* permits district-court review of claims of discriminatory taxation based upon overvaluation of railroad property is without merit. The language of § 306(b)(1) makes

clear that in order to compare the actual assessment ratios applicable to railroad property and to other commercial and industrial property, it is necessary to determine what the "true market values" are. The obstacle to respondents' position that the first occurrence of the phrase "true market value" in the statute should be read as "state determined market value" is the language of § 306(c) stating that the burden of proof in determining assessed value and true market value is governed by state law. It would be inconsistent to allocate the burden of proof as to an issue which could not be litigated in federal court in the first place. The additional provisions of § 306(c) instructing the district courts as to methods for proving the assessment ratio for "other commercial and industrial property" do not, as respondents claim, raise an implication that the State's valuation of a railroad's property may not be proved at all. Pp. 460–463.

(b) The position of the courts below that district courts may not review claims of discriminatory taxation based upon overvaluation of railroad property unless the plaintiff first makes a preliminary showing of intentional discrimination is also untenable. Section 306(b) speaks only in terms of "acts" which "unreasonably burden and discriminate against interstate commerce"; nowhere does it refer to the actor's intent. Moreover, § 306(c) provides that relief may be granted only if the ratio of assessed value to true market value of railroad property exceeds by at least 5% the assessment ratio for other commercial and industrial property. That provision makes sense as a prohibition on the litigation of *de minimis* disparate-impact claims, and does not support the view that Congress intended to reach only claims of intentional discrimination by overvaluation. Pp. 463–464.

(c) The contentions that injunctive relief against state taxation offends principles of comity, and that restrictions on valuation actions under § 306 are necessary to avoid crowded federal dockets and unreasonable delay of the state tax collection process, involve policy considerations that may have weighed heavily with legislators who considered the Act and its predecessors. This Court is not free to reconsider such policy matters. P. 464.

Reversed.

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

Betty Jo Christian argued the cause for petitioner. With her on the briefs were *Timothy M. Walsh*, *Steven Reed*, *Jerald S. Howe, Jr.*, and *Jeffrey D. Lerner*.

Albert G. Lauber, Jr., argued the cause for the United States as *amicus curiae* urging reversal. With him on the

brief were *Solicitor General Fried*, *Assistant Attorney General Willard*, *Richard G. Taranto*, *Anthony J. Steinmeyer*, *Jim J. Marquez*, and *John M. Mason*.

David W. Lee, Assistant Attorney General of Oklahoma, argued the cause for respondents. With him on the brief for respondents State Board of Equalization of Oklahoma et al. were *Robert H. Henry*, Attorney General, and *Neal Leader*, Assistant Attorney General. *J. Lawrence Blankenship* and *Donna E. Cox* filed a brief for respondents Oklahoma Tax Commission et al.*

JUSTICE MARSHALL delivered the opinion of the Court.

The issue presented by this case is whether § 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, 49 U. S. C. § 11503, permits review by federal courts of alleged overvaluation of railroad property by state taxation authorities.

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*Briefs of *amici curiae* urging reversal were filed for the American Bus Association by *Charles A. Webb* and *Theodore C. Knappen;* and for the Association of American Railroads by *Kenneth P. Kolson*.

Jerome B. Falk, Jr., and *Steven L. Mayer* filed a brief for Fifty California Counties as *amici curiae* urging affirmance.

Briefs of *amici curiae* were filed for the State of California et al. by *John K. Van de Kamp*, Attorney General of California, *Timothy G. Laddish*, Supervising Deputy Attorney General, and *Julian O. Standen*, and by the Attorneys General for their respective States as follows: *Duane Woodard* of Colorado, *Robert A. Butterworth* of Florida, *Thomas J. Miller* of Iowa, *Hubert H. Humphrey III* of Minnesota, *Mike Greeley* of Montana, *Robert M. Spire* of Nebraska, *Brian McKay* of Nevada, *Lacy H. Thornburg* of North Carolina, *Dave Frohnmayer* of Oregon, *Travis Medlock* of South Carolina, *Roger A. Tellinghuisen* of South Dakota, *W. J. Michael Cody* of Tennessee, *Mary Sue Terry* of Virginia, *Kenneth O. Eikenberry* of Washington, and *Joseph B. Meyer* of Wyoming; and for the State of Kansas et al. by *Robert T. Stephan*, Attorney General of Kansas, and *Carol B. Bonebrake*, and by the Attorneys General for their respective States as follows: *Robert K. Corbin* of Arizona, *Michael J. Bowers* of Georgia, *Jim Jones* of Idaho, *William L. Webster* of Missouri, *Hal Stratton* of New Mexico, *David L. Wilkinson* of Utah, and *Charles G. Brown* of West Virginia.

I

In 1976, after 15 years of intermittent and inconclusive legislative action, Congress passed the Railroad Revitalization and Regulatory Reform Act, Pub. L. 94–210, 90 Stat. 31 (Act). The Act's purpose, as stated in the congressional declaration of policy, was "to provide the means to rehabilitate and maintain the physical facilities, improve the operations and structure, and restore the financial stability of the railway system of the United States." § 101(a). Among the means chosen by Congress to fulfill these objectives, particularly the goal of furthering railroad financial stability, was a prohibition on discriminatory state taxation of railroad property. After an extended period of congressional investigation, Congress concluded that "railroads are over-taxed by at least $50 million each year." H. R. Rep. No. 94–725, p. 78 (1975).

Congress' solution to the problem of discriminatory state taxation of railroads was embodied in § 306 of the Act, currently codified at 49 U. S. C. § 11503.[1] In broad terms, Congress declared in § 306(b) that assessment ratios or taxation rates imposed on railroad property which differ significantly from the ratios or rates imposed on other commercial and industrial property are prohibited as burdens on interstate commerce.[2] Section 306(c) declared an exception from the

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[1] The language of the original § 306, first codified at 49 U. S. C. § 26c (1976 ed.), was slightly altered when in 1978 the provision was recodified at 49 U. S. C. § 11503. See Act of Oct. 17, 1978, Pub. L. 95–473, 92 Stat. 1337 *et seq.* These changes "may not be construed as making a substantive change in the laws replaced." § 3(a), 92 Stat. 1466. For convenience, further references to the statute are to the text of 49 U. S. C. § 11503.

[2] Title 49 U. S. C. § 11503(b) provides in relevant part:

"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:

"(1) assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the

provisions of the Tax Injunction Act, 28 U. S. C. § 1341, allowing railroads to challenge discriminatory taxation in federal district courts.[3] States were given a 3-year grace period, until February 1979, to bring their property taxation systems into compliance with the statutory requirements. § 306(2)(b), 90 Stat. 54; see Act of Oct. 17, 1978, Pub. L. 95–473, 92 Stat. 1466.

The present action was filed by petitioner Burlington Northern Railroad in the United States District Court for the Western District of Oklahoma on March 3, 1983. The complaint alleged that respondents, the Oklahoma Tax Commis-

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same assessment jurisdiction has to the true market value of the other commercial and industrial property.

"(2) levy or collect a tax on an assessment that may not be made under clause (1) of this subsection. . . ."

[3] Title 49 U. S. C. § 11503(c) provides:

"Notwithstanding section 1341 of title 28 and without regard to the amount in controversy or citizenship of the parties, a district court of the United States has jurisdiction, concurrent with other jurisdiction of courts of the United States and the States, to prevent a violation of subsection (b) of this section. Relief may be granted under this subsection only if the ratio of assessed value to true market value of rail transportation property exceeds by at least 5 percent, the ratio of assessed value to true market value of other commercial and industrial property in the same assessment jurisdiction. The burden of proof in determining assessed value and true market value is governed by State law. If the ratio of the assessed value of other commercial and industrial property in the assessment jurisdiction to the true market value of all other commercial and industrial property cannot be determined to the satisfaction of the district court through the random-sampling method known as a sales assessment ratio study (to be carried out under statistical principles applicable to such a study), the court shall find, as a violation of this section—

"(1) an assessment of the rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the assessed value of all other property subject to a property tax levy in the assessment jurisdiction has to the true market value of all other commercial and industrial property; and

"(2) the collection of an ad valorem property tax on the rail transportation property at a tax rate that exceeds the tax ratio rate applicable to taxable property in the taxing district."

sion and State Board of Equalization and their members, had discriminated against petitioner in the assessment of state property taxes for the 1982 tax year.[4] In particular, petitioner alleged that respondents had overvalued petitioner's property.

The determination of railroad property tax liability in Oklahoma proceeds in several discrete stages. The first step is to ascertain the amount of property subject to tax. The Oklahoma Tax Commission follows the procedure of determining the value of the entire railroad, and then allocating a portion of that total system value to Oklahoma. The value of the railroad is determined by calculating a weighted average of original cost of assets and capitalized net operating income. Response to Complaint ¶ 14, App. 16. A similar procedure for determining the value of railroad property subject to tax by valuing the total system and apportioning that value to the taxing jurisdiction is employed in almost all jurisdictions which apply property taxes to railroads. See J. Runke & A. Finder, State Taxation of Railroads and Tax Relief Programs 23–32 (1977). In allocating a proportion of petitioner's property to Oklahoma, the Tax Commission took the position in 1982 that 3.53% of petitioner's property was taxable in the State, an allocation which petitioner does not dispute. Brief for Petitioner 9, n. 14.

Oklahoma does not assess property at full market value for tax purposes. See Okla. Const., Art. 10, § 8 (assessment not to exceed 35% of market value). Therefore, the second step in the determination of tax liability is the application to the true market valuation of the assessment ratio. In 1982, the State assessed the taxable value of petitioner's property at 10.87% of true market value. Petitioner does not dispute that this was the same assessment ratio employed with re-

[4]The Oklahoma Tax Commission submits each year a recommendation as to the assessment of railroad property to the State Board of Equalization, which makes the final assessment decision. Response to Complaint ¶ 14, App. 15–16.

spect to all other commercial and industrial property in the State. Brief for Petitioner 9, n. 14.

Petitioner's claim of discriminatory taxation was thus based solely upon the State's original determination of the market value of petitioner's entire railroad system. The 1982 assessment by the State determined that the "true" market value of the railroad was approximately $3.6 billion. Response to Complaint ¶28, App. 22. Petitioner contended that fair application of respondents' own valuation methodology would have resulted in a determination that the "true" market value of the railroad was approximately $1.5 billion. Complaint ¶34, App. to Pet for Cert. 31a.

The District Court, following the decision of the United States Court of Appeals for the Tenth Circuit in *Burlington Northern R. Co.* v. *Lennen*, 715 F. 2d 494 (1983), cert. denied, 467 U. S. 1230 (1984), held that § 11503 does not permit the exercise of federal jurisdiction to review claims of state taxation based upon alleged overvaluation of railroad property, unless the railroad "'can make a strong showing of purposeful overvaluation with discriminatory intent.'" CIV 83–419–R (WD Okla. Jan. 8, 1985), App. to Pet. for Cert. 10a (quoting *Burlington Northern R. Co.* v. *Lennen*, *supra*, at 498). The District Court found that no such showing had been made, and dismissed "for lack of subject matter jurisdiction" under Federal Rule of Civil Procedure 12(b)(1). App. to Pet. for Cert. 17a. The Court of Appeals affirmed in an unpublished opinion. No. 85–1657 (CA10 May 2, 1986). We granted certiorari, 479 U. S. 913 (1986), to resolve a conflict between the position of the Tenth Circuit and that of the Eighth Circuit in *Burlington Northern R. Co.* v. *Bair*, 766 F. 2d 1222 (1985). We now reverse.

II

There is some difference of opinion between respondents and the Court of Appeals as to the proper interpretation of § 11503. The Court of Appeals, following its decision

in *Burlington Northern R. Co.* v. *Lennen, supra,* held that district courts may not review claims of discriminatory taxation based upon overvaluation of railroad property unless the plaintiff first makes a preliminary showing of intentional discrimination. Respondents suggest that § 11503 *never* permits district court review of such claims. Brief for Respondents State Board of Equalization et al. 9; Tr. of Oral Arg. 41, 52–53. Our reading of the statute convinces us that both positions are untenable.

The parties have canvassed at length the 15-year legislative history of the Act, and of the protection against discriminatory state taxation which became § 11503. We find the results of that investigation inconclusive and irrelevant. Legislative history can be a legitimate guide to a statutory purpose obscured by ambiguity, but "[i]n the absence of a 'clearly expressed legislative intention to the contrary,' the language of the statute itself 'must ordinarily be regarded as conclusive.'" *United States* v. *James,* 478 U. S. 597, 606 (1986) (quoting *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.,* 447 U. S. 102, 108 (1980)). Unless exceptional circumstances dictate otherwise, "[w]hen we find the terms of a statute unambiguous, judicial inquiry is complete." *Rubin* v. *United States,* 449 U. S. 424, 430 (1981).

In the present case, the language of § 11503 plainly declares the congressional purpose. Subsection (b)(1) forbids any State to "assess rail transportation property at a value that has a higher ratio to the true market value . . . than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property." It is clear from this language that in order to compare the actual assessment ratios, it is necessary to determine what the "true market values" are. Respondents take the position that the first occurrence of the phrase "true market value" in § 11503(b)(1) should be read as "state determined market value," for they contend in essence that what-

ever the State determines the value of the railroad to be, the resulting assessment ratio is not subject to further judicial scrutiny in the federal courts.

The obstacle to this position is the language of § 11503(c), which states that "[t]he burden of proof in determining assessed value and true market value is governed by State law." It would be inconsistent to allocate the burden of proof as to an issue which could not be litigated in federal court in the first place. Respondents attempt to meet this argument by pointing to the remainder of subsection (c), which specifically instructs the district courts as to methods for proving the assessment ratio for other commercial and industrial property, either through statistical sampling of the assessed value and sale value of individual properties, or through the determination of assessed value and true market value of "all other commercial and industrial property" "in the assessment jurisdiction." § 11503(c)(1). Respondents contend that these instructions as to the determination of assessment ratios for other commercial and industrial property show that it is the burden of proof on these issues only which is allocated in subsection (c), and that it is only these issues which may be the subject of proof before the district court.

In fact, however, the language of subsection (c) leads to the opposite conclusion. The general statement that assessed value and true market value are subjects for judicial inquiry, and are to be proved under burdens allocated by state law, is followed by a specific instruction as to how two of those issues are to be addressed. These are not, by their placement or meaning, words of limitation on the preceding general statement, but rather a particular grant of authority to district courts to use statistical methods for establishing the assessed and market values of "other commercial and industrial property" where such methods will result in proof "to the satisfaction of the district court." Congress has said that the value of one kind of property may, in the court's discre-

tion, be proved by particular means; this raises no implication whatever that the value of another kind of property may not be proved at all.[5] Respondents' position depends upon the addition of words to a statutory provision which is complete as it stands. Adoption of their view would require amendment rather than construction of the statute, and it must be rejected here.

The position taken by the Court of Appeals is also unsatisfactory. The court found that some disputes as to state valuation of railroad property may be the subject of a federal claim under § 11503, but only where the plaintiff alleges, and makes a preliminary showing, that the overvaluation results from discriminatory intent. App. to Pet. for Cert. 10a; *Burlington Northern R. Co.* v. *Lennen*, 715 F. 2d, at 498. The statute provides no support for this interpretation. Subsection (b) speaks only in terms of "acts" which "unreasonably burden and discriminate against interstate commerce"; nowhere does it refer to the intent of the actor. The Court of Appeals does not dispute that the other acts prohibited by the plain language of § 11503(b), such as the use of facially discriminatory disparities in assessment ratio or the systematic undervaluation of other commercial and industrial property, are not subject to an intent requirement. It does not explain how the same sentence can be interpreted in two such strikingly different senses depending upon whether the railroad's challenge is to the State's undervaluation of other

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[5] Petitioner has not challenged the valuation methodology employed by respondents in determining the value of petitioner's railroad; petitioner's sole challenge is to the application of that methodology, particularly the State's evaluation of the cost of capital and the State's refusal to make deductions for property which petitioner claims is obsolete. Tr. of Oral Arg. 15–16. This case therefore does not present the question whether a railroad may, in an action under § 11503, challenge in the district court the appropriateness of the accounting methods by which the State determined the railroad's value, or is instead restricted to challenging the factual determinations to which the State's preferred accounting methods were applied. Accordingly we express no view on that issue.

commercial and industrial property or to the State's overvaluation of railroad property.

Further support for our conclusion is found in § 11503(c), which provides that "[r]elief may be granted under this subsection only if the ratio of assessed value to true market value of rail transportation property exceeds by at least 5 percent" the assessment ratio for other commercial and industrial property. Such a provision makes sense as a prohibition on the litigation of *de minimis* disparate-impact claims in the federal courts, but it is hard to reconcile with the proposition that Congress intended to reach only claims of intentional discrimination by overvaluation. If intentional discrimination is the evil to be remedied, did Congress propose to permit the States to discriminate at will, so long as they unfairly retained only one nickel out of every dollar? The Court of Appeals' suggested interpolation of an intent requirement draws no support from the statute's language and is inconsistent with its expressed purpose.

III

Respondents contend that injunctive relief against state taxation offends the principles of comity. Brief for Respondents State Board of Equalization et al. 41–42. The Court of Appeals found that its restrictions on valuation actions under § 11503 are necessary in order to avoid "an inevitable clog of federal dockets" and "unreasonable delay of the state tax collection process." App. to Pet. for Cert. 10a. These are policy considerations which may have weighed heavily with legislators who considered the Act and its predecessors. It should go without saying that we are not free to reconsider them now. The decision of the Court of Appeals is

Reversed.

Syllabus

MEESE, ATTORNEY GENERAL OF THE UNITED STATES, ET AL. *v.* KEENE

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

No. 85–1180. Argued December 2, 1986—Decided April 28, 1987

The Foreign Agents Registration Act of 1938 (Act) requires registration, reporting, and disclosure by persons engaging in propaganda on behalf of foreign powers. The Act uses the term "political propaganda" to identify those expressive materials subject to its requirements, and defines the term as, *inter alia*, any communication intended to influence the United States' foreign policies. Appellee, a member of the California State Senate, wished to show three Canadian films identified by the Department of Justice (DOJ) as "political propaganda" under the Act, but did not want to be publicly regarded as a disseminator of "political propaganda." He therefore brought suit in Federal District Court to enjoin the application of the term "political propaganda" to the films. The District Court granted the injunction, holding that the risk of damage to appellee's reputation established his standing to challenge the constitutionality of the use of the term "political propaganda," and that such use violated the First Amendment. According to the District Court, the public believes that materials to which the term "political propaganda" applies have been "officially censured," and therefore those materials are rendered unavailable to people like appellee because of the risk of being seen in an unfavorable light by the public. In the District Court's view, the conscious use of such a pejorative label was an unnecessary and therefore invalid abridgment of speech.

Held:

1. Appellee has standing to challenge the Act's use of the term "political propaganda" as a violation of the First Amendment. Pp. 472–477.

(a) That the identification of the films in question as "political propaganda" threatens to cause appellee cognizable injury is established by uncontradicted affidavits indicating that his exhibition of the films would substantially harm his chances for reelection and adversely affect his reputation in the community. Even if he could minimize these risks by providing viewers with a statement about the high quality of the films and his reasons for agreeing with them, the statement would be ineffective among those citizens who shunned the films as "political propaganda." Moreover, the need to take such affirmative steps would itself constitute a cognizable injury to appellee. Pp. 472–476.

(b) The risk of injury to appellee's reputation can be traced to appellants' conduct, since it stems from DOJ's application of the term "political propaganda" to the films. P. 476.

(c) Granting appellee's requested relief would at least partially redress the complained-of injury, since a judgment declaring the Act unconstitutional would eliminate the need to choose between exhibiting the films and incurring the risk of injury to appellee's reputation. Pp. 476–477.

2. The Act's use of the term "political propaganda" is constitutional. The District Court's holding to the contrary erroneously rests on potential public misunderstanding of the Act's effect rather than on what the Act actually says, requires, or prohibits. Pp. 477–485.

(a) As defined in the Act, the term "political propaganda" not only includes slanted, misleading advocacy in the popular, pejorative sense, but also encompasses materials that are completely accurate and merit the highest respect. Pp. 477–478.

(b) Since the Act neither inhibits appellee's access to the films nor prohibits, edits, or restrains the distribution of materials to which the term "political propaganda" applies, it places no burden on protected expression. To the contrary, it simply requires the disseminators of propaganda to make additional disclosures to better enable the public to evaluate the material's impact, allows them to add further information that they think germane, and thereby actually fosters freedom of speech. It is, in fact, the District Court's injunction that wrongfully withholds information—the fact that the films have been deemed to be "political propaganda"—on the paternalistic assumption that the public will misunderstand and therefore misuse the information. Pp. 480–483.

(c) Although the Act's definition of "political propaganda" has existed since 1942, there is no evidence that public misunderstanding or the fear thereof has actually interfered with the exhibition of a significant number of foreign-made films. Pp. 483–484.

(d) The Act's use of the term "political propaganda" is neutral, evenhanded, and without pejorative connotation, and is therefore constitutionally permissible. Pp. 484–485.

619 F. Supp. 1111, reversed and remanded.

STEVENS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, POWELL, and O'CONNOR, JJ., joined. BLACKMUN, J., filed an opinion dissenting in part, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 485. SCALIA, J., took no part in the consideration or decision of the case.

Deputy Solicitor General Ayer argued the cause for the United States. With him on the briefs were *Solicitor General Fried, Assistant Attorney General Willard, Paul J. Larkin, Jr.*, and *Leonard Schaitman.*

John G. Donhoff, Jr., argued the cause for respondent. With him on the brief was *Stephen R. Barnett.**

JUSTICE STEVENS delivered the opinion of the Court.

The Foreign Agents Registration Act of 1938, 52 Stat. 631–633, as amended in 1942 and 1966, 22 U. S. C. §§ 611–621 (Act), uses the term "political propaganda," as defined in the Act, to identify those expressive materials that must comply with the Act's registration, filing, and disclosure requirements. The constitutionality of those underlying requirements and the validity of the characteristics used to define the regulated category of expressive materials are not at issue in this case. The District Court concluded, however, that Congress violated the First Amendment by using the term "political propaganda" as the statutory name for the regulated category of expression.

Appellee, an attorney and a member of the California State Senate, does not want the Department of Justice and the public to regard him as the disseminator of foreign political propaganda, but wishes to exhibit three Canadian motion picture films that have been so identified.[1] The films, distrib-

**Daniel J. Popeo* and *George C. Smith* filed a brief for the Washington Legal Foundation et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *Daniel Marcus, Susan W. Shaffer, Charles S. Sims, Robert Abrams*, Attorney General of New York, *O. Peter Sherwood*, Solicitor General, *Lawrence S. Kahn*, Deputy Solicitor General, and *Sanford M. Cohen*, Assistant Attorney General; for the Freedom to Read Foundation by *Robert Steven Chapman;* and for Playboy Enterprises, Inc., et al by *Bruce J. Ennis, Jr., Burton Joseph*, and *Maxwell J. Lillienstein.*

[1] In a letter dated January 13, 1983, the Chief of the Registration Unit of the Internal Security Section of the Criminal Division of the Department of Justice notified the National Film Board of Canada (NFBC) that these three films were "political propaganda," and requested that the NFBC

uted by the NFBC,[2] deal with the subjects of nuclear war and acid rain.[3] Appellee brought suit in the Federal District Court for the Eastern District of California on March 24, 1983, to enjoin the application of the Act to these three films. On May 23, 1983, the District Court denied appellants' motion to dismiss and granted appellee's motion for a preliminary injunction. The injunction prohibited appellants from designating the films as "political propaganda" and from subjecting them to the labeling and reporting requirements of the Act. The court issued findings of fact and conclusions of law on September 7, 1983. *Keene* v. *Smith*, 569 F. Supp. 1513. The court held that the risk of damage to Keene's reputation established his standing to challenge the constitutionality of the statute's use of the term "propaganda," and that appellee had established his entitlement to a preliminary injunction.[4]

On September 12, 1985, the District Court granted summary judgment for appellee and a permanent injunction against enforcement of any portion of the Act which incorporates the term "political propaganda." 619 F. Supp. 1111.

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comply with the labeling and reporting requirements imposed by § 4 of the Act, 22 U. S. C. § 614. App. 18.

[2] The NFBC (New York office) has been registered with the Attorney General as an agent of a foreign principal, the NFBC, since 1947, pursuant to 22 U. S. C. § 612. Second Declaration of Joseph E. Clarkson ¶ 4, App. 57.

[3] The films are entitled If You Love This Planet, Acid Rain: Requiem or Recovery, and Acid From Heaven. The first film concerns "the environmental effects of nuclear war." Complaint ¶ 1, App. 10. "Acid rain" is formed when nitrogen oxides and sulfur dioxide, products of fossil fuel combustion, are discharged into the atmosphere; converted to sulfates, nitrates, sulfuric acids, and nitric acids through various chemical reactions; and then deposited as precipitation. See 1 F. Grad, Treatise on Environmental Law § 2.09, pp. 2–578 to 2–579 (1986).

[4] *Keene* v. *Smith*, 569 F. Supp., at 1518, 1522. The District Court found that appellee lacked standing to challenge the labeling requirement that the Act imposes on the agent of the foreign principal. *Id.*, at 1519. That ruling is not now before this Court.

The District Court opined that the term "propaganda" is a semantically slanted word of reprobation; that the use of such a denigrating term renders the regulated materials unavailable to American citizens who wish to use them as a means of personal expression; and that since there was no compelling state interest to justify the use of such a pejorative label, it was an unnecessary, and therefore invalid, abridgment of speech. The court amended its judgment on October 29, 1985, limiting the permanent injunction against enforcement of the Act to the three films at issue in this case.

We noted probable jurisdiction of the Attorney General's appeal under 28 U. S. C. § 1252, 475 U. S. 1117 (1986), and we now reverse.

Before we discuss the District Court's holding on the First Amendment issue, we briefly describe the statutory scheme and determine that appellee has standing to challenge the Act.

I

The statute itself explains the basic purpose of the regulatory scheme. It was enacted:

> "[T]o protect the national defense, internal security, and foreign relations of the United States by requiring public disclosure by persons engaging in propaganda activities and other activities for or on behalf of foreign governments, foreign political parties, and other foreign principals so that the Government and the people of the United States may be informed of the identity of such persons and may appraise their statements and actions in the light of their associations and activities." 56 Stat. 248–249.

See *Viereck* v. *United States*, 318 U. S. 236, 244 (1943).

The Act requires all agents of foreign principals to file detailed registration statements, describing the nature of their business and their political activities. The registration requirement is comprehensive, applying equally to agents of

friendly, neutral, and unfriendly governments. Thus, the New York office of the NFBC has been registered as a foreign agent since 1947 because it is an agency of the Canadian government. The statute classifies the three films produced by the Film Board as "political propaganda" because they contain political material intended to influence the foreign policies of the United States, or may reasonably be adapted to be so used.

When the agent of a foreign principal disseminates any "political propaganda," § 611(j), in the United States mails or in the channels of interstate commerce, he or she must also provide the Attorney General with a copy of the material and with a report describing the extent of the dissemination.[5] In addition, he or she must provide the recipient of the material with a disclosure statement on a form prescribed by the Attorney General.[6] When an agent seeks to disseminate

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[5] Title 22 U. S. C. § 614(a) provides:

"Every person within the United States who is an agent of a foreign principal and required to register under the provisions of this subchapter and who transmits or causes to be transmitted in the United States mails or by any means or instrumentality of interstate or foreign commerce any political propaganda for or in the interests of such foreign principal (i) in the form of prints, or (ii) in any other form which is reasonably adapted to being, or which he believes will be, or which he intends to be, disseminated or circulated among two or more persons shall, not later than forty-eight hours after the beginning of the transmittal thereof, file with the Attorney General two copies thereof and a statement, duly signed by or on behalf of such agent, setting forth full information as to the places, times, and extent of such transmittal."

[6] Section 614(b) provides:

"It shall be unlawful for any person within the United States who is an agent of a foreign principal and required to register under the provisions of this subchapter to transmit or cause to be transmitted in the United States mails or by any means or instrumentality of interstate or foreign commerce any political propaganda for or in the interests of such foreign principal (i) in the form of prints, or (ii) in any other form which is reasonably adapted to being, or which he believes will be or which he intends to be, disseminated or circulated among two or more persons, unless such political propaganda is conspicuously marked at its beginning with, or prefaced

such political advocacy material, he or she must first label that material with certain information, the agent's identity, and the identity of the principal for whom he or she acts. The standard form to be used with films reads as follows:

> "This material is prepared, edited, issued or circulated by (name and address of registrant) which is registered with the Department of Justice, Washington, D. C. under the Foreign Agents Registration Act as an agent of (name and address of foreign principal). Dissemination reports on this film are filed with the Department of Justice where the required registration statement is available for public inspection. Registration does not indicate approval of the contents of this material by the United States Government." App. 16, 59.

It should be noted that the term "political propaganda" does not appear on the form.

The statutory definition of that term reads as follows:

> "(j) The term 'political propaganda' includes any oral, visual, graphic, written, pictorial, or other communica-

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or accompanied by, a true and accurate statement, in the language or languages used in such political propaganda, setting forth the relationship or connection between the person transmitting the political propaganda or causing it to be transmitted and such propaganda; that the person transmitting such political propaganda or causing it to be transmitted is registered under this subchapter with the Department of Justice, Washington, District of Columbia, as an agent of a foreign principal, together with the name and address of such agent of a foreign principal and of such foreign principal; that, as required by this subchapter, his registration statement is available for inspection at and copies of such political propaganda are being filed with the Department of Justice; and that registration of agents of foreign principals required by the subchapter does not indicate approval by the United States Government of the contents of their political propaganda. The Attorney General, having due regard for the national security and the public interest, may by regulation prescribe the language or languages and the manner and form in which such statement shall be made and require the inclusion of such other information contained in the registration statement identifying such agent of a foreign principal and such political propaganda and its sources as may be appropriate."

tion or expression by any person (1) which is reasonably adapted to, or which the person disseminating the same believes will, or which he intends to, prevail upon, indoctrinate, convert, induce, or in any other way influence a recipient or any section of the public within the United States with reference to the political or public interests, policies, or relations of a government or a foreign country or a foreign political party or with reference to the foreign policies of the United States or promote in the United States racial, religious, or social dissensions, or (2) which advocates, advises, instigates, or promotes any racial, social, political, or religious disorder, civil riot, or other conflict involving the use of force or violence in any other American republic or the overthrow of any government or political subdivision of any other American republic by any means involving the use of force or violence." § 611(j).

II

In determining whether a litigant has standing to challenge governmental action as a violation of the First Amendment, we have required that the litigant demonstrate "a claim of specific present objective harm or a threat of specific future harm." *Laird* v. *Tatum*, 408 U. S. 1, 14 (1972). In *Laird*, the plaintiffs alleged that the intelligence-gathering operations of the United States Army "chilled" the exercise of their First Amendment rights because they feared that the defendants might, in the future, make unlawful use of the data gathered. We found that plaintiffs lacked standing; the Army's intelligence-gathering system did not threaten any cognizable interest of the plaintiffs. While the governmental action need not have a direct effect on the exercise of First Amendment rights, we held, it must have caused or must threaten to cause a direct injury to the plaintiffs. *Id.*, at 12–13. The injury must be "'distinct and palpable.'" *Allen* v. *Wright*, 468 U. S. 737, 751 (1984) (citations omitted).

Appellee's allegations and affidavits establish that his situation fits squarely within these guidelines. To be sure, the identification as "political propaganda" of the three films Keene is interested in showing does not have a direct effect on the exercise of his First Amendment rights; it does not prevent him from obtaining or exhibiting the films. As the District Court recognized, however, "[w]hether the statute in fact constitutes an abridgement of the plaintiff's freedom of speech is, of course, irrelevant to the standing analysis." 619 F. Supp., at 1118. While Keene did not and could not allege that he was unable to receive or exhibit the films at all, he relies on the circumstance that he wished to exhibit the three films, but was "deterred from exhibiting the films by a statutory characterization of the films as 'political propaganda.'" 569 F. Supp., at 1515. If Keene had merely alleged that the appellation deterred him by exercising a chilling effect on the exercise of his First Amendment rights, he would not have standing to seek its invalidation. See *Laird*, *supra*, at 13–14.

We find, however, that appellee has alleged and demonstrated more than a "subjective chill"; he establishes that the term "political propaganda" threatens to cause him cognizable injury. He stated that "if he were to exhibit the films while they bore such characterization, his personal, political, and professional reputation would suffer and his ability to obtain re-election and to practice his profession would be impaired." 569 F. Supp., at 1515. In support of this claim, appellee submitted detailed affidavits, including one describing the results of an opinion poll[7] and another containing the

[7] The poll was entitled Gallup Study of The Effect of Campaign Disclosures on Adults' Attitudes Toward Candidates (July, 1984). App. 78–98. The study was based on a telephone survey, in which five questions were posed to a representative national sample of adults. The questions tested the effect that publicizing various events associated with a candidate running for the state legislature would have on his candidacy. One of the surveyed events was that the political candidate "arranged to show to [the] public three foreign films that the Justice Dept. had classified as 'Political

views of an experienced political analyst,[8] supporting the conclusion that his exhibition of films that have been classified as "political propaganda" by the Department of Justice would substantially harm his chances for reelection and would adversely affect his reputation in the community. The affidavits were uncontradicted.

Propaganda.'" App. 86. The poll concluded that if this event occurred, 49.1% of the public would be less inclined to vote for the candidate. *Ibid.*; see also *id.*, at 93–94 (sampling tolerances; 95% confidence level that sampling error is less than four percentage points).

After examining the survey data, the survey research practitioner who had designed the survey concluded that the charge of showing political propaganda "would have a seriously adverse effect on a California State Legislature candidate's chances [for election] if this charge were raised during a campaign." Declaration of Mervin Field ¶ 5, App. 69. The District Court found that this declaration, "neither rebutted nor impeached by the defendants, establishes beyond peradventure of a doubt that whoever disseminates materials officially found to be 'political propaganda' runs the risk of being held in a negative light by members of the general public." 619 F. Supp. 1111, 1124 (1985) (footnote omitted). In addition, a principal political fundraiser and adviser to appellee, Harry Bistrin, stated: "I have no doubt but that some members of the North Coast [of California] press, present political adversaries, and future opponents, would openly seize upon the opportunity to utilize the government's reporting, dissemination and label requirements under [the Act] to their benefit by portraying the plaintiff as a disseminator of 'foreign political propaganda.' For these reasons the plaintiff has a compelling interest, perhaps more than most citizens, to ensure that the exercise of his first amendment rights does not 'boomerang' to be utilized as a deadly weapon against him in his political career." Declaration in Support of Plaintiff's Motion for a Preliminary Injunction, App. 30.

[8] "Designating material as 'political propaganda,' . . . denigrates the material and stigmatizes those conveying it, in a manner that mere designation of the material as 'political advocacy' would not. It is my professional judgment that knowledge of such a designation would be extremely likely to deter persons from viewing or reading such materials and, diminish and/or slant its communicative value, in a manner likely to make the reader or viewer suspicious of the material, far less likely to credit it or accept its conclusions." Declaration of Leonard W. Doob ¶ 9, App. 103. The declarant is Senior Research Associate and Sterling Professor Emeritus of Psychology at Yale University.

In ruling on the motion for summary judgment, the District Court correctly determined that the affidavits supported the conclusion that appellee could not exhibit the films without incurring a risk of injury to his reputation and of an impairment of his political career. The court found that the Act "puts the plaintiff to the Hobson's choice of foregoing the use of the three Canadian films for the exposition of his own views or suffering an injury to his reputation." 619 F. Supp., at 1120. While appellee does not allege that the Act reduces the number of people who will attend his film showings, see Brief for Appellee 15, n. 14, he cites "the risk that the much larger audience that is his constituency would be influenced against him because he disseminated what the government characterized as the political propaganda of a foreign power." *Ibid.* See also Tr. of Oral Arg. 36 (the label "raises the hackles of suspicion on the part of the audience"). As the affidavits established, this suspicion would be a substantial detriment to Keene's reputation and candidacy.

It is, of course, possible that appellee could have minimized these risks by providing the viewers of the films with an appropriate statement concerning the quality of the motion pictures—one of them won an "Oscar" award from the Academy of Motion Picture Arts and Sciences as the best foreign documentary in 1983—and his reasons for agreeing with the positions advocated by their Canadian producer concerning nuclear war and acid rain. Even on that assumption, however, the need to take such affirmative steps to avoid the risk of harm to his reputation constitutes a cognizable injury in the course of his communication with the public. This case is similar to *Lamont* v. *Postmaster General*, 381 U. S. 301 (1965), in which we did not question that petitioner had standing to challenge a statute requiring the Postmaster General to hold all "communist political propaganda" originating abroad and not release it to the addressee unless that individual made a written request to the Post Office for deliv-

ery of the material. Although the statute was directed to the Postmaster General, it affected addressee Lamont just as the Act under consideration affected Keene. The necessity of going on the record as requesting this political literature constituted an injury to Lamont in his exercise of First Amendment rights. Likewise, appellee is not merely an undifferentiated bystander with claims indistinguishable from those of the general public, as the Government argues; he would have to take affirmative steps at each film showing to prevent public formation of an association between "political propaganda" and his reputation. Moreover, while these steps might prevent or mitigate damage to his reputation among those members of the public who do view the films, they would be ineffective among those citizens who shun the film as "political propaganda."[9]

Our cases recognize that a mere showing of personal injury is not sufficient to establish standing; we have also required that the injury be "fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen* v. *Wright*, 468 U. S., at 751; see also *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U. S. 464, 472 (1982). Because the alleged injury stems from the Department of Justice's enforcement of a statute that employs the term "political propaganda," we conclude that the risk of injury to appellee's reputation "fairly can be traced" to the defendant's conduct. *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U. S. 26, 41 (1976).

Moreover, enjoining the application of the words "political propaganda" to the films would at least partially redress the reputational injury of which appellee complains. The Attorney General argues that an injunction would not provide the

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[9] See *Block* v. *Meese*, 253 U. S. App. D. C. 317, 322, 793 F. 2d 1303, 1308 (1986) (sole distributor of If You Love This Planet has standing to challenge classification of film as "political propaganda"; potential customers declined to take the film because of the classification).

relief sought, because appellee's constituents and others may continue to react negatively to his exhibition of films once they have been labeled as "political propaganda." However, appellee's alleged harm occurs because the Department of Justice has placed the legitimate force of its criminal enforcement powers behind the label of "political propaganda." A judgment declaring the Act unconstitutional would eliminate the need to choose between exhibiting the films and incurring the risk that public perception of this criminal enforcement scheme will harm appellee's reputation. Appellee declared his intent "to continue to exhibit the three films periodically in the future, but only if the defendants are permanently enjoined from classifying the films as 'political propaganda.'" Declaration of Barry Keene As Regards Having Exhibited the Three Films, App. 110. Thus, the threatened injury alleged in the complaint is "likely to be redressed by a favorable decision." See *Valley Forge*, 454 U. S., at 472, and cases cited *ibid.*, at n. 9.

III

We begin our examination of the District Court's ruling on the First Amendment issue by noting that the term "political propaganda" has two meanings. In popular parlance many people assume that propaganda is a form of slanted, misleading speech that does not merit serious attention and that proceeds from a concern for advancing the narrow interests of the speaker rather than from a devotion to the truth. See, *e. g.*, Declaration of Edwin Newman, Correspondent for NBC News, App. 107–108. Casualty reports of enemy belligerents, for example, are often dismissed as nothing more than "propaganda." As defined in the Act, the term political propaganda includes misleading advocacy of that kind. See 22 U. S. C. § 611(j). But it also includes advocacy materials that are completely accurate and merit the closest attention and the highest respect. Standard reference works include both broad, neutral definitions of the word "propaganda" that

are consistent with the way the word is defined in this statute,[10] and also the narrower, pejorative definition.[11]

Appellee argues that the statute would be unconstitutional even if the broad neutral definition of propaganda were the only recognized meaning of the term because the Act is "a Classic Example of Content-Based Government Regulation of Core-Value Protected Speech."[12] As appellee notes, the Act's reporting and disclosure requirements are expressly conditioned upon a finding that speech on behalf of a foreign principal has political or public-policy content.

The District Court did not accept this broad argument. It found that the basic purpose of the statute as a whole was "to inform recipients of advocacy materials produced by or under the aegis of a foreign government of the source of such materials" (emphasis deleted), and that it could not be gainsaid that this kind of disclosure serves rather than disserves the First Amendment.[13] The statute itself neither prohibits nor censors the dissemination of advocacy materials by agents of foreign principals.

The argument that the District Court accepted rests not on what the statute actually says, requires, or prohibits, but rather upon a potential misunderstanding of its effect. Simply because the term "political propaganda" is used in the text of the statute to define the regulated materials, the court assumed that the public will attach an "unsavory connotation,"

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[10] See, *e. g.*, Webster's Third New International Dictionary 1817 (1981 ed.) ("doctrines, ideas, argument, facts, or allegations spread by deliberate effort through any medium of communication in order to further one's cause or to damage an opposing cause").

[11] See, *e. g.*, Webster's New World Dictionary, College Edition 1167 (1968) ("now often used disparagingly to connote deception or distortion"); The New Columbia Encyclopedia 2225 (1975) ("[A]lmost any attempt to influence public opinion, including lobbying, commercial advertising, and missionary work, can be broadly construed as propaganda. Generally, however, the term is restricted to the manipulation of political beliefs").

[12] Brief for Appellee 20.

[13] See 619 F. Supp., at 1125.

619 F. Supp., at 1125, to the term and thus believe that the materials have been "officially censured by the Government." *Ibid.* The court further assumed that this denigration makes this material unavailable to people like appellee, who would otherwise distribute such material, because of the risk of being seen in an unfavorable light by the members of the public who misunderstand the statutory scheme.[14] According to the District Court, the denigration of speech to which the label "political propaganda" has been attached constitutes "a conscious attempt to place a whole category of materials beyond the pale of legitimate discourse," *id.*, at 1126, and is therefore an unconstitutional abridgment of that speech. We

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[14] The risk of this reputational harm, as we have held earlier in this opinion, is sufficient to establish appellee's standing to litigate the claim on the merits. Whether the risk created by the Act violates the First Amendment is, of course, a separate matter. The crux of the District Court's analysis of this latter issue is set forth in this paragraph:

"With respect to the evidentiary question—does the phrase 'political propaganda,' when officially applied by officials of the United States Department of Justice, abridge speech—the Court has little difficulty. The declaration supplied by Mervin Field, neither rebutted nor impeached by the defendants, establishes beyond peradventure of a doubt that whoever disseminates materials officially found to be 'political propaganda' runs the risk of being held in a negative light by members of the general public. *See* Gallup Study of the Effect of Campaign Disclosures on Adults' Attitudes Toward Candidates, July, 1984; Plaintiff's Exhibit A, Declaration of Mervin D. Field, at 3. For this reason, the Court finds that Congress' use of the phrase 'political propaganda' to describe the materials subject to the registration and reporting requirements constitutes a burden on speech by making such materials unavailable to all but the most courageous. Since the exercise of First Amendment rights often requires an act of courage, it is important to note that the courage required by the operation of FARA is not the courage of one's convictions but the courage to use materials officially censured by the government." 619 F. Supp., at 1124–1125.

An obvious flaw in this reasoning is that the materials that satisfy the definition of "political propaganda" are not "materials officially censured by the government." The statutory term is a neutral one, and in any event, the Department of Justice makes no public announcement that the materials are "political propaganda."

find this argument unpersuasive, indeed, untenable, for three reasons.

First, the term "political propaganda" does nothing to place regulated expressive materials "beyond the pale of legitimate discourse." *Ibid.* Unlike the scheme in *Lamont* v. *Postmaster General*, the Act places no burden on protected expression. We invalidated the statute in *Lamont* as interfering with the addressee's First Amendment rights because it required "an official act (viz., returning the reply card) as a limitation on the unfettered exercise of the addressee's First Amendment rights." 381 U. S., at 305. The physical detention of the materials, not their mere designation as "communist political propaganda," was the offending element of the statutory scheme. The Act "se[t] administrative officials astride the flow of mail to inspect it, appraise it, write the addressee about it, and await a response before dispatching the mail." *Id.*, at 306. The Act in this case, on the other hand, does not pose any obstacle to appellee's access to the materials he wishes to exhibit. Congress did not prohibit, edit, or restrain the distribution of advocacy materials in an ostensible effort to protect the public from conversion, confusion, or deceit.

To the contrary, Congress simply required the disseminators of such material to make additional disclosures that would better enable the public to evaluate the import of the propaganda.[15] The statute does not prohibit appellee from

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[15] "What emerged from extended Congressional investigations, hearings and deliberations was this Act, intended to provide an appropriate method to obtain information essential for the proper evaluation of political propaganda emanating from hired agents of foreign countries. As the House and Senate Committees considering the Bill said, it 'does not in any way impair the right of freedom of speech, or of a free press, or other constitutional rights.' Resting on the fundamental constitutional principle that our people, adequately informed, may be trusted to distinguish between the true and the false, the bill is intended to label information of foreign origin so that hearers and readers may not be deceived by the belief that the information comes from a disinterested source. Such legislation

advising his audience that the films have not been officially censured in any way. Disseminators of propaganda may go beyond the disclosures required by statute and add any further information they think germane to the public's viewing of the materials. By compelling some disclosure of information and permitting more, the Act's approach recognizes that the best remedy for misleading or inaccurate speech contained within materials subject to the Act is fair, truthful, and accurate speech. See generally *Whitney* v. *California*, 274 U. S. 357, 377 (1927) (Brandeis, J., concurring) ("If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence"). The prospective viewers of the three films at issue may harbor an unreasoning prejudice against arguments that have been identified as the "political propaganda" of foreign principals and their agents, but the Act allows appellee to combat any such bias simply by explaining—before, during, or after the film, or in a wholly separate context—that Canada's interest in the consequences of nuclear war and acid rain does not necessarily undermine the integrity or the persuasiveness of its advocacy.

Ironically, it is the injunction entered by the District Court that withholds information from the public. The suppressed information is the fact that the films fall within the category of materials that Congress has judged to be "political propaganda." A similar paternalistic strategy of protecting the public from information was followed by the Virginia Assembly, which enacted a ban on the advertising of prescription drug prices by pharmacists. See *Virginia Pharmacy Bd.* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748 (1976). The State sought to justify the ban as a means of

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implements rather than detracts from the prized freedoms guaranteed by the First Amendment. No strained interpretation should frustrate its essential purpose." *Viereck* v. *United States*, 318 U. S. 236, 251 (1943) (Black, J., dissenting).

preventing "the aggressive price competition that will result from unlimited advertising" and the "loss of stable pharmacist-customer relationships" that would result from comparison shopping on the basis of price. We wholly rejected these justifications, finding that the ban was predicated upon assumptions about the reactions the public would have if they obtained the "wrong" kind of information. Although the proscribed information in that case was price advertising of pharmacy items, our rationale applies equally to information that the Congress considers certain expressive materials to be "propaganda":

> "[O]n close inspection it is seen that the State's protectiveness of its citizens rests in large measure on the advantages of their being kept in ignorance. The advertising ban does not directly affect professional standards one way or the other. It affects them only through the reactions it is assumed people will have to the free flow of drug price information." *Id.*, at 769.

Likewise, despite the absence of any direct abridgment of speech, the District Court in this case assumed that the reactions of the public to the label "political propaganda" would be such that the label would interfere with freedom of speech. In *Virginia Pharmacy Bd.*, we squarely held that a zeal to protect the public from "too much information" could not withstand First Amendment scrutiny:

> "There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them. . . . It is precisely this kind of choice, between the dangers of suppressing information, and the dangers from its misuse if it is freely available, that the First Amendment makes for us." *Id.*, at 770.

See also *Linmark Associates, Inc.* v. *Willingboro*, 431 U. S. 85, 96–97 (1977).

Second, the reasoning of the District Court is contradicted by history. The statutory definition of "political propaganda" has been on the books for over four decades.[16] We should presume that the people who have a sufficient understanding of the law to know that the term "political propaganda" is used to describe the regulated category also know that the definition is a broad, neutral one rather than a pejorative one.[17] Given this long history, it seems obvious that if the fear of misunderstanding had actually interfered with

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[16] The Act as adopted in 1938 did not use the term "political propaganda." In 1942 the Act was amended to add the term and to require that materials meeting the definition of "political propaganda" be labeled with an identification statement and a copy provided to the Attorney General. Act of Apr. 29, 1942, ch. 263, §§ 1, 4, 56 Stat. 248, 255, 22 U. S. C. §§ 611, 614. The statute states that the policy and purpose of the Act are to require "public disclosure by persons engaging in propaganda activities and other activities for or on behalf of . . . foreign principals so that the Government and the people of the United States may be informed of the identity of such persons and may appraise their statements and actions in the light of their associations and activities." 22 U. S. C. § 611 note (Policy and Purpose). The House Report stated, "[T]hese amendments do not change the fundamental approach of the statute, which is one not of suppression or of censorship, but of publicity and disclosure." H. R. Rep. No. 1547, 77th Cong., 1st Sess., 2, 4 (1941). When Congress again amended the Act in 1966, it retained the expression "political propaganda" to describe the materials subject to the requirements of the Act.

[17] The Chief of the Registration Unit, Internal Security Section, Criminal Division of the Department of Justice, submitted a nonexhaustive list of films reported by agents under § 4 of the Act. The film titles support the conclusion that the Act's definition of "propaganda" is indeed a neutrally applied one which includes allies as well as adversaries of the United States. The titles and their foreign principals include, Berlin Means Business and More (Berlin Economic Development Corporation); Hong Kong Style (Government of Hong Kong); A Conversation with Golda Meir (Consulate General of Israel); and Ballad of a Soldier (Sovexportfilm). A television videotape entitled What is Japan Doing About Energy? (the Government of Japan) is also included in the list. Second Declaration of Joseph E. Clarkson, Exhibit B, App. 60–63.

the exhibition of a significant number of foreign-made films, that effect would be disclosed in the record. Although the unrebutted predictions about the potentially adverse consequences of exhibiting these films are sufficient to support appellee's standing, they fall far short of proving that the public's perceptions about the word "propaganda" have actually had any adverse impact on the distribution of foreign advocacy materials subject to the statutory scheme. There is a risk that a partially informed audience might believe that a film that must be registered with the Department of Justice is suspect, but there is no evidence that this suspicion—to the degree it exists—has had the effect of Government censorship.

Third, Congress' use of the term "political propaganda" does not lead us to suspend the respect we normally owe to the Legislature's power to define the terms that it uses in legislation. We have no occasion here to decide the permissible scope of Congress' "right to speak";[18] we simply view this particular choice of language, statutorily defined in a neutral and evenhanded manner, as one that no constitutional provision prohibits the Congress from making. Nor do we agree with the District Court's assertion that Congress' use of the term "political propaganda" was "a wholly gratuitous step designed to express the suspicion with which Congress regarded the materials." 619 F. Supp., at 1125. It is axiomatic that the statutory definition of the term excludes unstated meanings of that term. *Colautti* v. *Franklin*, 439 U. S. 379, 392, and n. 10 (1979). Congress' use of the term "propaganda" in this statute, as indeed in other legislation, has no pejorative connotation.[19] As judges it is our duty to

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[18] The implications of judicial parsing of statutory language to determine if Congress' word choices violate the First Amendment are discussed in *Block* v. *Meese*, 253 U. S. App. D. C., at 327–328, 793 F. 2d, at 1313–1314.

[19] See, *e. g.*, 26 U. S. C. § 501(c)(3) (excluding from the charitable deduction those charitable organizations whose activities include in substantial part "carrying on propaganda, or otherwise attempting, to influence legis-

construe legislation as it is written, not as it might be read by a layman, or as it might be understood by someone who has not even read it. If the term "political propaganda" is construed consistently with the neutral definition contained in the text of the statute itself, the constitutional concerns voiced by the District Court completely disappear.

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

It is so ordered.

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

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

The Court, in this case today, fails to apply the long-established "principle that the freedoms of expression must be ringed about with adequate bulwarks." *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58, 66 (1963). While I agree with the Court's conclusion that appellee has standing, I do not agree that the designation "political propaganda," imposed by the Department of Justice on three films from Canada about acid rain and nuclear war, pursuant to the Foreign

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lation"); 36 U. S. C. § 1304(a) (no substantial part of the activities of United Services Organizations "shall involve carrying on propaganda, or otherwise attempting to influence legislation"); 5 U. S. C. § 4107(b)(1) (agency may not train employee by, in, or through a non-Government facility a substantial part of the activities of which is "carrying on propaganda, or otherwise attempting, to influence legislation").

Like "propaganda," the word "lobbying" has negative connotations. See The New Columbia Encyclopedia 1598 (1975) ("The potential for corruption . . . has given lobbying an unsavory connotation"). Although the Federal Regulation of Lobbying Act, 2 U. S. C. §§ 261–270, uses this semantically slanted word, we are not aware of any suggestion that these negative connotations violate the First Amendment. See *United States* v. *Harriss*, 347 U. S. 612 (1954) (construing and upholding constitutionality of statute's registration and reporting requirements).

Agents Registration Act (Act), 52 Stat. 631, as amended, 22 U. S. C. §§ 611–621, presents no obstacle to expression protected by the First Amendment.

I

The Court's decision rests upon its conclusion that the term "political propaganda" is neutral and without negative connotation. It reaches this conclusion by limiting its examination to the statutory definition of the term and by ignoring the realities of public reaction to the designation. But even given that confined view of its inquiry, it is difficult to understand how a statutory categorization which includes communication that "instigates . . . civil riot . . . or the overthrow of . . . government . . . by any means involving the use of force or violence," § 611(j)(2), can be regarded as wholly neutral. Indeed, the legislative history of the Act indicates that Congress fully intended to discourage communications by foreign agents.

The Act grew out of the investigations of the House Un-American Activities Committee, formed in 1934 to investigate Nazi propaganda activities in the United States and the dissemination of subversive propaganda controlled by foreign countries attacking the American form of government. See H. R. Res. 198, 73d Cong., 2d Sess. (1934), 78 Cong. Rec. 13–14 (1934).[1] The Act mandated disclosure, not direct cen-

[1] One of the countermeasures the Committee recommended in light of the danger posed by foreign propaganda was that all propaganda agents who represented any foreign government or foreign political party be required to register with the Secretary of State. H. R. Rep. No. 153, 74th Cong., 1st Sess., 23 (1935). This requirement became the centerpiece of the Act, which was motivated by concern with the "many persons in the United States representing foreign governments or foreign political groups, who are supplied by such foreign agencies with funds and other materials to foster un-American activities, and to influence the external and internal policies of this country, thereby violating both the letter and the spirit of international law, as well as the democratic basis of our own American institutions of government." H. R. Rep. No. 1381, 75th Cong., 1st Sess., 1–2 (1937).

sorship, but the underlying goal was to control the spread of propaganda by foreign agents. This goal was stated unambiguously by the House Committee on the Judiciary: "We believe that the spotlight of pitiless publicity will serve as a deterrent to the spread of pernicious propaganda." H. R. Rep. No. 1381, 75th Cong., 1st Sess., 2 (1937).

In 1942, Congress revised the Act, 56 Stat. 248, ch. 263, at the request of the Department of Justice in order to strengthen the Government's "chief instrument . . . for controlling foreign agent activity in the theater of political propaganda." Hearings on H. R. 6045 before Subcommittee No. 4 of the House Committee on the Judiciary, 77th Cong., 1st Sess., Ser. No. 9, p. 24 (1941) (1941 Hearings) (statement of Lawrence M. C. Smith, Chief, Special Defense Unit, Department of Justice). The amendments included the definition of propaganda in addition to labeling and reporting requirements virtually identical to those imposed under the current version of the Act. The Department of Justice explained that it sought to counter secret propaganda efforts "[i]n view of the increased attempts by foreign agents at the systematic manipulation of mass attitudes on national and international questions, by adding requirements to keep our Government and people informed of the nature, source, and extent of political propaganda distributed in the United States." *Id.*, at 25. And, as in the original Act, the amended version furthered Congress' desire to disable certain types of speech by the use of disclosure requirements designed to bring about that result.[2]

The meaning of "political propaganda" has not changed in the 45 years since Congress selected those two words. While the Act is currently applied primarily to foreign policy

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[2] See, *e. g.*, 1941 Hearings 20 (statement of Lawrence M. C. Smith) ("And . . . as Justice Holmes has said, champagne that is put in the light and left in the light goes flat, and that is the way we have found it to be, that these bad political organizations cannot survive in the pitiless light of publicity").

advocacy, the designation it employs continues to reflect the original purposes of the Act and continues to carry its original connotations. For example, a Department of Justice representative recently recognized:

> "[I]t is fair to say that the original act reflected a perceived close connection between political propaganda and subversion. It is this original focus . . . and therefore the pejorative connotations of the phrases 'foreign agent' and 'political propaganda' which has caused such misunderstanding over the years." Oversight Hearing before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 98th Cong., 1st Sess., 3 (1983) (testimony of D. Lowell Jensen, Assistant Attorney General, Criminal Division, Department of Justice).

Even if Congress had enacted the "propaganda" designation at issue here with a completely neutral purpose, that would not be sufficient for the First Amendment inquiry, for the Court has "long recognized that even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment." *Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Revenue*, 460 U. S. 575, 592 (1983). The Court today, however, fails to undertake this inquiry. It concludes that the statutory definition of "political propaganda" is a "neutral one," *ante*, at 479, n. 14, and dismisses the District Court's holding as resting on a "potential misunderstanding of [the statute's] effect," *ante*, at 478.

A definition chosen by Congress is controlling as to the scope of the statute, but the Court has never held that Congress' choice of a definition precludes an independent determination of a statute's constitutionality based upon its *actual* effect. See *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U. S. 238, 255 (1986) (plurality opinion) ("The fact that the statute's practical effect may be to discourage protected speech is sufficient to characterize [it] as an infringement

on First Amendment activities"). In *Lamont* v. *Postmaster General*, 381 U. S. 301 (1965), the "communist political propaganda" that was detained by the Postmaster and delivered only upon the addressee's request was defined by reference to the same "neutral" definition of "political propaganda" in the Act that is at issue here. *Id.*, at 302–303. Yet the Court examined the effects of the statutory requirements and had no trouble concluding that the need to request delivery of mail classified as "communist political propaganda" was "almost certain to have a deterrent effect" upon debate. *Id.*, at 307. The reason was certainly the disapprobation conveyed by the classification:

> "Public officials, like schoolteachers who have no tenure, might think they would invite disaster if they read what the Federal Government says contains the seeds of treason. Apart from them, any addressee is likely to feel some inhibition in sending for literature which federal officials have condemned as 'communist political propaganda.'" *Ibid.*

I do not see why the analysis here should be any different, or why the statutory definition should be given any greater weight, in the case of the elected public official who wishes to exhibit films that the Federal Government has categorized as "political propaganda."

I can conclude only that the Court has asked, and has answered, the wrong question. Appellee does not argue that his speech is deterred by the statutory definition of "propaganda." He argues, instead, that his speech is deterred by the common perception that material so classified is unreliable and not to be trusted, bolstered by the added weight and authority accorded any classification made by the all-pervasive Federal Government. Even if the statutory definition is neutral, it is the common understanding of the Government's action that determines the effect on discourse protected by the First Amendment.

We need not speculate as to the common reaction to the term "propaganda," or rely only on the Court's assessment in *Lamont* v. *Postmaster General*, *supra*, of the negative connotations it raises. Appellee has submitted testimony of an expert in the study of propaganda, unrebutted by appellants. According to the declaration of Leonard W. Doob, Sterling Professor Emeritus of Psychology at Yale University: "[T]he designation 'political propaganda' of a film or book by the government is pejorative, denigrating to the material, and stigmatizing to those disseminating it. . . . [A]s the history of the last seventy years suggests, to call something propaganda is to assert that it communicates hidden or deceitful ideas; that concealed interests are involved; that unfair or insidious methods or *[sic]* being employed; that its dissemination is systematic and organized in some way." App. 101. See also *ante*, at 474, n. 8. It simply strains credulity for the Court to assert that "propaganda" is a neutral classification.

II

Because the Court believes that the term "political propaganda" is neutral, it concludes that "the Act places no burden on protected expression." *Ante*, at 480. The Court's error on neutrality leads it to ignore the practical effects of the classification, which create an indirect burden on expression. As a result, the Court takes an unjustifiably narrow view of the sort of government action that can violate First Amendment protections. Because Congress did "not pose any obstacle to appellee's access to the materials he wishes to exhibit" in that it "did not prohibit, edit, or restrain the distribution of advocacy materials," *ibid.*, the Court thinks that the propaganda classification does not burden speech. But there need not be a direct restriction of speech in order to have a First Amendment violation. The Court has recognized that indirect discouragements are fully capable of a coercive effect on speech, *American Communications Assn.* v. *Douds*, 339 U. S. 382, 402 (1950), and that the First

Amendment protections extend beyond the blatant censorship the Court finds lacking here. "[T]he fact that no direct restraint or punishment is imposed upon speech . . . does not determine the free speech question." *Ibid.*

In *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58 (1963), for example, the Court struck down a Rhode Island statute authorizing a commission to designate morally objectionable material. The Court rejected the State's argument that the First Amendment was not violated because the Commission did not "regulate or suppress obscenity," *id.*, at 66, finding that through the use of *informal sanctions*, "the Commission deliberately set out to achieve the suppression of publications deemed 'objectionable' and succeeded in its aim," *id.*, at 67. There likewise was no overt restraint on speech in *Lamont*. The Postmaster General argued there that because an addressee had only to return a card in order to receive the publication, "only inconvenience and not an abridgment is involved." 381 U. S., at 309 (concurring opinion). But, as was stated there, "inhibition as well as prohibition against the exercise of precious First Amendment rights is a power denied to government." *Ibid.*[3]

By ignoring the practical effect of the Act's classification scheme, the Court unfortunately permits Congress to accomplish by indirect means what it could not impose directly—a restriction of appellee's political speech. Political discourse is burdened by the Act because Congress' classification scheme inhibits dissemination of classified films. In deciding whether or not to show a film, individuals and institutions are

[3] See also *Freedman* v. *Maryland*, 380 U. S. 51, 59 (1965) (film censorship program unconstitutional in the absence of procedural safeguards because otherwise, as a practical matter, "it may prove too burdensome to seek review of the censor's determination"); *Speiser* v. *Randall*, 357 U. S. 513, 526 (1958) (state program placing burden on taxpayers to prove they did not advocate overthrow of United States declared unconstitutional because "[i]n practical operation . . . this procedural device must necessarily produce a result which the State could not command directly. It can only result in a deterrence of speech which the Constitution makes free").

bound to calculate the risk of being associated with materials officially classified as propaganda. Many, such as appellee, reasonably will decline to assume the necessary risk. That risk is particularly high for those who are accountable to the public, among them librarians and elected officials, to cite obvious examples. In addition, the official designation taints the message of a classified film by lessening its credence with viewers. For the film to carry its full force and meaning an exhibitor must attempt to dispel skepticism flowing from the notion that the film is laced with lies and distortions. These burdens are too great and too real in practical terms to be ignored simply because they are imposed by way of public reaction rather than through a direct restriction on speech.

The Court perceives no burden on First Amendment rights, because "Congress simply required the disseminators of [propaganda] material to make additional disclosures that would better enable the public to evaluate the import of the propaganda." *Ante*, at 480. Yet in its discussion of standing, the majority recognizes that the practical effect of the "disclosure" is to place a film exhibitor on the defensive, for this "disclosure" would require the exhibitor to take affirmative steps to avoid harm to his or her reputation. *Ante*, at 475. Moreover, disclosure requirements are not inherently consistent with the First Amendment and do not necessarily serve to advance discourse. The Court often has struck down disclosure requirements that threatened to have a "deterrent and 'chilling' effect on the free exercise of constitutionally enshrined rights of free speech, expression, and association." *Gibson* v. *Florida Legislative Investigation Comm.*, 372 U. S. 539, 557 (1963); see also, *Brown* v. *Socialist Workers '74 Campaign Comm.*, 459 U. S. 87, 100 (1982) (names of campaign contributors and recipients of funds); *Talley* v. *California*, 362 U. S. 60 (1960) (identification of names and addresses of authors of handbills); *N. A. A. C. P.* v. *Alabama*, 357 U. S. 449, 462 (1958) (membership lists).

The Court likens the injunction issued by the District Court to the state ban on advertising prices of prescription drugs struck down in *Virginia Pharmacy Bd.* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748 (1976). *Ante*, at 481–482. But there is a significant difference between the "paternalistic strategy of protecting the public from information," *ante*, at 481, by way of a *ban* on information and a prohibition of the Government disparagement at issue in this case. A ban on advertising does indeed "enforc[e] silence," in the words of Justice Brandeis. *Whitney* v. *California*, 274 U. S. 357, 377 (1927) (concurring opinion). But the District Court's holding here—that a derogatory classification impermissibly inhibits protected expression—did not impose a ban; it merely lifted a disclosure requirement, as in the other cases cited above. Under the District Court's ruling, opponents of the viewpoint expressed by the National Film Board of Canada remained completely free to point out the foreign source of the films. The difference was that dialogue on the value of the films and the viewpoints they express could occur in an atmosphere free of the constraint imposed by Government condemnation. It is the Government's classification of those films as "political propaganda" that is paternalistic. For that Government action does more than simply provide additional information. It places the power of the Federal Government, with its authority, presumed neutrality, and assumed access to all the facts, behind an appellation *designed* to reduce the effectiveness of the speech in the eyes of the public.

III

Appellants have not even attempted to articulate any justification for saddling the expression of would-be film exhibitors with the classification "political propaganda." Yet this Court has held consistently that a limitation on First Amendment freedoms can be justified only by a compelling governmental interest. *FEC* v. *Massachusetts Citizens for Life*,

Inc., 479 U. S., at 256; *NAACP* v. *Button*, 371 U. S. 415, 438 (1963). The asserted purpose of the Act's classification scheme is "so that the Government and the people of the United States may be informed of the identity of such persons and may appraise their statements and actions in the light of their associations and activities." 56 Stat. 249. But this goal has been rendered incapable of justifying even the slightest burden on speech, for appellants interpret the Act in a way that nullifies its effectiveness as a disclosure mechanism.

There are two ways in which the purpose of the Act to inform the public is fulfilled. First, the Act requires films transmitted by foreign agents to be "conspicuously marked" with the name and address of the agent and the foreign principal, and, second, the Act requires dissemination reports for the film and the agent's registration statement to be placed on file with the Department of Justice, available for public inspection. §§ 614(a), (b), (c), and 616(a); see *ante*, at 470, and nn. 5 and 6.[4] The public is able to learn of its opportunity to examine these files by reading the label affixed to the film. See *ante*, at 471.[5]

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[4] The statutory requirement that a foreign agent submit two copies of the material it distributes, § 614(a), is relaxed for motion pictures. Two copies need not be filed so long as the agent files dissemination reports monthly and submits either a filmstrip showing the required labeling on the film or an affidavit "certifying that the required label has been made a part of the film." 28 CFR § 5.400(c) (1986). Dissemination reports require a description of the propaganda material, the number of copies transmitted, the dates and means of transmission, and the number of each type of recipient: libraries, public officials, newspapers, etc. For films, the report must also list the "name of [the] station, organization, or theater using," the dates it was shown, and the estimated audience. App. 17. A person who willfully violates the registration or filing requirements is subject to a fine of up to $10,000 and/or imprisonment for not more than five years. § 618(a)(2).

[5] Failure to comply with the labeling requirement is punishable by a fine of not more than $5,000 and/or imprisonment for not more than six months. *Ibid.*

The purposes of the Act could be fulfilled by such a process without categorizing the films as "political propaganda." But the importance of conveying any of this information to the public is belied by the Government's position that the informative label can be removed by appellee. See Declaration of Joseph E. Clarkson, Chief, Registration Unit, Internal Security Section, Criminal Division, Department of Justice. App. 22. After the complaint in this case (which included a challenge to the labeling requirement) was filed in the District Court, the Department of Justice asserted that it "has never construed the Act to apply to a person in [appellee's] position, and thus has not, does not, and will not require [appellee] to attach the neutral statutory disclaimer to, or exhibit the disclaimer on said films if he obtains them." *Ibid.* The only reasonable interpretation of this statement is that any exhibitor would be "a person in [appellee's] position" and thus exempt from the labeling requirements. But if the labeling requirements apply to the foreign agent only, and can be removed by recipients of the film, the information will never reach the public, its intended audience. This nullification of the primary purpose of the statute means that the classification of the films as "political propaganda" places a purely gratuitous burden on a would-be exhibitor and serves no governmental interest at all, let alone a compelling one.

Even if appellants could assert a compelling interest, the propaganda classification carries a derogatory meaning that is unnecessary to the asserted purpose of the Act. The Department of Justice admitted as much in a letter regarding proposed changes in the legislation:

> "We believe Congress should . . . consider replacing the broad definition of 'political propaganda,' which currently defines materials that must be labelled, with a more concise definition, more narrowly focused on the United States political process. We would also support the use of a more neutral term like political 'advocacy' or 'information' to denominate information that must be

labelled." Letter, dated August 8, 1983, to the Honorable Robert W. Kastenmeier, Chairman, Subcommittee on Courts, Civil Liberties and the Administration of Justice, of the House Committee on the Judiciary, from Edward C. Schmults, Deputy Attorney General, Department of Justice. App. 118.[6]

Given that position, the Court errs in tolerating even the slightest infringement of First Amendment rights by governmental use of a classification deemed unnecessary by those who enforce it. I respectfully dissent.

[6] The Justice Department also has favored altering the disclosure statement. In the same letter, Deputy Attorney General Schmults said: "We would . . . favor amending the Act to permit use of simpler and more neutral language in the disclosure label, to avoid unnecessary negative connotations that may be inferred from the disclosure statement (as, for instance, from the current statement that the United States Government has not approved the contents of the message)."

Syllabus

POPE ET AL. *v.* ILLINOIS

CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND DISTRICT

No. 85–1973. Argued February 24, 1987—Decided May 4, 1987

Under *Miller* v. *California*, 413 U. S. 15, the third or "value" prong of the tripartite test for judging whether material is obscene requires the trier of fact to determine "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." After petitioners, both of whom were attendants at adult bookstores, sold certain magazines to police, they were separately charged with the offense of "obscenity" under Illinois law. Both trial courts instructed the respective juries that, to convict, they must find, *inter alia*, that the magazines were without "value." The juries were also instructed to judge whether the material was obscene by determining how it would be viewed by ordinary adults in the whole State of Illinois. The State Appellate Court affirmed both petitioners' convictions, rejecting their contention that the "value" issue must be determined solely on an objective basis and not by reference to "contemporary community standards."

Held:

1. In a prosecution for the sale of allegedly obscene materials, the jury should not be instructed to apply community standards in deciding the value question. Only the first and second prongs of the *Miller* test—appeal to prurient interest and patent offensiveness—should be decided with reference to "contemporary community standards." The ideas that a work represents need not obtain majority approval to merit protection, and the value of that work does not vary from community to community based on the degree of local acceptance it has won. The proper inquiry is not whether an ordinary member of any given community would find serious value in the allegedly obscene material, but whether a reasonable person would find such value in the material, taken as a whole. The instruction at issue therefore violated the First and Fourteenth Amendments. Pp. 500–501.

2. Whether petitioners' convictions should be reversed outright or are subject to salvage because the erroneous instruction constituted harmless error will not be decided by this Court, since the State Appellate Court has not considered the harmless-error issue. Under *Rose* v. *Clark*, 478 U. S. 570, in the absence of error that renders a trial fundamentally unfair, a conviction should be affirmed where the reviewing court can find that the record developed at trial established guilt beyond

a reasonable doubt. Here, since the jurors were not precluded from considering the value question, petitioners' convictions should stand despite the erroneous "community standards" instruction if the appellate court concludes that no rational juror, if properly instructed, could find "value" in the magazines petitioners sold. Pp. 501–504.

138 Ill. App. 3d 726, 486 N. E. 2d 350, vacated and remanded.

WHITE, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and POWELL, O'CONNOR, and SCALIA, JJ., joined, and in Parts I and II of which BLACKMUN, J., joined. SCALIA, J., filed a concurring opinion, *post*, p. 504. BLACKMUN, J., filed an opinion concurring in part and dissenting in part, *post*, p. 505. BRENNAN, J., filed a dissenting opinion, *post*, p. 506. STEVENS, J., filed a dissenting opinion, in which MARSHALL, J., joined, in all but n. 11 of which BRENNAN, J., joined, and in Part I of which BLACKMUN, J., joined, *post*, p. 507.

Glenn A. Stanko argued the cause for petitioners. With him on the briefs was *J. Steven Beckett*.

Sally Louise Dilgart, Assistant Attorney General of Illinois, argued the cause for respondent. On the brief were *Neil F. Hartigan*, Attorney General, *Roma J. Stewart*, Solicitor General, and *Mark L. Rotert* and *Jack Donatelli*, Assistant Attorneys General.*

JUSTICE WHITE delivered the opinion of the Court.

In *Miller* v. *California*, 413 U. S. 15 (1973), the Court set out a tripartite test for judging whether material is obscene. The third prong of the *Miller* test requires the trier of fact to determine "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Id.*, at 24. The issue in this case is whether, in a prosecution for

*Briefs of *amici curiae* urging reversal were filed for the American Booksellers Association, Inc., et al. by *Michael A. Bamberger*, *R. Bruce Rich*, *Roger L. Funk*, and *Maxwell J. Lillienstein;* for the American Civil Liberties Union et al. by *Bruce J. Ennis, Jr.*, *David W. Ogden*, *Harvey Grossman*, *Jane M. Whicher*, *Jack Novik*, and *David Goldstein;* and for Volunteer Lawyers for the Arts, Inc., by *Irwin Karp* and *I. Fred Koenigsberg*.

Edward Cooper and *James J. Clancy* filed a brief for the city of Santa Ana, California, as *amicus curiae*.

the sale of allegedly obscene materials, the jury may be instructed to apply community standards in deciding the value question.

I

On July 21, 1983, Rockford, Illinois, police detectives purchased certain magazines from the two petitioners, each of whom was an attendant at an adult bookstore. Petitioners were subsequently charged separately with the offense of "obscenity" for the sale of these magazines. Each petitioner moved to dismiss the charges against him on the ground that the then-current version of the Illinois obscenity statute, Ill. Rev. Stat., ch. 38, ¶11–20 (1983), violated the First and Fourteenth Amendments to the United States Constitution. Both petitioners argued, among other things, that the statute was unconstitutional in failing to require that the value question be judged "solely on an objective basis as opposed to reference *[sic]* to contemporary community standards." App. 8, 22.[1] Both trial courts rejected this contention and instructed the respective juries to judge whether the material was obscene by determining how it would be viewed by ordinary adults in the whole State of Illinois.[2] Both petitioners

[1] As noted in petitioners' motions to dismiss, App. 7, 21, the statute under which petitioners were prosecuted had been construed to incorporate the third prong of the tripartite test set out in the plurality opinion in *Memoirs* v. *Massachusetts*, 383 U. S. 413 (1966), viz., material is obscene only if "utterly without redeeming social value." *Id.*, at 418. See *People* v. *Ridens*, 59 Ill. 2d 362, 321 N. E. 2d 264 (1974); *People* v. *Thomas*, 37 Ill. App. 3d 320, 346 N. E. 2d 190 (1976). In *Miller* v. *California*, 413 U. S. 15, 22 (1973), the Court held that this test is not constitutionally mandated because it imposes a burden of proof on the State that is "virtually impossible to discharge under our criminal standards of proof." Nonetheless, at the time petitioners were prosecuted Illinois still chose to retain the higher burden of proof on the value question, which it was of course free to do. For purposes of this case, it makes no difference that the value inquiry was under the *Memoirs* as opposed to the *Miller* test.

[2] The instructions stated that the obscenity determination was to be made under a statewide standard rather than by reference to the standard of any single city, town, or region within the State. App. 11, 25–26.

were found guilty, and both appealed to the Illinois Appellate Court, Second District. That court also rejected petitioners' contention that the issue of value must be determined on an objective basis and not by reference to contemporary community standards. 138 Ill. App. 3d 726, 486 N. E. 2d 350 (1985); 138 Ill. App. 3d 595, 486 N. E. 2d 345 (1985). The Illinois Supreme Court denied review, and we granted certiorari, 479 U. S. 812 (1986).

II

There is no suggestion in our cases that the question of the value of an allegedly obscene work is to be determined by reference to community standards. Indeed, our cases are to the contrary. *Smith* v. *United States*, 431 U. S. 291 (1977), held that, in a federal prosecution for mailing obscene materials, the first and second prongs of the *Miller* test—appeal to prurient interest and patent offensiveness—are issues of fact for the jury to determine applying contemporary community standards. The Court then observed that, unlike prurient appeal and patent offensiveness, "[l]iterary, artistic, political, or scientific value . . . is not discussed in *Miller* in terms of contemporary community standards." *Id.*, at 301 (citing F. Schauer, The Law of Obscenity 123–124 (1976)). This comment was not meant to point out an oversight in the *Miller* opinion, but to call attention to and approve a deliberate choice.

In *Miller* itself, the Court was careful to point out that "[t]he First Amendment protects works which, taken as a whole, have serious literary, artistic, political, or scientific value, regardless of whether the government or a majority of the people approve of the ideas these works represent." 413 U. S., at 34. Just as the ideas a work represents need not obtain majority approval to merit protection, neither, insofar as the First Amendment is concerned, does the value of the work vary from community to community based on the degree of local acceptance it has won. The proper inquiry is not whether an ordinary member of any given community

would find serious literary, artistic, political, or scientific value in allegedly obscene material, but whether a reasonable person would find such value in the material, taken as a whole.[3] The instruction at issue in this case was therefore unconstitutional.

III

The question remains whether the convictions should be reversed outright or are subject to salvage if the erroneous instruction is found to be harmless error. Petitioners contend that the statute is invalid on its face and that the convictions must necessarily be reversed because, as we understand it, the State should not be allowed to preserve any conviction under a law that poses a threat to First Amendment values. But the statute under which petitioners were convicted is no longer on the books; it has been repealed and replaced by a statute that does not call for the application of community standards to the value question.[4] Facial invali-

[3] Of course, as noted above, the mere fact that only a minority of a population may believe a work has serious value does not mean the "reasonable person" standard would not be met.

The State contends that without an instruction to apply contemporary community standards the jury will be at a loss as to how to decide the value issue. Brief for Respondent 21. In an obscenity prosecution the trial court, in its discretion, could instruct the jury to decide the value question by considering whether a reasonable person would find serious literary, artistic, political, or scientific value in the work, taken as a whole. Such an instruction would be no more likely to confuse a jury than the "reasonable man" instructions that have been given for generations in other contexts, such as tort suits.

The State also suggests, in attempting to justify the use of a "community standards" instruction on the value question, that such an instruction is the functional equivalent of a "reasonable man" instruction. *Id.*, at 16. The risk, however, is that under a "community standards" instruction a jury member could consider himself bound to follow prevailing local views on value without considering whether a reasonable person would arrive at a different conclusion.

[4] The new statute provides in relevant part:

"Any material or performance is obscene if: (1) the average person, applying contemporary adult community standards, would find that, taken as a whole, it appeals to the prurient interest; and (2) the average person,

dation of the repealed statute would not serve the purpose of preventing future prosecutions under a constitutionally defective standard. Cf., *e. g.*, *Secretary of State of Maryland* v. *Joseph H. Munson Co.*, 467 U. S. 947, 964–968, and n. 13 (1984). And if we did facially invalidate the repealed statute and reverse petitioners' convictions, petitioners could still be retried under that statute, provided that the erroneous instruction was not repeated, because petitioners could not plausibly claim that the repealed statute failed to give them notice that the sale of obscene materials would be prosecuted. See *Dombrowski* v. *Pfister*, 380 U. S. 479, 491, n. 7 (1965); *United States* v. *Thirty-seven Photographs*, 402 U. S. 363, 375, n. 3 (1971). Under these circumstances, we see no reason to require a retrial if it can be said beyond a reasonable doubt that the jury's verdict in this case was not affected by the erroneous instruction.

The situation here is comparable to that in *Rose* v. *Clark*, 478 U. S. 570 (1986). In *Rose*, the jury in a murder trial was incorrectly instructed on the element of malice,[5] yet the Court held that a harmless-error inquiry was appropriate. The Court explained that in the absence of error that renders a trial fundamentally unfair, such as denial of the right to counsel or trial before a financially interested judge, a conviction should be affirmed "[w]here a reviewing court can find that the record developed at trial established guilt beyond a

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applying contemporary adult community standards, would find that it depicts or describes, in a patently offensive way, ultimate sexual acts or sadomasochistic sexual acts, whether normal or perverted, actual or simulated, or masturbation, excretory functions or lewd exhibitions of the genitals; and (3) taken as a whole, it lacks serious literary, artistic, political or scientific value." Ill. Rev. Stat., ch. 38, ¶ 11–20(b) (1985) (effective Jan. 1, 1986).

[5] The jury in *Rose* was instructed that "[a]ll homicides are presumed to be malicious in the absence of evidence which would rebut the implied presumption." This instruction shifted the burden of proof on an element of the crime, in violation of *Sandstrom* v. *Montana*, 442 U. S. 510 (1979), and *Francis* v. *Franklin*, 471 U. S. 307 (1985).

reasonable doubt . . . ." *Id.*, at 579. The error in *Rose* did not entirely preclude the jury from considering the element of malice, *id.*, at 580, n. 8, and the fact that the jury could conceivably have had the impermissible presumption in mind when it considered the element of malice was not a reason to retry the defendant if the facts that the jury necessarily found established guilt beyond a reasonable doubt.[6] The Court said: "When a jury is instructed to presume malice from predicate facts, it still must find the existence of those facts beyond reasonable doubt. *Connecticut* v. *Johnson*, 460 U. S. 73, 96–97 (1983) (POWELL, J., dissenting). In many cases, the predicate facts conclusively establish intent, so that no rational jury could find that the defendant committed the relevant criminal act but did not *intend* to cause injury." *Id.*, at 580–581.

Similarly, in the present cases the jurors were not precluded from considering the question of value: they were informed that to convict they must find, among other things, that the magazines petitioners sold were utterly without redeeming social value. While it was error to instruct the juries to use a state community standard in considering the value question, if a reviewing court concludes that no rational juror, if properly instructed, could find value in the magazines, the convictions should stand.[7]

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[6] We do not understand *Rose*, as JUSTICE STEVEN's dissent apparently does, to be based on the fiction that a reviewing court could say beyond all reasonable doubt that the jury *in fact* did not have the impermissible burden-shifting instruction in mind when it concluded that the defendant killed with malice. To say that the jury "would have found it unnecessary to rely on the presumption," *Connecticut* v. *Johnson*, 460 U. S. 73, 97, n. 5 (POWELL, J., dissenting), or that the impermissible instruction was "superfluous," *Rose*, 478 U. S., at 581, is not to say that the reviewing court can retrace the jury's deliberative processes but that the facts found by the jury were such that it is clear beyond a reasonable doubt that if the jury had never heard the impermissible instruction its verdict would have been the same.

[7] The problem with the instructions in both cases is that the jury could have been impermissibly aided or constrained in finding the relevant ele-

Although we plainly have the authority to decide whether, on the facts of a given case, a constitutional error was harmless under the standard of *Chapman* v. *California*, 386 U. S. 18 (1967), we do so sparingly. *Rose* v. *Clark*, *supra*, at 584. In this case the Illinois Appellate Court has not considered the harmless-error issue. We therefore vacate its judgment and remand so that it may do so.

It is so ordered.

JUSTICE SCALIA, concurring.

I join the Court's opinion with regard to harmless error because I think it implausible that a community standard embracing the entire State of Illinois would cause any jury to convict where a "reasonable person" standard would not. At least in these circumstances, if a reviewing court concludes that no rational juror, properly instructed, could find value in the magazines, the Constitution is not offended by letting the convictions stand.

I join the Court's opinion with regard to an "objective" or "reasonable person" test of "serious literary, artistic, political, or scientific value," *Miller* v. *California*, 413 U. S. 15, 24 (1973), because I think that the most faithful assessment of what *Miller* intended, and because we have not been asked to reconsider *Miller* in the present case. I must note, however, that in my view it is quite impossible to come to an objective assessment of (at least) literary or artistic value, there being many accomplished people who have found literature in Dada, and art in the replication of a soup can. Since

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ment of the crime: in *Rose*, by the erroneous presumption; in this case, by possible reliance on unreasonable community views on the value question. By leaving open the possibility that petitioners' convictions can be preserved despite the instructional error, we do no more than we did in *Rose*. To the extent that cases prior to *Rose* may indicate that a conviction can never stand if the instructions provided the jury do not require it to find each element of the crime under the proper standard of proof, see, *e. g.*, *Cabana* v. *Bullock*, 474 U. S. 376, 384 (1986), after *Rose*, they are no longer good authority.

ratiocination has little to do with esthetics, the fabled "reasonable man" is of little help in the inquiry, and would have to be replaced with, perhaps, the "man of tolerably good taste"—a description that betrays the lack of an ascertainable standard. If evenhanded and accurate decisionmaking is not always impossible under such a regime, it is at least impossible in the cases that matter. I think we would be better advised to adopt as a legal maxim what has long been the wisdom of mankind: *De gustibus non est disputandum.* Just as there is no use arguing about taste, there is no use litigating about it. For the law courts to decide "What is Beauty" is a novelty even by today's standards.

The approach proposed by Part II of JUSTICE STEVENS' dissent does not eliminate this difficulty, but arguably aggravates it. It is a refined enough judgment to estimate whether a reasonable person *would* find literary or artistic value in a particular publication; it carries refinement to the point of meaninglessness to ask whether he *could* do so. Taste being, as I have said, unpredictable, the answer to the question must always be "yes"—so that there is little practical difference between that proposal and Part III of JUSTICE STEVENS' dissent, which asserts more forthrightly that "government may not constitutionally criminalize mere possession or sale of obscene literature, absent some connection to minors, or obtrusive display to unconsenting adults." *Post*, at 513 (footnote omitted).

All of today's opinions, I suggest, display the need for reexamination of *Miller*.

JUSTICE BLACKMUN, concurring in part and dissenting in part.

I join Part I of JUSTICE STEVENS' dissenting opinion for I agree with him that "harmless error" analysis may not appropriately be applied to this case. I join Parts I and II of JUSTICE WHITE's opinion for the Court (but not the Court's judgment remanding the case for harmless-error analysis),

however, because I believe the standard enunciated in those Parts of that opinion meets the other concerns voiced by the dissent. JUSTICE WHITE points out: "Just as the ideas a work represents need not obtain majority approval to merit protection, neither, insofar as the First Amendment is concerned, does the value of the work vary from community to community based on the degree of local acceptance it has won." *Ante*, at 500. JUSTICE WHITE further emphasizes: "Of course . . . the mere fact that only a minority of a population may believe a work has serious value does not mean the 'reasonable person' standard would not be met." *Ante*, at 501, n. 3. Thus, contrary to the dissent's characterization, I do not think that "[a] juror asked to create a 'reasonable person' in order to apply the standard that the Court announces today might well believe that the majority of the population who find no value in such a book are more reasonable than the minority who do find value." *Post*, at 512. Rather, the Court's opinion stands for the clear proposition that the First Amendment does not permit a majority to dictate to discrete segments of the population—be they composed of art critics, literary scholars, or scientists—the value that may be found in various pieces of work. That only a minority may find value in a work does not mean that a jury would not conclude that "a reasonable person would find such value in the material, taken as a whole." *Ante*, at 501. Reasonable people certainly may differ as to what constitutes literary or artistic merit. See *ante*, at 504 (SCALIA, J., concurring). As I believe JUSTICE SCALIA recognizes in his concurrence (although he may not applaud it), the Court's opinion today envisions that even a minority view among reasonable people that a work has value may protect that work from being judged "obscene."

JUSTICE BRENNAN, dissenting.

JUSTICE STEVENS persuasively demonstrates the unconstitutionality of criminalizing the possession or sale of "obscene" materials to consenting adults. I write separately

only to reiterate my view that *any* regulation of such material with respect to consenting adults suffers from the defect that "the concept of 'obscenity' cannot be defined with sufficient specificity and clarity to provide fair notice to persons who create and distribute sexually oriented materials, to prevent substantial erosion of protected speech as a byproduct of the attempt to suppress unprotected speech, and to avoid very costly institutional harms." *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 103 (1973) (BRENNAN, J., dissenting). I therefore join all but footnote 11 of JUSTICE STEVENS' dissent.

JUSTICE STEVENS, with whom JUSTICE MARSHALL joins, with whom JUSTICE BRENNAN joins except as to footnote 11, and with whom JUSTICE BLACKMUN joins as to Part I, dissenting.

The Court correctly holds that the juries that convicted petitioners were given erroneous instructions on one of the three essential elements of an obscenity conviction. Nevertheless, I disagree with its disposition of the case for three separate reasons: (1) the error in the instructions was not harmless; (2) the Court's attempt to clarify the constitutional definition of obscenity is not faithful to the First Amendment; and (3) I do not believe Illinois may criminalize the sale of magazines to consenting adults who enjoy the constitutional right to read and possess them.

I

The distribution of magazines is presumptively protected by the First Amendment. The Court has held, however, that the constitutional protection does not apply to obscene literature. If a state prosecutor can convince the trier of fact that the three components of the obscenity standard set forth in *Miller* v. *California*, 413 U. S. 15, 24 (1973), are satisfied, it may, in the Court's view, prohibit the sale of sexually explicit magazines. In a criminal prosecution, the pros-

ecutor must prove each of these three elements beyond a reasonable doubt. Thus, in these cases, in addition to the first two elements of the *Miller* standard, the juries were required to find, on the basis of proof beyond a reasonable doubt, that each of the magazines "lacks serious literary, artistic, political, or scientific value." *Ibid.*

The required finding is fundamentally different from a conclusion that a majority of the populace considers the magazines offensive or worthless.[1] As the Court correctly holds, the juries in these cases were not instructed to make the required finding; instead, they were asked to decide whether "ordinary adults in the whole State of Illinois" would view the magazines that petitioners sold as having value. App. 11, 25–26. Because of these erroneous instructions, the juries that found petitioners guilty of obscenity did not find one of the essential elements of that crime. This type of omission can never constitute harmless error.[2]

Just as the constitutional right to trial by jury prohibits a judge from directing a verdict for the prosecution, *United States* v. *Martin Linen Supply Co.*, 430 U. S. 564, 572–573 (1977), so too, "a jury's verdict cannot stand if the instructions provided the jury do not require it to find each element of the crime under the proper standard of proof." *Cabana* v. *Bullock*, 474 U. S. 376, 384 (1986). As JUSTICE WHITE has explained:

> "It should hardly need saying that a judgment or conviction cannot be entered against a defendant no matter

[1] "The First Amendment protects works which, taken as a whole, have serious literary, artistic, political, or scientific value, regardless of whether the government or a majority of the people approve of the ideas these works represent." *Miller* v. *California*, 413 U. S., 15, 34 (1973). See *ante*, at 500.

[2] In Section II, *infra*, I explain my disagreement with the Court's formulation of the obscenity standard, and in Section III, *infra*, I elaborate on my reasons for believing that the Constitution does not tolerate criminal prosecution in cases such as this. For purposes of the harmless-error discussion, however, those disagreements are irrelevant.

> how strong the evidence is against him, unless that evidence has been presented to a jury (or a judge, if a jury is waived) and unless the jury (or judge) finds from that evidence that the defendant's guilt has been proved beyond a reasonable doubt. It cannot be 'harmless error' wholly to deny a defendant a jury trial *on one or all elements of the offense* with which he is charged." *Henderson* v. *Morgan*, 426 U. S. 637, 650 (1976) (WHITE, J., concurring) (emphasis added).

Yet, this is exactly what happened in these cases. Because of the constitutionally erroneous instructions, petitioners were denied a jury determination on one of the critical elements of an obscenity prosecution.

An application of the harmless-error doctrine under these circumstances would not only violate petitioners' constitutional right to trial by jury, but would also pervert the notion of harmless error. When a court is asked to hold that an error that occurred did not interfere with the jury's ability to legitimately reach the verdict that it reached, harmless-error analysis may often be appropriate.[3] But this principle cannot apply unless the jury found all of the elements required to support a conviction. The harmless-error doctrine may enable a court to remove a taint from proceedings in order to *preserve* a jury's findings, but it cannot constitutionally *supplement* those findings. It is fundamental that an appellate court (and for that matter, a trial court) is not free to decide in a criminal case that, if asked, a jury *would* have found

[3] See, *e. g.*, *Rose* v. *Clark*, 478 U. S. 570 (1986) (instruction on permissive presumption may be found to have been "superfluous"); *Delaware* v. *Van Arsdall*, 475 U. S. 673 (1986) (failure to permit cross-examination on witness' bias); *Chapman* v. *California*, 386 U. S. 18 (1967) (improper comment on defendant's failure to testify); but see *Rose*, *supra*, at 587 (STEVENS, J., concurring) (harmless-error analysis may be inappropriate even when error does not implicate reliability and accuracy of factual findings). These cases are consistent with the theory that "the Constitution entitles a criminal defendant to a fair trial, not a perfect one." *Van Arsdall*, *supra*, at 681.

something that it did not find. We have consistently rejected the possibility of harmless error in these circumstances. See *Jackson* v. *Virginia*, 443 U. S. 307, 320, n. 14 (1979); *Carpenters* v. *United States*, 330 U. S. 395, 408–409 (1947); *Bollenbach* v. *United States*, 326 U. S. 607, 615 (1946); see also *Marks* v. *United States*, 430 U. S. 188, 196, n. 12 (1977).

The Court suggests that these cases "are no longer good authority" in light of the decision last term in *Rose* v. *Clark*, 478 U. S. 570 (1986). See *ante*, at 503–504, n. 7. I emphatically disagree. In *Rose* v. *Clark* the Court held that harmless-error analysis is applicable to instructions that informed the jury of the proper elements of the crime and the proper standard of proof, but impermissibly gave the jury the option of finding one of the elements through a presumption, in violation of *Sandstrom* v. *Montana*, 442 U. S. 510 (1979), and *Francis* v. *Franklin*, 471 U. S. 307 (1985). In holding harmless-error analysis applicable, the Court explained that because the presumption in question "'does not remove the issue of intent from the jury's consideration, *it is distinguishable from other instructional errors that prevent a jury from considering an issue.*'" 478 U. S., at 580, n. 8 (emphasis added), quoting *Connecticut* v. *Johnson*, 460 U. S. 73, 95, n. 3 (1983) (POWELL, J., dissenting). The Court reasoned that when the evidence is overwhelming on intent, the instruction allowing the jury to use a presumption can be deemed "simply superfluous," 478 U. S., at 581, for as JUSTICE POWELL had earlier stated, in some cases the evidence may be so "dispositive of intent that a reviewing court can say beyond a reasonable doubt that the jury would have found it unnecessary to rely on the presumption." *Connecticut* v. *Johnson*, 460 U. S., at 97, n. 5 (dissenting opinion). This case is, of course, far different. No court could ever determine that the instructions on the element were superfluous, since the error in the instructions went to the ultimate fact that the juries were required to find. *Rose* v.

Clark did not modify the precedents requiring that a jury find all of the elements of a crime under the proper standard, any more than it modified the Sixth Amendment's provision that "[i]n all criminal prosecutions, the accused shall enjoy the right to a . . . trial by an impartial jury."

II

Aside from its error in remanding convictions which must clearly be reversed, the Court announces an obscenity standard that fails to accomplish the goal that the Court ascribes to it. After stressing the need to avoid a mere majoritarian inquiry, the Court states:

> "The proper inquiry is not whether an ordinary member of any given community would find serious literary, artistic, political, or scientific value in allegedly obscene material, but whether a reasonable person would find such value in the material, taken as a whole." *Ante*, at 500–501.

The problem with this formulation is that it assumes that all reasonable persons would resolve the value inquiry in the same way. In fact, there are many cases in which *some* reasonable people would find that specific sexually oriented materials have serious artistic, political, literary, or scientific value, while *other* reasonable people would conclude that they have no such value. The Court's formulation does not tell the jury how to decide such cases.[4]

[4] Notwithstanding the Court's rejection of the community values test, the Court's standard would still, in effect, require a juror to apply community values, unless the juror were to find that an ordinary member of his or her community is not "a reasonable person." While this is, of course, not an impossible conclusion, it surely conflicts with the Court's admonition that the value of works does not "vary from community to community based on the degree of local acceptance it has won," and that whether a majority of the people find value in the material is immaterial. *Ante*, at 500, and n. 3. Indeed, as applied in the tort context, to which the Court analogizes, *ante*, at 501, n. 3, the reasonable man standard is extolled as enabling the "triers of fact . . . to look to a community standard." Re-

In my judgment, communicative material of this sort is entitled to the protection of the First Amendment if *some reasonable persons* could consider it as having serious literary artistic, political, or scientific value. Over 40 years ago, the Court recognized that

> "Under our system of government there is an accommodation for the widest varieties of tastes and ideas. What is good literature, what has educational value, what is refined public information, what is good art, varies with individuals as it does from one generation to another. . . . From the multitude of competing offerings the public will pick and choose. What seems to one to be trash may have for others fleeting or even enduring values." *Hannegan* v. *Esquire, Inc.*, 327 U. S. 146, 157–158 (1946).

The purpose of the third element of the *Miller* test is to ensure that the obscenity laws not be allowed to "'level' the available reading matter to the majority or lowest common denominator of the population. . . . It is obvious that neither *Ulysses* nor *Lady Chatterley's Lover* would have literary appeal to the majority of the population." F. Schauer, The Law of Obscenity 144 (1976). A juror asked to create "a reasonable person" in order to apply the standard that the Court announces today might well believe that the majority of the population who find no value in such a book are more reasonable than the minority who do find value.[5] First Amend-

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statement (Second) of Torts § 283, Comment *c* (1965). Absent intolerable orthodoxy, First Amendment protection cannot be circumscribed by the attitudes of a "reasonable man," who has been described as an "'excellent'" character who "'stands like a monument in our Courts of Justice, vainly appealing to his fellow-citizens to order their lives after his own example.'" W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on the Law of Torts 174 (5th ed. 1984), quoting A. Herbert, Misleading Cases in the Common Law 12 (3d ed. 1928).

[5] The problems with the Court's formulation are accentuated when expert evidence is adduced about the value that the material has to a discrete segment of the population—be they art scholars, scientists, or literary crit-

ment protection surely must not be contingent on this type of subjective determination.

III

There is an even more basic reason why I believe these convictions must be reversed. The difficulties inherent in the Court's "reasonable person" standard reaffirm my conviction that government may not constitutionally criminalize mere possession or sale of obscene literature, absent some connection to minors or obtrusive display to unconsenting adults.[6] During the recent years in which the Court has struggled with the proper definition of obscenity, six Members of the Court have expressed the opinion that the First Amendment, at the very least, precludes criminal prosecutions for sales such as those involved in this case.[7] Dissent-

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ics. Certainly a jury could conclude that although those people reasonably find value in the material, the ordinary "reasonable person" would not.

[6] The definitional problems the Court confronts buttress the conclusion that:

"none of the available formulas, including the one announced today, can reduce the vagueness to a tolerable level while at the same time striking an acceptable balance between the protections of the First and Fourteenth Amendments on the one hand, and on the other, the asserted state interest in regulating the dissemination of certain sexually oriented materials." *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 84 (1973) (BRENNAN, J., dissenting).

[7] See *Roth* v. *United States*, 354 U. S. 476, 508 (1957) (Douglas and Black, JJ., dissenting); *Sewell* v. *Georgia*, 435 U. S. 982, 988 (1978) (Stewart, J., dissenting from denial of certiorari); *Paris Adult Theatre I*, *supra* (BRENNAN, Stewart, and MARSHALL, JJ., dissenting); *Smith* v. *United States*, 431 U. S. 291, 311 (1977) (STEVENS, J., dissenting). It has been recognized recently that the "the bulk of scholarly commentary is of the opinion that the Supreme Court's resolution of and basic approach to the First Amendment issues" involved in obscenity laws "is incorrect," in that it fails to adequately protect First Amendment values. See Attorney General's Comm'n on Pornography, Final Report 261 (July 1986).

On the state level, the Oregon Supreme Court recently held that its State Constitution gives people in Oregon the right to "write, print, read, say, show, or sell anything to a consenting adult even though that expression may be generally or universally considered 'obscene.'" *State* v. *Henry*, 302 Ore. 510, 525, 732 P. 2d 9, 18 (1987). At least five States do

ing in *Smith* v. *United States*, 431 U. S. 291 (1977), I explained my view:

> "The question of offensiveness to community standards, whether national or local, is not one that the average juror can be expected to answer with evenhanded consistency. The average juror may well have one reaction to sexually oriented materials in a completely private setting and an entirely different reaction in a social context. Studies have shown that an opinion held by a large majority of a group concerning a neutral and objective subject has a significant impact in distorting the perceptions of group members who would normally take a different position. Since obscenity is by no means a neutral subject, and since the ascertainment of a community standard is such a subjective task, the expression of individual jurors' sentiments will inevitably influence the perceptions of other jurors, particularly those who would normally be in the minority. Moreover, because the record never discloses the obscenity standards which the jurors actually apply, their decisions in these cases are effectively unreviewable by an appellate court. In the final analysis, the guilt or innocence of a criminal defendant in an obscenity trial is determined primarily by individual jurors' subjective reactions to the materials in question rather than by the predictable application of rules of law.
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> "This conclusion is especially troubling because the same image—whether created by words, sounds, or pictures—may produce such a wide variety of reactions. As Mr. Justice Harlan noted: '[It is] often true that one

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not have adult obscenity statutes, although they do criminalize certain materials harmful to minors. See Alaska Stat. Ann. § 11.61.125 (1983); Me. Rev. Stat. Ann., Tit. 17, § 2911 *et seq.* (1983); N. M. Stat. Ann. § 30–37–1 *et seq.* (1980 and Supp. 1986); S. D. Comp. Laws Ann. § 22–24–1 *et seq.* (1979); Vt. Stat. Ann., Tit. 13, § 2801 *et seq.* (1974 and Supp. 1987).

> man's vulgarity is another's lyric. Indeed, we think it is largely because government officials [or jurors] cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.' *Cohen* v. *California*, 403 U. S. 15, 25. In my judgment, the line between communications which 'offend' and those which do not is too blurred to identify criminal conduct. It is also too blurred to delimit the protections of the First Amendment." *Id.*, at 315–316 (footnotes omitted).

The Court has repeatedly recognized that the Constitution "requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender* v. *Lawson*, 461 U. S. 352, 357 (1983).[8] These two requirements serve overlapping functions. Not only do vague statutes tend to give rise to selective and arbitrary prosecution, but selective and arbitrary prosecution often lessens the degree to which an actor is on notice that his or her conduct is illegal.

When petitioners Pope and Morrison accepted part-time employment as clerks in the bookstores, they could hardly have been expected to examine the stores' entire inventories, and even if they had, they would have had no way of knowing which, if any, of the magazines being sold were legally "obscene." Perhaps if the enterprise were being carried out in a

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[8] See also *Papachristou* v. *Jacksonville*, 405 U. S. 156, 162–163, 168–169 (1972); *Lanzetta* v. *New Jersey*, 306 U. S. 451, 453 (1939); *Connally* v. *General Construction Co.*, 269 U. S. 385, 391–393 (1926). We have been especially intolerant of vague statutes in the First Amendment area. See *Smith* v. *Goguen*, 415 U. S. 566, 573 (1974); *Grayned* v. *Rockford*, 408 U. S. 104, 108–109 (1972); *Interstate Circuit, Inc.* v. *Dallas*, 390 U. S. 676, 684–690 (1968); *Cramp* v. *Board of Public Instruction of Orange County*, 368 U. S. 278, 283–284 (1961); *Smith* v. *California*, 361 U. S. 147, 151 (1959); *Winters* v. *New York*, 333 U. S. 507, 515 (1948).

clandestine manner, it might be fair to impute to them knowledge that something illegal was going on. But these stores both had large signs indicating the nature of the enterprise, one claiming that the store had "The Largest Selection of Adult Merchandise in Northern Illinois." See People's Exhibit No. 3, *People* v. *Morrison*, No. 84–cm–4114 (17th Jud. Cir. Ill. 1984).[9] The Illinois Appellate Court found that Pope had the necessary scienter because it was "difficult to believe that [he] would not be fully apprised of the type and character of the three magazines simply by looking at them." App. to Pet. for Cert. 19. It is obvious that Pope knew that the magazines were "pornographic," but that does not mean he knew, or should have known, that they were legally "obscene" under the Illinois statute and our precedents.[10] It would have been quite reasonable for him to conclude that if sale of the magazines were indeed against the law, then the police would never allow the store to remain in operation, much less publicly advertise its goods.[11] Nor

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[9] In both trials, the State used the fact that the stores were open only to those over 18 years of age as proof that respondents knew the materials were obscene. See Tr. in *People* v. *Pope*, No. 83–cm–4116, pp. 317–318 (17th Jud. Cir. Ill. 1984); Tr. in *People* v. *Morrison*, No. 84–cm–4114, p. 303 (17th Jud. Cir. Ill. 1984). As I explained in *Splawn* v. *California*, 431 U. S. 595 (1977):

"Signs which identify the 'adult' character of a motion picture theatre or a bookstore convey the message that sexually provocative entertainment is to be found within . . . . Such signs, however, also provide a warning to those who find erotic materials offensive that they should shop elsewhere for other kinds of books, magazines, or entertainment. Under any sensible regulatory scheme, truthful description of subject matter that is pleasing to some and offensive to others ought to be encouraged, not punished." *Id.*, at 604 (dissenting opinion).

[10] "The statements did make it clear that the films were 'sexually provocative,' but that is hardly a confession that they were obscene." *Id.*, at 603.

[11] The insurmountable vagueness problems involved in criminalization are not, in my view, implicated with respect to civil regulation of sexually explicit material, an area in which the States retain substantial leeway. See *Smith* v. *United States*, 431 U. S., at 317–321 (STEVENS, J., dissent-

would an examination of the statute have given him much guidance.

Under ordinary circumstances, ignorance of the law is no excuse for committing a crime. But that principle presupposes a penal statute that adequately puts citizens on notice of what is illegal. The Constitution cannot tolerate schemes that criminalize categories of speech that the Court has conceded to be so vague and uncertain that they cannot "be defined legislatively." *Smith* v. *United States*, 431 U. S., at 303. If a legislature cannot define the crime, Richard Pope and Michael Morrison should not be expected to. Criminal prosecution under these circumstances "may be as much of a trap for the innocent as the ancient laws of Caligula." *United States* v. *Cardiff*, 344 U. S. 174, 176 (1952).

Concern with the vagueness inherent in criminal obscenity statutes is not the only constitutional objection to the criminalization of the sale of sexually explicit material (not involving children) to consenting adults. In *Stanley* v. *Georgia*, 394 U. S. 557 (1969), the Court held that Georgia could not criminalize the mere possession of obscene matter. The decision was grounded upon a recognition that "[o]ur whole constitutional heritage rebels at the thought of giving government the power to control men's minds." *Id.*, at 565. The only justification we could find for the law there was

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ing); see generally *Winters*, *supra*, at 515 ("The standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement"). Moreover, as long as it does not deny "access to the market," and allows "the viewing public" to "satisfy its appetite for sexually explicit fare," I believe that the State may regulate the sale and exhibition of even nonobscene material. See *Young* v. *American Mini Theatres, Inc.*, 427 U. S. 50 (1976); *Schad* v. *Mount Ephraim*, 452 U. S. 61, 79 (1981) (STEVENS, J., concurring). As for prohibiting sale or exhibition of sexually explicit material to minors or material containing depiction of minors, it has long been established that the State may go beyond the constitutional definition of obscenity. See *New York* v. *Ferber*, 458 U. S. 747 (1982); *Ginsberg* v. *New York*, 390 U. S. 629 (1968); see also *Ferber*, *supra*, at 777 (STEVENS, J., concurring).

Georgia's desire to "protect the individual's mind from the effects of obscenity," *ibid.*, and we concluded that such a desire to "control the moral content of a person's thoughts . . . is wholly inconsistent with the philosophy of the First Amendment." *Id.*, at 565–566.

The Court has adopted a restrictive reading of *Stanley*, opining that it has no implications to the criminalization of the sale or distribution of obscenity. See *United States* v. *Reidel*, 402 U. S. 351 (1971); *United States* v. *12 200-Ft. Reels of Film*, 413 U. S. 123 (1973). But such a crabbed approach offends the overarching First Amendment principles discussed in *Stanley*, almost as much as it insults the citizenry by declaring its right to read and possess material which it may not legally obtain.[12] In *Stanley*, the Court recognized that there are legitimate reasons for the State to regulate obscenity: protecting children and protecting the sensibilities of unwilling viewers. 394 U. S., at 507. But surely a broad criminal prohibition on all sale of obscene material cannot survive simply because the State may constitutionally restrict public display or prohibit sale of the material to minors.

As was the case in *Smith*, "I do not know whether the ugly pictures in this record have any beneficial value." 431 U. S., at 319 (STEVENS, J., dissenting). I do know though:

> "The fact that there is a large demand for comparable materials indicates that they do provide amusement or information, or at least satisfy the curiosity of interested persons. Moreover, there are serious well-intentioned

[12] "After all, if a person has the right to receive information without regard to its social worth—that is, without regard to its obscenity—then it would seem to follow that a State could not constitutionally punish one who undertakes to provide that information to a *willing, adult recipient.*" *Paris Adult Theatre I*, 413 U. S., at 86, n. 9 (BRENNAN, J., dissenting); see also *United States* v. *Reidel*, 402 U. S. 351, 360 (1971) (MARSHALL, J., dissenting); *United States* v. *12 200-Ft. Reels of Film*, 413 U. S. 123, 137 (1973) (Douglas, J., dissenting).

people who are persuaded that they serve a worthwhile purpose. Others believe they arouse passions that lead to the commission of crimes; if that be true, surely there is a mountain of material just within the protected zone that is equally capable of motivating comparable conduct. Moreover, the baneful effects of these materials are disturbingly reminiscent of arguments formerly made about what are now valued as works of art. In the end, I believe we must rely on the capacity of the free marketplace of ideas to distinguish that which is useful or beautiful from that which is ugly or worthless." *Id.*, at 320–321 (footnotes omitted).

I respectfully dissent.

ARIZONA *v.* MAURO

CERTIORARI TO THE SUPREME COURT OF ARIZONA

No. 85–2121. Argued March 31, 1987—Decided May 4, 1987

After being advised of his *Miranda* rights while in custody for killing his son, respondent stated that he did not wish to answer any questions until a lawyer was present. All questioning then ceased and respondent was placed in the police captain's office since there was no secure detention area. Following her questioning in another room, respondent's wife insisted that she be allowed to speak with her husband. Although reluctant at first, the police allowed the meeting in the office on the condition that an officer be present. Using a recorder placed in plain sight, the officer taped a brief conversation, during which the wife expressed despair, and respondent told her not to answer questions until a lawyer was present. The prosecution used the tape to rebut respondent's insanity defense, the trial court having refused to suppress it upon finding that the police's actions were not a subterfuge to avoid the dictates of *Miranda*. Respondent was convicted and sentenced to death, but the Arizona Supreme Court reversed, holding that the police had impermissibly interrogated respondent within the meaning of *Miranda*. Noting police admissions that they knew it was "possible" that respondent might make incriminating statements if he saw his wife, the court relied on the ruling in *Rhode Island* v. *Innis*, 446 U. S. 291, that "interrogation" includes a practice—whether actual questioning or "its functional equivalent"—that the police know is reasonably likely to elicit an incriminating response from a suspect. According to *Innis*, the likelihood-of-response question focuses primarily upon the perceptions of the suspect, rather than the intent of the police.

Held: The police's actions following respondent's refusal to be questioned without a lawyer did not constitute interrogation or its functional equivalent. The purpose of *Miranda* and *Innis* is to prevent the government from using the coercive nature of confinement to extract confessions that would not be given in an unrestrained environment. This purpose is not implicated here, since respondent was not subjected to compelling influences, psychological ploys, or direct questioning. There is no evidence that the police allowed the wife to meet with respondent in order to obtain incriminating statements. Moreover, police testimony, which the trial court found credible, indicated a number of legitimate reasons for an officer's presence at the meeting, including the wife's safety and various security considerations. Furthermore, an examination of the situation

from respondent's perspective demonstrates the improbability that he would have felt he was being coerced to incriminate himself simply because he was told his wife would be allowed to speak to him. Although the police were indeed aware that it was "possible" respondent would incriminate himself while talking to his wife, police do not "interrogate" a suspect simply by hoping he will confess. Thus, respondent's statements to his wife were voluntary, and their use at his trial was not prohibited by the Fifth and Fourteenth Amendments. Pp. 525–530.

149 Ariz. 24, 716 P. 2d 393, reversed and remanded.

POWELL, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, O'CONNOR, and SCALIA, JJ., joined. STEVENS, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and BLACKMUN, JJ., joined, *post*, p. 530.

Jack Roberts, Assistant Attorney General of Arizona, argued the cause for petitioner. With him on the brief were *Robert K. Corbin*, Attorney General, *Georgia B. Ellexson*, Assistant Attorney General, *William J. Schafer III*, and *John Verkamp*.

Kathleen Kelly Walsh argued the cause and filed a brief for respondent.

JUSTICE POWELL delivered the opinion of the Court.

While respondent in this case was in police custody, he indicated that he did not wish to answer any questions until a lawyer was present. The issue presented is whether, in the circumstances of this case, officers interrogated respondent in violation of the Fifth and Fourteenth Amendments when they allowed him to speak with his wife in the presence of a police officer.

I

On November 23, 1982, the Flagstaff Police Department received a telephone call from a local K mart store. The caller stated that a man had entered the store claiming to have killed his son. When officers reached the store, respondent Mauro freely admitted that he had killed his son. He directed the officers to the child's body, and then was arrested and advised of his constitutional rights pursuant to

Miranda v. *Arizona*, 384 U. S. 436 (1966). The officers then took Mauro to the police station, where he was advised of his *Miranda* rights again. At that point, Mauro told the officers that he did not wish to make any more statements without having a lawyer present. All questioning then ceased. As no secure detention area was available, Mauro was held in the office of the police captain.

At the same time, one of the officers, Detective Manson, was questioning Mauro's wife in another room. After she finished speaking with Manson, Mrs. Mauro asked if she could speak to her husband. Manson was reluctant to allow the meeting, but after Mrs. Mauro insisted, he discussed the request with his supervisor, Sergeant Allen. Allen testified that he "saw no harm in it and suggested to [Manson] that if she really sincerely wanted to talk to him to go ahead and allow it." App. 74. Allen instructed Manson not to leave Mr. and Mrs. Mauro alone and suggested that Manson tape-record the conversation.

Manson then "told both Mr. and Mrs. Mauro that they could speak together only if an officer were present in the room to observe and hear what was going on." *Id.*, at 218 (findings of trial court). He brought Mrs. Mauro into the room and seated himself at a desk, placing a tape recorder in plain sight on the desk. He recorded their brief conversation, in which she expressed despair about their situation. During the conversation, Mauro told his wife not to answer questions until a lawyer was present.[1]

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[1] The entire conversation proceeded as follows:

"MRS. MAURO: Please—please, I don't know what to do. We should have put David [the victim] in the hospital. Please—I don't know what we're going to do. We should have went for help—we should have went for help.

"[MR. MAURO]: You tried as best you could to stop it.

"MRS. MAURO: I—

"[MR. MAURO]: Shut up.

"MRS. MAURO: —taken him to a mental hospital or something. What'll we do?

Mauro's defense at trial was that he had been insane at the time of the crime. In rebuttal, the prosecution played the tape of the meeting between Mauro and his wife, arguing that it demonstrated that Mauro was sane on the day of the murder. Mauro sought suppression of the recording on the ground that it was a product of police interrogation in violation of his *Miranda* rights. The trial court refused to suppress the recording. First, it explained the basis of the officers' decision to allow Mrs. Mauro to meet with her husband in the presence of a policeman:

> "The police counseled [Mrs. Mauro] not to [speak with her husband], but she was adamant about that. They finally yielded to her insistent demands. The Police Station lacked a secure interview room. The police justifiably appeared *[sic]* for Mrs. Mauro's . . . safety, and they were also concerned about security, both in terms of whether Mr. and Mrs. Mauro might cook up a lie or

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"[MR. MAURO]: Shut up.

"DET. MANSON: Do you know a reverend or a priest or someone you can talk to—take care of David?

"MRS. MAURO: No.

"[MR. MAURO]: Don't answer questions until you get rights of attorney before you find out whats *[sic]* going on. You tried to stop me as best you can. What are you going to do, kill me? You tried the best you can to stop me.

"MRS. MAURO: I don't—we don't—I don't have money.

"[MR. MAURO]: There's a public attorney.

"MRS. MAURO: I don't know.

"[MR. MAURO]: There's a public attorney. Why don't you just be quiet.

"MRS. MAURO: I don't have any money to bury him. I don't have any money. All I got is enough money for the rent for the children and that's it.

"DET. MANSON: Did you want to talk to your husband any more?

"MRS. MAURO: No, I can't talk to him.

"[MR. MAURO]: Then don't talk to me—get out.

"MRS. MAURO: I don't know what to do. O.K."

149 Ariz. 24, 30–31, 716 P. 2d 393, 399–400 (1986).

swap statements with each other that shouldn't have been allowed, and whether some escape attempt might have been made, or whether there might have been an attempt to smuggle in a weapon. They really had no idea what to expect along those lines." *Ibid.*

In light of these justifications, the trial court found "that this procedure was not a ruse, nor a subterfuge by the police. They did not create this situation [*i. e.*, allowing the meeting] as an indirect means of avoiding the dictates of Miranda." *Ibid.* Accordingly, the trial court admitted the evidence. Mauro was convicted of murder and child abuse, and sentenced to death.

The Arizona Supreme Court reversed. 149 Ariz. 24, 716 P. 2d 393 (1986). It found that by allowing Mauro to speak with his wife in the presence of a police officer, the detectives interrogated Mauro within the meaning of *Miranda*. This interrogation was impermissible, the court said, because Mauro previously had invoked the right to have counsel present before being questioned further. The court noted that both detectives had acknowledged in pretrial hearings that they knew it was "possible" that Mauro might make incriminating statements if he saw his wife.[2] The court relied

[2] The court relied on testimony of the officers at the hearing in the trial court on the suppression motion. Sergeant Allen testified as follows:

"Q. [C]ertainly when you sent an officer in there to listen to that conversation, you knew that it was possible that he might make incriminating statements?

"A. That's correct.

"Q. And obviously, you wanted to record that conversation so as to have a record of those incriminating statements.

"A. That's correct." *Id.*, at 30, 716 P. 2d, at 399.

Detective Manson's testimony was as follows:

"Q. [Detective Manson], certainly you were aware that during the conversation either [Mrs. Mauro] or my client may have given an incriminating statement?

"A. Yes.

"Q. And obviously one of the purposes of your tape recording the interview was to take down any such statements?

on our statement in *Rhode Island* v. *Innis*, 446 U. S. 291 (1980), that interrogation includes a "practice that the police should know is reasonably likely to evoke an incriminating response from a suspect," *id.*, at 301. The court then concluded that the officers' testimony demonstrated that there had been interrogation, because "[t]hey both knew that if the conversation took place, incriminating statements were likely to be made." 149 Ariz., at 31, 716 P. 2d, at 400. Therefore, it held that the tape recording was not properly admitted at Mauro's trial.

Arizona filed a petition for a writ of certiorari. Because the decision below appeared to misconstrue our decision in *Rhode Island* v. *Innis*, *supra*, we granted the petition, 479 U. S. 811 (1986). We now reverse.

II

We begin by summarizing the relevant legal principles. The Fifth Amendment provides that no "person . . . shall be compelled in any criminal case to be a witness against himself."[3] In *Miranda* v. *Arizona*, 384 U. S. 436 (1966), the Court concluded that "without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Id.*, at 467. "Accordingly, the Court formulated the now-familiar 'procedural safeguards effective to secure the privilege against self-incrimination.'" *Colorado* v. *Spring*, 479 U. S. 564, 572 (1987) (quoting *Miranda* v. *Arizona*, *supra*, at 444). Among these is the rule that when an accused has "expressed his desire to deal with the police only through counsel, [he] is not subject to further interrogation by the authori-

"A. Yes, sir." *Ibid.*

[3] In *Malloy* v. *Hogan*, 378 U. S. 1 (1964), the Court held that the Fourteenth Amendment requires observance of this privilege in state-court proceedings.

ties until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Edwards* v. *Arizona*, 451 U. S. 477, 484–485 (1981).

One of the questions frequently presented in cases in this area is whether particular police conduct constitutes "interrogation." In *Miranda*, the Court suggested in one passage that "interrogation" referred only to actual "questioning initiated by law enforcement officers." 384 U. S., at 444. But this statement was clarified in *Rhode Island* v. *Innis*, *supra*. In that case, the Court reviewed the police practices that had evoked the *Miranda* Court's concern about the coerciveness of the "'interrogation environment.'" 446 U. S., at 299 (quoting *Miranda*, *supra*, at 457). The questioned practices included "the use of lineups in which a coached witness would pick the defendant as the perpetrator . . .[,] the so-called 'reverse line-up' in which a defendant would be identified by coached witnesses as the perpetrator of a fictitious crime," and a variety of "psychological ploys, such as to 'posi[t]' 'the guilt of the subject,' to 'minimize the moral seriousness of the offense,' and 'to cast blame on the victim or on society.'" 446 U. S., at 299 (quoting *Miranda*, *supra*, at 450) (brackets by *Innis* Court). None of these techniques involves express questioning, and yet the Court found that any of them, coupled with the "interrogation environment," was likely to "'subjugate the individual to the will of his examiner' and thereby undermine the privilege against compulsory self-incrimination." 466 U. S., at 399 (quoting *Miranda*, *supra*, at 457). Thus, the *Innis* Court concluded that the goals of the *Miranda* safeguards could be effectuated if those safeguards extended not only to express questioning, but also to "its functional equivalent." 446 U. S., at 301. The Court explained the phrase "functional equivalent" of interrogation as including "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an

incriminating response from the suspect." *Ibid.* (footnotes omitted). Finally, it noted that "[t]he latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police." *Ibid.*

III

We now turn to the case before us. The officers gave Mauro the warnings required by *Miranda*. Mauro indicated that he did not wish to be questioned further without a lawyer present. Mauro never waived his right to have a lawyer present. The sole issue, then, is whether the officers' subsequent actions rose to the level of interrogation—that is, in the language of *Innis*, whether they were the "functional equivalent" of police interrogation. We think it is clear under both *Miranda* and *Innis* that Mauro was not interrogated. The tape recording of the conversation between Mauro and his wife shows that Detective Manson asked Mauro no questions about the crime or his conduct.[4] Nor is it suggested—or supported by any evidence—that Sergeant Allen's decision to allow Mauro's wife to see him was the kind of psychological ploy that properly could be treated as the functional equivalent of interrogation.[5]

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[4] In the course of the conversation, that apparently lasted only a few minutes, Manson made two statements, both apparently directed at Mauro's wife. See n. 1, *supra*.

[5] JUSTICE STEVENS suggests that the officers "employed a powerful psychological ploy." *Post*, at 531. He bases this statement on his reading of the record that the officers "failed to give respondent any advance warning that Mrs. Mauro was coming to talk to him, that a police officer would accompany her, or that their conversation would be recorded." *Ibid.* This reading is difficult to reconcile with the trial court's conclusion that the officers "told both Mr. and Mrs. Mauro that they could speak together only if an officer were present in the room to observe and hear what was going on." App. 218. This sentence seems to indicate that Mauro received advance warning. But accepting the facts as JUSTICE STEVENS states them, the opinion still makes it clear that Mauro was fully informed before the conversation began. Similarly, it may be that the officers did not give Mr. Mauro advance warning that they would record the conversa-

There is no evidence that the officers sent Mrs. Mauro in to see her husband for the purpose of eliciting incriminating statements. As the trial court found, the officers tried to discourage her from talking to her husband, but finally "yielded to her insistent demands," App. 218. Nor was Detective Manson's presence improper. His testimony, that the trial court found credible, indicated a number of legitimate reasons—not related to securing incriminating statements—for having a police officer present. See *supra*, at 523–524 (quoting App. 218). Finally, the weakness of Mauro's claim that he was interrogated is underscored by examining the situation from his perspective. Cf. *Rhode Island* v. *Innis*, 446 U. S., at 301 (suggesting that the suspect's perspective may be relevant in some cases in determining whether police actions constitute interrogation). We doubt that a suspect, told by officers that his wife will be allowed to speak to him, would feel that he was being coerced to incriminate himself in any way.

The Arizona Supreme Court was correct to note that there was a "possibility" that Mauro would incriminate himself while talking to his wife. It also emphasized that the officers were aware of that possibility when they agreed to allow the Mauros to talk to each other.[6] But the actions in this case

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tion, but the trial court noted that "[t]he officer who was present produced a tape recorder and told the couple that their conversation would be recorded and put that tape recorder down on the desk in plain sight and taped their conversation, so they had knowledge that that was going on." *Ibid.* JUSTICE STEVENS also implies that respondent was forced against his will to talk to his wife. *Post*, at 531. But, as the trial court observed, "[t]he defendant, with knowledge that the police were listening, could have chosen not to speak to his wife. Instead, he chose to speak." App. 219. In short, the trial court's findings completely rebut the atmosphere of oppressive police conduct portrayed by the dissent.

[6] The dissent suggests that the Arizona Supreme Court found as a fact that the officers intended to interrogate Mauro and faults us for reversing this allegedly factual finding. With due respect, we disagree with this reading of the record. The Arizona Supreme Court did not conclude that the officers intended to interrogate Mauro. Rather it concluded that

were far less questionable than the "subtle compulsion" that we held *not* to be interrogation in *Innis*. See *id.*, at 303. Officers do not interrogate a suspect simply by hoping that he will incriminate himself. In *Miranda*, and again in *Innis*, the Court emphasized:

> "Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence. The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated. . . . Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today." *Miranda* v. *Arizona*, 384 U. S., at 478, quoted in *Rhode Island* v. *Innis*, *supra*, at 299–300.

See *Oregon* v. *Elstad*, 470 U. S. 298, 305 (1985). ("'[F]ar from being prohibited by the Constitution, admissions of guilt by wrongdoers, if not coerced, are inherently desirable'" (quoting *United States* v. *Washington*, 431 U. S. 181, 187 (1977))). Mauro was not subjected to compelling influences, psychological ploys, or direct questioning. Thus, his volunteered statements cannot properly be considered the result of police interrogation.

In deciding whether particular police conduct is interrogation, we must remember the purpose behind our decisions in *Miranda* and *Edwards:* preventing government officials from

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"[t]hey both knew that . . . incriminating statements were likely to be made." 149 Ariz., at 31, 716 P. 2d, at 400. Taken in context, this is a determination that the facts known to the officers satisfied the legal standard we established in *Rhode Island* v. *Innis*. Our decision today does not overturn any of the factual findings of the Arizona Supreme Court. Rather, it rests on a determination that the facts of this case do not present a sufficient likelihood of incrimination to satisfy the legal standard articulated in *Miranda* v. *Arizona* and in *Rhode Island* v. *Innis*.

using the coercive nature of confinement to extract confessions that would not be given in an unrestrained environment. The government actions in this case do not implicate this purpose in any way. Police departments need not adopt inflexible rules barring suspects from speaking with their spouses, nor must they ignore legitimate security concerns by allowing spouses to meet in private. In short, the officers in this case acted reasonably and lawfully by allowing Mrs. Mauro to speak with her husband. In this situation, the Federal Constitution does not forbid use of Mauro's subsequent statements at his criminal trial.

IV

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

It is so ordered.

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

The Supreme Court of Arizona unanimously and unequivocally concluded that the police intended to interrogate respondent.[1] This Court reverses, finding that no interroga-

[1] Thus, the Arizona Supreme Court credited part, but not all, of the following testimony by Detective Manson:

"Q. I'd like to ask you some questions concerning police interrogation techniques, if I might.

"Do you have any experience in police interrogation techniques?

"A. Yes, sir.

. . . . .

"Q. Another technique, Byron, would be to, for example, if you are investigating a juvenile matter, to have the parents come down and speak to the juvenile in your presence?

"A. That's correct.

"Q. Along those same lines, it's not uncommon to ask a family member to come in and speak to someone in your presence?

"A. That's correct.

"Q. And, in fact, that technique was utilized in this case, isn't it true?

tion occurred because Mauro "was not subjected to compelling influences, psychological ploys, or direct questioning." *Ante*, at 529. The record indicates, however, that the police employed a powerful psychological ploy; they failed to give respondent any advance warning that Mrs. Mauro was coming to talk to him, that a police officer would accompany her, or that their conversation would be recorded.[2] As the transcript of the conversation reveals, respondent would not have freely chosen to speak with her. See *ante*, at 522–523, n. 1. These facts compel the conclusion that the police took advantage of Mrs. Mauro's request to visit her husband, setting up a confrontation between them at a time when he manifestly desired to remain silent. Because they allowed respondent's conversation with his wife to commence at a time when they knew it was reasonably likely to produce an incriminating statement, the police interrogated him. The Court's opposite conclusion removes an important brick from the wall of

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"A. I don't believe so, no, sir. That was not our purpose. That was not an interrogation method." App. 79, 81.

[2]The trial court found that the police "told both Mr. and Mrs. Mauro that they could speak together only if an officer were present in the room to observe what was going on." App. 218. This advice was not given to Mr. Mauro until Mrs. Mauro entered the room in which he was being held. The trial court did not dispute the testimony of Officer Manson, which establishes that up to the moment when Mrs. Mauro and Officer Manson entered the room with the tape recorder running, every effort was made to keep respondent from knowing that Mrs. Mauro was in the police station:

"Q. When did Mrs. Mauro become aware that her husband was in custody at the Police Station?

"A. I'm not sure. It was probably during our initial interview. I know that we had closed the door to the captain's office and that we entered through the back door. We didn't want them to see each other." *Id.*, at 111–112.

There is nothing in the trial court's opinion or elsewhere in the record to support the Court's apparent assumption, see *ante*, at 527–528, n. 5, that Officer Manson separately advised respondent beforehand that his wife would be brought in to see him and that a police officer would monitor the conversation.

protection against police overreaching that surrounds the Fifth Amendment rights of suspects in custody.

I

At the time of the meeting in question between William Mauro and his wife, he was in police custody and had requested an attorney. It is therefore undisputed that he could not be subjected to interrogation until he either received the assistance of counsel or initiated a conversation with the police. See *ante*, at 525–526; *Edwards* v. *Arizona*, 451 U. S. 477, 484–485 (1981). Since neither event occurred, the tape-recorded evidence must be excluded if it was the product of "interrogation" within the meaning of *Rhode Island* v. *Innis*, 446 U. S. 291 (1980).

Police conduct may constitute "interrogation" even if the officers do not pose direct questions to the suspect. The Court explained the term in *Rhode Island* v. *Innis:*

> "[T]he term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. . . . A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation." *Id.*, at 301 (footnotes omitted).

In a footnote, the Court added:

> "By 'incriminating response' we refer to any response—whether inculpatory or exculpatory—that the *prosecution* may seek to introduce at trial." *Id.*, at 301, n. 5 (emphasis in original).

The Arizona Supreme Court correctly applied the *Innis* standard when it held that "the admission of a tape-recorded conversation between [Mauro] and his wife violated his state and federal rights not to incriminate himself. U. S. Const. amend. V, XIV; Ariz. Const. art. 2, § 10." 149 Ariz. 24, 29,

716 P. 2d 393, 398 (1986).[3] After distinguishing the cases on which the Attorney General of Arizona relied,[4] the State Supreme Court explained:

> "Unlike the Narten cases and *Summerlin*, this is not a case where an officer accidentally overhears a conversation. Rather, here we have illicit custodial interrogation. At the time of the tape recording at issue, appellant was under arrest and being detained at a police station. There is no doubt that this constituted a custodial setting. However, besides being in a custodial setting, the conversation must constitute 'interrogation.'
>
> "Interrogation includes a 'practice that the police should know is reasonably likely to evoke an incriminating response from a suspect.' *Rhode Island* v. *Innis*, 446 U. S. 291, 301 . . . (1980). 'The focus in ascertaining whether particular police conduct amounts to interrogation, then, is not on the form of the words used, but the intent of the police officers and the perceptions of the

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[3] The Arizona Supreme Court, after studying the trial record in light of our precedents, concluded that respondent's Fifth Amendment rights had been violated. Its decision rests on a careful evaluation of the behavior of the local police. Justices of that court regularly review cases in which Arizona police officers have testified. The Arizona Supreme Court's assessment of the actual intent of the Arizona police officers who testified in this case is therefore a good deal more reliable than this Court's. Indeed, whenever this Court reviews a state appellate court's examination of a trial record there is a special risk of error resulting from lack of familiarity with local conditions and from the limited time the Members of this Court can devote to study of the trial record. In some instances, this risk of error is outweighed by the necessity of granting review to decide an "issue of general or recurring significance" or to resolve a split of authority. *Connecticut* v. *Barrett*, 479 U. S. 523, 536 (1987) (STEVENS, J., dissenting). In my opinion, however, no trace of such necessity is present in this case. The vote of four Members of this Court to grant certiorari in this case was surely an exercise of indiscretion.

[4] *State* v. *Narten*, 99 Ariz. 116, 407 P. 2d 81 (1965), cert. denied, 384 U. S. 1008 (1966); *Narten* v. *Eyman*, 460 F. 2d 184 (CA9 1969); *State* v. *Summerlin*, 138 Ariz. 426, 675 P. 2d 686 (1984).

suspect.' *State* v. *Finehout*, 136 Ariz. at 230, 665 P. 2d at 574. An incriminating response is any response—whether inculpatory or exculpatory—that the prosecution may seek to introduce at trial. *Rhode Island* v. *Innis*, 446 U. S., at 301 n. 5 . . . .

"The intent of the detectives is clear from their own testimony. They both knew that if the conversation took place, incriminating statements were likely to be made. With that in mind, they decided to take in a tape recorder, sit near appellant and his wife and allow the conversation to commence.

"Since the intent of the detectives is so clear, we need not address appellant's perceptions. Whether the police knew that appellant was unusually disoriented or upset might have been an important factor in this case had the State's intent not been so unambiguous. *See id.*, 446 U. S. at 302–03 . . . (suspect's peculiar susceptibility to the police appeal and whether the police knew that appellant was unusually disoriented or upset are factors to be examined in determining the perceptions of a suspect). We find, therefore, that in allowing the conversation to commence, the police did indirectly what they could not do directly—interrogate appellant." *Id.*, at 31–32, 716 P. 2d, at 400–401.

II

The Court's proffered reasons for disturbing these cogent findings are unpersuasive. In *Rhode Island* v. *Innis*, the Court emphasized that the police "cannot be held accountable for the unforeseeable results of their words or actions." 446 U. S., at 301–302. But there is a grand canyon between innocent unforeseeability and the mere lack of explicit police subterfuge that the Court now finds adequate to preclude a finding that an interrogation has taken place. It is, of course, true that the trial court found that the spousal conversation, which Detective Manson witnessed and recorded,

"was not a ruse, nor a subterfuge by the police. . . . They did not create this situation as an indirect means of avoiding the dictates of Miranda." App. 218. But this observation, as the Arizona Supreme Court correctly recognized, is not sufficient to satisfy the concerns of the Fifth Amendment.

It is undisputed that a police decision to place two suspects in the same room and then to listen to or record their conversation may constitute a form of interrogation even if no questions are asked by any police officers. That is exactly what happened here.[5] The police placed respondent and his wife, who was also in police custody, in the same small area. Mr. and Mrs. Mauro were both suspects in the murder of their son. Each of them had been interrogated separately before the officers decided to allow them to converse, an act that surely did not require a tape recorder or the presence of a police officer within hearing range. Under the circumstances, the police knew or should have known that Mrs. Mauro's encounter with respondent was reasonably likely to produce an incriminating response. Indeed, Officer Allen's supervisor testified that the police had a reasonable expectation that the spousal conversation would provide information on the murder investigation. When asked, "what was the purpose in having Detective Manson present during any interview or confrontation . . . between the defendant, Mr. Mauro, and his wife . . . ?" Captain Latham replied:

> "Well, one of the reasons would be to, for her protection, in case he attacked her or there was any violence that occurred. . . . The other reason would be to see what the conversation was about. *She and he both were under investigation at that time, and any statements that she made or he made could shed light on our case.*" App. 101 (emphasis added).

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[5] The regrettable irony in this case is that respondent endured the functional equivalent of interrogation while in the very process of advising his wife to exercise her own Fifth Amendment right to remain silent. See *ante*, at 522–523, n. 1.

In my opinion, it was not only likely, but highly probable, that one of the suspects would make a statement that the prosecutor might seek to introduce at trial. It follows that the police conduct in this case was the "functional equivalent" of deliberate, direct interrogation.

The State should not be permitted to set aside this conclusion with testimony that merely indicates that the evidence-gathering purpose of the police was mixed with other motives. For example, it is irrelevant to the inquiry whether the police had legitimate security reasons for having an officer present that were "not related to securing incriminating statements." *Ante*, at 528. Nor does it matter that the officers lacked a precise expectation of how the statements Mauro would make might be incriminating; much interrogation is exploratory rather than directed at the admission of a fact whose incriminatory import is already known to the officers.

The Court's final proffered reason for disregarding the findings of the Supreme Court of Arizona is that the suspect may not have felt coerced to incriminate himself. The police did not compel or even encourage Mauro to speak with his wife. When they brought her into the room without warning Mauro in advance, however, they expected that the resulting conversation "could shed light on our case." App. 101. Under the circumstances, the mere fact that respondent's wife made the initial request leading to the conversation does not alter the correctness of the Supreme Court of Arizona's analysis. The officers exercised exclusive control over whether and when the suspects spoke with each other; the police knew that whatever Mauro might wish to convey to his wife at that moment, he would have to say under the conditions unilaterally imposed by the officers. In brief, the police exploited the custodial situation and the understandable desire of Mrs. Mauro to speak with respondent to conduct an interrogation.

I respectfully dissent.

Syllabus

BOARD OF DIRECTORS OF ROTARY INTERNATIONAL ET AL. *v.* ROTARY CLUB OF DUARTE ET AL.

APPEAL FROM THE COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT

No. 86–421. Argued March 30, 1987—Decided May 4, 1987

Rotary International is a nonprofit corporation composed of local Rotary Clubs. Its purposes are to provide humanitarian service, to encourage high ethical standards in all vocations, and to help build world peace and good will. Individuals are admitted to local club membership according to a "classification system" based on business, professional, and institutional activity in the community. Although women are permitted to attend meetings, give speeches, receive awards, and form auxiliary organizations, the Rotary constitution excludes women from membership. Because it had admitted women to active membership, the Duarte, California, Rotary Club's membership in the international organization was terminated. That club and two of its women members filed a suit alleging that the termination violated California's Unruh Act (Act), which entitles all persons, regardless of sex, to full and equal accommodations, advantages, facilities, privileges, and services in all business establishments in the State. The state trial court entered judgment for Rotary International, concluding that neither it nor the Duarte Club is a "business establishment" within the meaning of the Act. However, the State Court of Appeal reversed on this point, and rejected the contention that Rotary's policy of excluding women is protected by the First Amendment. Accordingly, the court ordered the Duarte Club's reinstatement, and enjoined the enforcement of the gender requirements against it.

Held:

1. The Unruh Act does not violate the First Amendment by requiring California Rotary Clubs to admit women. Pp. 544–549.

(a) Application of the Act to local Rotary Clubs does not interfere unduly with club members' freedom of private association. In determining whether a particular association is sufficiently intimate or private to warrant constitutional protection, consideration must be given to factors such as size, purpose, selectivity, and whether others are excluded from critical aspects of the relationship. Here, the relationship among Rotary Club members does not warrant protection, in light of the potentially large size of local clubs, the high turnover rate among club members, the inclusive nature of each club's membership, the public purposes behind clubs' service activities, and the fact that the clubs encourage the

participation of strangers in, and welcome media coverage of, many of their central activities. Pp. 544–547.

(b) Application of the Act to California Rotary Clubs does not violate the First Amendment right of expressive association. Although clubs engage in a variety of commendable service activities that are protected by the First Amendment, the evidence fails to demonstrate that admitting women will affect in any significant way the existing members' ability to carry out those activities. Moreover, the Act does not require clubs to abandon or alter their classification and admission systems, but, in fact, will permit them to have an even more representative membership with a broadened capacity for service. Even if the Act does work some slight infringement of members' rights, that infringement is justified by the State's compelling interests in eliminating discrimination against women and in assuring them equal access to public accommodations. The latter interest extends to the acquisition of leadership skills and business contacts as well as tangible goods and services. Pp. 548–549.

2. The contentions that the Act is unconstitutionally vague and overbroad were not properly presented to the state courts, and therefore will not be reviewed by this Court. Pp. 549–550.

178 Cal. App. 3d 1035, 224 Cal. Rptr. 213, affirmed.

POWELL, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BRENNAN, WHITE, MARSHALL, and STEVENS, JJ., joined. SCALIA, J., concurred in the judgment. BLACKMUN and O'CONNOR, JJ., took no part in the consideration or decision of the case.

William P. Sutter argued the cause for appellants. With him on the briefs were *Peter F. Lovato III* and *Wm. John Kennedy*.

Judith Resnik argued the cause for appellees. On the brief were *Carol Agate*, *Sanford K. Smith*, *Blanche C. Bersch*, *Paul Hoffman*, and *Fred Okrand*.

Marian M. Johnston argued the cause for intervenor State of California. With her on the brief were *John K. Van de Kamp*, Attorney General, *Andrea Sheridan Ordin*, Chief Assistant Attorney General, and *Beverly Tucker*, Deputy Attorney General.*

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*Briefs of *amici curiae* urging reversal were filed for the Boy Scouts of America by *Ronald C. Redcay*, *George A. Davidson*, and *David K. Park*; for the Conference of Private Organizations by *Thomas P. Ondeck*; for the

JUSTICE POWELL delivered the opinion of the Court.

We must decide whether a California statute that requires California Rotary Clubs to admit women members violates the First Amendment.

I

A

Rotary International (International) is a nonprofit corporation founded in 1905, with headquarters in Evanston, Illinois. It is "an organization of business and professional men united worldwide who provide humanitarian service, encourage high ethical standards in all vocations, and help build goodwill and peace in the world." Rotary Manual of Procedure 7 (1981) (hereinafter Manual), App. 35. Individual members belong to a local Rotary Club rather than to International. In turn, each local Rotary Club is a member of International. *Ibid.* In August 1982, shortly before the trial in this case, Inter-

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Legal Foundation of America by *Jean F. Powers* and *David Crump;* and for Pilot Club International et al. by *Stephen G. Seliger.*

Briefs of *amici curiae* urging affirmance were filed for the State of Minnesota et al. by *Hubert H. Humphrey III*, Attorney General of Minnesota, *Richard S. Slowes*, Assistant Solicitor General, and *Peter M. Ackerberg*, Special Assistant Attorney General, and for the Attorneys General for their respective States as follows: *Joseph I. Lieberman* of Connecticut, *Neil F. Hartigan* of Illinois, *William J. Guste* of Louisiana, *W. Cary Edwards* of New Jersey, *Anthony J. Celebrezze, Jr.*, of Ohio, *Dave Frohnmayer* of Oregon, *Jim Mattox* of Texas, *David L. Wilkinson* of Utah, and *Donald S. Hanaway* of Wisconsin; for the city of New York et al. by *Doron Gopstein* and *Leonard Koerner;* for the American Jewish Congress et al. by *Marc D. Stern;* for the Anti-defamation League of B'nai B'rith by *Abigail T. Kelman, Justin J. Finger, Jeffrey P. Sinensky, Steven M. Freeman*, and *Meyer Eisenberg;* for California Women Lawyers et al. by *Lorraine L. Loder* and *Fredric D. Woocher;* for the Kiwanis Club of Ridgewood, Inc., et al. by *Marcia K. Baer;* for the Lloyd Lyons Club by *Marla J. McGeorge* and *Allen T. Murphy, Jr.;* and for the Rotary Club of Seattle et al. by *M. Margaret McKeown* and *Eugene C. Chellis.*

Joan M. Graff and *Douglas R. Young* filed a brief for the Employment Law Center of the Legal Aid Society of San Francisco as *amicus curiae.*

national comprised 19,788 Rotary Clubs in 157 countries, with a total membership of about 907,750. Brief for Appellants 7.

Individuals are admitted to membership in a Rotary Club according to a "classification system." The purpose of this system is to ensure "that each Rotary Club includes a representative of every worthy and recognized business, professional, or institutional activity in the community." 2 Rotary Basic Library, Club Service 67–69 (1981), App. 86. Each active member must work in a leadership capacity in his business or profession. The general rule is that "one active member is admitted for each classification, but he, in turn, may propose an additional active member, who must be in the same business or professional classification."[1] *Id.*, at 7, App. 86. Thus, each classification may be represented by two active members. In addition, "senior active" and "past service" members may represent the same classifications as active members. See Standard Rotary Club Constitution, Art. V, §§2–5, Record 97–98. There is no limit to the number of clergymen, journalists, or diplomats who may be admitted to membership. Manual 31, 33, App. 38–39.

Subject to these requirements, each local Rotary Club is free to adopt its own rules and procedures for admitting new members. *Id.*, at 7, App. 35. International has promulgated Recommended Club By-laws providing that candidates for membership will be considered by both a "classifications committee" and a "membership committee." The classifications committee determines whether the candidate's business or profession is described accurately and fits an "open" classification. The membership committee evaluates the candidate's "character, business and social standing, and general

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[1] Rotary Clubs may establish separate classifications for subcategories of a business or profession as long as the classification "describe[s] the member's principal and recognized professional activity . . . ." 2 Rotary Basic Library, Club Service 8 (1981), App. 87. For example, a single Rotary Club may admit categories and subcategories of lawyers: *e. g.*, trial, corporate, tax, labor, and so on. *Ibid.*

eligibility." Brief for Appellants 7–8. If any member objects to the candidate's admission, the final decision is made by the club's board of directors.

Membership in Rotary Clubs is open only to men. Standard Rotary Club Constitution, Art. V, § 2, Record 97. Herbert A. Pigman, the General Secretary of Rotary International, testified that the exclusion of women results in an "aspect of fellowship . . . that is enjoyed by the present male membership," App. to Juris. Statement G–52, and also allows Rotary to operate effectively in foreign countries with varied cultures and social mores. Although women are not admitted to membership, they are permitted to attend meetings, give speeches, and receive awards. Women relatives of Rotary members may form their own associations, and are authorized to wear the Rotary lapel pin. Young women between 14 and 28 years of age may join Interact or Rotaract, organizations sponsored by Rotary International.

B

In 1977 the Rotary Club of Duarte, California, admitted Donna Bogart, Mary Lou Elliott, and Rosemary Freitag to active membership. International notified the Duarte Club that admitting women members is contrary to the Rotary constitution. After an internal hearing, International's board of directors revoked the charter of the Duarte Club and terminated its membership in Rotary International. The Duarte Club's appeal to the International Convention was unsuccessful.

The Duarte Club and two of its women members filed a complaint in the California Superior Court for the County of Los Angeles. The complaint alleged, *inter alia*, that appellants' actions violated the Unruh Civil Rights Act, Cal. Civ. Code Ann. § 51 (West 1982).[2] Appellees sought to enjoin

[2] The Unruh Civil Rights Act provides, in part:

"All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, or national origin

International from enforcing its restrictions against admitting women members, revoking the Duarte Club's charter, or compelling delivery of the charter to any representative of International. Appellees also sought a declaration that appellants' actions had violated the Unruh Act. After a bench trial, the court concluded that neither Rotary International nor the Duarte Club is a "business establishment" within the meaning of the Unruh Act. The court recognized that "some individual Rotarians derive sufficient business advantage from Rotary to warrant deduction of Rotarian expenses in income tax calculations, or to warrant payment of those expenses by their employers . . . ." App. to Juris. Statement B–3. But it found that "such business benefits are incidental to the principal purposes of the association . . . to promote fellowship . . . and . . . 'service' activities." *Ibid.* The court also found that Rotary clubs do not provide their members with goods, services, or facilities. On the basis of these findings and conclusions, the court entered judgment for International.

The California Court of Appeal reversed. 178 Cal. App. 3d 1035, 224 Cal. Rptr. 213 (1986). It held that both Rotary International and the Duarte Rotary Club are business establishments subject to the provisions of the Unruh Act. For purposes of the Act, a "'business' embraces everything about which one can be employed," and an "establishment" includes "not only a fixed location, . . . but also a permanent 'commercial force or organization' or a 'permanent settled position (as in life or business).'" *O'Connor* v. *Village Green Owners Assn.*, 33 Cal. 3d 790, 795, 662 P. 2d 427, 430 (1983) (quoting *Burks* v. *Poppy Construction Co.*, 57 Cal. 2d 463, 468–469, 370 P. 2d 313, 316 (1962)). The Court of Appeal identified several "businesslike attributes" of Rotary International, including its complex structure, large staff and budget, and ex-

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are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." Cal. Civ. Code Ann. § 51 (West 1982).

tensive publishing activities. The court held that the trial court had erred in finding that the business advantages afforded by membership in a local Rotary Club are merely incidental. It stated that testimony by members of the Duarte Club "leaves no doubt that business concerns are a motivating factor in joining local clubs," and that "business benefits [are] enjoyed and capitalized upon by Rotarians and their businesses or employers." 178 Cal. App. 3d, at 1057, 224 Cal. Rptr., at 226. The Court of Appeal rejected the trial court's finding that the Duarte Club does not provide goods, services, or facilities to its members. In particular, the court noted that members receive copies of the Rotary magazine and numerous other Rotary publications, are entitled to wear and display the Rotary emblem, and may attend conferences that teach managerial and professional techniques.

The court also held that membership in Rotary International or the Duarte Club does not give rise to a "continuous, personal, and social" relationship that "take[s] place more or less outside public view." *Ibid.* (internal quotation marks and citations omitted). The court further concluded that admitting women to the Duarte Club would not seriously interfere with the objectives of Rotary International. Finally, the court rejected appellants' argument that their policy of excluding women is protected by the First Amendment principles set out in *Roberts* v. *United States Jaycees*, 468 U. S. 609 (1984). It observed that "[n]othing we have said prevents, or can prevent, International from adopting or attempting to enforce membership rules or restrictions outside of this state." *Id.*, at 1066, 224 Cal. Rptr., at 231. The court ordered appellants to reinstate the Duarte Club as a member of Rotary International, and permanently enjoined them from enforcing or attempting to enforce the gender requirement against the Duarte Club.

The California Supreme Court denied appellants' petition for review. We postponed consideration of our jurisdiction to the hearing on the merits. 479 U. S. 929 (1986). We

conclude that we have appellate jurisdiction,[3] and affirm the judgment of the Court of Appeal.

II

In *Roberts* v. *United States Jaycees*, *supra*, we upheld against First Amendment challenge a Minnesota statute that required the Jaycees to admit women as full voting members. *Roberts* provides the framework for analyzing appellants' constitutional claims. As we observed in *Roberts*, our cases have afforded constitutional protection to freedom of association in two distinct senses. First, the Court has held that the Constitution protects against unjustified government interference with an individual's choice to enter into and maintain certain intimate or private relationships. Second, the Court has upheld the freedom of individuals to associate for the purpose of engaging in protected speech or religious activities. In many cases, government interference with one form of protected association will also burden the other form of association. In *Roberts* we determined the nature and degree of constitutional protection by considering separately the effect of the challenged state action on individuals' free-

[3] We have appellate jurisdiction to review a final judgment entered by the highest court of a State in which decision could be had "where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity." 28 U. S. C. § 1257(2). Appellants squarely challenged the constitutionality of the Unruh Act, as applied, and the Court of Appeal sustained the validity of the statute as applied. "We have held consistently that a state statute is sustained within the meaning of § 1257(2) when a state court holds it applicable to a particular set of facts as against the contention that such application is invalid on federal grounds." *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U. S. 434, 441 (1979) (citing *Cohen* v. *California*, 403 U. S. 15, 17–18 (1971); *Warren Trading Post* v. *Arizona Tax Comm'n*, 380 U. S. 685, 686, and n. 1 (1965); *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58, 61, n. 3 (1963); *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, 288–290 (1921)).

dom of private association and their freedom of expressive association. We follow the same course in this case.[4]

A

The Court has recognized that the freedom to enter into and carry on certain intimate or private relationships is a fundamental element of liberty protected by the Bill of Rights. Such relationships may take various forms, including the most intimate. See *Moore* v. *East Cleveland*, 431 U. S. 494, 503–504 (1977) (plurality opinion). We have not attempted to mark the precise boundaries of this type of constitutional protection. The intimate relationships to which we have accorded constitutional protection include marriage, *Zablocki* v. *Redhail*, 434 U. S. 374, 383–386 (1978); the begetting and bearing of children, *Carey* v. *Population Services International*, 431 U. S. 678, 684–686 (1977); child rearing and education, *Pierce* v. *Society of Sisters*, 268 U. S. 510, 534–535 (1925); and cohabitation with relatives, *Moore* v. *East Cleveland*, *supra*, at 503–504. Of course, we have not held that constitutional protection is restricted to relationships among family members. We have emphasized that the First Amendment protects those relationships, including family relationships, that presuppose "deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life." *Roberts* v. *United States Jaycees*, *supra*, at 619–620. But in *Roberts* we observed that "[d]etermining the limits of state authority over an individual's freedom to enter into a particular association . . . unavoidably entails a careful

[4] International, an association of thousands of local Rotary Clubs, can claim no constitutionally protected right of private association. Moreover, its expressive activities are quite limited. See *infra*, at 548–549. Because the Court of Appeal held that the Duarte Rotary Club also is a business establishment subject to the provisions of the Unruh Act, we proceed to consider whether application of the Unruh Act violates the rights of members of local Rotary Clubs.

assessment of where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments." 468 U. S., at 620 (citing *Runyon* v. *McCrary*, 427 U. S. 160, 187–189 (1976) (POWELL, J., concurring)). In determining whether a particular association is sufficiently personal or private to warrant constitutional protection, we consider factors such as size, purpose, selectivity, and whether others are excluded from critical aspects of the relationship. 468 U. S., at 620.

The evidence in this case indicates that the relationship among Rotary Club members is not the kind of intimate or private relation that warrants constitutional protection. The size of local Rotary Clubs ranges from fewer than 20 to more than 900. App. to Juris. Statement G–15 (deposition of Herbert A. Pigman, General Secretary of Rotary International). There is no upper limit on the membership of any local Rotary Club. About 10 percent of the membership of a typical club moves away or drops out during a typical year. 2 Rotary Basic Library, Club Service 9–11 (1981), App. 88. The clubs therefore are instructed to "keep a flow of prospects coming" to make up for the attrition and gradually to enlarge the membership. *Ibid.* The purpose of Rotary "is to produce an inclusive, not exclusive, membership, making possible the recognition of all useful local occupations, and enabling the club to be a true cross section of the business and professional life of the community." 1 Rotary Basic Library, Focus on Rotary 60–61 (1981), App. 84. The membership undertakes a variety of service projects designed to aid the community, to raise the standards of the members' businesses and professions, and to improve international relations.[5] Such an in-

[5] We of course recognize that Rotary Clubs, like similar organizations, perform useful and important community services. Rotary Clubs in the vicinity of the Duarte Club have provided meals and transportation to the elderly, vocational guidance for high school students, a swimming program for handicapped children, and international exchange programs, among many other service activities. Record 217H–217J.

clusive "fellowship for service based on diversity of interest," *ibid.*, however beneficial to the members and to those they serve, does not suggest the kind of private or personal relationship to which we have accorded protection under the First Amendment. To be sure, membership in Rotary Clubs is not open to the general public. But each club is instructed to include in its membership "all fully qualified prospective members located within its territory," to avoid "arbitrary limits on the number of members in the club," and to "establish and maintain a membership growth pattern." Manual 139, App. 61–62.

Many of the Rotary Clubs' central activities are carried on in the presence of strangers. Rotary Clubs are required to admit any member of any other Rotary Club to their meetings. Members are encouraged to invite business associates and competitors to meetings. At some Rotary Clubs, the visitors number "in the tens and twenties each week." App. to Juris. Statement G–24 (deposition of Herbert A. Pigman, General Secretary of Rotary International). Joint meetings with the members of other organizations, and other joint activities, are permitted. The clubs are encouraged to seek coverage of their meetings and activities in local newspapers. In sum, Rotary Clubs, rather than carrying on their activities in an atmosphere of privacy, seek to keep their "windows and doors open to the whole world," 1 Rotary Basic Library, Focus on Rotary 60–61 (1981), App. 85. We therefore conclude that application of the Unruh Act to local Rotary Clubs does not interfere unduly with the members' freedom of private association.[6]

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[6] Appellants assert that we "approved" a distinction between the Jaycees and the Kiwanis Club in *Roberts* v. *United States Jaycees*, 468 U. S. 609, 630 (1984). Brief for Appellants 21. Appellants misconstrue *Roberts*. In that case we observed that the Minnesota court had suggested Kiwanis Clubs were outside the scope of the State's public accommodations law. We concluded that this refuted the Jaycees' arguments that the Minnesota statute was vague and overbroad. We did not consider whether the relationship among members of the Kiwanis Club was sufficiently intimate or private to warrant constitutional protection. Similarly,

B

The Court also has recognized that the right to engage in activities protected by the First Amendment implies "a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts* v. *United States Jaycees*, 468 U. S., at 622. See *NAACP* v. *Claiborne Hardware Co.*, 458 U. S. 886, 907–909, 932–933 (1982). For this reason, "[i]mpediments to the exercise of one's right to choose one's associates can violate the right of association protected by the First Amendment . . . ." *Hishon* v. *King & Spalding*, 467 U. S. 69, 80, n. 4 (1984) (POWELL, J., concurring) (citing *NAACP* v. *Button*, 371 U. S. 415 (1963); *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449 (1958)). In this case, however, the evidence fails to demonstrate that admitting women to Rotary Clubs will affect in any significant way the existing members' ability to carry out their various purposes.

As a matter of policy, Rotary Clubs do not take positions on "public questions," including political or international issues. Manual 115, App. 58–59. To be sure, Rotary Clubs engage in a variety of commendable service activities that are protected by the First Amendment. But the Unruh Act does not require the clubs to abandon or alter any of these activities. It does not require them to abandon their basic goals of humanitarian service, high ethical standards in all vocations, good will, and peace. Nor does it require them to abandon their classification system or admit members who do not reflect a cross section of the community. Indeed, by

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we have no occasion in this case to consider the extent to which the First Amendment protects the right of individuals to associate in the many clubs and other entities with selective membership that are found throughout the country. Whether the "zone of privacy" established by the First Amendment extends to a particular club or entity requires a careful inquiry into the objective characteristics of the particular relationships at issue. *Roberts* v. *United States Jaycees*, *supra*, at 620. Cf. *Moose Lodge No. 107* v. *Irvis*, 407 U. S. 163, 179–180 (1972) (Douglas, J., dissenting).

opening membership to leading business and professional women in the community, Rotary Clubs are likely to obtain a more representative cross section of community leaders with a broadened capacity for service.[7]

Even if the Unruh Act does work some slight infringement on Rotary members' right of expressive association, that infringement is justified because it serves the State's compelling interest in eliminating discrimination against women. See *Buckley* v. *Valeo*, 424 U. S. 1, 25 (1976) *(per curiam)* (right of association may be limited by state regulations necessary to serve a compelling interest unrelated to the suppression of ideas). On its face the Unruh Act, like the Minnesota public accommodations law we considered in *Roberts*, makes no distinctions on the basis of the organization's viewpoint. Moreover, public accommodations laws "plainly serv[e] compelling state interests of the highest order." 468 U. S., at 624. In *Roberts* we recognized that the State's compelling interest in assuring equal access to women extends to the acquisition of leadership skills and business contacts as well as tangible goods and services. *Id.*, at 626. The Unruh Act plainly serves this interest. We therefore hold that application of the Unruh Act to California Rotary Clubs does not violate the right of expressive association afforded by the First Amendment.[8]

III

Finally, appellants contend that the Unruh Act is unconstitutionally vague and overbroad. We conclude that these contentions were not properly presented to the state courts.

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[7] In 1980 women were reported to make up 40.6 percent of the managerial and professional labor force in the United States. U. S. Department of Commerce, Statistical Abstract of the United States 400 (1986).

[8] Appellants assert that admission of women will impair Rotary's effectiveness as an international organization. This argument is undercut by the fact that the legal effect of the judgment of the California Court of Appeal is limited to the State of California. See *supra*, at 543. Appellants' argument also is undermined by the fact that women already attend the Rotary Clubs' meetings and participate in many of their activities.

It is well settled that this Court will not review a final judgment of a state court unless "the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system." *Webb* v. *Webb*, 451 U. S. 493, 496–497 (1981). Appellants did not present the issues squarely to the state courts until they filed their petition for rehearing with the Court of Appeal. The court denied the petition without opinion. When "'"the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary."'" *Exxon Corp.* v. *Eagerton*, 462 U. S. 176, 181, n. 3 (1983) (quoting *Fuller* v. *Oregon*, 417 U. S. 40, 50, n. 11 (1974) (in turn quoting *Street* v. *New York*, 394 U. S. 576, 582 (1969))). Appellants have made no such showing in this case.[9]

IV

The judgment of the Court of Appeal of California is affirmed.

It is so ordered.

JUSTICE SCALIA concurs in the judgment.

JUSTICE BLACKMUN and JUSTICE O'CONNOR took no part in the consideration or decision of this case.

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[9] Appellants point to a passage in the brief they filed in the California Court of Appeal that quotes this Court's opinion in *NAACP* v. *Button*, 371 U. S. 415, 435 (1963): "'It is enough [for unconstitutionality] that a vague and broad statute lends itself to selective enforcement against unpopular causes.'" Brief for Respondents in B001663 (Cal. Ct. App.), p. 26 (brackets in original) (quoted in Brief for Appellants 37–37). The quotation occurs in the course of an argument that the Unruh Act should be applied only to memberships in entities that are a vehicle for the public sale of goods, services, or commercial advantages. This casual reference to a federal case, in the midst of an unrelated argument, is insufficient to inform a state court that it has been presented with a claim subject to our appellate jurisdiction under 28 U. S. C. § 1257(2).

Syllabus

PENNSYLVANIA *v.* FINLEY

CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

No. 85–2099. Argued March 2, 1987—Decided May 18, 1987

Respondent was convicted of second-degree murder and sentenced to life imprisonment in a Pennsylvania trial court, and the Pennsylvania Supreme Court affirmed on direct appeal. In respondent's subsequent postconviction proceedings, the trial court, as required by state law, appointed counsel to assist her. Counsel reviewed the trial record; consulted with respondent; concluded that there were no arguable bases for collateral review; advised the trial court in writing of his conclusion; and requested permission to withdraw. After reviewing the record, the court agreed that there were no arguably meritorious issues and dismissed the proceedings. Respondent acquired new appointed counsel and appealed to the Pennsylvania Superior Court, which concluded that counsel's conduct in the trial court violated respondent's constitutional rights, and remanded the case for further proceedings. The Superior Court relied on *Anders* v. *California*, 386 U. S. 738, which held that (1) when an attorney appointed to represent an indigent defendant on *direct appeal* finds the case to be wholly frivolous he must request the court's permission to withdraw and submit a brief referring to anything in the record arguably supporting the appeal, (2) a copy of the brief must be furnished the indigent and time must be allowed for him to raise any points that he chooses, and (3) the court itself must then decide whether the case is wholly frivolous.

Held: The court below improperly relied on the Federal Constitution to extend the *Anders* procedures to these collateral postconviction proceedings. Denial of counsel to indigents on first appeal as of right amounts to discrimination against the poor in violation of the Fourteenth Amendment, and *Anders* established a prophylactic framework that is relevant when, and only when, a litigant has a previously established constitutional right to counsel. The right to appointed counsel extends to only the first appeal of right, and since a defendant has no federal constitutional right to counsel when pursuing a discretionary appeal on direct review of his conviction, *Ross* v. *Moffitt*, 417 U. S. 600, *a fortiori*, he has no such right when attacking, in postconviction proceedings, a conviction that has become final upon exhaustion of the appellate process. The *Anders* procedures do not apply to a state-created right to counsel on postconviction review just because they are applied to the right to counsel on first appeal as of right. Respondent's access to a lawyer was the

result of the State's decision, not the command of the Federal Constitution. The procedures followed by her trial counsel in the postconviction proceedings fully comported with the fundamental fairness mandated by the Due Process Clause. States have no obligation to provide postconviction relief, and when they do, the fundamental fairness mandated by the Due Process Clause does not require that the State supply a lawyer as well. Nor was the equal protection guarantee of meaningful access violated in this case. Moreover, there is no merit to respondent's contention that once the State has granted a prisoner access to counsel on postconviction review, the Due Process Clause of the Fourteenth Amendment requires that counsel's actions comport with the *Anders* procedures. *Evitts* v. *Lucey*, 469 U. S. 387, distinguished. Pennsylvania made a valid choice to give prisoners the assistance of counsel in postconviction proceedings without requiring the full panoply of procedural protections that the Constitution requires be given to defendants who are in a fundamentally different position—at trial and on first appeal as of right. Pp. 554–559.

330 Pa. Super. 313, 479 A. 2d 568, reversed and remanded.

REHNQUIST, C. J., delivered the opinion of the Court, in which WHITE, POWELL, O'CONNOR, and SCALIA, JJ., joined. BLACKMUN, J., filed an opinion concurring in the judgment, *post*, p. 559. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 559. STEVENS, J., filed a dissenting opinion, *post*, p. 570.

Gaele McLaughlin Barthold argued the cause for petitioner. With her on the briefs were *Ann C. Lebowitz*, *Ronald Eisenberg*, and *William G. Chadwick, Jr.*

Catherine M. Harper, by appointment of the Court, 479 U. S. 928, argued the cause and filed a brief for respondent.*

**Linley E. Pearson*, Attorney General of Indiana, and *William E. Daily* and *Lisa M. Paunicka*, Deputy Attorneys General, filed a brief for the State of Indiana et al. as *amici curiae* urging reversal, joined by officials for their respective States as follows: *John Van de Kamp*, Attorney General of California, *John J. Kelly*, Chief State's Attorney for Connecticut, *Charles M. Oberly*, Attorney General of Delaware, *Jim Smith*, Attorney General of Florida, *Corinne K. A. Watanabe*, Attorney General of Hawaii, *Jim Jones*, Attorney General of Idaho, *Robert T. Stephan*, Attorney General of Kansas, *David L. Armstrong*, Attorney General of Kentucky, *William J. Guste, Jr.*, Attorney General of Louisiana, *William L. Webster*, Attorney General of Missouri, *Travis Medlock*, Attorney General of South

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

In 1975 respondent was convicted of second-degree murder by the Court of Common Pleas of Philadelphia County. She was sentenced to life imprisonment. Her appointed trial attorney appealed the conviction to the Supreme Court of Pennsylvania. That court unanimously affirmed the conviction. 477 Pa. 211, 383 A. 2d 898 (1978). Having failed on direct appeal, respondent, proceeding *pro se*, sought relief from the trial court under the Pennsylvania Post Conviction Hearing Act. See 42 Pa. Cons. Stat. § 9541 *et seq.* (1982). She raised the same issues that the Supreme Court of Pennsylvania had rejected on the merits. The trial court denied relief, but the State Supreme Court reversed, holding that respondent was entitled, under state law, to appointed counsel in her postconviction proceedings. 497 Pa. 332, 440 A. 2d 1183 (1981). On remand, the trial court appointed counsel. Counsel reviewed the trial record and consulted with respondent. He concluded that there were no arguable bases for collateral relief. Accordingly, he advised the trial court in writing of his conclusion and requested permission to withdraw. The trial court conducted an independent review of the record and agreed that there were no issues even arguably meritorious. The court thus dismissed the petition for postconviction relief.

Respondent acquired new appointed counsel and pursued an appeal to the Superior Court. Over a dissent, that court concluded that the conduct of the counsel in the trial court's postconviction proceedings violated respondent's constitu-

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Carolina, *Mary Sue Terry*, Attorney General of Virginia, *Bronson C. La Follette*, Attorney General of Wisconsin, and *Archie G. McClintock*, Attorney General of Wyoming.

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *Larry W. Yackle*, *Alvin J. Bronstein*, *Vivian O. Berger*, *David Goldstein*, and *Stefan Presser;* and for the National Legal Aid and Defender Association by *David P. Bergschneider*.

tional rights. 330 Pa. Super. 313, 479 A. 2d 568 (1984). The court held that "Pennsylvania law concerning procedures to be followed when a court-appointed attorney sees no basis for an appeal is derived from the seminal case of" *Anders* v. *California*, 386 U. S. 738 (1967). 330 Pa. Super., at 318, 479 A. 2d, at 570. In *Anders*, this Court held that when an attorney appointed to represent an indigent defendant on direct appeal finds a case wholly frivolous:

> "[H]e should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished the indigent and time allowed him to raise any points that he chooses; the court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous." 386 U. S., at 744.

The Superior Court held that respondent's postconviction counsel had failed to follow these procedures, and it therefore remanded the case to the Court of Common Pleas for further proceedings. We granted certiorari, 479 U. S. 812 (1986), and we now reverse.

We think that the court below improperly relied on the United States Constitution to extend the *Anders* procedures to postconviction proceedings. The holding in *Anders* was based on the underlying constitutional right to appointed counsel established in *Douglas* v. *California*, 372 U. S. 353 (1963). Relying on "that equality demanded by the Fourteenth Amendment," *id.*, at 358, the *Douglas* Court held that denial of counsel to indigents on first appeal as of right amounted to unconstitutional discrimination against the poor. In *Anders*, the Court held that in order to protect the "constitutional requirement of substantial equality and fair process" set out in *Douglas*, appointed appellate counsel must follow the procedures described above when a case appears to be frivolous. 386 U. S., at 744. Of course, *Anders* did

not set down an independent constitutional command that all lawyers, in all proceedings, must follow these particular procedures. Rather, *Anders* established a prophylactic framework that is relevant when, and only when, a litigant has a previously established constitutional right to counsel.

We have never held that prisoners have a constitutional right to counsel when mounting collateral attacks upon their convictions, see *Johnson* v. *Avery*, 393 U. S. 483, 488 (1969), and we decline to so hold today. Our cases establish that the right to appointed counsel extends to the first appeal of right, and no further. Thus, we have rejected suggestions that we establish a right to counsel on discretionary appeals. *Wainwright* v. *Torna*, 455 U. S. 586 (1982); *Ross* v. *Moffitt*, 417 U. S. 600 (1974). We think that since a defendant has no federal constitutional right to counsel when pursuing a discretionary appeal on direct review of his conviction, *a fortiori*, he has no such right when attacking a conviction that has long since become final upon exhaustion of the appellate process. See *Boyd* v. *Dutton*, 405 U. S. 1, 7, n. 2 (1972) (POWELL, J., dissenting).

In *Ross* v. *Moffitt*, *supra*, we analyzed the defendant's claim to appointed counsel on discretionary review under two theories. We concluded that the fundamental fairness exacted by the Due Process Clause did not require appointment of counsel:

> "[I]t is ordinarily the defendant, rather than the State, who initiates the appellate process, seeking not to fend off the efforts of the State's prosecutor but rather to overturn a finding of guilt made by a judge or jury below. The defendant needs an attorney on appeal not as a shield to protect him against being 'haled into court' by the State and stripped of his presumption of innocence, but rather as a sword to upset the prior determination of guilt. This difference is significant for, while no one would agree that the State may simply dispense with the trial stage of proceedings without a crimi-

> nal defendant's consent, it is clear that the State need not provide any appeal at all. *McKane* v. *Durston*, 153 U. S. 684 (1894). The fact that an appeal *has* been provided does not automatically mean that a State then acts unfairly by refusing to provide counsel to indigent defendants at every stage of the way." 417 U. S., at 610–611.

We also concluded that the equal protection guarantee of the Fourteenth Amendment does not require the appointment of an attorney for an indigent appellant just because an affluent defendant may retain one. "The duty of the State under our cases is not to duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse his conviction, but only to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process." *Id.*, at 616.

These considerations apply with even more force to postconviction review. First, we reject respondent's argument that the *Anders* procedures should be applied to a state-created right to counsel on postconviction review just because they are applied to the right to counsel on first appeal that this Court established in *Douglas*. Respondent apparently believes that a "right to counsel" can have only one meaning, no matter what the source of that right. But the fact that the defendant has been afforded assistance of counsel in some form does not end the inquiry for federal constitutional purposes. Rather, it is the source of that right to a lawyer's assistance, combined with the nature of the proceedings, that controls the constitutional question. In this case, respondent's access to a lawyer is the result of the State's decision, not the command of the United States Constitution.

We think that the analysis that we followed in *Ross* forecloses respondent's constitutional claim. The procedures followed by respondent's habeas counsel fully comported with fundamental fairness. Postconviction relief is even further removed from the criminal trial than is discretionary direct

review. It is not part of the criminal proceeding itself, and it is in fact considered to be civil in nature. See *Fay* v. *Noia*, 372 U. S. 391, 423–424 (1963). It is a collateral attack that normally occurs only after the defendant has failed to secure relief through direct review of his conviction. States have no obligation to provide this avenue of relief, cf. *United States* v. *MacCollom*, 426 U. S. 317, 323 (1976) (plurality opinion), and when they do, the fundamental fairness mandated by the Due Process Clause does not require that the State supply a lawyer as well.

Nor was the equal protection guarantee of "meaningful access" violated in this case. By the time respondent presented her application for postconviction relief, she had been represented at trial and in the Supreme Court of Pennsylvania. In *Ross*, we concluded that the defendant's access to the trial record and the appellate briefs and opinions provided sufficient tools for the *pro se* litigant to gain meaningful access to courts that possess a discretionary power of review. 417 U. S., at 614–615. We think that the same conclusion necessarily obtains with respect to postconviction review. Since respondent has no underlying constitutional right to appointed counsel in state postconviction proceedings, she has no constitutional right to insist on the *Anders* procedures which were designed solely to protect that underlying constitutional right.

Respondent relies on *Evitts* v. *Lucey*, 469 U. S. 387, 401 (1985), for the proposition that even though the State need not grant a prisoner access to counsel on postconviction review, once it has done so, the Due Process Clause of the Fourteenth Amendment requires that counsel's actions comport with the procedures enumerated in *Anders*. In *Evitts*, the Court held that a State cannot penalize a criminal defendant by dismissing his first appeal as of right when his appointed counsel has failed to follow mandatory appellate rules. In so ruling, the Court rejected the State's argument that since it need not provide an appeal in the first place, see

McKane v. *Durston*, 153 U. S. 684 (1894), it could cut off a defendant's appeal without running afoul of the Due Process Clause. Noting that "[t]he right to appeal would be unique among state actions if it could be withdrawn without consideration of applicable due process norms," 469 U. S., at 400–401, the Court reasoned that "when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution—and, in particular, in accord with the Due Process Clause," *id.*, at 401. Respondent argues that by allowing counsel to represent her without complying with *Anders*, the Court of Common Pleas improperly deprived her of her state-law right to "effective" assistance.

We think that *Evitts* provides respondent no comfort. Initially, the substantive holding of *Evitts*—that the State may not cut off a right to appeal because of a lawyer's ineffectiveness—depends on a constitutional right to appointed counsel that does not exist in state habeas proceedings. More important, however, is the fact that unlike the prisoner in *Evitts*, who was actually deprived of a state-created right to appeal, respondent here has suffered no deprivation, assuming for the moment that the Due Process Clause is relevant. Cf. *Wainright* v. *Torna*, 455 U. S., at 588, n. 4 *(per curiam)*; *Polk County* v. *Dodson*, 454 U. S. 312 (1981). The Court of Common Pleas found that respondent's right to counsel under Pennsylvania law was satisfied by the conduct of her appointed counsel, combined with the court's independent review of the record. The Superior Court did not disagree with this state-law holding. Rather, it ruled that *Anders* required even more assistance, as a matter of federal constitutional law. We have rejected that conclusion, and therefore the State's obligations, as a matter of both federal and state law, have been fulfilled. Since respondent has received exactly that which she is entitled to receive under state law—an independent review of the record by competent counsel—she cannot claim any deprivation without due process.

At bottom, the decision below rests on a premise that we are unwilling to accept—that when a State chooses to offer help to those seeking relief from convictions, the Federal Constitution dictates the exact form such assistance must assume. On the contrary, in this area States have substantial discretion to develop and implement programs to aid prisoners seeking to secure postconviction review. In Pennsylvania, the State has made a valid choice to give prisoners the assistance of counsel without requiring the full panoply of procedural protections that the Constitution requires be given to defendants who are in a fundamentally different position—at trial and on first appeal as of right. In this context, the Constitution does not put the State to the difficult choice between affording no counsel whatsoever or following the strict procedural guidelines annunciated in *Anders*. The judgment of the Superior Court is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE BLACKMUN, concurring in the judgment.

I agree with the Court's conclusion that the Superior Court erred in its belief that the United States Constitution required the application of the procedures mandated by *Anders* v. *California*, 386 U. S. 738 (1967), to this case. In my view, however, on remand the Superior Court should be able to consider whether appointed counsel's review of respondent's case was adequate under Pennsylvania law or the Pennsylvania Supreme Court's remand order.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

On respondent's appeal from denial of state collateral relief, the Pennsylvania Supreme Court held that state law required Dorothy Finley's counsel to review the record carefully, to amend her petition for relief, and to file a brief on her behalf. On remand, however, her counsel advised the

trial court (Court of Common Pleas) summarily to dismiss her petition. Today the Court reverses the subsequent determination of the appellate court (Superior Court) that the performance of Dorothy Finley's trial counsel was deficient for failure to comply with three different sets of requirements: those established by *Anders* v. *California*, 386 U. S. 738 (1967), by *Commonwealth* v. *McClendon*, 495 Pa. 467, 434 A. 2d 1185 (1981), and by the remand order issued originally by the Pennsylvania Supreme Court.

In Pennsylvania, courts may comply with either the *Anders* or the *McClendon* procedures when appointed counsel wishes to withdraw from representation of a petitioner's collateral attack upon a judgment. 330 Pa. Super. 313, 320–321, 479 A. 2d 568, 571 (1984). The *Anders* procedures require counsel to perform a conscientious evaluation of the record, to write a brief referring to "arguable" support in the record, and to give notice to the client. The trial court may grant counsel's request to withdraw after a full examination of the record. *Anders* v. *California*, *supra*, at 744. The *McClendon* procedures require "an exhaustive examination of the record" by counsel and an "independent determination" by the court that the petition is wholly frivolous. No *Anders* brief or notice to client is required. 330 Pa. Super., at 320–321, 479 A. 2d, at 571.

In addition to finding that trial counsel complied with neither of these two sets of requirements, the state appellate court found that the lower court failed to comply with the specific requirements of the remand order of the State Supreme Court. In that circumstance, the appellate court decision rested on this independent state ground, and the petition for certiorari should be dismissed as improvidently granted. Moreover, the controversy involving the application of the *Anders* procedures is not ripe for review. Finally, I believe that counsel's deficient performance violated Finley's federal rights to due process and equal protection. I therefore dissent.

I

The failure of the trial court to ensure compliance with the State Supreme Court's instructions on remand is an independent state ground for the appellate court's decision. After exhausting direct appeals of her criminal convictions, Finley filed a *pro se* application for collateral relief pursuant to the Pennsylvania Post Conviction Hearing Act, 42 Pa. Cons. Stat. § 9541 *et seq.* (1982) (PCHA). The trial court summarily denied the petition. The Pennsylvania Supreme Court reversed and held that Finley was entitled to appointed counsel if indigent, since the PCHA required the appointment of counsel to assist her in a meaningful manner. 497 Pa. 332, 334, 440 A. 2d 1183, 1184 (1981). The State Supreme Court did not rely on or refer to federal statutory or constitutional law. It stated that the right to counsel guaranteed by the PCHA could be denied "*only* where a previous *PCHA petition* involving the same issues has been determined adversely to the petitioner in a *proceeding on the PCHA petition*. . . ." *Ibid.* (emphasis added). Finley had not previously filed a PCHA petition and therefore had a right to counsel. The State Supreme Court instructed that appointed counsel was not to limit his or her efforts to the claims raised by Finley, but should "explore legal grounds for complaint, investigate underlying facts" and "articulate claims for relief." The trial court was further instructed to allow counsel to amend the petition. 497 Pa., at 334–335, 440 A. 2d, at 1184–1185.

On remand, Finley's counsel failed to meet these requirements. Appointed counsel read only the "Notes of Testimony" of the original trial and failed to indicate to the trial court how he had conducted an exhaustive research of the record. 330 Pa. Super., at 322–323, 479 A. 2d, at 572–573. Instead of filing a brief and amending the complaint, as the remand order required, he simply submitted a "no-merit" let-

ter describing his limited review, listing the identical issues that were previously presented to the Pennsylvania Supreme Court on both direct appeal and on collateral attack, and stating why he regarded those claims as meritless.[1] Finley did not receive advance notice from either the court or her counsel that the latter was filing a letter maintaining that all her claims were without merit. Tr. of Oral Arg. 17. Indeed, there is no evidence that Finley ever received a copy of the letter. The attorney also failed to inform Finley of her right to seek new counsel or to proceed *pro se* before the trial court. 330 Pa. Super., at 320–321, 323, 479 A. 2d, at 571, 573. After receiving the no-merit letter, the trial court dismissed Finley's petition without a hearing. New counsel was appointed to represent Finley in the appeal of the dismissal.

The Superior Court reversed, noting that the trial court had failed to follow the required instructions of the State Supreme Court's remand, which were based on its interpretation of the PCHA. "The [Pennsylvania] Supreme Court remanded, not because it saw any particular merit to the [contentions raised at that time], which were identical to those disposed of earlier in appellant's direct appeal. . . . The Supreme Court wished to afford appellant the opportunity to amass other issues with arguable merit. . . ." 330 Pa. Super., at 321, 479 A. 2d, at 571–572.

The Superior Court cited to Rule 1504 of the Pennsylvania Rules of Criminal Procedure as a basis for the earlier remand order. That Rule requires counsel to "act as an advocate in fulfilling his role." 330 Pa. Super., at 321, 479 A. 2d, at 572. The Superior Court stated that Finley's appellant counsel was able to list several issues "which may have arguable merit" simply by reviewing the "'bare record available in the

[1] The Superior Court noted that counsel gave an incorrect explanation of one of these two issues in his evaluation of why these issues were meritless. 330 Pa. Super., at 323, n. 4, 479 A. 2d, at 573, n. 4.

Superior Court.'" *Id.*, at 323, 479 A. 2d, at 572–573 (citing Brief for Appellant).[2] Thus, the trial court's failure to require a submitted brief and an amended complaint did not satisfy the mandate of the State Supreme Court that effective counsel be provided for Finley's first PCHA petition. Since trial counsel had failed to amend the petition or submit a brief, "the proceeding was in fact uncounselled" under Pennsylvania law. *Id.*, at 321, 479 A. 2d, at 572 (citation omitted).

This reliance on state grounds independently and adequately justified the Superior Court's remand. There is no need for a plain statement indicating the independence of the state grounds since there was no federal law interwoven with this determination. See *Michigan* v. *Long*, 463 U. S. 1032, 1041 (1983). Indeed, the Superior Court referred to state law with the very purpose of basing the reversal of the trial court's decision on grounds independent of both *Anders* and *McClendon*. 330 Pa. Super., at 321–322, 479 A. 2d, at 571–572. As a result, the Court has no need to address the issue of what general requirements govern representation in collateral proceedings in Pennsylvania, much less whether *Anders* is applicable.

II

The *Anders* issue is not ripe for review for yet another reason. The Superior Court's decision leaves the trial court discretion on remand to impose the requirements of either *Anders* or *McClendon*, so long as it also complies with the requirements imposed by the original remand order by the Pennsylvania Supreme Court. See 330 Pa. Super., at 322,

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[2] Finley's appellate counsel raised a number of issues of arguable merit that establish Sixth Amendment violations of ineffective assistance of counsel. See Brief for Respondent 15, n. 7.

479 A. 2d, at 571.[3] Because the trial court had satisfied neither the requirements of *Anders* nor *McClendon*,[4] the Superior Court remanded the case and did not specify which set of procedures the trial court was to follow.[5]

It is more than conjecture that the *Anders* requirements may never be imposed in this case, given the alternative availability of *McClendon* as a source of duties in Pennsylvania. After the present case was decided, the Superior Court held that the *McClendon* procedures—*not* the *Anders* requirements—are required on collateral review. *Commonwealth* v. *McGeth*, 347 Pa. Super. 333, 344–345, 500 A. 2d 860, 866 (1985). The Pennsylvania Supreme Court has never held that *Anders* procedures are required on collateral review. In *Commonwealth* v. *Lowenberg*, 493 Pa. 232, 235, 425 A. 2d 1100, 1101–1102 (1981), the State Supreme Court was equally divided on this issue and therefore affirmed the lower court ruling that the *Anders* procedures are required

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[3] The Superior Court acknowledged that Pennsylvania appellate courts do not always require that trial courts follow the *Anders* procedure, but may allow the appointed counsel to withdraw if the lower court complies with the alternative requirements enunciated by the Pennsylvania Supreme Court in *Commonwealth* v. *McClendon*, 495 Pa. 467, 434 A. 2d 1185 (1981). 330 Pa. Super., at 320, 479 A. 2d, at 571 ("[C]ompliance was unnecessary" if counsel conducted an exhaustive examination of the record and the lower court concludes that the petitioner's claims are completely frivolous).

[4] The Superior Court found that the *McClendon* requirements were not satisfied. "Here, there is no mention of an exhaustive search nor the required finding that the case is wholly frivolous. Counsel must certify to an exhaustive reading and endeavor to uncover all possible issues for review so that the frivolity of the appeal may be determined by the lower court, or . . . at the appellate level." 330 Pa. Super., at 322, 479 A. 2d, at 572 (footnotes omitted).

[5] The Superior Court's instructions to the trial court were as follows:

"Since the procedures utilized herein were defective, they acted to deprive appellant of her right to adequate representation. We remand for an evidentiary hearing on the claims raised in appellant's brief and any other issues discerned by counsel after an exhaustive search of the record in accordance with this opinion." *Id.*, at 323–324, 479 A. 2d, at 573.

only on direct appeal from a criminal conviction, and *not* on collateral review. Because Pennsylvania does not require that *Anders* be followed on collateral review, there is no occasion for today's decision.

It is also unnecessary to decide in this case the adequacy of the *McClendon* procedures. The Commonwealth does not oppose the imposition of the *McClendon* requirements. Indeed, the Commonwealth approves of the *McClendon* requirements as a "flexible and enlightened approach." Brief for Petitioner 18, n. 11. Since it is not clear that the parties in this case have adversarial legal interests, there is no case or controversy regarding the adequacy of *McClendon*. See *Steffel* v. *Thompson*, 415 U. S. 452, 460 (1974).[6]

In order to avoid issuing an advisory opinion, we should await a final judgment by a Pennsylvania court that requires the imposition of the *Anders* procedures.[7] Since review of the trial court's eventual decision may be sought later in both the state appellate courts and this Court, we should

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[6] There are several additional reasons why the Court should not decide the validity of the *McClendon* requirements. First, any holding that determines the applicability of the *McClendon* requirements to collateral review proceedings is inappropriate because of the lack of a final judgment. Since the trial court has not yet chosen which procedure to follow, there is no final judgment or decree that we can review. Cf. *Republic Gas Co.* v. *Oklahoma*, 334 U. S. 62, 69–71 (1948). Second, the validity of the *McClendon* requirements is not at issue in this case, and is not briefed by the litigants. Third, the *McClendon* issue is not ripe for review. The trial court may decide not to impose the *McClendon* requirements, and thus any opinion on this issue is an impermissible advisory opinion.

[7] Such an approach is consistent with the past practices of the Court:

"It has long been this Court's 'considered practice not to decide abstract, hypothetical or contingent questions, . . . or to decide any constitutional question in advance of the necessity for its decision, . . . or to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied, . . . or to decide any constitutional question except with reference to the particular facts to which it is to be applied . . . .'" *Public Workers* v. *Mitchell*, 330 U. S. 75, 90, n. 22 (1947); see also *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469, 510 (1975) (REHNQUIST, J., dissenting).

avoid prematurely reversing the decision of an inferior state court.[8] Thus, I would dismiss the petition as improvidently granted.

III

I also disagree with the Court's holding that trial counsel's abandonment of his client without notice and his advocacy against Finley's petition did not violate her federal rights to due process and equal protection. The Court denigrates Finley's right to effective assistance of counsel by noting that this case involves only postconviction review by a trial court. It argues that such review is similar to discretionary appellate review, for which appointment of counsel is not required by the Federal Constitution under *Ross* v. *Moffitt*, 417 U. S. 600, 621 (1974). See *ante*, at 555. This case, however, is readily distinguished from *Ross*. Under state law, Finley has a *mandatory* right to *effective* assistance of counsel, and the trial court is *required* to review the issues of arguable merit.

In construing the PCHA legislation, the Pennsylvania Supreme Court concluded:

> "We pause to note that the mandatory appointment requirement is a salutary one and best comports with efficient judicial administration and serious consideration of a prisoner's claims. Counsel's ability to frame the issues in a legally meaningful fashion insures the trial court that all relevant considerations will be brought to its attention. . . ." *Commonwealth* v. *Mitchell*, 427 Pa. 395, 397, 235 A. 2d 148, 149 (1967).

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[8] In the instant case, the Commonwealth sought discretionary review of the Superior Court's decision in the Pennsylvania Supreme Court. Review was granted, and the matter was briefed and argued. The court, however, ordered that the appeal be dismissed "as having been improvidently granted." 510 Pa. 304, 507 A. 2d 822 (1986). Under Pennsylvania law, the State Supreme Court's refusal to review is not a decision on the merits. See *Commonwealth* v. *Britton*, 509 Pa. 620, 506 A. 2d 895 (1986); *Dayton* v. *Dayton*, 509 Pa. 632, 506 A. 2d 901 (1986).

The Pennsylvania Legislature recognized the importance of collateral review by adopting the PCHA, which requires effective assistance of counsel. 330 Pa. Super., at 321, 479 A. 2d, at 572. An appointed counsel's determination that a petitioner's claims have no merit may completely preclude consideration of meritorious claims. Pennsylvania law allows summary dismissal, without appointment of counsel, of petitions which raise claims that were the subject of previous PCHA petitions. Pa. Rule Crim. Proc. 1504.[9]

The Court justifies its holding on the ground that a State may refuse indigent prisoners any assistance of counsel and therefore has the lesser power to deliver inadequate legal services. But it has long been settled that even if a right to counsel is not required by the Federal Constitution, when a State affords this right it must ensure that it is not withdrawn in a manner inconsistent with equal protection and due process. See *Evitts* v. *Lucey*, 469 U. S. 387, 400 (1985); *Ross* v. *Moffitt*, *supra; Johnson* v. *Avery*, 393 U. S. 483, 488 (1969); *Smith* v. *Bennett*, 365 U. S. 708, 713 (1961).

"'Due process' emphasizes fairness between the State and the individual dealing with the State." *Ross* v. *Moffitt*, *supra*, at 609. "[F]undamental fairness entitles indigent defendants to 'an adequate opportunity to present their claims fairly within the adversary system.'" *Ake* v. *Oklahoma*, 470 U. S. 68, 77 (1985) (citation omitted). In my view, the Federal Constitution requires that the *Anders* procedures must be followed when a State provides assistance of counsel in collateral proceedings. As the Court previously explained:

> "This requirement would not force appointed counsel to brief his case against his client but would merely afford the latter that advocacy which a nonindigent defendant

[9] This right to counsel on collateral review is of special significance to Finley because the Superior Court found several arguably meritorious issues which indicate that effective assistance of counsel was not rendered both in the trial that resulted in her conviction and in the handling of the postconviction petition. 330 Pa. Super., at 322–323, 479 A. 2d, at 572–573.

is able to obtain. It would also induce the court to pursue all the more vigorously its own review because of the ready references not only to the record, but also to the legal authorities as furnished it by counsel. The no-merit letter, on the other hand, affords neither the client nor the court any aid. The former must shift entirely for himself while the court has only the cold record which it must review without the help of an advocate. Moreover, such handling would tend to protect counsel from the constantly increasing charge that he was ineffective and had not handled the case with that diligence to which an indigent defendant is entitled." *Anders* v. *California*, 386 U. S., at 745.

Even if the *Anders* requirements were not mandated by due process, the performance of Finley's counsel clearly violated minimal standards of fundamental fairness. At a minimum, due process requires that counsel perform as an advocate. The "very premise of our adversarial system . . . is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." *Herring* v. *New York*, 422 U. S. 853, 862 (1975). It is fundamentally unfair for appointed counsel to argue against his or her client's claims without providing notice or an opportunity for that client either to proceed *pro se* or to seek the advice of another attorney. "It is one thing for a prisoner to be told that appointed counsel sees no way to help him, and quite another for him to feel sandbagged when counsel appointed by one arm of the government seems to be helping another to seal his doom." *Suggs* v. *United States*, 129 U. S. App. D. C. 133, 136, 391 F. 2d 971, 974 (1968). Indeed, even the Commonwealth concedes that "due process requires that the attorney conduct a conscientious and meaningful review of the case and the record." Tr. of Oral Arg. 14. The Superior Court's criticism of the trial counsel's review of the record as insufficient was in those terms, since Finley's appellate counsel was able to list several issues of

arguable merit based on the "bare record available in the Superior Court." 330 Pa. Super., at 323, 479 A. 2d, at 572.

The performance of Finley's counsel also violated the Equal Protection Clause. Equal protection demands that States eliminate unfair disparities between classes of individuals. There is no rational basis for assuming that petitions submitted by indigents for collateral review will be less meritorious than those of other defendants. It is hard to believe that retained counsel would file a letter that advocates dismissal of a client's case without notice to the client and without conducting a conscientious assessment of the record. Since an impoverished prisoner must take whatever a State affords, it is imperative that the efforts of court-appointed counsel be scrutinized so that the indigent receives adequate representation. Equal protection therefore requires the imposition of the *Anders* requirements. Otherwise, "[t]he indigent, where the record is unclear or the errors are hidden, has only the right to a meaningless ritual," while a person who can afford it obtains meaningful review. *Douglas* v. *California*, 372 U. S. 353, 358 (1963).

IV

The Court transforms Finley's right to effective counsel into a right to a meaningless ritual.[10] In the face of the identification by the Superior Court of three possible means of ensuring adequate representation, the Court was without jurisdiction to render its decision. "Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground." *Michigan* v. *Long*, 463 U. S., at

[10] I disagree with the Court's interpretation that the Commonwealth's obligations, as a matter of state law, were conclusively determined by the trial court. In my view, therefore, today's holding does not preclude a determination of this case under the Commonwealth's own laws and Constitution. See *South Dakota* v. *Opperman*, 428 U. S. 364, 396 (1976) (MARSHALL, J., dissenting).

1040. I would therefore dismiss the petition as improvidently granted.

I respectfully dissent.

JUSTICE STEVENS, dissenting.

Without bothering to identify the basis for federal jurisdiction in this case, the Court blithely assumes that the decision below does not rest on an independent and adequate state ground. I cannot agree. State procedural rules are often patterned after federal precedents, but they are, nonetheless, rules of state law. In this case, the Pennsylvania Superior Court explicitly stated that it was applying "*Pennsylvania law* concerning procedures to be followed when a court-appointed attorney sees no basis for an appeal." 330 Pa. Super. 313, 318, 479 A. 2d 568, 570 (1984) (emphasis added). As for federal precedents, the court simply noted that state law in the area was "derived from" this Court's 1967 decision in *Anders* v. *California*, 386 U. S. 738. Thus, I believe that the "plain statement" test of *Michigan* v. *Long*, 463 U. S. 1032, 1037–1044 (1983), is satisfied, and that the decision on review rested on independent and adequate state grounds. Moreover, it seems rather clear to me, for the reasons stated in Part I of JUSTICE BRENNAN's dissent, that the decision below did not rest alone on that portion of the discussion which could conceivably be considered to be based on *Anders*. See *ante*, at 561–563. In either event, there is no basis for concluding that the Pennsylvania Superior Court's decision to remand this case stemmed from its belief that the Federal Constitution required it to do so.

But even if I believed that the court relied on some federal precedents, and that the sacrosanct "plain statement" were missing, I would still conclude that this Court lacks jurisdiction over the case. It is unrealistic—and quite unfair—to expect the judges in the Philadelphia office of the Superior Court of Pennsylvania to acquire and retain familiarity with this Court's jurisprudence concerning the intricacies of our own jurisdiction. The occasions on which the decisions of

the judges in that office will be subject to direct review by the Supreme Court of the United States are far too rare to make it appropriate for them to become familiar with the *Michigan* v. *Long* presumption. It is denigrating enough to require the justices of the 50 State Supreme Courts to include such a statement in their decisions, without demanding the same of the 716 state appellate judges or all 20,000 state-court judges who decide cases that could conceivably be reviewed by this Court.*

Before the Commonwealth of Pennsylvania petitioned this Court for a writ of certiorari, it sought review of the Superior Court's judgment in the Supreme Court of Pennsylvania. Had it not done so, this Court could not have accepted jurisdiction of the petition because cases originating in a state court may not be reviewed here unless the judgment was "rendered by the highest court of a State in which a decision could be had." 28 U. S. C. § 1257. When the Pennsylvania Supreme Court dismissed the Commonwealth's appeal as improvidently granted, it did not accompany its order with any statement of reasons. We thus have no way of knowing whether its action was based on a correct interpretation of Pennsylvania law or an incorrect interpretation of federal law.

In my opinion, due respect for the courts of the States, as well as our separate interest in the "avoidance of rendering advisory opinions," *Michigan* v. *Long*, *supra*, at 1040, strongly favors the former presumption. I would not take yet another step down the jurisdiction-expanding path marked by *Michigan* v. *Long*, see *Delaware* v. *Van Arsdall*,

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*These figures are based on 1984 statistics as reported in two recent publications. See Conference of State Court Administrators and the Court Statistics and Information Project of the National Center for State Courts, R. Roper, M. Elsner, & V. Flango, 1984 State Appellate Court Jurisdiction Guide for Statistical Reporting 5–9 (1985) (figure for appellate judges); National Center for State Courts, State Court Caseload Statistics: Annual Report 1984, pp. 195–248 (June 1986) (figure for all judges).

475 U. S. 673, 689 (1986) (STEVENS, J., dissenting). Instead, I would dismiss the writ for want of jurisdiction.

I respectfully dissent.

Syllabus

NATIONAL LABOR RELATIONS BOARD *v.* INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 340

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

No. 85–1924. Argued February 25, 1987—Decided May 18, 1987

Respondent Union fined two of its members (Schoux and Choate), who worked as supervisors, for violating its constitution by working for employers that did not have a collective-bargaining agreement with the Union. The employers filed unfair labor practice charges with the National Labor Relations Board (NLRB), alleging that the Union had violated § 8(b)(1)(B) of the National Labor Relations Act (Act), which makes it an unfair labor practice for a union "to restrain or coerce . . . an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances." An Administrative Law Judge (ALJ) agreed, finding, *inter alia*, that (1) Schoux and Choate were supervisors within the meaning of § 2(11) of the Act, (2) under the "reservoir doctrine," they were also employer representatives for the purposes of "collective bargaining or the adjustment of grievances" covered by § 8(b)(1)(B), even though neither performed such duties, since § 2(11) supervisors form the logical "reservoir" from which the employer is likely to select his future representatives for collective bargaining or grievance adjustment, and (3) the Union had restrained or coerced the employers within the meaning of § 8(b)(1)(B) even though the Union did not have a collective-bargaining relationship with the employers at the time of the fines, since the Union's action could have the *effect* of forcing the representatives to quit, and since, in any event, the Union intended to represent the employers' employees in the future. The NLRB adopted the ALJ's findings and conclusions, entered an order against the Union, and sought enforcement of its order in the Court of Appeals. Reversing the finding of a § 8(b)(1)(B) violation, the court agreed that Schoux and Choate were employer representatives for § 8(b)(1)(B) purposes, but rejected the NLRB's conclusion that the Union intended to represent the employers' employees. The court held that if a union does not represent or intend to represent the complaining employer's employees, there can be no § 8(b)(1)(B) violation when the union disciplines its members who are the employer's designated bargaining representatives.

Held: A union does not violate § 8(b)(1)(B) when it disciplines a supervisor union member who does not participate as the employer's representative in collective bargaining or grievance adjustment, and whose employer has not entered into a collective-bargaining agreement with the union. Pp. 580–596.

(a) Union discipline of a supervisor-member is prohibited under § 8(b)(1)(B) only when that member engages in § 8(b)(1)(B) activities—that is, collective bargaining, grievance adjustment, or some other closely related activity, such as contract interpretation. Union discipline violates § 8(b)(1)(B) only when it may adversely affect the supervisor's future conduct in performing § 8(b)(1)(B) duties, and such an adverse effect exists only when the supervisor is disciplined for behavior that occurs while the supervisor has § 8(b)(1)(B) duties. The general impact of union discipline on the supervisor's loyalty to the employer is insufficient to create a § 8(b)(1)(B) violation. *Florida Power & Light Co.* v. *Electrical Workers*, 417 U. S. 790; *American Broadcasting Cos.* v. *Writers Guild, West, Inc.*, 437 U. S. 411. The NLRB's "reservoir doctrine," involving discipline of supervisors who have no § 8(b)(1)(B) duties, cannot be reconciled with the Act's structure or the limited construction of § 8(b)(1)(B) in *Florida Power* and *American Broadcasting Cos.* Thus, the Union's discipline of Schoux and Choate was not an unfair labor practice. Pp. 580–589.

(b) Furthermore, the absence of a collective-bargaining relationship between the employers and the Union when the latter enforced its no-contract-no-work rule against its supervisor-members made the possibility that the Union's discipline of the supervisors would coerce the employers too attenuated to form the basis of an unfair labor practice charge. Such discipline will not affect the manner in which employer representatives perform grievance-adjustment or collective-bargaining tasks. Nor did the Union's discipline of the supervisors coerce the employers in their *selection* of § 8(b)(1)(B) representatives. Although any union member who valued union membership would be less willing to serve if the cost of service were loss of membership, which, in turn, would limit the size of the supervisor pool from which an employer could select its representatives, this minimal effect on the employer's selection of § 8(b)(1)(B) representatives is insufficient to support a § 8(b)(1)(B) charge. Moreover, an *employer* is not restrained or coerced in the selection of its representatives because a *union member* must accept union expulsion or other discipline to continue in a supervisory position. Since union members have a right to resign from a union at any time and avoid imposition of union discipline, the employer may require that its representatives leave the union. Pp. 589–596.

780 F. 2d 1489, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which MARSHALL, BLACKMUN, POWELL, and STEVENS, JJ., joined. SCALIA, J., filed an opinion concurring in the judgment, *post*, p. 596. WHITE, J., filed a dissenting opinion, in which REHNQUIST, C. J., and O'CONNOR, J., joined, *post*, p. 598.

Jerrold J. Ganzfried argued the cause for petitioner. With him on the briefs were *Solicitor General Fried*, *Deputy Solicitor General Cohen*, *Norton J. Come*, and *Linda Sher*.

Laurence J. Cohen argued the cause for respondent. With him on the brief were *Larry D. Silver*, *Kathryn A. Sure*, *Mark S. Renner*, and *Laurence Gold*.*

JUSTICE BRENNAN delivered the opinion of the Court.

The question for decision is whether a union "restrain[s] or coerce[s] . . . an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances," 29 U. S. C. § 158(b)(1)(B), when it disciplines a supervisor union member who does not participate in collective bargaining or adjust contractual grievances, and whose employer has not entered into a collective-bargaining agreement with the union.

I

Royal Electric (Royal) and Nutter Electric (Nutter) are members of the National Electrical Contractors Association (NECA). In May 1981, the last in a series of collective-bargaining agreements between NECA and the International Brotherhood of Electrical Workers, Local 340 (IBEW or Union), expired. Negotiations for a new agreement failed shortly thereafter, and the Union struck all NECA employers, including Royal and Nutter.

**Mark R. Thierman* filed a brief for the Sacramento Valley Chapter of the National Electrical Contractors Association, Inc., et al. as *amici curiae* urging reversal.

David M. Silberman filed a brief for the American Federation of Labor and Congress of Industrial Organizations as *amicus curiae* urging affirmance.

The strike lasted several months. On September 15, 1981, the Union sent NECA a disclaimer of interest "in representing . . . the employees of the multi-[employer] bargaining unit previously established," 271 N. L. R. B. 995, 996 (1984); NECA accepted the disclaimer the following day. The Union then filed petitions seeking to represent the employees of 17 NECA members in single-employer units. Neither then nor thereafter did the Union file a petition to represent the employees of Royal or Nutter.

The Union's attempt to represent the employees of single-employer units was unsuccessful. On October 1, 1981, NECA signed an agreement with the National Association of Independent Unions (NAIU). Royal and Nutter adopted NECA's agreement with NAIU.

The unfair labor practice charges in this case arise from the Union's imposition of fines on two of its members, Albert Schoux and Ted Choate, who work as supervisors for Royal and Nutter respectively. In the fall of 1982, internal Union charges were filed against Schoux and Choate, alleging that they had violated the Union's constitution by working for employers that did not have a collective-bargaining relationship with the Union.[1] Each was found guilty as charged; Schoux was fined $8,200 and Choate $6,000.

Royal and Nutter then filed unfair labor practice charges against the IBEW, alleging that, by fining Schoux and Choate, the Union had restrained or coerced Royal and Nutter "in the selection of [their] representatives for the purposes of collective bargaining or the adjustment of grievances" in violation of § 8(b)(1)(B) of the National Labor Relations Act (NLRA or Act), as amended, 61 Stat. 140, 29 U. S. C. § 158(b)(1)(B). The Administrative Law Judge (ALJ) agreed. First, he found that Schoux and Choate were

[1] The Constitution of the IBEW forbids members to "[w]or[k] for, or on behalf of, any employer . . . whose position is adverse or detrimental to the I. B. E. W." App. 152.

supervisors within the meaning of § 2(11) of the NLRA.[2] He then relied on the so-called "reservoir doctrine" to find that they were also part of the narrower category of "[employer] representatives for [the purposes of] collective bargaining or grievance adjustment" covered by § 8(b)(1)(B), despite the fact that neither performed such duties. 271 N. L. R. B., at 997 and 998. Under the reservoir doctrine, the National Labor Relations Board (NLRB or Board) expansively interprets the phrase "representativ[e] for the purposes of collective bargaining or the adjustment of grievances" to include all supervisors within the meaning of § 2(11), on the ground that "such individuals form the logical 'reservoir' from which the employer is likely to select his representatives for collective bargaining or grievance adjustment." *Id.*, at 997. The fact that a supervisor might be selected to perform these tasks in the future is therefore sufficient to classify him or her as a § 8(b)(1)(B) representative.

The ALJ further determined that, even aside from the reservoir doctrine, Schoux was a § 8(b)(1)(B) employer representative because he "granted employees time off and resolved personal complaints or problems regarding job assignments." *Ibid.* The ALJ relied on the Board's broad interpretation of the term grievances "as used in both Section 2(11) and Section 8(b)(1)(B) so as to include not only contractual grievances but also personal grievances." *Ibid.*

On this reasoning, the ALJ held that Schoux and Choate acted as grievance-adjustment or collective-bargaining representatives for their employers under § 8(b)(1)(B). He found that "'the reasonably foreseeable and intended effect of [the

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[2] "The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." 29 U. S. C. § 152(11).

Union's] discipline is that the supervisor-member will cease working'" for the nonsignatory employer, "'thereby depriving the employer of the grievance adjustment services of his chosen representative.'" *Id.*, at 1000 (quoting *Plumbers Local 364*, 254 N. L. R. B. 1123, 1125 (1981)). Consequently, the ALJ decided that, by fining Schoux and Choate for working for Royal and Nutter, the Union had restrained and coerced the employers in the selection of representatives for grievance adjustment and collective bargaining. 271 N. L. R. B., at 1000 and 1002.

Finally, the ALJ rejected the Union's argument that no violation of § 8(b)(1)(B) could occur when a union did not have a collective-bargaining relationship with the employer at the time the supervisor-member was disciplined. IBEW argued that a union which neither represented nor intended to represent the employees of a company had no incentive to influence the company's choice of representative, or to affect the performance of grievance-adjustment or collective-bargaining duties. The ALJ rejected this argument for two reasons. First, he concluded that it was irrelevant that the Union did not intend to interfere with the employer's relationship with its § 8(b)(1)(B) representatives, because the discipline could nonetheless have the *effect* of forcing the representative to quit, depriving the employer of his or her services. Second, he determined that the argument was inapplicable in this case because the Union *did* seek to represent the employees of Royal and Nutter at some future date. *Id.*, at 1002.

The NLRB adopted the ALJ's findings and conclusions. It ordered the Union to rescind the fines levied on Schoux and Choate, to expunge from their records the disciplinary action taken against them, and to post appropriate notices. On November 8, 1984, the Board sought enforcement of its order in the Court of Appeals for the Ninth Circuit.

The Court of Appeals agreed with the NLRB's conclusion that Schoux and Choate were representatives of the em-

ployer for the purposes of § 8(b)(1)(B). It rejected, however, the Board's conclusion that the Union did, in fact, intend to represent the employees of Royal and Nutter.[3] As a result, the court reversed the finding of a § 8(b)(1)(B) violation, holding that "when a union does not represent or intend to represent the complaining company's employees[,] there can be no Section 8(b)(1)(B) violation when a union disciplines members even if they are designated bargaining representatives." 780 F. 2d 1489, 1492 (CA9 1986). The court relied on its previous decision in *NLRB* v. *International Brotherhood of Electrical Workers*, 714 F. 2d 870, 871 (CA9 1980), where it had reasoned that a union that does not represent or intend to represent a company's employees "ha[s] no incentive to either influence [the employer's] choice of bargaining representatives or affect [the supervisor-member's] loyalty to [the employer]." We granted certiorari, 479 U. S. 811 (1986), to resolve a conflict in the Circuits.[4] We now affirm.

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[3] We uphold the rejection of the NLRB's conclusion that the Union had demonstrated an intent to represent the employees of Royal and Nutter. The Court of Appeals stated:

"We hold that where a Union has filed a disclaimer of interest, and has made no subsequent organizing efforts, its discipline of members fully a year after the termination of the bargaining relationship between the Union and the employers cannot reasonably be construed as an effort to restrain or coerce the employer. We require some evidence of specific overt acts such as picketing, handbilling, making statements of interest to the employers, or passing out opposition cards to find a desire to represent these particular employees. Here there was no evidence of such an intent . . . ." 780 F. 2d 1489, 1492–1493 (CA9 1986).

[4] The Court of Appeals for the Eleventh Circuit has held that even if a union does not represent or intend to represent a company's employees, discipline that pressures a supervisor-member to cease working for a nonunion company violates § 8(b)(1)(B). *NLRB* v. *International Brotherhood of Electrical Workers*, 703 F. 2d 501 (1983). In the present case, and in *NLRB* v. *International Brotherhood of Electrical Workers*, 714 F. 2d 870 (1980), the Court of Appeals for the Ninth Circuit reached the opposite conclusion.

II

We first review the Court of Appeals' holding that Schoux and Choate were § 8(b)(1)(B) employer representatives. To address this issue, it is first necessary to retrace briefly the treatment of § 8(b)(1)(B) by the Board and this Court.

Section 8(b)(1)(B) of the NLRA provides:

> "It shall be an unfair labor practice for a labor organization or its agents—
>
> "(1) to restrain or coerce . . . (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances."

This section was enacted to prevent a union from exerting direct pressure on an employer to force it into a multiemployer bargaining unit or to dictate its choice of representatives for the settlement of employee grievances. S. Rep. No. 105, 80th Cong., 1st Sess., pt. 1, p. 21 (1947).

For two decades after enactment, the Board construed § 8(b)(1)(B) to prohibit only union pressure applied directly to the employer and intended to compel it to replace its chosen representative. In 1968, however, the Board substantially extended § 8(b)(1)(B) in *San Francisco-Oakland Mailers' Union No. 18 (Northwest Publications, Inc.)*, 172 N. L. R. B. 2173 *(Oakland Mailers)*. The NLRB held that a union violates § 8(b)(1)(B) when it disciplines an employer representative for the manner in which his or her § 8(b)(1)(B) duties are performed. The Board reasoned that the union "interfer[ed] with the [employer's] control over its representatives" by attempting "to compel the employer's foremen to take prounion positions in interpreting the collective bargaining agreement," because the employer "would have to replace its foremen or face *de facto* nonrepresentation by them." *Id.*, at 2173–2174. Hence, the Board concluded that union pressure designed to alter the manner in which an employer representative performs § 8(b)(1)(B) functions coerces the employer in its selection of that § 8(b)(1)(B) representative.

This decision extended § 8(b)(1)(B) in two ways. First, it prohibited *indirect* coercion of the employer's selection of a representative that might result from union pressure on the employer representative. Second, it suggested that contract interpretation is so closely related to collective bargaining that it, too, is a § 8(b)(1)(B) activity. This Court has since indicated that the Board's expansion of § 8(b)(1)(B) in *Oakland Mailers* was at best "within the outer limits" of the section. *Florida Power & Light Co.* v. *Electrical Workers*, 417 U. S. 790, 805 (1974).

In the meantime, however, subsequent decisions of the NLRB further extended § 8(b)(1)(B) to prohibit union discipline of employer representatives for the manner in which they performed supervisory functions *other than* collective bargaining, contract interpretation, and grievance adjustment. In the Board's view, "disciplining . . . a supervisor whenever he was engaged in management or supervisory activities, even though his collective-bargaining or grievance-adjustment duties were not involved" would have the same coercive effect as disciplining an employer representative engaged in § 8(b)(1)(B) duties. *Id.*, at 802. Section 8(b)(1)(B) became, in the eyes of the Board, "a general prohibition of a union's disciplining supervisor-members for their conduct in the course of representing the interests of their employers." *Ibid.*

In *Florida Power*, this expansion came to an abrupt halt; indeed a retreat was called. The Court held that § 8(b)(1)(B) cannot be read to prohibit discipline of employer representatives for performance of rank-and-file work during a strike. The decision created a restrictive "adverse-effect" test to determine when § 8(b)(1)(B) is violated:

> "Nowhere in the legislative history is there to be found any implication that Congress sought to extend protection to the employer from union restraint or coercion when engaged in any activity other than the *selection* of its representatives for the purposes of collective

> bargaining and grievance adjustment. The conclusion is thus inescapable that a union's discipline of one of its members who is a supervisory employee can constitute a violation of § 8(b)(1)(B) *only when that discipline may adversely affect the supervisor's conduct in performing the duties of, and acting in his capacity as, grievance adjuster or collective bargainer on behalf of the employer.*" 417 U. S., at 804–805 (emphasis added).

The Court then found that the union's discipline of employer representatives who crossed a picket line to do struck work could not adversely affect performance of § 8(b)(1)(B) duties. In so finding, the Court stressed that the employer representatives "were not engaged in collective bargaining or grievance adjustment, or in any activities related thereto." *Id.*, at 805.

The Court's language implicitly limited the application of the adverse-effect test: an adverse effect on future § 8(b)(1)(B) activities exists *only* when an employer representative is disciplined for behavior that occurs *while he or she is engaged in § 8(b)(1)(B) duties*—that is, "collective bargaining or grievance adjustment, or . . . any activities related thereto." *Ibid.*[5] This conclusion is supported by

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[5] Commentators agree that the test has this limited scope. See, *e. g.*, Comment, Section 8(b)(1)(B) of the National Labor Relations Act and Union Discipline of Supervisor-Members after *Writers Guild:* Equipoise or Imbalance?, 1978 S. Ill. U. L. J. 453, 464 ("By intimating that section 8(b)(1)(B) is limited to protecting supervisors from discipline when they are specifically representing management in collective bargaining and the adjustment of grievances, the Court while not specifically overruling *Oakland Mailers*, seemed to be restricting the post-1968 extension of the section"); Comment, Section 8(b)(1)(B), National Labor Relations Act: When Does Union Discipline of Supervisor-Members Constitute Restraint or Coercion of the Selection of Employer Representatives?, 1976 Wis. L. Rev. 866, 882–883:

"The Court's use of the word 'engaged' implies that for a union to violate section 8(b)(1)(B) a supervisor must be disciplined for actually engaging in grievance adjustment, collective bargaining, or related activities. A mere

the Court's determination that the general impact of union discipline on a § 8(b)(1)(B) representative's loyalty to the employer is insufficient to create a § 8(b)(1)(B) violation. The Court recognized that a "likely effect" of union discipline of the employer representative for performing tasks other than grievance adjustment and collective bargaining would be "to make [the representative] subservient to the union's wishes when he performs those functions in the future." *Id.*, at 807. Nonetheless the Court refused to consider this potential problem of conflicting loyalties an adverse effect of union discipline because Congress did not design § 8(b)(1)(B) to guarantee employers the undivided loyalty of § 8(b)(1)(B) representatives.[6] Based on a review of the legislative history of §§ 2(3), 2(11), 14(a), and 8(b)(1)(B) of the Act,[7] the Court held:

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theoretical connection to those duties—a potential fear of the union by the supervisor-member or the lack of undivided loyalty to the employer caused by the supervisor-member's honoring of the picket line—is too remote to cause a section 8(b)(1)(B) violation. In the Court's view it would appear that a violation of the section will occur only when the supervisor is disciplined while he or she is actually performing one of the protected activities."

[6] The Court stated:

"The concern expressed in this argument is a very real one, but the problem is one that Congress addressed, not through § 8(b)(1)(B), but through a completely different legislative route. Specifically, Congress in 1947 amended the definition of 'employee' in § 2(3), 29 U. S. C. § 152(3), to exclude those denominated supervisors under § 2(11), . . . thereby excluding them from coverage of the Act." *Florida Power*, 417 U. S., at 807.

[7] Section 2(3), 29 U. S. C. § 152(3), provides in pertinent part:

"The term 'employee' shall include any employee, . . . but shall not include . . . any individual employed as a supervisor . . . ."

Section 2(11), 29 U. S. C. § 152(11), which defines the term "supervisor," is set forth in n. 2, *supra*.

Section 14(a), 29 U. S. C. § 164(a), reveals another part of the congressional resolution of the conflict-of-loyalty question:

"Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this subchapter shall be compelled to deem individuals de-

> "Congress' solution [to the problem of conflicting loyalties] was essentially one of providing the employer with an option. On the one hand, he is at liberty to demand absolute loyalty from his supervisory personnel by insisting, on pain of discharge, that they neither participate in, nor retain membership in, a labor organization. Alternatively, an employer who wishes to do so can permit his supervisors to join or retain their membership in labor unions, resolving such conflicts as arise through the traditional procedures of collective bargaining. But it is quite apparent, given the statutory language and the particular concerns that the legislative history shows motivated Congress to enact § 8(b)(1)(B), that it did not intend to make *that* provision any part of the solution to the generalized problem of supervisor-member conflict of loyalties." *Id.*, at 812–813 (citation omitted; footnote omitted).

In addition, the Court stated that it was willing to assume that "the Board's *Oakland Mailers* decision fell within the outer limits" of the adverse-effect test. *Id.*, at 805. Thus, implicitly, the Board went beyond those limits "[i]n . . . subsequent cases . . . [where] the Board held that the same coercive effect was likely to arise from the disciplining of a supervisor whenever he was engaged in management or supervisory activities, even though his collective-bargaining or grievance-adjusting duties were not involved." *Id.*, at 801–802.

Four years later, in *American Broadcasting Cos.* v. *Writers Guild, West, Inc.*, 437 U. S. 411 (1978) *(ABC)*, the Court applied the adverse-effect test enunciated in *Florida Power* and held that union discipline of employer representatives who performed § 8(b)(1)(B) duties, specifically grievance adjustment, during a strike violated the employer's rights under § 8(b)(1)(B):

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fined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining."

> "[T]he Court in *[Florida Power]* delineated the boundaries of when that 'carryover' effect would violate § 8(b)(1)(B): whenever such discipline may adversely affect the supervisor's conduct *in his capacity as a grievance adjustor or collective bargainer.* In these situations—that is, when such impact might be felt—the employer would be deprived of the full services of his representatives and hence would be restrained and coerced in his selection of those representatives." 437 U. S., at 429 (emphasis added).

The Court also held that, before a § 8(b)(1)(B) violation can be sustained, the NLRB must make a factual finding that a union's sanction will adversely affect the employer representative's performance of collective-bargaining or grievance-adjusting duties. *Id.*, at 430.

In *ABC*, therefore, the Board found, and the Court agreed, that the union fines of employer representatives *engaged in* grievance adjustment would have an adverse effect on the supervisor-member's future performance of that same § 8(b)(1)(B) duty. This holding is consistent with the analysis of the Court in *Florida Power*—that § 8(b)(1)(B) forbids only discipline for acts or omissions that occur while an employer representative is engaged in § 8(b)(1)(B) activities.[8] Accord-

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[8] It is also consistent with a plausible theory of human nature. An employer representative who has been disciplined for acts or omissions that occur while he or she is engaged in § 8(b)(1)(B) activity might well be wary about crossing the union when performing such duties in the future. But a supervisor-member who has been disciplined for behavior unrelated to § 8(b)(1)(B) functions is unlikely to react by altering his or her performance of § 8(b)(1)(B) tasks. Cf. Comment, Union Discipline of Supervisors Who are Union Members for Performing Rank-and-File Struck Work Is Not an Unfair Labor Practice, 87 Harv. L. Rev. 458, 468 (1973) ("[S]upervisors can easily distinguish discipline for performing rank-and-file struck work from discipline for the manner in which they represent the employer in [§ 8(b)(1)(B)] processes"). Insofar as dictum in *ABC* suggests that a union may not discipline supervisor-members for acts or omissions that occur while the supervisor-member is engaged in supervisory activities

ingly, we conclude that discipline of a supervisor member is prohibited under § 8(b)(1)(B) only when that member is engaged in § 8(b)(1)(B) activities—that is, collective bargaining, grievance adjustment, or some other closely related activity *(e. g.*, contract interpretation, as in *Oakland Mailers)*.

One obvious ramification of this conclusion is that § 8(b)(1)(B) prohibits discipline of only those supervisor-members who actually perform § 8(b)(1)(B) duties. Clearly a supervisor cannot be disciplined for acts or omissions that occur during performance of § 8(b)(1)(B) duties if he or she has none. We therefore reject the NLRB's "reservoir doctrine," on which the Court of Appeals relied. As stated above, the rationale of the doctrine is that § 2(11) supervisors constitute a reservoir of workers available for selection at some future date as collective-bargaining agents or grievance adjusters. The Board speculates that if a union is permitted to discipline a supervisor-member, even one without § 8(b)(1)(B) duties, the union discipline *might* affect the supervisor's loyalty to his or her employer, the effect of that discipline *might* linger, a smaller pool of loyal supervisors *might* be available, and the employer *might* therefore be restricted in its *future* choice of representatives for § 8(b)(1)(B) purposes. The reservoir doctrine, and this chain of suppositions on which it rests, cannot be reconciled with the structure of the NLRA or with the Court's limited construction of § 8(b)(1)(B) in *Florida Power* and *ABC*.

The structure of the NLRA reveals that in § 8(b)(1)(B) Congress addressed "a separate and far more limited problem than that of conflict of loyalties." *Florida Power*, 417 U. S., at 811, n. 21. One need only compare the scope of § 8(b)(1)(B) with that of other sections of the Act: § 8(b)(1)(B) covers only individuals selected as the employer's representatives "for the purposes of collective bargaining or the adjustment of grievances," while the total class of supervisors

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other than § 8(b)(1)(B) activities, the dictum is inconsistent with *Florida Power*, and we disavow it.

"is defined by § 2(11) to include individuals engaged in a substantially broader range of activities." 417 U. S., at 811, n. 21.

Second, the Board's justification for the "reservoir doctrine" is that it protects the supervisor's loyalty to the employer from the conflicting pressures of union discipline.[9] Yet union discipline of supervisors who engage in no § 8(b)(1)(B) activity coerces the employer only by creating the potential for interference with hypothetical grievance-adjustment or collective-bargaining duties; it cannot have a contemporaneous effect on the performance of § 8(b)(1)(B) duties themselves. This is precisely the vague conflict-of-loyalties concern the Court said could not support a § 8(b)(1)(B) charge against the union. *Florida Power*, *supra*, at 812–813.[10]

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[9] See *NLRB* v. *Rochester Musicians Assn.*, 514 F. 2d 988, 992–993 (CA2 1975) ("The rationale of [the reservoir] doctrine is that supervisors are viewed as a reservoir of manpower available and likely to be chosen as collective bargainers or grievance adjusters at some later date. Since union discipline could affect the supervisor's loyalty to the employer, the employer would be restricted in his choice of future representatives"); *Erie Newspaper Guild* v. *NLRB*, 489 F. 2d 416, 420 (CA3 1973) ("The Board contends that once these supervisors were disciplined by the union, they could no longer be fully loyal to the employer who would be coerced in his future selection of representatives"); *International Assn. of Heat and Frost Insulators & Asbestos Workers (Cork Insulating Co.)*, 189 N. L. R. B. 854 (1971) ("[T]he employer [has a] right . . . to select [collective-bargaining and grievance] representatives from an uncoerced group of supervisors whose loyalty to him has not been prejudiced"). See generally Comment, The Role of Supervisors in Employee Unions, 40 U. Chi. L. Rev. 185, 197 (1972).

[10] For this reason, one Court of Appeals concluded that the Court's decision in *Florida Power* signified the demise of the reservoir doctrine:

"There is surely no more interference with the actual process of grievance adjustment in union discipline of a supervisor who at present plays no part in that process, than there is in discipline of one with actual authority to adjust grievances for performing non-supervisory work. In each case the union's action is too insignificant to affect the management's rights pro-

Finally, the crux of the Court's holding in *ABC* was that the Board must make a factual inquiry whether a union's sanction may adversely affect the employer representative's performance of collective-bargaining or grievance-adjusting duties before a § 8(b)(1)(B) violation can be sustained. 437 U. S., at 430. One simply cannot discern whether discipline will have an adverse impact on a supervisor-member's future performance of § 8(b)(1)(B) duties when their existence is purely hypothetical.[11]

We conclude that the union discipline at issue was not an unfair labor practice. Although both Schoux and Choate were supervisors within the meaning of § 2(11), neither had grievance-adjustment or collective-bargaining responsibilities protected by § 8(b)(1)(B).[12] The possibility that a § 2(11)

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tected by § 8(b)(1)(B)." *NLRB* v. *Rochester Musicians Assn.*, *supra*, at 992–993.

See also Comment, 1978 S. Ill. U. L. J., at 475 ("The Board must find the supervisor-members actually are empowered with real collective bargaining or grievance adjusting functions"); Comment, Changing Interpretation of NLRA Section 8(b)(1)(B)—Union Discipline of Supervisors in the Aftermath of *Florida Power & Light*, 10 John Marshall J. Prac. & Proc. 117, 126 (1976) ("In short, the Court . . . abolished the 'reservoir doctrine'"); cf. *Erie Newspaper Guild* v. *NLRB*, *supra*, at 420 (disapproving "reservoir doctrine" before *Florida Power* was decided).

[11] See Comment, 87 Harv. L. Rev., at 467, n. 65:

"[I]n cases in which the disciplined union members are supervisors but not § 8(b)(1)(B) representatives, a finding of an unfair labor practice will be . . . difficult to justify, since a crucial factor is the impact the discipline will have on the members when they perform collective bargaining and grievance adjustment duties. Although the union discipline could arguably influence fellow supervisors who do perform such duties, or might influence the disciplined supervisors in the performance of any such duties they might be granted in the future, the likely impact on grievance adjustment and collective bargaining is clearly less significant."

[12] The NLRB held in the alternative that because Schoux did adjust *personal* grievances—as opposed to contract grievances—he qualified as a § 8(b)(1)(B) supervisor, even without application of the reservoir doctrine. As a consequence of our conclusion in Part III, *infra*, we need not decide whether the Board's broad definition of grievance—and hence of "griev-

supervisor might someday perform § 8(b)(1)(B) functions and that past discipline might then have an adverse effect on the performance of such duties is simply too speculative to support a finding that an employer has been "restrain[ed] or coerce[d]" "in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances."

III

The Court of Appeals found, as a matter of law, that the Union did not have a collective-bargaining relationship with Royal or Nutter, and that it did not seek to represent their employees in the future. It held that such a finding precluded union liability for violation of § 8(b)(1)(B). The NLRB argues, however, that even under these circumstances, the Union's enforcement of its no-contract-no-work rule against its supervisor-members would restrain or coerce Royal and Nutter by affecting the way in which the supervisor-members performed their § 8(b)(1)(B) tasks and by restricting the selection of § 8(b)(1)(B) representatives. On reasoning analogous to that in Part II, we find that the absence of a collective-bargaining relationship between the union and the employer, like the absence of § 8(b)(1)(B) responsibilities in a disciplined supervisor-member, makes the possibility that the Union's discipline of Schoux and Choate will coerce Royal and Nutter too attenuated to form the basis of an unfair labor practice charge.

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ance adjustment"—is consistent with the narrow purpose and scope of § 8(b)(1)(B). We observe, however, that in *Florida Power* the Court said that grievance adjustment is a "particular and explicitly stated activity." 417 U. S., at 803. See also D. Bok & J. Dunlop, Labor and the American Community 220 (1970) ("grievance" is a "disput[e] over the application of the contract"). Other sections of the Labor Management Relations Act, 1947, similarly suggest a narrow meaning. See §§ 203 and 204, 29 U. S. C. §§ 173, 174. See also Comment, 1976 Wis. L. Rev., at 879 ("In *Florida Power* the Supreme Court appears to have defined both [collective bargaining and grievance adjustment] very narrowly").

First, the discipline will not affect the manner in which employer representatives perform grievance-adjustment or collective-bargaining tasks. When a union has a collective-bargaining relationship with an employer, it may have an incentive to affect its supervisor-member's handling of grievance-adjustment and collective-bargaining chores. Moreover, union discipline of employer representatives for behavior that occurs during performance of § 8(b)(1)(B) duties might adversely affect the future performance of those duties. See *supra*, at 585–586. But when a union has no collective-bargaining relationship with an employer, and does not seek to establish one, both the incentive to affect a supervisor's performance *and* the possibility that an adverse effect will occur vanish. The union has nothing to gain by interference with the supervisor-member's loyalty during grievance adjustment or collective bargaining; nor can the employer representative reasonably expect that he or she will be subject to discipline for the *manner* in which those duties are performed in the future.[13] In other words, the assumption underpinning *Florida Power* and *ABC*—that an adverse effect can occur simply by virtue of the fact that an employer representative is disciplined for behavior that occurs during performance of § 8(b)(1)(B) tasks—is not applicable when the employer has no continuing relationship with the union.[14]

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[13] Direct coercion of an employer's selection of a § 8(b)(1)(B) representative would always be a § 8(b)(1)(B) violation, whether or not the union has or seeks a bargaining relationship with an employer. This case does not present the question whether indirect coercion of an employer in its selection of a representative through a union's *selective* enforcement of a facially uniform rule would constitute a violation of § 8(b)(1)(B) without regard to whether the union has a bargaining relationship with the employer. The Court of Appeals has suggested that it might. See *NLRB* v. *International Brotherhood of Electrical Workers*, 714 F. 2d, at 872 ("The case may be different if there is evidence that the union's actual purpose in enforcing its bylaw was to interfere with the employer's selection").

[14] In *American Broadcasting Cos.* v. *Writers Guild, West, Inc.*, 437 U. S. 411 (1978) *(ABC)*, the Court found that discipline imposed on grievance-

Second, the Union's discipline of Schoux and Choate does not coerce Royal and Nutter in their *selection* of § 8(b)(1)(B) representatives. Section 8(b)(1)(B) was primarily intended to prevent a union engaged in a long-term relationship with an employer from dictating the latter's choice of representative or the form that representation would take (single-unit or multiemployer unit). See S. Rep. No. 105, 80th Cong., 1st Sess., p. 21 (1947). It was not intended to prevent enforcement of uniform union rules that may occasionally have the incidental effect of making a supervisory position less desirable.

The only sense in which employers (both those with and those without a collective-bargaining relationship with the union) may be coerced in their *selection* of § 8(b)(1)(B) representatives by the application of the no-contract-no-work rule to supervisor-members is that the employer may be left with a smaller pool of individuals from which it may choose its representatives. This is because some union members will be reluctant to serve as § 8(b)(1)(B) representatives if the price is loss of union membership or payment of disciplinary fines.[15]

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handling supervisors who crossed union picket lines violated § 8(b)(1)(B), even though the supervisor-members did not adjust grievances for the striking employees, but only for employees whom the striking union did not represent or desire to represent. *Id.*, at 437–438, n. 37. In that case, however, the union *did* represent some of the employer's employees and therefore had a bargaining relationship with the coerced employer. The union had a continuing relationship with the employer and an incentive (possibly recurrent) to affect the employer representative's performance of § 8(b)(1)(B) duties. In *ABC*, for example, the union needed the support of all employees to make the strike seeking benefits for its members effective.

[15] *ABC* does suggest in dictum that any discipline that affects a supervisor-member's "willingness to serve" as a § 8(b)(1)(B) supervisor is unlawful. *Id.*, at 436. The Court observed that the intended effect of the union's discipline was to deprive the employer of the services of its chosen representative for grievance adjustment for the duration of the strike and any strike in the future, *id.*, at 435, and concluded:

"Union pressure on supervisors can affect either their willingness to serve as grievance adjusters or collective bargainers, or the manner in which

For example, the no-contract-no-work rule is designed to prevent *any* union member from working for an employer that does not pay the union wage scale, but it does have the peripheral effect of making a § 8(b)(1)(B) representative less willing to serve in that capacity than he or she otherwise would be, see *ABC*, 437 U. S., at 436, thereby limiting the employer's selection. *Any* discipline imposed on a § 8(b)(1)(B) representative, however, will affect willingness to serve in this sense.[16]

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they fulfill these functions; and either effect impermissibly coerces the employer in his choice of representative." *Id.*, at 436.

This statement was unnecessary to the disposition of *ABC*. There the Court held that the union fines had adversely affected the manner in which the employer representatives *fulfilled § 8(b)(1)(B) functions* and therefore interfered with the employer's control over its representatives.

[16] Cf. *Scofield* v. *NLRB*, 394 U. S. 423 (1969). *Scofield* involved § 8(b)(1)(A) of the NLRA which forbids a union "to restrain or coerce" employees in the exercise of their rights to refrain from collective activity and which contains a proviso stating that the section "shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein." The Court upheld union fines of members who had broken a union rule by refraining from certain collective activity, concluding that such discipline did not restrain or coerce the union members and hence did not violate § 8(b)(1)(A), saying:

"[Section] 8(b)(1) leaves a union free to enforce a properly adopted rule which reflects a legitimate union interest, impairs no policy Congress has imbedded in the labor laws, and is reasonably enforced against union members who are free to leave the union and escape the rule." 394 U. S., at 430.

Section 8(b)(1)(B) must be similarly interpreted to allow unions to enforce internal union rules that impair no labor policy. See Gould, Some Limitations Upon Union Discipline Under the National Labor Relations Act: The Radiations of *Allis-Chalmers*, 1970 Duke L. J. 1067, 1128–1129 ("If, as the Court said in *Allis-Chalmers*, the union has a substantial interest in disciplining strikebreakers, that analysis ought not to be altered simply because they happen to be in the supervisory positions. The thrust against the union as an institution and against its strike function is just as direct and effective").

In addition, so long as there is any attraction to union membership, this test would preclude existence of union rules excluding supervisors from membership. Again, this is because any union member who valued membership would be less willing to serve, see *ABC*, *supra*, at 436, if the cost of service were loss of membership, and because any reluctance to give up membership would limit the size of the supervisor pool from which an employer could select its representatives.[17] This minimal effect on an employer's selection of § 8(b)(1)(B) representatives is insufficient to support a § 8(b)(1)(B) charge. It is inconceivable that every union rule that affects a union member's willingness to serve as a supervisor could be prohibited by a provision as narrow in scope as § 8(b)(1)(B).

A supervisor-member cannot serve both masters without incurring some obligations to both; it is simply unfair to require unions to accept members who receive all of the benefits of the association and bear none of the obligations.[18] We

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[17] It is highly unlikely that Congress intended § 8(b)(1)(B) to ban a union rule forbidding its members to be supervisors without saying so. It is undisputed that at the time § 8(b)(1)(B) was enacted, many unions allowed only rank-and-file workers to retain membership. See Brief for Respondent 11, n. 8.

In 1947 the NLRA was amended so that employers could prohibit supervisors from obtaining or maintaining union membership, see 29 U. S. C. §§ 152(3), 164(a), because Congress believed that granting supervisors a protected right to join a union is "inconsistent with the policy of Congress to assure workers freedom from domination or control by their supervisors" and "inconsistent with our policy to protect the rights of employers." H. R. Rep. No. 245, 80th Cong., 1st Sess., 14 (1947). Yet the NLRB's interpretation of § 8(b)(1)(B) would have the anomalous result of *requiring* unions to remain open to workers who decide to become supervisors.

[18] Cf. *Florida Power*, 417 U. S., at 812, n. 22 ("[W]hile both the employer and the union may have conflicting but nonetheless legitimate expectations of loyalty from supervisor-members during a strike, the fact that the supervisor will in some measure be the beneficiary of any advantages secured by the union through the strike makes it inherently inequita-

therefore reject the argument that unions must both accept supervisor-members and grant them immunity from enforcement of uniform rules.

Finally, both the structure of the NLRA and recent developments in its interpretation suggest that employers are no longer restrained or coerced in their selection of representatives by union discipline of supervisor-members. The statute itself reveals that it is the employer, not the supervisor-member, who is protected from coercion by the statutory scheme. It is difficult to maintain that an *employer* is restrained or coerced because a *union member* must accept union expulsion or other discipline to continue in a supervisory position. The employer's problem—that the supervisor-member might decline to serve as a representative or align with the union during a strike and deprive the employer of services—is of its own making. A dissenting member of the Board has said:

> "Having been afforded the opportunity to refuse to hire union members as supervisors, the opportunity to discharge supervisors for involvement in union affairs, the opportunity to incorporate into a collective-bargaining agreement the permissible extent of a supervisor-member's functioning during a strike and, indeed, the opportunity to provide additional incentives making it worthwhile for all union members to forfeit union benefits upon taking supervisory positions, the employer, having forsaken such opportunities, cannot now be heard to argue that the union is affecting its selection of the very grievance adjustment or collective bargaining representative it permits to retain union membership." *New York Typographical Union No. 6 (Triangle Publications)*, 216 N. L. R. B. 896, 901 (1975) (member Fanning, dissenting).

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ble that he be allowed to function as a strikebreaker without incurring union sanctions").

In *ABC* the Court determined that the employer was coerced despite the fact that it could order the supervisor-members to leave the union and free themselves from further threats of discipline. But, as the Court pointed out, when *ABC* was decided, supervisor-members were *not* free to leave the union at any time. In *ABC*, for example, the union had a "known policy not to permit a member to resign during a strike and for a period of six months thereafter," so plainly "the employer's only recourse would have been to replace [the supervisor-members] as his grievance representatives." 437 U. S., at 436–437.

The law has since changed. Recently this Court decided in *Pattern Makers* v. *NLRB*, 473 U. S. 95 (1985), that union members have a right to resign from a union *at any time* and avoid imposition of union discipline. The employer may order its representatives to leave the union immediately and there is no barrier to a supervisor-member's obedience to that order. The very least that may be derived from *Pattern Makers* is that union rules or discipline that merely diminish an employer representative's willingness to serve no longer restrain or coerce the *employer* in its selection of a § 8(b)(1)(B) representative.

IV

Section 8(b)(1)(B) was enacted to protect the integrity of the processes of grievance adjustment and collective bargaining—two private dispute-resolution systems on which the national labor laws place a high premium. Although some union discipline might impermissibly affect the manner in which a supervisor-member carries out § 8(b)(1)(B) tasks or coerce the employer in its selection of a § 8(b)(1)(B) representative, union discipline directed at supervisor-members without § 8(b)(1)(B) duties, working for employers with whom the union neither has nor seeks a collective-bargaining relationship, cannot and does not adversely affect the performance of § 8(b)(1)(B) duties. Consequently, such union

action does not coerce the employer in its selection of § 8(b)(1)(B) representatives. The order of the Court of Appeals for the Ninth Circuit is therefore

Affirmed.

JUSTICE SCALIA, concurring in the judgment.

Because I agree with the conclusion of Part III of the Court's opinion, I find it unnecessary (as should the Court) to reach the "reservoir doctrine" question discussed in Part II. And while I agree with much of the reasoning of Part III, I cannot join it, principally because in my view it does not matter whether the Union intended to represent Royal or Nutter; and if it did matter, I would find inadequate basis for overturning the Board's factual finding of representational intent. I would affirm the Court of Appeals solely on the ground that the Union had no collective-bargaining agreement covering either Royal or Nutter.

Section 8(b)(1)(B) of the National Labor Relations Act makes it unlawful for a labor union "to restrain or coerce . . . an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances." 29 U. S. C. § 158(b)(1)(B). As the Court suggests, the statute by its plain terms governs only the relationship between unions and employers, not the relationship between unions and their members. Further, it pertains to only one aspect of the union-employer relationship: the employer's *selection* of a bargaining or grievance adjustment representative. Nonetheless, in *American Broadcasting Cos.* v. *Writers Guild, Inc.*, 437 U. S. 411 (1978) *(ABC)*, we affirmed the Board's application of this statute to union discipline of members who cross picket lines in order to perform grievance adjustment work for employers with whom the union has a collective-bargaining contract. The Board now asks us to approve an extension of the statute to a still more remote form of such "restraint" by a union upon employer "selec-

tion"—namely, such restraint directed against an employer with whom the union has no collective-bargaining agreement.

If the question before us were whether, given the deference we owe to agency determinations, the Board's construction of this Court's opinion in *ABC* is a reasonable one, I would agree with the Government that it is. We defer to agencies, however (and thus apply a mere "reasonableness" standard of review) in their construction of their statutes, not of our opinions. The question before us is not whether *ABC* can reasonably be read to support the Board's decision, but whether § 8(b)(1)(B) can reasonably be read to support it. It seems to me that *ABC* and the Board's prior decision in *San Francisco-Oakland Mailers' Union No. 18 (Northwest Publications, Inc.)*, 172 N. L. R. B. 2173 (1968), which held that unions violate § 8(b)(1)(B) by disciplining member-representatives for the manner in which they interpret collective-bargaining contracts, represent at best the "outer limits," *Florida Power & Light Co.* v. *Electrical Workers*, 417 U. S. 790, 805 (1974), of any permissible construction of § 8(b)(1)(B). I would certainly go no further, and would accordingly limit the Board's indirect restraint theory to circumstances in which there is an actual contract between the union and affected employer, without regard to whether the union has an intent to establish such a contract. Of course, as the Court's opinion points out: "Direct coercion [*i. e.*, real coercion] of an employer's selection of a § 8(b)(1)(B) representative would always be a § 8(b)(1)(B) violation, whether or not the union has or seeks a bargaining relationship with an employer." *Ante*, at 590, n. 13.

The Board's approach is the product of a familiar phenomenon. Once having succeeded, by benefit of excessive judicial deference, in expanding the scope of a statute beyond a reasonable interpretation of its language, the emboldened agency presses the rationale of that expansion to the limits of its logic. And the Court, having already sanctioned a point

of departure that is genuinely not to be found within the language of the statute, finds itself cut off from that authoritative source of the law, and ends up construing not the statute but its own construction. Applied to an erroneous point of departure, the logical reasoning that is ordinarily the mechanism of judicial adherence to the rule of law perversely carries the Court further and further from the meaning of the statute. Some distance down that path, however, there comes a point at which a later incremental step, again rational in itself, leads to a result so far removed from the statute that obedience to text must overcome fidelity to logic. Chief Justice Burger's remarks in *United States* v. *12 200-ft. Reels of Film*, 413 U. S. 123 (1973), are nowhere more applicable than in this context:

> "The seductive plausibility of single steps in a chain of evolutionary development of a legal rule is often not perceived until a third, fourth, or fifth 'logical' extension occurs. Each step, when taken, appeared a reasonable step in relation to that which preceded it, although the aggregate or end result is one that would never have been seriously considered in the first instance. This kind of gestative propensity calls for the 'line drawing' familiar in the judicial, as in the legislative process: 'thus far but not beyond.'" *Id.*, at 127.

That is the case here. Logic is on the side of the Board, but the statute is with the respondent. I concur in the judgment of the Court.

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

The majority has once again substituted its judgment for a fair and reasonable interpretation by the National Labor Relations Board of § 8(b)(1)(B), and I, once again, respectfully dissent. See *Florida Power & Light Co.* v. *Electrical Workers*, 417 U. S. 790, 813 (1974) (WHITE, J., dissenting).

The Board concluded that a union violates § 8(b)(1)(B) when it disciplines a member, who serves as an employer representative,[1] for working for an employer which does not have a collective-bargaining agreement with the union. The purpose of such discipline is to force the member to leave his or her job and its effect is to deprive the employer of the services of the representative which it has selected. *International Brotherhood of Electrical Workers Local 340 (Royal Electric Co.)*, 271 N. L. R. B. 995, 1000 (1984). The Board's interpretation of § 8(b)(1)(B) is longstanding. *New Mexico District Council of Carpenters and Joiners of America (A. S. Horner, Inc.)*, 177 N. L. R. B. 500 (1969), enf'd, 454 F. 2d 1116 (CA10 1972).

As we have often stated, "[t]he function of striking [the] balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review." *American Broadcasting Cos.* v. *Writers Guild, West, Inc.*, 437 U. S. 411, 431 (1978) *(ABC)* (internal quotations omitted). We do not sit as a "super-Board authorized to overrule an agency's choice between reasonable constructions of the controlling statute. We should not impose

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[1] In Part II, the majority holds that Schoux and Choate were not "representatives" of their employers within the meaning of § 8(b)(1)(B). This issue is not properly before this Court. The Board concluded that Schoux and Choate acted as grievance-adjustment or collective-bargaining representatives for their employers under § 8(b)(1)(B) and the Ninth Circuit agreed with the Board's conclusion. *Ante*, at 577, 578–579. The Board obviously did not raise this issue in its petition for certiorari since it had prevailed on the issue. The only question presented for our review was "[w]hether the National Labor Relations Board reasonably concluded that a union violated Section 8(b)(1)(B) of the National Labor Relations Act by disciplining supervisor-members (who represent management in grievance adjustment or collective bargaining) for working for an employer that does not have a collective bargaining agreement with that union." Respondent did not cross-petition for certiorari nor did it challenge the Court of Appeals' conclusion in its brief in opposition to the petition for writ of certiorari or in its brief on the merits. We should therefore judge the case as it comes to us.

our views on the Board as long as it stays within the outer boundaries of the statute it is charged with administering." *Florida Power*, *supra*, at 816. The Board has done so here. By its plain language, § 8(b)(1)(B) protects an employer's right to *select* grievance-adjustment and collective-bargaining representatives, and does not merely ensure that union control does not affect the manner in which a selected representative thereafter performs his or her duties. And I see nothing in the language or legislative history of the NLRA which indicates congressional intent to foreclose the Board from applying § 8(b)(1)(B) to the type of union interference with an employer's right to select its representatives which is presented here. The section was primarily intended to prevent unions from forcing employers into multi-employer bargaining units and from dictating the identity of employers' representatives for collective bargaining and grievance adjusting. *NLRB* v. *Amax Coal Co.*, 453 U. S. 322, 334–335 (1981); *Florida Power*, *supra*, at 803–804. There is no reason why the Board cannot fairly interpret the interdiction against dictating an employer's choice of representative to encompass both requiring an employer to select Mr. Y, see *Florida Power*, *supra*, and preventing an employer from selecting anyone who is a member of a union which does not have a collective-bargaining agreement with the employer.[2]

Moreover, we traveled this road previously in *ABC*. We stated there: "Union pressure on supervisors can affect either *their willingness to serve as grievance adjustors or collective bargainers*, or the manner in which they fulfill these functions; and either effect impermissibly coerces the

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[2] The Senate Report stated that "this subsection would not permit a union to dictate who shall represent an employer in the settlement of employee grievances, or to *compel the removal of a personnel director or supervisor* who has been delegated the function of settling grievances." S. Rep. No. 105, 80th Cong., 1st Sess., pt. 1, p. 21 (1947) (emphasis added).

employer in his choice of representative." 437 U. S., at 436 (emphasis added). The majority mischaracterizes this statement as "dictum," "unnecessary to the disposition of *ABC*." *Ante*, at 591–592, n. 15. The union discipline threatened in that case was found to have kept some supervisor-members from reporting to work during the strike and to have adversely affected those who reported to work in the performance of their grievance-adjustment duties. 437 U. S., at 431–436. As to the former group, we agreed with the Board that ABC was "restrained and coerced within the meaning of § 8(b)(1)(B) by being totally deprived of the opportunity to choose these particular supervisors as [its] collective-bargaining or grievance-adjustment representatives during the strike." *Id.*, at 432. The *manner* in which these supervisor-members performed their duties was obviously not affected since they performed no duties during the strike; as here, it was their willingness to serve as employer representatives that was at issue. We cited approvingly the Board's disposition of an unfair labor practice claim analogous to the claim asserted in *ABC* and virtually identical to the one asserted here. In *A. S. Horner, Inc.*, *supra*, the Board held that union discipline imposed on a member who worked as a supervisor for an employer which had no contract with the union violated § 8(b)(1)(B) because it would have required the supervisor to leave his job and thus would have deprived the employer of the services of its selected representative. 437 U. S., at 436, n. 36.

Also at issue in *ABC* was a group of employees—directors—who were members of the striking union but who performed grievance-adjustment duties only with respect to members of other unions. That fact did not lead us to a different analysis or result under § 8(b)(1)(B). "A union may no more interfere with the employer's choice of a grievance representative with respect to employees represented by other unions than with respect to those employees whom it itself represents. *International Organization of Masters, Mates*

and Pilots, International Marine Division, 197 N. L. R. B. 400 (1972), enf'd, 159 U. S. App. D. C. 11, 14, 486 F. 2d 1271, 1274 (1973), cert. denied, 416 U. S. 956 (1974), and *International Organization of Masters, Mates and Pilots* v. *NLRB*, 539 F. 2d 554, 559–560 (CA5 1976)." *Id.*, at 438, n. 37. The majority seeks to distinguish *ABC* on the ground that respondent here has no collective-bargaining relationship at all with Royal and Nutter, *ante*, at 590–591, n. 14, but this fact is without significance. The harm is the same in both cases —the union discipline would deprive the employer of the services of its selected representative.[3]

The majority further attempts to distance itself from *ABC* by asserting that *Pattern Makers* v. *NLRB*, 473 U. S. 95 (1985), in which we held that union members have a right to resign from a union during a strike or when a strike is imminent and avoid imposition of union discipline, undercuts the force of *ABC*. *Ante*, at 594–595. But *Pattern Makers* does not significantly affect the rationale of *ABC*. Although ABC at the time could not have required its supervisor-members to renounce union membership when it received notice that the union was calling a strike, it could have required them to renounce their union membership when they were first promoted to a supervisory position. 437 U. S., at 436–437. Nevertheless, the Board concluded that this employer option did not render § 8(b)(1)(B) inapplicable and we accepted that decision. *Id.*, at 437. Clearly, the position of a supervisor-member creates some tension in the administration of labor relations. Both unions and employers have the power to resolve the tension, however. Unions can expel members who

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[3] Section 8(b)(1)(B) is not on its face limited to coercion by a union with a collective-bargaining relationship with an employer. In contrast, § 8(b)(3), 29 U. S. C. § 158(b)(3), for example, makes it an unfair labor practice for a union to refuse to bargain collectively with an employer, "provided it is the representative of his employees."

serve as supervisors[4] and employers can forbid supervisors to retain their union membership. Unions and employers do not always do so, however, obviously because each believes that there is some benefit to be gained from accepting supervisor-members. The Board has interpreted § 8(b)(1)(B) to require unions that choose to accept the benefits of supervisor-members to bear the burden of their immunity from certain disciplinary rules, in furtherance of the federal policy that employers should select their representatives free of union coercion. The majority simply disagrees with this judgment by the Board and would place the burden on employers; that is, if an employer chooses to accept the benefits of supervisor-members, it must bear the risk that it may be deprived of their services as representatives for collective bargaining and grievance adjustment. But this choice between reasonable constructions of the statute has been entrusted to the NLRB, not to this Court. Hence, I dissent.

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[4] The majority asserts that the Board's construction of § 8(b)(1)(B) requires that it also interpret the section to prohibit a union from excluding supervisors from membership, since such a union rule would similarly make members less willing to serve in supervisory positions. *Ante*, at 593–594. The Board has not, however, interpreted § 8(b)(1)(B) so broadly. In *National Association of Letter Carriers*, 240 N. L. R. B. 519 (1979), the Board held that it was no violation of § 8(b)(1)(B) for a union to adopt a rule rendering letter carriers who accepted positions as temporary supervisors ineligible for membership as long as they worked in that capacity, despite the fact that the rule diminished the pool of letter carriers available to serve as temporary supervisors. I see no fatal inconsistency in the Board's positions. In the case of a union rule which excludes all supervisors from membership regardless of their employers, the primary relationship affected is the one between the union and its members, whereas in the case of a union rule prohibiting members from working for particular employers (those without collective-bargaining agreements with the union), the primary relationship affected is the one between the union and the employers. A union more easily infringes upon a "policy Congress has imbedded in the labor laws," *ante*, at 592, n. 16, in the latter situation.

SAINT FRANCIS COLLEGE ET AL. *v.* AL-KHAZRAJI, AKA ALLAN

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

No. 85–2169. Argued February 25, 1987—Decided May 18, 1987

Respondent professor, a United States citizen born in Iraq, filed suit in Federal District Court against petitioners, his former employer and its tenure committee, alleging that, by denying him tenure nearly three years before, they had discriminated against him on the basis of his Arabian race in violation of 42 U. S. C. § 1981. The court held that the claim was not barred under the Pennsylvania 6-year statute of limitations, but granted summary judgment for petitioners upon finding that § 1981 does not reach discrimination claims based on Arabian ancestry. The Court of Appeals for the Third Circuit acknowledged that its recent *Goodman* case had overruled its earlier decisions by applying Pennsylvania's 2-year personal injury statute of limitations rather than the 6-year period in § 1981 cases, but ruled that respondent's claim was not time barred since *Goodman* should not be applied retroactively under *Chevron Oil Co.* v. *Huson*, 404 U. S. 97. However, the court reversed the District Court on the merits, holding that respondent had properly alleged racial discrimination in that, although Arabs are Caucasians under current racial classifications, Congress, when it passed what is now § 1981, did not limit its protections to those who today would be considered members of a race different from the defendant's. The court said that, at a minimum, § 1981 reaches discrimination directed against an individual because he or she is genetically part of an ethnically and physiognomically distinctive subgrouping of *homo sapiens*. Because the record was insufficient to determine whether respondent had been subjected to the sort of prejudice that § 1981 would redress, the case was remanded.

Held:

1. Respondent's claim was not time barred. When respondent filed suit, it was clearly established in the Third Circuit that a § 1981 plaintiff had six years to bring an action. The Court of Appeals correctly held that its *Goodman* decision should not be applied retroactively, since *Chevron* indicated that it is manifestly inequitable to apply statute of limitations decisions retroactively when they overrule clearly established Circuit precedent on which the complaining party was entitled to rely. Pp. 608–609.

2. A person of Arabian ancestry may be protected from racial discrimination under § 1981. The Court of Appeals properly rejected petitioners' contention that, as a Caucasian, respondent cannot allege the type of discrimination that § 1981 forbids since that section does not encompass claims of discrimination by one Caucasian against another. That position assumes that all those who might be deemed Caucasians today were thought to be of the same race when § 1981 became law. In fact, 19th-century sources commonly described "race" in terms of particular ethnic groups, including Arabs, and do not support the claim that Arabs and other present-day "Caucasians" were then considered to be a single race. Moreover, § 1981's legislative history indicates that Congress intended to protect identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics. However, a distinctive physiognomy is not essential to qualify for § 1981 protection. Thus, if respondent can prove that he was subjected to intentional discrimination based on the fact that he was born an Arab, rather than solely on the place or nation of his origin or his religion, he will have made out a § 1981 case. Pp. 609–613.

784 F. 2d 505, affirmed.

WHITE, J., delivered the opinion for a unanimous Court. BRENNAN, J., filed a concurring opinion, *post*, p. 614.

Nick S. Fisfis argued the cause and filed a brief for petitioners.

Caroline Mitchell argued the cause for respondent. With her on the brief were *Julius LeVonne Chambers* and *Eric Schnapper.**

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

Briefs of *amici curiae* urging affirmance were filed for the American-Arab Anti-Discrimination Committee by *James G. Abourezk;* for the Anti-Defamation League of B'nai B'rith et al. by *Gregg H. Levy, Mitchell F. Dolin, Meyer Eisenberg, David Brody, Edward N. Leavy, Steven M. Freeman, Jill L. Kahn, Robert S. Rifkind, Samuel Rabinove, Richard T. Foltin, Eileen Kaufman, Harold R. Tyler, James Robertson, Norman Redlich, William L. Robinson, Judith A. Winston, Joseph A. Morris,* and *Grover G. Hankins;* and for the Mexican American Legal Defense and Educational Fund et al. by *Barry Sullivan, William D. Snapp, Antonia Hernandez, E. Richard Larson,* and *Kenneth Kimerling.*

JUSTICE WHITE delivered the opinion of the Court.

Respondent, a citizen of the United States born in Iraq, was an associate professor at St. Francis College, one of the petitioners here. In January 1978, he applied for tenure; the Board of Trustees denied his request on February 23, 1978. He accepted a 1-year, nonrenewable contract and sought administrative reconsideration of the tenure decision, which was denied on February 6, 1979. He worked his last day at the college on May 26, 1979. In June 1979, he filed complaints with the Pennsylvania Human Relations Commission and the Equal Employment Opportunities Commission. The state agency dismissed his claim and the EEOC issued a right-to-sue letter on August 6, 1980.

On October 30, 1980, respondent filed a *pro se* complaint in the District Court alleging a violation of Title VII of the Civil Rights Act of 1964 and claiming discrimination based on national origin, religion, and/or race. Amended complaints were filed, adding claims under 42 U. S. C. §§ 1981, 1983, 1985(3), 1986, and state law. The District Court dismissed the §§ 1986 and 1985(3) and Title VII claims as untimely but held that the §§ 1981 and 1983 claims were not barred by the Pennsylvania 6-year statute of limitations. The court at that time also ruled that because the complaint alleged denial of tenure because respondent was of the Arabian race, an action under § 1981 could be maintained. Defendants' motion for summary judgment came up before a different judge, who construed the pleadings as asserting only discrimination on the basis of national origin and religion, which § 1981 did not cover. Even if racial discrimination was deemed to have been alleged, the District Court ruled that § 1981 does not reach claims of discrimination based on Arabian ancestry.[1]

The Court of Appeals rejected petitioners' claim that the § 1981 claim had not been timely filed. Under the Court of Appeals' holding in *Goodman* v. *Lukens Steel Co.*, 777 F. 2d

[1] The § 1983 claim was dismissed for want of state action. The pendent state claims were also dismissed.

113 (1985), that the Pennsylvania 2-year statute of limitations governed § 1981 cases, respondent's suit would have been barred. The Court of Appeals, however, relying on *Chevron Oil Co.* v. *Huson*, 404 U. S. 97 (1971), held that *Goodman* should not be retroactively applied and that this suit was timely under its pre-*Goodman* cases which had borrowed the State's 6-year statute.

Reaching the merits, the Court of Appeals held that respondent had alleged discrimination based on race and that although under current racial classifications Arabs are Caucasians, respondent could maintain his § 1981 claim.[2] Congress, when it passed what is now § 1981, had not limited its protections to those who today would be considered members of a race different from the race of the defendant. Rather, the legislative history of the section indicated that Congress intended to embrace "at the least, membership in a group that is ethnically and physiognomically distinctive." 784 F. 2d 505, 517 (1986). Section 1981, "at a minimum," reaches "discrimination directed against an individual because he or she is genetically part of an ethnically and physiognomically distinctive sub-grouping of *homo sapiens*." *Ibid.* Because respondent had not had full discovery and the record was not sufficient to determine whether he had been subjected to the sort of prejudice § 1981 would redress, respondent was to be given the opportunity to prove his case.[3]

We granted certiorari, 479 U. S. 812 (1986), limited to the statute of limitations issue and the question whether a person of Arabian ancestry was protected from racial discrimination under § 1981, and now affirm the judgment of the Court of Appeals.

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[2] The Court of Appeals thus rejected petitioners' claim that respondent's complaint alleged only national origin and religious discrimination, assertedly not reached by § 1981.

[3] The Court of Appeals also held that the individual members of the tenure committee were subject to liability under § 1981. The District Court was also to reconsider its dismissal of the pendent state claims.

I

We agree with the Court of Appeals that respondent's claim was not time barred. *Wilson* v. *Garcia*, 471 U. S. 261 (1985), required that in selecting the applicable state statute of limitations in § 1983 cases, the lower federal courts should choose the state statute applicable to other personal injury torts. Thereafter, the Third Circuit in *Goodman* held that *Wilson* applies to § 1981 cases as well and that the Pennsylvania 2-year statute should apply. The Court of Appeals in this case, however, held that when respondent filed his suit, which was prior to *Wilson* v. *Garcia*, it was clearly established in the Third Circuit that a § 1981 plaintiff had six years to bring an action and that *Goodman* should not be applied retroactively to bar respondent's suit.

Insofar as what the prevailing law was in the Third Circuit, we have no reason to disagree with the Court of Appeals. Under controlling precedent in that Circuit, respondent had six years to file his suit, and it was filed well within that time. See 784 F. 2d, at 512–513. We also assume but do not decide that *Wilson* v. *Garcia* controls the selection of the applicable state statute of limitations in § 1981 cases. The Court of Appeals, however, correctly held that its decision in *Goodman* should not be retroactively applied to bar respondent's action in this case. The usual rule is that federal cases should be decided in accordance with the law existing at the time of decision. *Gulf Offshore Co.* v. *Mobil Oil Corp.*, 453 U. S. 473, 486, n. 16 (1981); *Thorpe* v. *Durham Housing Authority*, 393 U. S. 268, 281 (1969); *United States* v. *Schooner Peggy*, 1 Cranch 103, 110 (1801). But *Chevron Oil Co.* v. *Huson*, *supra*, counsels against retroactive application of statute of limitations decisions in certain circumstances. There, the Court held that its decision specifying the applicable state statute of limitations should be applied only prospectively because it overruled clearly established Circuit precedent on which the complaining party was entitled to rely, because retroactive application would be inconsistent with the pur-

pose of the underlying substantive statute, and because such application would be manifestly inequitable. The Court of Appeals found these same factors were present in this case and foreclosed retroactive application of its decision in *Goodman*. We perceive no good reason for not applying *Chevron* where *Wilson* has required a Court of Appeals to overrule its prior cases. Nor has petitioner persuaded us that there was any error in the application of *Chevron* in the circumstances existing in this case.

II

Section 1981 provides:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

Although § 1981 does not itself use the word "race," the Court has construed the section to forbid all "racial" discrimination in the making of private as well as public contracts. *Runyon* v. *McCrary*, 427 U. S. 160, 168, 174–175 (1976). Petitioner college, although a private institution, was therefore subject to this statutory command. There is no disagreement among the parties on these propositions. The issue is whether respondent has alleged *racial* discrimination within the meaning of § 1981.

Petitioners contend that respondent is a Caucasian and cannot allege the kind of discrimination § 1981 forbids. Concededly, *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U. S. 273 (1976), held that white persons could maintain a § 1981 suit; but that suit involved alleged discrimination against a white person in favor of a black, and petitioner submits that the section does not encompass claims of discrimina-

tion by one Caucasian against another. We are quite sure that the Court of Appeals properly rejected this position.

Petitioner's submission rests on the assumption that all those who might be deemed Caucasians today were thought to be of the same race when § 1981 became law in the 19th century; and it may be that a variety of ethnic groups, including Arabs, are now considered to be within the Caucasian race.[4] The understanding of "race" in the 19th century, however, was different. Plainly, all those who might be deemed Caucasian today were not thought to be of the same race at the time § 1981 became law.

In the middle years of the 19th century, dictionaries commonly referred to race as a "continued series of descendants from a parent who is called the *stock*," N. Webster, An American Dictionary of the English Language 666 (New

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[4] There is a common popular understanding that there are three major human races—Caucasoid, Mongoloid, and Negroid. Many modern biologists and anthropologists, however, criticize racial classifications as arbitrary and of little use in understanding the variability of human beings. It is said that genetically homogeneous populations do not exist and traits are not discontinuous between populations; therefore, a population can only be described in terms of relative frequencies of various traits. Clear-cut categories do not exist. The particular traits which have generally been chosen to characterize races have been criticized as having little biological significance. It has been found that differences between individuals of the same race are often greater than the differences between the "average" individuals of different races. These observations and others have led some, but not all, scientists to conclude that racial classifications are for the most part sociopolitical, rather than biological, in nature. S. Molnar, Human Variation (2d ed. 1983); S. Gould, The Mismeasure of Man (1981); M. Banton & J. Harwood, The Race Concept (1975); A. Montagu, Man's Most Dangerous Myth (1974); A. Montagu, Statement on Race (3d ed. 1972); Science and the Concept of Race (M. Mead, T. Dobzhansky, E. Tobach, & R. Light eds. 1968); A. Montagu, The Concept of Race (1964); R. Benedict, Race and Racism (1942); Littlefield, Lieberman, & Reynolds, Redefining Race: The Potential Demise of a Concept in Physical Anthropology, 23 Current Anthropology 641 (1982); Biological Aspects of Race, 17 Int'l Soc. Sci. J. 71 (1965); Washburn, The Study of Race, 65 American Anthropologist 521 (1963).

York 1830) (emphasis in original), "[t]he lineage of a family," 2 N. Webster, A Dictionary of the English Language 411 (New Haven 1841), or "descendants of a common ancestor," J. Donald, Chambers' Etymological Dictionary of the English Language 415 (London 1871). The 1887 edition of Webster's expanded the definition somewhat: "The descendants of a common ancestor; a family, tribe, people or nation, believed or presumed to belong to the same stock." N. Webster, Dictionary of the English Language 589 (W. Wheeler ed. 1887). It was not until the 20th century that dictionaries began referring to the Caucasian, Mongolian, and Negro races, 8 The Century Dictionary and Cyclopedia 4926 (1911), or to race as involving divisions of mankind based upon different physical characteristics. Webster's Collegiate Dictionary 794 (3d ed. 1916). Even so, modern dictionaries still include among the definitions of race "a family, tribe, people, or nation belonging to the same stock." Webster's Third New International Dictionary 1870 (1971); Webster's Ninth New Collegiate Dictionary 969 (1986).

Encyclopedias of the 19th century also described race in terms of ethnic groups, which is a narrower concept of race than petitioners urge. Encyclopedia Americana in 1858, for example, referred to various races such as Finns, vol. 5, p. 123, gypsies, 6 *id.*, at 123, Basques, 1 *id.*, at 602, and Hebrews, 6 *id.*, at 209. The 1863 version of the New American Cyclopaedia divided the Arabs into a number of subsidiary races, vol. 1, p. 739; represented the Hebrews as of the Semitic race, 9 *id.*, at 27, and identified numerous other groups as constituting races, including Swedes, 15 *id.*, at 216, Norwegians, 12 *id.*, at 410, Germans, 8 *id.*, at 200, Greeks, 8 *id.*, at 438, Finns, 7 *id.*, at 513, Italians, 9 *id.*, at 644–645 (referring to mixture of different races), Spanish, 14 *id.*, at 804, Mongolians, 11 *id.*, at 651, Russians, 14 *id.*, at 226, and the like. The Ninth edition of the Encyclopedia Britannica also referred to Arabs, vol. 2, p. 245 (1878), Jews, 13 *id.*, at 685 (1881), and other ethnic groups such as Germans, 10 *id.*, at

473 (1879), Hungarians, 12 *id.*, at 365 (1880), and Greeks, 11 *id.*, at 83 (1880), as separate races.

These dictionary and encyclopedic sources are somewhat diverse, but it is clear that they do not support the claim that for the purposes of § 1981, Arabs, Englishmen, Germans, and certain other ethnic groups are to be considered a single race. We would expect the legislative history of § 1981, which the Court held in *Runyon* v. *McCrary* had its source in the Civil Rights Act of 1866, 14 Stat. 27, as well as the Voting Rights Act of 1870, 16 Stat. 140, 144, to reflect this common understanding, which it surely does. The debates are replete with references to the Scandinavian races, Cong. Globe, 39th Cong., 1st Sess., 499 (1866) (remarks of Sen. Cowan), as well as the Chinese, *id.*, at 523 (remarks of Sen. Davis), Latin, *id.*, at 238 (remarks of Rep. Kasson during debate of home rule for the District of Columbia), Spanish, *id.*, at 251 (remarks of Sen. Davis during debate of District of Columbia suffrage), and Anglo-Saxon races, *id.*, at 542 (remarks of Rep. Dawson). Jews, *ibid.*, Mexicans, see *ibid.* (remarks of Rep. Dawson), blacks, *passim*, and Mongolians, *id.*, at 498 (remarks of Sen. Cowan), were similarly categorized. Gypsies were referred to as a race. *Ibid.* (remarks of Sen. Cowan). Likewise, the Germans:

> "Who will say that Ohio can pass a law enacting that no man of the German race . . . shall ever own any property in Ohio, or shall ever make a contract in Ohio, or ever inherit property in Ohio, or ever come into Ohio to live, or even to work? If Ohio may pass such a law, and exclude a German citizen . . . because he is of the German nationality or race, then may every other State do so." *Id.*, at 1294 (remarks of Sen. Shellabarger).

There was a reference to the Caucasian race, but it appears to have been referring to people of European ancestry. *Id.*, at 523 (remarks of Sen. Davis).

The history of the 1870 Act reflects similar understanding of what groups Congress intended to protect from intentional

discrimination. It is clear, for example, that the civil rights sections of the 1870 Act provided protection for immigrant groups such as the Chinese. This view was expressed in the Senate. Cong. Globe, 41st Cong., 2d Sess., 1536, 3658, 3808 (1870). In the House, Representative Bingham described § 16 of the Act, part of the authority for § 1981, as declaring "that the States shall not hereafter discriminate against the immigrant from China and in favor of the immigrant from Prussia, nor against the immigrant from France and in favor of the immigrant from Ireland." *Id.*, at 3871.

Based on the history of § 1981, we have little trouble in concluding that Congress intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics. Such discrimination is racial discrimination that Congress intended § 1981 to forbid, whether or not it would be classified as racial in terms of modern scientific theory.[5] The Court of Appeals was thus quite right in holding that § 1981, "at a minimum," reaches discrimination against an individual "because he or she is genetically part of an ethnically and physiognomically distinctive subgrouping of *homo sapiens*." It is clear from our holding, however, that a distinctive physiognomy is not essential to qualify for § 1981 protection. If respondent on remand can prove that he was subjected to intentional discrimination based on the fact that he was born an Arab, rather than solely on the place or nation of his origin, or his religion, he will have made out a case under § 1981.

The judgment of the Court of Appeals is accordingly affirmed.

It is so ordered.

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[5] We note that under prior cases, discrimination by States on the basis of ancestry violates the Equal Protection Clause of the Fourteenth Amendment. *Hernandez* v. *Texas*, 347 U. S. 475, 479 (1954); *Oyama* v. *California*, 332 U. S. 633, 646 (1948); *Hirabayashi* v. *United States*, 320 U. S. 81, 100 (1943). See also *Hurd* v. *Hodge*, 334 U. S. 24, 32 (1948).

JUSTICE BRENNAN, concurring.

Pernicious distinctions among individuals based solely on their ancestry are antithetical to the doctrine of equality upon which this Nation is founded. Today the Court upholds Congress' desire to rid the Nation of such arbitrary and invidious discrimination, and I concur in its opinion and judgment. I write separately only to point out that the line between discrimination based on "ancestry or ethnic characteristics," *ante*, at 613, and discrimination based on "place or nation of . . . origin," *ibid.*, is not a bright one. It is true that one's ancestry—the ethnic group from which an individual and his or her ancestors are descended—is not necessarily the same as one's national origin—the country "where a person was *born*, or, more broadly, the country from which his or her ancestors *came*." *Espinoza* v. *Farah Manufacturing Co.*, 414 U. S. 86, 88 (1973) (emphasis added). Often, however, the two are identical as a factual matter: one was born in the nation whose primary stock is one's own ethnic group. Moreover, national origin claims have been treated as ancestry or ethnicity claims in some circumstances. For example, in the Title VII context, the terms overlap as a legal matter. See 29 CFR § 1606.1 (1986) (emphasis added) (national origin discrimination "includ[es], but [is] not limited to, the denial of equal employment opportunity because of an individual's, or his or her ancestor's, place of origin; *or* because an individual has the physical, cultural, or linguistic characteristics of a national origin group"); *Espinoza*, *supra*, at 89 (the deletion of the word ancestry from the final version of § 703 of Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e–2(e), "was not intended as a material change, . . . suggesting that the terms 'national origin' and 'ancestry' were considered synonymous"). I therefore read the Court's opinion to state only that discrimination based on *birthplace alone* is insufficient to state a claim under § 1981.

Syllabus

SHAARE TEFILA CONGREGATION ET AL. *v.* COBB ET AL.

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

No. 85–2156. Argued February 25, 1987—Decided May 18, 1987

After their synagogue was painted with anti-Semitic slogans, phrases, and symbols, petitioners brought suit in Federal District Court, alleging that the desecration by respondents violated 42 U. S. C. § 1982. The District Court dismissed petitioners' claims, and the Court of Appeals affirmed, holding that discrimination against Jews is not racial discrimination under § 1982.

Held:

1. A charge of racial discrimination within the meaning of § 1982 cannot be made out by alleging only that the defendants were motivated by racial animus. It is also necessary to allege that that animus was directed toward the kind of group that Congress intended to protect when it passed the statute. P. 617.

2. Jews can state a § 1982 claim of racial discrimination since they were among the peoples considered to be distinct races and hence within the protection of the statute at the time it was passed. They are not foreclosed from stating a cause of action simply because the defendants are also part of what today is considered the Caucasian race. *Saint Francis College* v. *Al-Khazraji*, *ante*, p. 604. Pp. 617–618.

785 F. 2d 523, reversed and remanded.

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

Patricia A. Brannan argued the cause for petitioners. With her on the briefs were *David S. Tatel*, *Joseph M. Hassett*, *Steven P. Hollman*, *Irvin N. Shapell*, and *Kevin J. Lipson*.

Deborah T. Garren argued the cause for respondents and filed a brief for respondent Remer. With her on the brief was *Robert B. Barnhouse*.*

*Briefs of *amici curiae* urging reversal were filed for the State of Maryland by *Stephen H. Sachs*, Attorney General, *Dennis M. Sweeney*, Deputy Attorney General, and *Ralph S. Tyler III* and *C. J. Messerschmidt*, Assistant Attorneys General; for the Anti-Defamation League of B'nai B'rith

JUSTICE WHITE delivered the opinion of the Court.

On November 2, 1982, the outside walls of the synagogue of the Shaare Tefila Congregation in Silver Spring, Maryland, were sprayed with red and black paint and with large anti-Semitic slogans, phrases, and symbols. A few months later, the Congregation and some individual members brought this suit in the Federal District Court, alleging that defendants' desecration of the synagogue had violated 42 U. S. C. §§ 1981, 1982, 1985(3) and the Maryland common law of trespass, nuisance, and intentional infliction of emotional distress. On defendants' motion under Federal Rules of Civil Procedure 12(b)(1) and (6), the District Court dismissed all the claims. The Court of Appeals affirmed in all respects. 785 F. 2d 523 (CA4 1986). Petitioners petitioned for writ of certiorari. We granted the petition, 479 U. S. 812 (1986), and we now reverse the judgment of the Court of Appeals.

Section 1982 guarantees all citizens of the United States, "the same right . . . as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold, and convey real and personal property." The section forbids both official and private racially discriminatory interference with property rights, *Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409 (1968). Petitioners' allegation was that they were deprived of the right to hold property in violation of § 1982 because the defendants were motivated by racial prejudice. They unsuccessfully argued in the District Court and Court of Appeals that Jews are not a racially distinct group, but that defendants' conduct is actionable because they viewed Jews as racially distinct and were motivated by racial prejudice. The

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et al. by *Gregg H. Levy, Mitchell F. Dolin, Meyer Eisenberg, David Brody, Edward N. Leavy, Steven M. Freeman, Jill L. Kahn, Robert S. Rifkind, Samuel Rabinove, Richard T. Foltin, Eileen Kaufman, Harold R. Tyler, James Robertson, Norman Redlich, William L. Robinson, Judith A. Winston, Joseph A. Morris,* and *Grover G. Hankins;* and for the American-Arab Anti-Discrimination Committee by *James G. Abourezk.*

Court of Appeals held that § 1982 was not "intended to apply to situations in which a plaintiff is not a member of a racially distinct group but is merely *perceived* to be so by defendants." 785 F. 2d, at 526 (emphasis in original). The Court of Appeals believed that "[b]ecause discrimination against Jews is not racial discrimination," *id.*, at 527, the District Court was correct in dismissing the § 1982 claim.

We agree with the Court of Appeals that a charge of racial discrimination within the meaning of § 1982 cannot be made out by alleging only that the defendants were motivated by racial animus; it is necessary as well to allege that defendants' animus was directed towards the kind of group that Congress intended to protect when it passed the statute. To hold otherwise would unacceptably extend the reach of the statute.

We agree with petitioners, however, that the Court of Appeals erred in holding that Jews cannot state a § 1982 claim against other white defendants. That view rested on the notion that because Jews today are not thought to be members of a separate race, they cannot make out a claim of racial discrimination within the meaning of § 1982. That construction of the section we have today rejected in *Saint Francis College* v. *Al-Khazraji*, *ante*, p. 604. Our opinion in that case observed that definitions of race when § 1982 was passed were not the same as they are today, *ante*, at 609–613, and concluded that the section was "intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics." *Ante*, at 613. As *Saint Francis* makes clear, the question before us is not whether Jews are considered to be a separate race by today's standards, but whether, at the time § 1982 was adopted, Jews constituted a group of people that Congress intended to protect. It is evident from the legislative history of the section reviewed in *Saint Francis College*, a review that we need not repeat here, that Jews and Arabs were among the peoples then con-

sidered to be distinct races and hence within the protection of the statute. Jews are not foreclosed from stating a cause of action against other members of what today is considered to be part of the Caucasian race.

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

It is so ordered.

Syllabus

ROSE *v.* ROSE ET AL.

APPEAL FROM THE COURT OF APPEALS OF TENNESSEE

No. 85–1206. Argued March 4, 1987—Decided May 18, 1987

Appellant, a totally disabled veteran whose main source of income is federal veterans' benefits, was held in contempt by the state trial court for failure to pay child support, the amount of which had been fixed by the court after considering appellant's benefits to be income under a Tennessee statute. The State Court of Appeals affirmed, rejecting appellant's contention that the Veterans' Administration (VA) has exclusive jurisdiction to specify payments of child support from the disability benefits it provides. The court determined that Congress intended disability benefits to support the beneficiary *and his dependents*, and held that the trial court's order directing appellant to pay a portion of those benefits as child support or be held in contempt did not undermine a substantial federal interest.

Held: A state court has jurisdiction to hold a disabled veteran in contempt for failing to pay child support, even if the veteran's only means of satisfying this obligation is to utilize veterans' benefits received as compensation for a service-connected disability. The Tennessee statute, as construed by the state courts to authorize an award of disability benefits as child support, is not pre-empted under the Supremacy Clause of Article VI since it does not conflict with federal law. Pp. 625–636.

(a) Title 38 U. S. C. § 3107(a)(2), which gives the VA discretionary authority to apportion disability compensation on behalf of a veteran's children, is not an exclusive grant of authority to the VA to order that child support be paid from disability benefits, and does not indicate that exercise of the VA's discretion could yield independent child support determinations in conflict with existing state-court orders. Moreover, the implementing regulations, which simply authorize apportionment if "the veteran is not reasonably discharging his or her [child support] responsibility . . . ," contain few guidelines for apportionment and no specific procedures for bringing claims. Furthermore, to construe § 3107(a)(2) as pre-emptive could open for reconsideration a vast number of existing divorce decrees affecting disabled veterans and lead in future cases to piecemeal litigation before the state courts and the VA. Given the traditional authority of state courts over child support, their unparalleled familiarity with local economic factors affecting the issue, and their experience in applying state statutes that contain detailed support guidelines and procedures, it seems certain that Congress would have been

more explicit had it meant the VA's apportionment power to displace state-court authority. Pp. 626–628.

(b) Title 38 U. S. C. § 211(a), which provides that VA decisions on benefits for veterans and their dependents are final, conclusive, and not subject to review by any other federal official or federal court, does not vest exclusive jurisdiction in the VA nor pre-empt state-court jurisdiction to enforce a veteran's child support obligation. Section 211(a) makes no reference to *state*-court jurisdiction. Moreover, its purpose of achieving uniformity in the administration of veterans' benefits is not threatened by state child support contempt proceedings, which do not review the disability eligibility decisions that are the primary focus of the section. Furthermore, since the VA is not a party in a contempt proceeding, it is not subjected to an additional litigation burden, the prevention of which is also a purpose of § 211(a). Pp. 628–630.

(c) State-court jurisdiction is not pre-empted by 38 U. S. C. § 3101(a), which provides that veterans' benefits payments made to, or on account of, a beneficiary, shall not be liable to attachment, levy, or seizure. Neither of § 3101(a)'s purposes—to avoid the VA's being placed in the position of a collection agency and to prevent the deprivation and depletion of veterans' means of subsistence—is constrained by allowing the state courts to hold appellant in contempt. The VA is not obliged to participate in the state proceedings or pay benefits directly to appellee. Moreover, the legislative history establishes that disability benefits are intended to provide compensation for disabled veterans *and their families*. *Wissner* v. *Wissner*, 338 U. S. 655, *Hisquierdo* v. *Hisquierdo*, 439 U. S. 572, and *Ridgway* v. *Ridgway*, 454 U. S. 46, distinguished. Pp. 630–634.

(d) Provisions of the Child Support Enforcement Act, which provide that moneys payable by the Government to any individual are subject to child support enforcement proceedings (42 U. S. C. § 659(a)), but which specifically exclude VA disability benefits, do not establish a congressional intent to exempt such benefits from legal process. Section 659(a) was intended to create a limited waiver of sovereign immunity so that state courts could issue valid orders directed against Government agencies attaching funds in their possession. Thus, although veterans' disability benefits may be exempt from attachment while in the VA's hands, once they are delivered to the veteran a state court can require that they be used to satisfy a child support order. Pp. 634–635.

Affirmed.

MARSHALL, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BRENNAN, BLACKMUN, and POWELL, JJ., joined, and in Parts I, II–A, II–B, II–D, and III of which STEVENS and O'CONNOR, JJ., joined. O'CONNOR, J., filed an opinion concurring in part and concurring in the

judgment, in which STEVENS, J., joined, *post*, p. 636. SCALIA, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 640. WHITE, J., filed a dissenting opinion, *post*, p. 644.

Jerry S. Jones argued the cause and filed briefs for appellant.

Roger Clegg argued the cause for the United States as *amicus curiae* urging reversal. On the brief were *Solicitor General Fried*, *Assistant Attorney General Willard*, *Deputy Solicitor General Wallace*, *Harriet S. Shapiro*, and *Michael Jay Singer*.

Howell H. Sherrod, Jr., argued the cause for appellee Rose. On the brief was *Michael J. Davenport*. *W. J. Michael Cody*, Attorney General, argued the cause for appellee State of Tennessee. With him on the brief were *John Knox Walkup*, Chief Deputy Attorney General, *Andy Bennett* and *Jennifer Helton Small*, Deputy Attorneys General, and *Dianne Stamey*, Assistant Attorney General.*

JUSTICE MARSHALL delivered the opinion of the Court.

In this case, we are asked to decide whether a state court has jurisdiction to hold a disabled veteran in contempt for failing to pay child support, where the veteran's only means

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*Briefs of *amici curiae* urging affirmance were filed for the State of California et al. by *John K. Van de Kamp*, Attorney General, *William A. Richmond*, and *John S. Higgins, Jr.*; for the State of Connecticut et al. by *Joseph I. Lieberman*, Attorney General, *Clarine Nardi Riddle*, Deputy Attorney General, *Joseph X. DuMond, Jr.*, and *William A. Collier*, Assistant Attorneys General, joined by the Attorneys General for their respective jurisdictions as follows: *Charles A. Graddick* of Alabama, *Steve Clark* of Arkansas, *Charles M. Oberly III* of Delaware, *Corinne Watanabe* of Hawaii, *Robert T. Stephan* of Kansas, *William L. Webster* of Missouri, *Brian McKay* of Nevada, *W. Cary Edwards* of New Jersey, *Lacy H. Thornburg* of North Carolina, *Nicholas J. Spaeth* of North Dakota, *LeRoy S. Zimmerman* of Pennsylvania, *Mark V. Meierhenry* of South Dakota, *Jim Mattox* of Texas, *David L. Wilkinson* of Utah, *Mary Sue Terry* of Virginia, *Kenneth O. Eikenberry* of Washington, *A. G. McClintock* of Wyoming, *C. William Ullrich* of Guam; and for the Women's Legal Defense Fund et al. by *Janet L. McDavid*, *Donna R. Lenhoff*, and *Nancy D. Polikoff*.

of satisfying this obligation is to utilize benefits received from the Veterans' Administration under 38 U. S. C. § 314 as compensation for a service-connected disability.

I

Appellant Charlie Wayne Rose is a totally disabled veteran of the Vietnam war. He married appellee Barbara Ann McNeil Rose in 1973, and the couple had two children before their marriage ended in October 1983, with a divorce decree from the Circuit Court for Washington County, Tennessee. In setting appellant's financial responsibility for child support, the Circuit Court considered along with other factors identified by a Tennessee statute the "earning capacity, obligations and needs, and financial resources of each parent." Tenn. Code Ann. § 36–5–101(e)(3) (1984) (formerly Tenn. Code Ann. § 36–820 (1977)). Appellant's income was then, and is now, composed entirely of benefits received from the Veterans' and Social Security Administrations. Appellant received monthly:[1] $1,211 in veterans' disability benefits; $1,806 in veterans' aid and attendance benefits; $90 in veterans' dependents' benefits; and $281 in Social Security disability benefits. The children received an additional $94 a month in Social Security children's insurance benefits.

The Circuit Court ordered appellant to pay $800 per month as child support, and he did not appeal. From the record it appears that he initially paid appellee $706 monthly, contending that the remaining $94 was satisfied by the children's insurance benefits appellee had received directly from the Social Security Administration. However, on appellee's first petition for contempt, the Circuit Court clarified its order in March 1984 to require appellant to pay $800 per month *in addition* to the Social Security insurance benefits. Record 19.

[1] These figures first appear in the record in May 1984, in pleadings filed by appellant as part of the contempt proceeding from which the present appeal is taken. Record 28. We presume that appellant received equal or comparable benefits at the time of the divorce. Congress has since increased slightly certain of the benefits, but for purposes of this appeal we use the figures provided at the time of the contempt proceeding.

The following month appellant paid for the support of his children only the $90 in dependents' benefits he had received from the Veterans' Administration. Appellee filed a second petition for contempt, seeking the remaining $710. Appellant responded with the assertion that only the Veterans' Administration or Social Security Administration could order him to contribute additional sums for child support. Invoking the Supremacy Clause, U. S. Const., Art. VI, cl. 2, he sought a ruling from the Circuit Court that it lacked jurisdiction over the disability benefits he received from these federal agencies and that § 36–820, pursuant to which the court had considered these benefits in setting the amount of child support, was null and void. Record 28–29.

The Circuit Court, after a hearing, found appellant in willful contempt for failing to pay child support. The court acknowledged that appellant could challenge the constitutionality of § 36–820, and could make the State of Tennessee a party to the action for such purposes, but it held that in the meantime he would have to comply with the order of child support. The court then ordered appellant incarcerated until he satisfied this obligation. App. to Juris. Statement 11a. Ten days later, appellant was released pursuant to an agreement between the parties that he would pay appellee moneys past due and, pending disposition of appeals, would each month pay $400 to appellee and deposit $400 into the registry of the Circuit Court. Record 39–40.

After becoming a party to this action, the State of Tennessee moved for summary judgment, arguing that § 36–820 was constitutional and thus the Circuit Court had properly asserted jurisdiction over appellant's disability benefits in setting and enforcing his child support obligation. The court agreed. In a two-page order, it upheld the statute and concluded that it had validly exercised "jurisdiction to order support payments to be made from Federal Disability Income Benefits." App. to Juris. Statement 14a.

The Tennessee Court of Appeals affirmed, rejecting appellant's contention that the Veterans' and Social Security Ad-

ministrations have exclusive jurisdiction to specify payment of child support from the disability benefits they provide. The appellate court first invoked precedent from this Court for the general rule that "state family law must not do major damage to clear and substantial federal interest[s]," *id.*, at 3a, citing *McCarty* v. *McCarty*, 453 U. S. 210, 220 (1981), or else "the Supremacy Clause will demand that state law be overridden." *Hisquierdo* v. *Hisquierdo*, 439 U. S. 572, 581 (1979). It then determined that Congress had intended disability benefits to support the beneficiary *and his dependents*, and thus the Circuit Court's order directing appellant to pay a portion of these benefits for the support of his children, or be held in contempt, did not undermine a substantial federal interest.

When the Supreme Court of Tennessee denied appellant's application for permission to appeal, App. to Juris. Statement 22a, he filed a jurisdictional statement in this Court. He expressly abandoned his challenge to the jurisdiction of the Circuit Court over the $281 in Social Security disability benefits he receives each month, Juris. Statement 16, leaving only his claim that jurisdiction to award as child support a portion of his monthly veterans' disability benefits and veterans' aid and attendance benefits rests exclusively in the Veterans' Administration.[2] We noted probable jurisdiction,[3] 478 U. S. 1003 (1986), and now affirm.

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[2] Joined by the United States as *amicus curiae*, appellant contends that the lower courts are divided on the issue whether state courts may award alimony or child support out of benefits paid to a disabled veteran. Compare, *e. g.*, *Parker* v. *Parker*, 335 Pa. Super. 348, 350–354, 484 A. 2d 168, 169–170 (1984); *In re Gardner*, 220 Wis. 493, 499–500, 264 N. W. 643, 646 (1936); *Pishue* v. *Pishue*, 32 Wash. 2d 750, 754–756, 203 P. 2d 1070, 1072–1073 (1949); *Gaskins* v. *Security-First National Bank of Los Angeles*, 30 Cal. App. 2d 409, 416–418, 86 P. 2d 681, 684–685 (1939), with, *e. g.*, *Ex parte Burson*, 615 S. W. 2d 192, 193 (Tex. 1981).

[3] Construing Tenn. Code Ann. § 36–820 (1977) (now codified as Tenn. Code Ann. § 36–5–101 (1984)) to authorize an award of a portion of appellant's veterans' disability benefits and veterans' aid and attendance

II

The Court of Appeals correctly identified the constitutional standard for determining whether § 36–820, as construed by the Tennessee courts to authorize an award of a veteran's disability benefits as child support, conflicts with federal law and is therefore pre-empted under the Supremacy Clause. We have consistently recognized that "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States." *In re Burrus*, 136 U. S. 586, 593–594 (1890); see *Hisquierdo*, *supra*, at 581; *McCarty*, *supra*, at 220. "On the rare occasion when state family law has come into conflict with a federal statute, this Court has limited review under the Supremacy Clause to a determination whether Congress has 'positively required by direct enactment' that state law be pre-empted." *Hisquierdo*, *supra*, at 581, quoting *Wetmore* v. *Markoe*, 196 U. S. 68, 77 (1904). Before a state law governing domestic relations will be overridden, it "must do 'major damage' to 'clear and substantial' federal interests." *Hisquierdo*, *supra*, at 581, quoting *United States* v. *Yazell*, 382 U. S. 341, 352 (1966).

Appellant claims that three provisions from Title 38 of the United States Code governing veterans' benefits, and a combination of provisions from the Child Support Enforcement Act, 42 U. S. C. § 651 *et seq.*, conflict with, and evidence Congress' intent to pre-empt, state statutes that are construed to give state courts jurisdiction over veterans' disability benefits. We consider each in turn.

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benefits as child support, the courts below have rejected appellant's contention that this statute conflicts with the federal disability benefits scheme administered by the Veterans' Administration and is therefore pre-empted under the Supremacy Clause, U. S. Const., Art VI, cl. 2. Because the state statute has been applied over objection that its application was unconstitutional, we conclude that this case is properly before us as an appeal. See 28 U. S. C. § 1257(2); *McCarty* v. *McCarty*, 453 U. S. 210, 219–220, n. 12 (1981); R. Stern, E. Gressman, & S. Shapiro, Supreme Court Practice 112–113 (6th ed. 1986).

A

First, appellant relies on 38 U. S. C. § 3107(a)(2) (1982 ed., Supp. III), a provision that gives the Administrator of Veterans' Affairs discretionary authority to apportion disability compensation on behalf of a veteran's children. Section 3107(a)(2) provides: "All or any part of the compensation . . . payable on account of any veteran may . . . if the veteran's children are not in the custody of the veteran be apportioned as may be prescribed by the Administrator." Appellant contends that this grant of authority is exclusive, and thus only the Administrator may issue an order directing him to pay appellee a portion of his disability benefits as child support. In the eyes of appellee and the State of Tennessee, § 3107 (a)(2) was intended simply to facilitate separate payment of benefits directly to a veteran's children in amounts that may have previously been set by a state court, and does not displace the state court's traditional enforcement remedies.

The parties cite no legislative history on the meaning of § 3107(a)(2), and our search has uncovered nothing of a dispositive nature. Nor are the Administrator's regulations for apportionment decisive. See 38 CFR §§ 3.450–3.461 (1986). Nowhere do the regulations specify that only the Administrator may define the child support obligation of a disabled veteran in the first instance. To the contrary, appellant, joined by the United States as *amicus curiae*, concedes that a state court may *consider* disability benefits as part of the veteran's income in setting the amount of child support to be paid. However, the carefully constructed argument continues, the state court's power to *enforce* its support order extends solely to income not derived from veterans' disability benefits. To collect child support in cases where it can only be paid from disability benefits, a claim for apportionment must first be filed with the Administrator on behalf of the children. See § 3.452(a). The Administrator may then con-

sider the state-court order in deciding how much, if any, of appellant's disability benefits should be apportioned to the children. Reply Brief for Appellant 2; Brief for United States as *Amicus Curiae* 12, n. 13.

This jurisdictional framework finds little support in the statute and implementing regulations. Neither mentions the limited role appellant assigns the state court's child support order or the restrictions appellant seeks to impose on that court's ability to enforce such an order. The statute simply provides that disability benefits "may . . . be apportioned as may be prescribed by the Administrator." 38 U. S. C. § 3107(a)(2). The regulations broadly authorize apportionment if "the veteran is not reasonably discharging his or her responsibility for the . . . children's support." 38 CFR § 3.450(a)(1)(ii) (1986). In none of these provisions is there an express indication that the Administrator possesses exclusive authority to order payment of disability benefits as child support. Nor is it clear that Congress envisioned the Administrator making independent child support determinations in conflict with existing state-court orders. The statute gives no hint that exercise of the Administrator's discretion may have this effect. The regulations contain few guidelines for apportionment[4] and no specific procedures for bringing apportionment claims.

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[4] One regulation forbids apportionment "[w]here the total benefit payable to the disabled person does not permit payment of a reasonable amount to any apportionee." 38 CFR § 3.458 (1986). But there are no guidelines defining the reasonableness of a requested apportionment.

By contrast, supplementing the apportionment regulation upon which appellant relies, § 3.450, is a provision that allows disability benefits to be "specially apportioned" between the veteran and his or her dependents "where hardship is shown to exist." § 3.451. A special apportionment is made "on the basis of the facts in the individual case as long as it does not cause undue hardship to the other persons in interest." *Ibid.* This "hardship" regulation *does* specify certain factors for the Administrator to consider in making an apportionment: the "[a]mount of Veterans Administration benefits payable; other resources and income of the veteran and those

Apart from these inadequacies, to construe § 3107(a)(2) as appellant suggests could open for reconsideration a vast number of existing divorce decrees affecting disabled veterans and lead in future cases to piecemeal litigation before the state courts and the Administrator. Given the traditional authority of state courts over the issue of child support, their unparalleled familiarity with local economic factors affecting divorced parents and children, and their experience in applying state statutes such as Tennessee's former § 36–820 that do contain detailed support guidelines and established procedures for allocating resources following divorce, we conclude that Congress would surely have been more explicit had it intended the Administrator's apportionment power to displace a state court's power to enforce an order of child support. Thus, we do not agree that the implicit pre-emption appellant finds in § 3107(a)(2) is "positively required by direct enactment," or that the state court's award of child support from appellant's disability benefits does "major damage" to any "clear and substantial" federal interest created by this statute. *Hisquierdo*, 439 U. S., at 581.

B

To support his contention that exclusive jurisdiction over veterans' disability benefits is vested in the Administrator, appellant next cites 38 U. S. C. § 211(a). This statute provides:

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dependents in whose behalf apportionment is claimed; and special needs of the veteran, his or her dependents, and the apportionment claimants." *Ibid.* It also provides that "[o]rdinarily apportionment of more than 50 percent of the veteran's benefits would constitute undue hardship on him or her while apportionment of less than 20 percent of his or her benefits would not provide a reasonable amount for any apportionee." *Ibid.* The fact that similar factors and quantitative guidelines are not listed in the provision for general apportionment suggests that not even the Administrator has interpreted 38 U. S. C. § 3107(a)(2) (1982 ed., Supp. III) to authorize routine child support determinations.

> "[D]ecisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans and their dependents . . . shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision . . . ." *Ibid.*

Though § 211(a) makes no reference to *state*-court jurisdiction, appellant and the Solicitor General argue that its underlying purposes should nevertheless be deemed controlling here. These purposes, identified in *Johnson* v. *Robison*, 415 U. S. 361, 370 (1974), are to achieve uniformity in the administration of veterans' benefits and protect the Administrator from expensive and time-consuming litigation.

As already noted, however, we can find no clear indication that Congress intended the Administrator to make child support determinations contrary to the determinations of state courts. The interest in uniform administration of veterans' benefits focuses, instead, on the technical interpretations of the statutes granting entitlements, particularly on the definitions and degrees of recognized disabilities and the application of the graduated benefit schedules. See *id.*, at 370, n. 12; Hearing on H. R. 360 et al. before a Subcommittee of the House Committee on Veterans' Affairs, 82d Cong., 2d Sess., 1962–1963 (1952). These are the issues Congress deemed especially well suited for administrative determination insulated from judicial review. Thus, even assuming that § 211(a) covers a contempt proceeding brought in state court against a disabled veteran to enforce an order of child support, that court is not reviewing the Administrator's decision finding the veteran eligible for specific disability benefits. The uniformity of the Administrator's decision is therefore not endangered. And since the Administrator is not a party in a contempt proceeding, no additional litigation burden is created. There being no "major damage" to the federal interests underlying § 211(a), we conclude that it does

not pre-empt exercise of state-court jurisdiction to enforce a veteran's child support obligation.

C

Appellant next claims that state-court jurisdiction is pre-empted by 38 U. S. C. § 3101(a), which provides that "[p]ayments of benefits . . . under any law administered by the Veterans' Administration . . . made to, or on account of, a beneficiary . . . shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary." Though the legislative history for this provision is also sparse, it recognizes two purposes: to "avoid the possibility of the Veterans' Administration . . . being placed in the position of a collection agency" and to "prevent the deprivation and depletion of the means of subsistence of veterans dependent upon these benefits as the main source of their income." S. Rep. No. 94–1243, pp. 147–148 (1976). Neither purpose is constrained by allowing the state court in the present case to hold appellant in contempt for failing to pay child support. The contempt proceeding did not turn the Administrator into a collection agency; the Administrator was not obliged to participate in the proceeding or to pay benefits directly to appellee. Nor did the exercise of state-court jurisdiction over appellant's disability benefits deprive appellant of his means of subsistence contrary to Congress' intent, for these benefits are not provided to support appellant alone.

Veterans' disability benefits compensate for impaired earning capacity, H. R. Rep. No. 96–1155, p. 4 (1980), and are intended to "provide reasonable and adequate compensation for disabled veterans *and their families*." S. Rep. No. 98–604, p. 24 (1984) (emphasis added). Additional compensation for dependents of disabled veterans is available under 38 U. S. C. § 315, and in this case totaled $90 per month for appellant's two children. But the paucity of the benefits available under § 315 belies any contention that Congress

intended these amounts alone to provide for the support of the children of disabled veterans. Moreover, as evidenced by § 3107(a)(2), the provision for apportionment we have already discussed, Congress clearly intended veterans' disability benefits to be used, in part, for the support of veterans' dependents.[5] On this basis we may distinguish several of the Court's prior decisions which held that state law governing domestic relations was pre-empted by federal statutes containing prohibitions similar to § 3101(a) against attachment, levy, or seizure of federal benefits.

In *Wissner* v. *Wissner*, 338 U. S. 655 (1950), this Court rejected a widow's community property claim to one-half the proceeds of a life insurance policy her husband, a deceased Army officer, had purchased during their marriage under a federally assisted program for members of the military. Because the federal statute creating the program gave the insured an express right to designate the beneficiary, this Court held that the entire proceeds must be paid to the husband's mother as he had directed. Otherwise, state community property principles would have frustrated Congress' unequivocal intent that the insured decide who should receive the policy proceeds. *Id.*, at 658–659.

As we have noted in the present case, by contrast, state contempt proceedings to enforce a valid child support order coincide with Congress' intent to provide veterans' disability compensation for the benefit of both appellant and his dependents. Moreover, in reaching what was clearly an alternative holding in *Wissner* that a community property division of the insurance proceeds would constitute a "seizure" in violation of a provision against "attachment, levy, or seizure," the Court was careful to identify a possible exception for ali-

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[5] That children may rightfully expect to derive support from a portion of their veteran parent's disability benefits is further evident in the regulation prohibiting apportionment once a child has been legally adopted by another person who, as a result of the adoption, assumes the support obligation. See 38 CFR § 3.458(d) (1986).

mony and child support cases. *Id.*, at 659–660. The suggested basis for this exception was that family support obligations are deeply rooted moral responsibilities, while the community property concept is more akin to an amoral business relationship. *Id.*, at 660.

The principles announced in *Wissner* were later applied in a case involving a conflict between state community property law and a federal statute providing retirement benefits for railroad employees. *Hisquierdo* v. *Hisquierdo*, 439 U. S. 572 (1979). There, we rejected a wife's community property claim to a portion of her husband's retirement annuity following their divorce, even though his entitlement to the benefits had accrued, in large part, during their married years. Congress, we held, had determined that the husband, as the retired railroad employee, should be the exclusive beneficiary. *Id.*, at 583. And this right was protected by a statutory prohibition against "garnishment, attachment, or other legal process under any circumstances whatsoever." *Id.*, at 576, quoting § 14 of the Railroad Retirement Act of 1974, 88 Stat. 1345. As in *Wissner*, Congress' precise specification of the intended beneficiary drew a direct conflict with the state community property law. We concluded that to divide the annuity proceeds would have frustrated the federal objective, and, therefore, the state law was pre-empted. 439 U. S., at 585. And again we discussed an exception to the antigarnishment statute for alimony and child support in non-community property cases.[6] *Id.*, at 587.

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[6] Consistent with the distinction suggested in *Wissner* v. *Wissner*, 338 U. S. 655 (1950), Congress had amended the Social Security Act to authorize garnishment of certain federal benefits, including railroad retirement annuities, for spousal and child support but not for community property divisions. 42 U. S. C. §§ 659 and 662. We construed these amendments to "expressly override" the anti-attachment provision for support claims, finding it "logical to conclude that Congress . . . thought that a family's need for support could justify garnishment, even though it deflected other federal benefit programs from their intended goals, but that community property claims, which are not based on need, could not do so." *His-*

We visited *Wissner* once again in *Ridgway* v. *Ridgway*, 454 U. S. 46 (1981), where a state court had ordered an Army officer, as part of a divorce decree, to keep in force a life insurance policy he had purchased under a federally assisted program for military members, and to specify that the proceeds be paid in the event of his death to his former wife for the benefit of their children. Before his death, the husband had remarried and changed the policy's beneficiary designation so that the proceeds would go to his new wife. We held that the state court's divorce decree conflicted with and was therefore pre-empted by the express provision of the federal statute giving the husband an unqualified right to designate the policy beneficiary. *Id.*, at 56–57. We also held that imposing a constructive trust on the policy proceeds for the benefit of the children would violate a statutory prohibition against "attachment, levy, or seizure," 38 U. S. C. § 770(g), a prohibition identical in all pertinent respects to § 3101(a) in the present case. 454 U. S., at 60.

Admittedly, in *Ridgway* we rejected a proposed construction of § 770(g) that would have barred its application to the children's equitable claim, 454 U. S., at 60–61, and we were unable to agree that the distinction between family support obligations and community property divisions would sustain

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quierdo v. *Hisquierdo*, 439 U. S., at 587; see also *McCarty* v. *McCarty*, 453 U. S., at 230.

After our decision in *Hisquierdo*, *supra*, Congress amended the Railroad Retirement Act's prohibition against garnishment and attachment so that retirement annuities *could* be characterized as community property. See 45 U. S. C. § 231m(b)(2) (1982 ed., Supp. III) (enacted in 1983). A comparable congressional response followed our holding in *McCarty*, *supra*, that military retirement benefits were the express personal entitlement of the retired military member and therefore could not, consistent with the intent of Congress, be divided as community property. See 10 U. S. C. § 1408(c)(1) (allowing treatment of retirement benefits as sole property of military member or as property shared with the member's spouse "in accordance with the law of the jurisdiction of [the state] court"); S. Rep. No. 97–502, p. 1 (1982).

an exception to the statute's operation. *Id.*, at 61–62, n. 11; see also *id.*, at 68, 70 (POWELL, J., dissenting). But the critical difference between *Ridgway* and the present case is that Congress has not made appellant the exclusive beneficiary of the disability benefits. As we have demonstrated, these benefits are intended to support not only the veteran, but the veteran's family as well. Recognizing an exception to the application of § 3101(a)'s prohibition against attachment, levy, or seizure in this context would further, not undermine, the federal purpose in providing these benefits. Therefore, regardless of the merit of the distinction between the moral imperative of family support obligations and the businesslike justifications for community property division, we conclude that § 3101(a) does not extend to protect a veteran's disability benefits from seizure where the veteran invokes that provision to avoid an otherwise valid order of child support.

D

Finally, appellant cites two provisions from the Child Support Enforcement Act that were designed to facilitate garnishment of federal funds where the intended recipient has failed to satisfy a legal obligation of child support. The first provision declares:

> "[M]oneys (the entitlement to which is based upon remuneration for employment) due from, or payable by, the United States . . . to any individual, including members of the armed services, shall be subject, in like manner and to the same extent as if the United States . . . were a private person, to legal process brought for the enforcement, against such individual of his legal obligations to provide child support . . . ." 42 U. S. C. § 659(a) (1982 ed., Supp. III).

Appellant, however, also points to the statutory definition of an entitlement "based upon remuneration for employment," which specifically excludes "any payments by the Veterans' Administration as compensation for a service-connected dis-

ability . . . ." § 662(f)(2). This exclusion, argues appellant, embodies Congress' intent that veterans' disability benefits not be subject to *any* legal process aimed at diverting funds for child support, including a state-court contempt proceeding of the sort invoked in this case.

But § 659(a) does not refer to *any* legal process. The provision was intended to create a limited waiver of sovereign immunity so that state courts could issue valid orders directed against agencies of the United States Government attaching funds in the possession of those agencies:

> "The term 'legal process' means any writ, order, summons, or other similar process in the nature of garnishment . . . issued by [a state court] . . . and . . . *directed to, and the purpose of which is to compel, a governmental entity*, which holds moneys which are otherwise payable to an individual, *to make a payment* from such moneys to another party in order to satisfy a legal obligation of such individual to provide child support . . . ." § 662(e) (emphasis added).

See also 5 CFR § 581.102(f) (1986); S. Rep. No. 93–1356, pp. 53–54 (1974). Waivers of sovereign immunity are strictly construed, and we find no indication in the statute that a state-court order of contempt issued against *an individual* is precluded where the individual's income happens to be composed of veterans' disability benefits. In this context, the Veterans' Administration is not made a party to the action, and the state court issues no order directing the Administrator to pay benefits to anyone other than the veteran. Thus, while it may be true that these funds are exempt from garnishment or attachment while in the hands of the Administrator, we are not persuaded that once these funds are delivered to the veteran a state court cannot require that veteran to use them to satisfy an order of child support.

III

We fully appreciate the physical sacrifice appellant made while in the military service of his country, and we acknowledge his needs as a totally disabled veteran for medical assistance and financial support. But we also recognize that pursuant to former Tenn. Code Ann. § 36–820 the Tennessee Circuit Court has properly taken into account appellant's needs, along with the needs of his children, in setting his child support obligation. Neither the Veterans' Benefits provisions of Title 38 nor the garnishment provisions of the Child Support Enforcement Act of Title 42 indicate unequivocally that a veteran's disability benefits are provided solely for that veteran's support. We hold, therefore, that as enacted these federal statutes were not in conflict with, and thus did not pre-empt § 36–820. Nor did the Circuit Court's efforts to enforce its order of child support by holding appellant in contempt transgress the congressional intent behind the federal statutes. The judgment of the Court of Appeals of Tennessee is

Affirmed.

JUSTICE O'CONNOR, with whom JUSTICE STEVENS joins, concurring in part and concurring in the judgment.

I agree with the Court that Mr. Rose may be compelled to use his veterans' disability benefits to discharge his child support obligation. I would rest this conclusion, however, on a ground that the Court disdains—the distinction between familial support obligations and other debts. The Court apparently views *Ridgway* v. *Ridgway*, 454 U. S. 46 (1981), as an insuperable obstacle to acknowledging that this distinction makes the difference here. I disagree: while *stare decisis* concerns may counsel against overruling *Ridgway*'s interpretation of the Servicemen's Group Life Insurance Act, I see no reason whatsoever to extend *Ridgway*'s equation of business debts with family support obligations absent the clearest congressional direction to do so. Read in light of this

Nation's common law heritage, the language of this statute, like that in *Ridgway*, incorporates, rather than rejects, this distinction.

The anti-attachment provision of 38 U. S. C. § 3101(a) says:

> "Payments of benefits due or to become due under any law administered by the Veterans' Administration shall not be assignable except to the extent specifically authorized by law, and such payment made to, or on account of, a beneficiary shall be exempt from taxation, shall be exempt from the claim of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary."

In my view, the bar against "levy, attachment, or seizure" is simply a means of enforcing the "exempt[ion] from the claims of creditors." The plain intent of § 3101(a) is to protect the veteran *and* his family against the claims of *creditors*. It is not intended to protect the veteran against claims *by* his family. As JUSTICE STEVENS explained in dissent in *Ridgway*, Congress simply intended:

> "'[T]o relieve the person exempted from the pressure of claims hostile to his dependents' essential needs as well as his own personal ones, not to relieve him of familial obligations and destroy what may be the family's last and only security, short of public relief.'" 454 U. S., at 76, quoting *Schlaefer* v. *Schlaefer*, 71 App. D. C. 350, 358, 112 F. 2d 177, 185 (1940) (per Rutledge, J.). See also 454 U. S., at 68 (POWELL, J., dissenting).

Our Anglo-American tradition accords a special sanctity to the support obligation. Unlike other debts, for example, the obligation to support spouse and child is enforced on threat of contempt. These obligations, moreover, may not be discharged in bankruptcy. 11 U. S. C. § 523(a)(5). Indeed, even before the bankruptcy laws specifically excepted the

support obligation from the discharge, this Court inferred such an exception, explaining the difference between a support obligation and other debts:

> "We think the reasoning of [*Audubon* v. *Shufeldt*, 181 U. S. 575 (1901),] recognizes the doctrine that a decree awarding alimony to the wife or children, or both, is not a debt which has been put in the form of a judgment, but is rather a legal means for enforcing the obligation of the husband and father to support and maintain his wife and children. He owes this duty not because of any contractual obligation or as a debt due from him to the wife, but because of the policy of the law which imposes the obligation upon the husband. The law interferes when the husband neglects or refuses to discharge this duty and enforces it against him by means of legal proceedings.
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> . . . . . .
>
> "The obligation continues after the discharge in bankruptcy as well as before, and is no more than the duty devolved by the law upon the husband to support his children and is not a debt in any just sense." *Wetmore* v. *Markoe*, 196 U. S. 68, 74–76 (1904).

Particularly relevant is the fact that the common law generally will not enforce similar anti-attachment provisions against a family member's claim for support. In discussing the very similar anti-attachment provision at issue in *Ridgway* v. *Ridgway*, *supra*, at 74, JUSTICE STEVENS noted in dissent:

> "The language used in the 'anti-attachment' provision of the [Servicemen's Group Life Insurance Act] is comparable to that found in so-called 'spendthrift clauses' that have protected trust beneficiaries from the claims of commercial creditors for centuries. As stated by Dean Griswold, '[i]t is widely held, however, that even where such trusts are generally valid, the interest of the beneficiary may be reached for the support of his wife or

children, or for the payment of alimony to his wife.' E. Griswold, Spendthrift Trusts 389 (2d ed. 1947)." See also *id.*, at 73–77 (STEVENS, J., dissenting).

As the Court acknowledges, *ante*, at 631–632, until *Ridgway*, we had carefully refused to hold that anti-attachment provisions similar to § 3101(a) shield the beneficiary from the support claims of his spouse and children. *Wissner* v. *Wissner*, 338 U. S. 655, 659–660 (1950); *Hisquierdo* v. *Hisquierdo*, 439 U. S. 572, 587 (1979). In addition, state courts all along have asserted that § 3101(a), its predecessors, and similar statutes do not make the support obligation unenforceable. *Mims* v. *Mims*, 442 So. 2d 102, 103–104 (Ala. Civ. App. 1983); *Smolin* v. *First Fidelity Savings & Loan Assn.*, 238 Md. 386, 392–394, 209 A. 2d 546, 549–550 (1965); *Dillard* v. *Dillard*, 341 S. W. 2d 668, 675 (Tex. Civ. App. 1960); *Voelkel* v. *Tohulka*, 236 Ind. 588, 592–593, 141 N. E. 2d 344, 346, cert. denied, 355 U. S. 891 (1957); *Pishue* v. *Pishue*, 32 Wash. 2d 750, 754–756, 203 P. 2d 1070, 1072–1073 (1949); *Hannah* v. *Hannah*, 191 Ga. 134, 137–139, 11 S. E. 2d 779, 781–782 (1940); *Gaskins* v. *Security-First National Bank of Los Angeles*, 30 Cal. App. 2d 409, 417–418, 86 P. 2d 681, 684–685 (1939); *In re Gardner*, 220 Wis. 490, 493, 264 N. W. 643, 647 (1936); *Stirgus* v. *Stirgus*, 172 Miss. 337, 341, 160 So. 285, 286 (1935); but cf. *Ridgway* v. *Ridgway*, 454 U. S., at 62, n. 11 (citing cases).

In short, the support obligation has always been granted a special place in our law. While the broad language of § 3101(a) seems clearly meant to bar the ordinary creditor's attachment, I cannot find, in light of this Nation's common law tradition, that the language of § 3101(a) expresses anything like the unequivocal congressional intent necessary to bar family members from enforcing the veteran's support obligation. The contrary holding in *Ridgway* is hopelessly anomalous, and should be relegated to the status of "a derelict on the waters of the law." *Lambert* v. *California*, 355 U. S. 225, 232 (1957) (Frankfurter, J., dissenting). Accord-

ingly, I concur in Parts I, II–A, II–B, II–D, and III of the Court's opinion, and object only to its failure to rest its holding squarely on the unique force of the support obligation.

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

I concur in the judgment of the Court that none of the statutes cited by appellant or the United States bars the Tennessee court from basing child support awards on a parent's veterans' benefits, or from enforcing such an award by civil contempt. I cannot, however, join much of the Court's analysis, which unnecessarily, and in my view erroneously, suggests that certain state actions not before us here are permissible because they do not frustrate the purposes of the federal provisions. While incompatibility with the purpose of a federal statute may invalidate a state law that does not violate its text, I know of no precedent for the proposition, which these portions of the opinion adopt, that compatibility with the purpose of a federal statute can save a state law that violates its text. Such a doctrine in effect asserts a power to narrow statutory texts, insofar as their pre-emptive effect is concerned, so as to make them more precisely tailored to the purpose that the Court perceives.

I

Title 38 U. S. C. § 3107(a)(2) (1982 ed., Supp. III) provides "All or any part of the compensation . . . payable on account of any veteran may . . . if the veteran's children are not in the custody of the veteran, be apportioned as may be prescribed by the Administrator." I agree with the Court that the language of this statute (1) gives the Administrator only discretionary authority to make apportionments; (2) does not on its face bar States from using veterans' benefits as the basis for child support orders where no such apportionment has been made or denied; and (3) should not be construed to have that as its purpose, in light of the presumption against federal intrusion into the field of family law. *Ante*, at 626–

628. I think those conclusions quite adequate to support the holding that § 3107 does not bar Tennessee from entering the order at issue here. I would not reach the question whether the State may enter a support order that conflicts with an apportionment ruling made by the Administrator, or whether the Administrator may make an apportionment ruling that conflicts with a support order entered by the State. *Ante*, at 627. Those questions are not before us, since the Administrator has made no such ruling.

Moreover, I am not at all certain that the Court answers those questions correctly. I am not persuaded that if the Administrator makes an apportionment ruling, a state court may enter a conflicting child support order. It would be extraordinary to hold that a federal officer's authorized allocation of federally granted funds between two claimants can be overridden by a state official. Congress could, I suppose, enact such a peculiar scheme, but it is at least not clear that it has done so here. Moreover, while I agree with the Court that one possible use of the Administrator's apportionment authority is to facilitate direct, separate payments of benefits to a spouse in accordance with a previous state-court order, see *ante*, at 626, I see nothing in the statute to indicate that that is the only possible use.

II

For related reasons, I also disagree with the Court's construction of 38 U. S. C. § 211(a), which provides that "[d]ecisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans and their dependents . . . shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision." The Court finds this inapplicable because it does not explicitly exclude *state*-court jurisdiction, as it does federal; *ante*, at 629, and because its underlying purpose of "achiev[ing] uniformity in the administration of

veterans' benefits and protect[ing] the Administrator from expensive and time-consuming litigation," *ibid.*, would not be impaired. I would find it inapplicable for a much simpler reason.

Had the Administrator granted or denied an application to apportion benefits, state-court action providing a contrary disposition would arguably conflict with the language of § 211 making his decisions "final and conclusive"—and if so would in my view be pre-empted, regardless of the Court's perception that it does not conflict with the "purposes" of § 211. But there is absolutely no need to pronounce upon that issue here. Because the Administrator can make an apportionment only upon receipt of a claim, Veterans' Administration Manual M21–1, ch. 26, ¶ 26.01 (Aug. 1, 1979), and because no claim for apportionment of the benefits at issue here has ever been filed, the Administrator has made no "decision" to which finality and conclusiveness can attach. See *Johnson* v. *Robison*, 415 U. S. 361, 367–368 (1974) (§ 211 does not bar claim that a statute regarding benefits is unconstitutional because Administrator has made no decision as to that issue). The Court again expresses views on a significant issue that is not presented.

III

Finally, 38 U. S. C. § 3101(a) provides that "[p]ayments of benefits . . . under any law administered by the Veterans' Administration . . . made to, or on account of, a beneficiary . . . shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary." The Court holds that this statute does not apply to attachments, levies, or seizures to enforce child support obligations—again on the basis that these actions would not frustrate the "purpose" of the provision. It reaches that conclusion by deducing, on the basis of legislative history and the apportionment provision, that the "purpose" of veterans' disability benefits is "in part, . . . the support of veterans' dependents." *Ante*, at 631. The

words of § 3101(a), however, extend to all use of the enumerated judicial processes ("attachment, levy, or seizure by any legal or equitable process whatever"), and I see no basis for consulting "purpose" to exclude, with no textual justification, some (but not all) state proceedings. Moreover, even if that mode of analysis is legitimate, it is not clear to me that depriving a veteran of benefits in favor of his children does not conflict with the statute's purpose. Little is proved by the statements in the House and Senate Reports that veterans' disability benefits are intended to compensate for impaired earning capacity and to provide reasonable compensation for disabled veterans and their families, *ante*, at 630, citing H. R. Rep. No. 96–1155, p. 4 (1980) and S. Rep. No. 98–604, p. 24 (1984); that intent would still be effectuated in the vast majority of situations (which is all that is needed to explain the statements) whether or not attachment for child support is allowed. These excerpts are extremely weak support for the proposition that a veteran's family has a right in the benefits, enforceable in state courts, as against the veteran—a proposition which, as JUSTICE O'CONNOR's concurrence notes, rests uneasily with our decision in *Ridgway* v. *Ridgway*, 454 U. S. 46 (1981). *Ante*, at 631. And the apportionment statute only demonstrates, at most, that Congress intended to permit children access to those benefits by means of an order of the Administrator, but says nothing about whether state courts may garnish, attach, or seize them on behalf of a veteran's children. In light of § 3101(a)'s explicit prohibition of such orders, I am reluctant to find authority to issue them.

Once again, however, this issue need not have been reached. Neither an order basing the amount of a veteran's child support obligation in part on his disability benefits nor an order that he satisfy that obligation on pain of being held in contempt is an attachment, garnishment, or seizure. Neither directs the disposition of the veteran's disability benefits or even specifically requires him to use them to satisfy his ob-

ligation. Cf. *Wissner* v. *Wissner*, 338 U. S. 655, 659 (1950) (order directing the diversion of future insurance proceeds as soon as they are made constitutes "seizure" of those proceeds). In other words, child support orders operate on the veteran's person, not on his property. They therefore are not prohibited by § 3101(a), and accordingly do not run afoul of the Supremacy Clause. I may add that this distinction between moving against property and moving against the veteran's person is not a technical and irrational one. It is one thing to prohibit a State from attaching a veteran's disability benefits to satisfy routine debts, but quite another to prohibit it from compelling him to satisfy an obligation so important to the public policy of the State that it is exempt from the State's constitutional bar on imprisonment for debt in civil cases, see Tenn. Const., Art. I, § 18; *Brown* v. *Brown*, 156 Tenn. 619, 625–626, 4 S. W. 2d 345, 346–347 (1928), permitting imprisonment to be imposed for default. See Tenn. Code. Ann. § 36–5–104 (1984).

* * *

In sum, with respect to three of the four statutes at issue, it seems to me the Court's opinion reaches important issues that need not be decided; resolves them by a process that assumes a broad power to limit clear text on the basis of apparent congressional purpose; and even on that assumption may resolve them incorrectly. With regard to the remaining statute, 42 U. S. C. § 659(a), I agree with the analysis contained in Part II–D of the Court's opinion.

JUSTICE WHITE, dissenting.

Title 38 U. S. C. § 3101(a) provides that "[p]ayments of benefits . . . under any law administered by the Veterans' Administration . . . made to, or on account of, a beneficiary . . . shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatsoever, either before or after receipt by the beneficiary." As the Court apparently recognizes, albeit grudgingly, under *Wissner* v.

Wissner, 338 U. S. 655 (1950), the order that appellant pay over a portion of his veterans' disability benefits on pain of contempt constitutes a "seizure" of the benefits.[1] The plain language of § 3101(a) prohibits *any* seizure of veterans' benefits, but the Court ignores that prohibition and creates an exception out of whole cloth, while seeming to recognize that there is no meritorious distinction between *Wissner* and this case, see *ante*, at 633–634.

The Court's decision is also inconsistent with *Ridgway* v. *Ridgway*, 454 U. S. 46 (1981). In *Ridgway*, a state court had "attempted to limit the reach of [the anti-attachment statute concerning veterans' life insurance benefits] on the theory that the purpose of the anti-attachment provision was to protect the policy proceeds from the claims of creditors, and that the provision has no application to minor children as-

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[1] See *ante*, at 631–632. In *Wissner*, the Court stated:

"The judgment under review has a further deficiency so far as it ordered the diversion of future payments as soon as they are paid by the Government to the [named beneficiary]. At least in this respect, the very payments under the policy are to be 'seized,' in effect, by the judgment below. This is in flat conflict with the exemption provision contained in 38 U. S. C. § 454a, made part of this Act by 38 U. S. C. § 816: Payments to the named beneficiary 'shall be exempt from the claims of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary. . . .'" 338 U. S., at 659.

That this was "clearly an alternative holding," *ante*, at 631–632, does not detract from the fact that it was a holding. It was, furthermore, an entirely reasonable holding: I cannot imagine that if state courts began using their contempt power to enforce the commercial debt obligations of veterans receiving disability pay the Court would have any difficulty finding a seizure.

JUSTICE SCALIA alone attaches significance to the fact that the order in this case does not explicitly refer to appellant's disability pay. *Ante*, at 643–644. This argument elevates form over substance: the order holding appellant in willful contempt relied on the fact that he could comply with the support order by using his disability pay, see App. to Juris. Statement 7a–8a, and the plain effect of the order was to require appellant to pay over his disability pay or go to jail.

serting equitable interests." *Id.*, at 60–61. The Court held, however, that "[t]his contention . . . fails to give effect to the unqualified sweep of the federal statute." *Id.*, at 61. The Court attempts to distinguish *Ridgway* by asserting that there the purpose of the statute providing life insurance policies was to benefit the veteran alone, while here the veteran's disability benefits are meant to support the veteran and his family. In support of this distinction the Court cites (1) a statement, taken from the legislative history of a 1984 bill increasing disability benefits, that "the [Veterans' Affairs] Committee periodically reviews the service-connected disability compensation program with a view toward assuring that the benefits authorized provide reasonable and adequate compensation for disabled veterans and their families," S. Rep. No. 98–604, p. 24, (1984), and (2) 38 U. S. C. § 3107(a)(2), which provides for the apportionment of veterans' benefits by the Administrator when the veteran is separated from his wife or lacks custody of his children. The legislative history of the 1984 statute plainly is not intended as a comment on the scope of § 3101(a), and even if it were it would not be controlling, since it was not made in conjunction with any amendment of that statute. The fact that the Administrator can apportion benefits for the use of a veteran's family supports rather than undercuts appellant's construction of § 3101(a), because it demonstrates that, to the extent that Congress intended disability pay to benefit veterans' families, it created a mechanism for achieving that goal.[2]

Two other statutes confirm that Congress does not intend veterans' disability benefits to be subject to state-court control. In 1975 and 1977, when amending the Social Security Act to provide that, notwithstanding any contrary law, federal benefits may be garnished to satisfy a child support or

[2] The Court cites nothing in the record to support its concern that "to construe § 3107(a)(2) as appellant suggests could open for reconsideration a vast number of existing divorce decrees affecting disabled veterans," *ante*, at 628.

alimony obligation, see 42 U. S. C. § 659, Congress declined to extend permission to garnish veterans' disability pay, see 42 U. S. C. § 662(f)(2). Also, when Congress passed the Uniformed Services Former Spouses' Protection Act, Pub. L. 97–252, Tit. X (1982), following this Court's decision in *McCarty* v. *McCarty*, 453 U. S. 210 (1981), it permitted state divorce courts to apportion military retired pay in divorce proceedings, see 10 U. S. C. § 1408, but withheld such permission for veterans' disability pay, see 10 U. S. C. § 1408(a)(4). Of course, this case does not involve direct garnishment or apportionment of veterans' disability pay, but there is no plausible reason that Congress would have written these specific exceptions for disability pay if it contemplated that state courts would enter orders such as were entered against appellant in this case. I respectfully dissent.

GRAY *v.* MISSISSIPPI

CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

No. 85–5454. Argued November 12, 1986—Decided May 18, 1987

Under *Witherspoon* v. *Illinois*, 391 U. S. 510, and its progeny, the right to an impartial jury under the Sixth and Fourteenth Amendments prohibits the exclusion of venire members for cause in capital cases unless their stated opposition to the death penalty would prevent or substantially impair the performance of their duties as jurors. *Davis* v. *Georgia*, 429 U. S. 122, in effect established a *per se* rule requiring the vacation of a death sentence imposed by a jury from which a potential juror, who has conscientious scruples against the death penalty but who nevertheless under *Witherspoon* is eligible to serve, has been erroneously excluded for cause. At *voir dire* during petitioner's capital murder trial, the trial judge in eight instances denied the prosecutor's motions to dismiss for cause venire members who expressed some degree of doubt about the death penalty. The prosecutor used peremptory challenges to remove those eight panel members. When venire member Bounds, although initially somewhat confused in her response, stated that she could reach a guilty verdict and vote to impose the death penalty, the trial judge nevertheless excused her for cause on the motion of the prosecutor, who by then had exercised all of his peremptory challenges. The judge acknowledged that he had made the prosecutor use peremptory challenges against venire members whose opposition to the death penalty was unequivocal. Ultimately, the Mississippi Supreme Court affirmed petitioner's conviction and death sentence. Although acknowledging that Bounds was clearly qualified to be a juror, the court concluded that her erroneous exclusion did not prejudice petitioner since that error simply corrected other errors the trial judge committed in refusing to dismiss venire members for cause after they unequivocally stated that they could not vote to impose the death penalty.

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

472 So. 2d 409, reversed in part and remanded.

JUSTICE BLACKMUN delivered the opinion of the Court as to Parts I, II, III–A, III–B–1, and IV, concluding that:

1. Venire member Bounds was clearly qualified to be seated as a juror under *Witherspoon* and its progeny. Thus, the trial court was not authorized to exclude her for cause. Pp. 657–659.

2. *Davis* is reaffirmed. *Witherspoon* violations constitute reversible constitutional error, and cannot be subjected to harmless-error review. Pp. 659–667.

(a) The State Supreme Court's analysis is rejected if and to the extent it is based on the reasoning that the trial judge restored one of the State's peremptory challenges by determining that he had erred in denying one of the *Witherspoon* motions, and that Bounds' erroneous removal for cause was therefore harmless since the State would have used its restored challenge to remove her in any case. This "unexercised peremptory" argument wrongly assumes that the crucial question is whether a particular prospective juror is excluded due to the court's erroneous ruling. Rather, the relevant inquiry is whether the composition of the *jury panel as a whole* could possibly have been affected by the error. However, the jury selection process requires a series of on-the-spot decisions weighing the relative objectionableness of a particular venire member against the number of peremptory challenges available at that time. Thus, the nature of the selection process defies any attempt to establish that an erroneous *Witherspoon* exclusion is harmless. Pp. 661–666.

(b) The State's argument that Bounds' exclusion was a single technical error that should be considered harmless because it did not have any prejudicial effect is unavailing under *Davis*. Pp. 666–667.

3. The State Supreme Court's judgment cannot stand insofar as it imposes the death sentence. P. 668.

JUSTICE BLACKMUN, joined by JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS, concluded in Part III–B–2 that, since it appears that prosecutors often use peremptory challenges to remove venire members who have expressed any degree of hesitation against imposing the death penalty, and because courts generally do not review the prosecution's reasons for exercising peremptory challenges, it cannot be said that an erroneous exclusion for cause of a scrupled, yet eligible, venire member is an isolated incident having no prejudicial effect in any particular case. The constitutional right to an impartial jury is so basic to a fair trial that its infraction can never be treated as harmless error. Pp. 667–668.

JUSTICE POWELL, agreed that the trial court erred in removing Bounds for cause and that *Davis* therefore requires petitioner's resentencing. But the proper exclusion by means of peremptory challenges of other jurors who might have shared Bounds' views did not exacerbate the prejudice created by her removal, and has no significance to the decision of this case. *Witherspoon* and its progeny do not restrict the traditional rights of prosecutors to remove peremptorily jurors believed to be unwilling to impose lawful punishment. Pp. 669–672.

BLACKMUN, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III–A, III–B–1, and IV, in which BRENNAN, MARSHALL, POWELL, and STEVENS, JJ., joined, and an opinion with respect to Part III–B–2, in which BRENNAN, MARSHALL, and STEVENS, JJ., joined. POWELL, J., filed an opinion concurring in part and concurring in the judgment, *post*, 669. SCALIA, J., filed a dissenting opinion, in which REHNQUIST, C. J., and WHITE and O'CONNOR, JJ., joined, *post*, 672.

Andru H. Volinsky argued the cause and filed briefs for petitioner.

Marvin L. White, Jr., Assistant Attorney General of Mississippi, argued the cause for respondent. With him on the brief were *Edwin Lloyd Pittman*, Attorney General, and *Amy D. Whitten*, Special Assistant Attorney General.*

JUSTICE BLACKMUN announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III–A, III–B–1, and IV, and an opinion with respect to Part III–B–2, in which JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS join.

More than 10 years ago, in *Davis* v. *Georgia*, 429 U. S. 122 (1976) *(per curiam)*, this Court on certiorari summarily reversed a judgment of a state court and ruled that when a trial court misapplies *Witherspoon* v. *Illinois*, 391 U. S. 510 (1968), and excludes from a capital jury a prospective juror who in fact is qualified to serve, a death sentence imposed by

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*A brief of *amici curiae* urging affirmance was filed for the State of North Carolina et al. by *Lacy H. Thornburg*, Attorney General, *Joan H. Byers*, Special Deputy Attorney General, *David Roy Blackwell*, Assistant Attorney General, *Charles A. Graddick*, Attorney General of Alabama, *John Van de Kamp*, Attorney General of California, *John I. Kelly*, Chief State's Attorney of Connecticut, *Charles M. Oberly III*, Attorney General of Delaware, *Jim Smith*, Attorney General of Florida, *Neil F. Hartigan*, Attorney General of Illinois, *Linley E. Pearson*, Attorney General of Indiana, *William J. Guste, Jr.*, Attorney General of Louisiana, *T. Travis Medlock*, Attorney General of South Carolina, *Mark V. Meierhenry*, Attorney General of South Dakota, *Mary Sue Terry*, Attorney General of Virginia, and *A. G. McClintock*, Attorney General of Wyoming.

the jury cannot stand.[1] This case presents the question whether the Court now should abandon that ruling and, instead, subject an impermissible exclusion to harmless-error review.

I

In June 1982, petitioner David Randolph Gray was indicted in Harrison County, Miss., on a capital charge for the stabbing death of Ronald Wojcik while engaged in the commission of the felony of kidnaping.[2] The trial judge began the jury selection process by assembling the entire venire in the courtroom. He then formed an initial panel for *voir dire* by calling 12 persons to the jury box. Tr. 193–194. After preliminary questioning by the court regarding prior knowledge of the case and of the parties involved, the prosecutor commenced his examination of the panel. After a member was removed for cause or by the prosecutor's use of a peremptory challenge, another venire member was called to the box for questioning by the prosecutor. When the prosecutor reached the point where he acknowledged that he would accept the full panel as it stood, the *voir dire* shifted to the defense and petitioner's attorney followed the same procedure. The questioning continued in this alternating fashion, with each side examining those venire members who had been called to the box since its last opportunity to inquire, until the final panel was selected.

The panel members were questioned individually for the most part, but this took place in the presence of the others

[1] Three Members of the Court dissented from the summary disposition of the *Davis* case. They would have given it plenary consideration. See 429 U. S., at 123. The Court, of course, at times has said that summary action here does not have the same precedential effect as does a case decided upon full briefing and argument. See, *e. g.*, *Edelman* v. *Jordan*, 415 U. S. 651, 671 (1974).

[2] The circumstances of the repulsive crime are set forth in the opinion of the Supreme Court of Mississippi. See 472 So. 2d 409, 412 (1985). Because the legal issue presented for this Court's review concerns the procedures followed during jury selection, we confine our recitation of facts to those relevant to that process.

in the box as well as in the presence of all prospective jurors in the courtroom waiting to be called. As a result, venire members were able to learn the consequences of different responses. In particular, they learned what response would likely result in their being excluded from the jury. This knowledge caused difficulty during the prosecutor's questioning. He asked each panel member whether he or she had any conscientious scruples against capital punishment and whether he or she could vote to impose a death sentence. Whenever a prospective juror revealed any such scruples or expressed any degree of uncertainty in the ability to cast such a vote, the prosecutor moved to have the panel member excused for cause. In one instance the court granted that motion. *Id.*, at 368. In eight instances, however, the court denied the motion. The prosecutor then used peremptory challenges to remove those eight panel members. App. 3, 5, 6, 9, 12, 13, 15, 16.[3] After his denials of these for-cause motions, the judge observed that venire members perhaps were not being forthright in their responses to the prosecutor. He criticized them for expressing insincere hesitation about

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[3] A motion to excuse a venire member for cause of course must be supported by specified causes or reasons that demonstrate that, as a matter of law, the venire member is not qualified to serve. J. Van Dyke, Jury Selection Procedures 139–140 (1977). There is no limitation on the number of venire members who may be challenged for cause. *Ibid.* In contrast, States traditionally have limited the number of peremptory challenges allotted to litigants because peremptory challenges ordinarily can be exercised without articulating reasons, *id.*, at 145–147, subject to constitutional limitations. See *Batson* v. *Kentucky*, 476 U. S. 79 (1986). A Mississippi statute provides: "In capital cases the defendant and the state shall each be allowed twelve peremptory challenges." Miss. Code Ann. § 99–17–3 (1972).

Although the prosecutor at Gray's trial did not refer expressly to this Court's decision in *Witherspoon* v. *Illinois*, 391 U. S. 510 (1968), it is clear that he was attempting to convince the court that these eight prospective jurors' scruples about the death penalty were so strong that they would not merely heighten the jurors' sense of responsibility, but rather would prevent them from acting in accordance with their oaths, Tr. 408, and thus, under *Witherspoon*, render them excludable for cause.

the death penalty in order to be excluded from the jury. He admonished them: "Now I don't want nobody telling me that, just to get off the jury. Now, that's not being fair with me." *Id.*, at 16.[4]

By the time venire member Mrs. H. C. Bounds was called to the jury box, the prosecutor had exercised all 12 of the State's peremptory challenges, see Miss. Code Ann. § 99–17–3 (1972), 4 of which apparently were exercised for reasons unrelated to the panel members' responses to *Witherspoon* questions. See Tr. 301–302, 381, 390–391. Although the *voir dire* of member Bounds was somewhat confused, she ultimately stated that she could consider the death penalty in an appropriate case and the judge concluded that Bounds was capable of voting to impose it.[5] Evidently de-

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[4] Our review of the transcript of the entire *voir dire* reveals that this problem had become apparent to the prosecutor before the judge uttered his admonition. During his earlier questioning of another venire member, who stated that he might have conscientious scruples against capital punishment, the prosecutor interrupted and said: "Let me tell you this, let me say this to you before you answer that. . . . I need to know whether you believe in that or whether you want to get off the Jury. You'd just rather not serve." App. 13. Another venire member's response to the prosecutor's *Witherspoon* question is equally telling: "I mean, the way the Jury is going now, what I'm saying is, I would, I would vote not guilty. . . . I would, you know, I would vote not guilty on the Death Penalty." *Id.*, at 7–8.

[5] The court questioned Bounds in an effort to clarify her position:

"BY THE COURT: In other words, you do not have any conscientious scruples against the imposition of the Death Penalty, if it's authorized by law. Is that right?

"BY MRS. BOUNDS: No.

"BY THE COURT: No. Okay." *Id.*, at 18.

After further questioning by the prosecutor in an attempt to demonstrate that Bounds was excludable for cause, the court again acknowledged Bounds' eligibility to serve:

"BY THE COURT: You could vote for the Death Penalty?

"BY MRS. BOUNDS: I think I could.

"BY THE COURT: All right. She says she can vote for the Death Penalty." *Id.*, at 22.

ciding that he did not want Bounds on the jury and realizing that he had no peremptory challenge left, the prosecutor asked the court to allow the State another such challenge.[6] App. 22. He argued that the court had erred in denying five or six of the State's for-cause challenges and thereby had compelled the State to use its peremptory challenges against those venire members. The prosecutor asserted that, if he had another challenge, he would use it to remove Bounds. *Ibid.*

The judge initially observed, "Well, I think that's right, I made you use about five of them that didn't equivocate. Uh, I never had no idea that we'd run into this many." *Id.*, at 23. After defense counsel objected to granting the State a 13th peremptory challenge, *ibid.*, the prosecutor urged the court to reverse one of its earlier denials of his for-cause motions, which would restore a peremptory challenge to the State. The trial court responded:

> "Well, I didn't examine them myself. Of course, I admit that they were unequivocal, about five of them, that answered you that way.
>
> "Go ask her [Bounds] if she'd vote guilty or not guilty, . . . and let's see what she says to that.
>
> "If she says, if she gets to equivocating on that, I'm going to let her off as a person who can't make up her mind." *Ibid.*

In response to the prosecutor's questioning, Bounds stated that she could reach either a guilty or not guilty verdict and that she could vote to impose the death penalty if the verdict were guilty. *Id.*, at 24. Despite these answers, the pros-

[6] In response to questioning from this Court during oral argument here, counsel for the State said that in some Mississippi cases, the trial judge has allowed additional peremptory challenges. He went on to say, however, that he was unaware of any state-court decision on the issue. Tr. of Oral Arg. 35–37. He noted that, on the occasions of which he was aware, when additional peremptory challenges were granted, the opposing side also received an equal number. *Id.*, at 36.

ecutor renewed his motion that she be removed for cause. Defense counsel pointed out that Bounds' answers to the questions did not render her excludable. He further contended that the prosecutor had not properly questioned the earlier jurors, who had not been excused for cause, to determine whether they were excludable under *Witherspoon.* The judge agreed that the prosecutor had not used the appropriate language and noted, "I should have questioned them on this, I guess. . . ." *Id.*, at 25.

After still further discussion, the judge excused Bounds for cause, but expressly declined to reconsider his earlier refusals to strike venire members for cause.[7] The *voir dire* continued until both sides accepted 12 venire members in the box

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[7] The court prefaced its conclusion with the following explanation:

"I'd hate to get a conviction and get it reversed because of this one woman. She can't make up her mind.

"Well, let the record show that the Court is of the firm opinion that there was at least five, even though I think there's around nine challenges been used by the District Attorney for cause, either eight or nine, all right, there was eight of them that had said that they were against Capital Punishment.

"And I think there was, uh, five of those that were unequivocally opposed to it and answered, in substance, if not even stronger language than the question set forth in the Witherspoon case, uh, from the United States Supreme Court, uh, that I should, at this point, allow him to challenge this lady for cause. She is totally indecisive. I think she is totally indecisive. She says one thing one time and one thing another.

"The Court is of the opinion that it cheated the State . . . by making the District Attorney use his peremptory challenges in at least five instances. And I'm going to allow it in this particular case."

"BY MR. STEGALL [defense counsel]: Excuse her for cause?

"BY THE COURT: I'm going to excuse her.

"BY MR. STEGALL: Let me ask the Court this, is the Court of the opinion that, uh, that there has been a sufficient record. . . .

"BY THE COURT: (Interposing) I'm not going to add any to his challenges.

"BY MR. STEGALL: Okay. All right.

"BY THE COURT: I'm not going to go back and give him five more. *I'm going to excuse her for cause.*" App. 26 (emphasis added).

and two alternates. The trial began that afternoon and concluded three days later when the jury convicted petitioner of capital murder and sentenced him to death.

In an otherwise unanimous opinion, the Supreme Court of Mississippi divided on petitioner's claim that his death sentence was invalid because the exclusion of Bounds violated his right to a fair and impartial jury and was inconsistent with *Witherspoon*'s dictates. 472 So. 2d 409 (1985). The majority stated at the outset that the jury selection problem in the case was created in part by the trial court's failure to follow the *voir dire* guidelines for capital cases set forth in *Armstrong* v. *State*, 214 So. 2d 589, 593 (Miss. 1968), cert. denied, 395 U. S. 965 (1969), which were aimed at ensuring compliance with *Witherspoon*. 472 So. 2d, at 421. Despite this violation of state procedure, the court affirmed petitioner's sentence as well as the judgment of conviction.

The majority explained that reluctance on the part of some venire members to serve complicated the jury selection. *Ibid.* The majority did not discuss in any detail the *voir dire* of the venire members whom the State removed by peremptory challenges. It noted, however, that the trial court had refused to excuse several jurors who had expressed conscientious scruples against the death penalty and who had stated they could not vote to inflict it. The majority offered the following explanation for the trial judge's action:

> "It is abundantly clear from the record that his reason for doing so was because he believed that the jurors were simply claiming to have conscientious scruples against the death penalty so that they could be released from jury service. Confronted by what he believed to be insincere attestations of personal moral convictions, the trial court was unwilling to dismiss those jurors for cause even though their responses clearly indicated that they could properly be so dismissed both under *Witherspoon* and *Adams* [v. *Texas*, 448 U. S. 38 (1980)]." *Id.*, at 421–422 (footnote omitted).

After reviewing Bounds' *voir dire*, the majority agreed with petitioner that Bounds "was clearly qualified to be seated as a juror under the *Adams* and [*Wainwright* v.] *Witt*, [469 U. S. 412 (1985)] criteria." *Id.*, at 422. It concluded, however, that petitioner was not prejudiced by the trial court's erroneous exclusion of this juror:

> "The force and effect of the trial court's ruling was to correct an error he had committed in refusing to dismiss other jurors for cause after they had unequivocally stated that they could not vote to impose the death penalty in any circumstance. . . . That being the case the trial court was correct when it recognized the error in its prior rulings and took affirmative action to correct that error." *Id.*, at 422–423.

Writing in dissent and joined by two other members of the court, Justice Sullivan emphasized that, according to the record, the trial judge excused Bounds for cause ("the majority . . . contradicts the trial judge's very words"), not on the basis of a peremptory challenge. *Id.*, at 424. In the dissent's view, the majority's reasoning was invalid because, under *Davis* v. *Georgia*, courts could not treat erroneous *Witherspoon* dismissals as harmless error. 472 So. 2d, at 425.

We granted certiorari, 475 U. S. 1010 (1986), to consider whether to abandon the *Davis* ruling and whether the improper excusal of a juror for cause can be harmless.

II

In *Witherspoon*, this Court held that a capital defendant's right, under the Sixth and Fourteenth Amendments, to an impartial jury prohibited the exclusion of venire members "simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." 391 U. S., at 522. It reasoned that the exclusion of venire members must be limited to those who were "irrevocably committed . . . to vote against the penalty

of death regardless of the facts and circumstances that might emerge in the course of the proceedings," and to those whose views would prevent them from making an impartial decision on the question of guilt. *Id.*, at 522, n. 21. We have reexamined the *Witherspoon* rule on several occasions, one of them being *Wainwright* v. *Witt*, 469 U. S. 412 (1985), where we clarified the standard for determining whether prospective jurors may be excluded for cause based on their views on capital punishment. We there held that the relevant inquiry is "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Id.*, at 424, quoting *Adams* v. *Texas*, 448 U. S. 38, 45 (1980).

There is no need to delve again into the intricacies of that standard. It is necessary, however, to keep in mind the significance of a capital defendant's right to a fair and impartial jury under the Sixth and Fourteenth Amendments.

JUSTICE REHNQUIST, in writing for the Court, recently explained:

> "It is important to remember that not all who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law." *Lockhart* v. *McCree*, 476 U. S. 162, 176 (1986).

The State's power to exclude for cause jurors from capital juries does not extend beyond its interest in removing those jurors who would "frustrate the State's legitimate interest in administering constitutional capital sentencing schemes by not following their oaths." *Wainwright* v. *Witt*, 469 U. S., at 423. To permit the exclusion for cause of other prospective jurors based on their views of the death penalty unnecessarily narrows the cross section of venire members. It "stack[s] the deck against the petitioner. To execute

[such a] death sentence would deprive him of his life without due process of law." *Witherspoon* v. *Illinois*, 391 U. S., at 523.

Every Justice of the Mississippi Supreme Court expressly stated that panel member Bounds "was clearly qualified to be seated as a juror under the *Adams* and *Witt* criteria." 472 So. 2d, at 422 and 424. We agree. Gray's death sentence therefore cannot stand unless this Court chooses to abandon *Davis*.

III

Although *Davis* was not cited in the Mississippi Supreme Court's majority opinion in the present case, this Court in *Davis* surely established a *per se* rule requiring the vacation of a death sentence imposed by a jury from which a potential juror, who has conscientious scruples against the death penalty but who nevertheless under *Witherspoon* is eligible to serve, has been erroneously excluded for cause. See *Davis*, 429 U. S., at 123–124 (dissenting opinion). The *Davis per curiam* opinion served to identify the Court's course after *Witherspoon*.[8] Soon after *Witherspoon* was decided, the Court was presented with several situations in which state courts had exhibited their confusion as to how to apply the standard enunciated in that case.[9] In 1971, it had sum-

[8] During the two years following *Witherspoon*, the Court twice reaffirmed its holding in brief opinions demonstrating its correct application. See *Boulden* v. *Holman*, 394 U. S. 478, 481–484 (1969), and *Maxwell* v. *Bishop*, 398 U. S. 262, 264–266 (1970) *(per curiam)*.

[9] Some courts already had recognized, however, the full import of the constitutional mandate expressed in *Witherspoon*. In *Marion* v. *Beto*, 434 F. 2d 29 (1970), cert. denied, 402 U. S. 906 (1971), the Court of Appeals for the Fifth Circuit described the split among state and lower federal courts on the effect of *Witherspoon* violations. 434 F. 2d, at 31–32. It concluded that the improper exclusion of even a single prospective juror from a capital jury required reversal of a death sentence for the reason that it prejudiced a defendant's right to an impartial jury, a right of particular significance in capital cases because of the magnitude of the decision and because jury unanimity was required. *Id.*, at 32. The Supreme Court of California refused to find an erroneous exclusion harmless even though it was suggested that the prosecutor would have used his peremptory challenges to

marily reversed the judgments in 23 cases imposing death sentences and had remanded the cases for further proceedings in light of *Witherspoon* and its progeny. See 403 U. S. 946–948. Several of the state courts in those cases had relied on harmless-error analyses similar to those Mississippi seeks to resurrect here. See nn. 14 and 16, *infra*.

We did not have occasion to revisit the *Witherspoon* issue during the period between the decision in *Furman* v. *Georgia*, 408 U. S. 238 (1972), and *Branch* v. *Texas*, decided with *Furman*, where Georgia and Texas death sentences were invalidated, and the decisions in *Gregg* v. *Georgia*, 428 U. S. 153 (1976), and its companion cases, where we upheld post-*Furman* death penalty statutes against constitutional challenge. But after *Gregg*, the *Witherspoon* issue again appeared. In fact, our first post-*Gregg* opinion in a capital case was *Davis*, which served to inform lower courts that we would continue to treat *Witherspoon* violations as reversible constitutional error in the post-*Gregg* era. 429 U. S., at 123. The instant case presents yet another opportunity for this Court to adopt a harmless-error analysis and once again we decline to do so.

The efforts to apply a harmless-error determination to *Witherspoon* violations have suggested two analyses. See Krauss, The *Witherspoon* Doctrine at *Witt*'s End: Death-Qualification Reexamined, 24 Am. Crim. L. Rev. 1, 32, n. 111 (1987). The first is to consider the state's retention of unexercised peremptory challenges at the end of jury selection as an indication that the erroneous for-cause exclusion was harmless. This approach relies on a representation by the state that it would have removed the venire member by peremptory challenge if the court had denied its for-cause

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exclude all prospective jurors opposed to the death penalty. *In re Anderson*, 69 Cal. 2d 613, 618–620, 447 P. 2d 117, 121–122 (1968), cert. denied *sub nom. Anderson* v. *California*, 406 U. S. 971 (1972). It noted that *Witherspoon* held that exclusion of all such prospective jurors did not yield an impartial jury. 69 Cal. 2d, at 620, 447 P. 2d, at 122.

motion. The second is to treat the erroneous exclusion as an isolated incident without prejudicial effect if it cannot be said that the ultimate panel did not fairly represent the community anyway. The Mississippi Supreme Court appears to have relied on a variation of the first analysis; respondent urges the Court to adopt the second.[10] We find each unpersuasive.

A

The seeming ambiguity of the Mississippi Supreme Court's opinion complicates somewhat our examination of its harmless-error analysis. The opinion is susceptible to three possible interpretations. The first is that, in the court's view, the trial judge recognized that he had erred earlier in failing to dismiss one of the jurors for cause and therefore restored to the State a peremptory challenge that the prosecutor then exercised to remove Bounds. The second is that the court could be seen as concluding that the trial court itself offset its earlier error in denying a valid for-cause *Witherspoon* motion by granting an invalid for-cause *Witherspoon* motion as to Bounds. The third is that the court could be seen to have decided that the trial judge restored a peremptory challenge to the State, by determining that he had erred previously in denying one of the prosecutor's *Witherspoon* motions, but still removed Bounds for cause. Under this interpretation, the court would have reasoned that, although the trial judge erred in removing Bounds for cause, the error was harmless because the State had an unexercised peremptory challenge

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[10] The State has devoted a significant portion of its brief to an argument based on the deference this Court owes to findings of fact made by a trial court. Such deference is inappropriate where, as here, the trial court's findings are dependent on an apparent misapplication of federal law, *Rogers* v. *Richmond*, 365 U. S. 534, 547 (1961), and are internally inconsistent. We rest our reasoning on the one unambiguous finding made by the trial court and affirmed on appeal—that the court was not authorized under the *Witherspoon-Witt* standard to exclude venire member Bounds for cause. See n. 5, *supra*.

that the prosecutor would have used to remove Bounds if the trial judge had refused to remove her for cause.

We disagree with the judgment if and to the extent it rests on the first interpretation because that reasoning is wholly unsupported by the record. The trial judge was explicit in his explanation that Bounds was removed for cause. See n. 7, *supra*. It is by no means clear that, in his view, he erred in denying the prosecutor's *Witherspoon* motions. Whether he actually erred in his earlier denials simply cannot be discerned from the record. Although the trial judge acknowledged that some of the venire members had responded to the prosecutor's questioning in language at least suggesting that they would be excludable under *Witherspoon*, the judge agreed with defense counsel that the prosecutor had not properly questioned the earlier venire members. App. 25. In order to avoid errors based on this type of failure to establish an adequate foundation for juror exclusion, Mississippi law, contrary to the implications in the dissent, requires the trial judge himself to question the venire members.[11] The trial judge in this case, however, did not comply with the Mississippi procedure. Had he done so, despite their initial

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[11] The Mississippi Supreme Court, in the present case, explained that, under state law in a capital case, the trial judge should ask the venire members

"'if any member of the panel has any conscientious scruples against the infliction of the death penalty, when the law authorizes it, in proper cases, and where the testimony warrants it. If there are those who say that they are opposed to the death penalty, the trial judge should then go further and ask those veniremen, who have answered in the affirmative, whether or not they could, nevertheless, follow the testimony and the instructions of the court and return a verdict of guilty although that verdict could result in the death penalty, if they, being the judges of the weight and worth of the evidence, were convinced of the guilt of the defendant and the circumstances warranted such a verdict. Those who say that they could follow the evidence and the instructions of the court should be retained, and those who cannot follow the instructions of the court should be released.'" 472 So. 2d, at 421, quoting *Armstrong* v. *State*, 214 So. 2d 589, 593 (Miss. 1968).

responses, the venire members might have clarified their positions upon further questioning and revealed that their concerns about the death penalty were weaker than they originally stated. It might have become clear that they could set aside their scruples and serve as jurors. The inadequate questioning regarding the venire members' views in effect precludes an appellate court from determining whether the trial judge erred in refusing to remove them for cause.[12]

We also disagree with the judgment of the Mississippi Supreme Court if and to the extent that it might be seen to approve a trial court's remedying an erroneous denial of a *Witherspoon* motion by granting an invalid *Witherspoon* motion. Our reasons are embraced by that well-worn adage that "two wrongs do not make a right." Although we prefer that a trial court remedy its own mistakes if possible, we cannot condone the "correction" of one error by the commitment of another.

Moreover, the fact that the State may have been deprived improperly of peremptory challenges does not render the *Witherspoon* error any less a violation of petitioner's constitutional rights guaranteed by the Sixth and Fourteenth Amendments. Peremptory challenges are not of constitutional origin. See *Batson* v. *Kentucky*, 476 U. S. 79, 91 (1986); *Swain* v. *Alabama*, 380 U. S. 202, 219 (1965); *Stilson* v. *United States*, 250 U. S. 583, 586 (1919). In a situation such as this where a constitutional right comes into conflict with a statutory right, the former prevails.[13]

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[12] The trial judge himself belatedly realized that he should have questioned the jurors more extensively, pursuant to state law, about their views on the death penalty. App. 23, 25. Furthermore, if he had intended to correct earlier errors, one would expect that he would have identified specifically the earlier rulings he considered erroneous and restored to the prosecutor enough peremptory challenges to compensate for the errors.

[13] We do not suggest that, if the trial judge believed that he had applied an erroneous standard during *voir dire*, there was no way to correct the error. The Mississippi Supreme Court said that a trial court "should be

Finally, we disagree with the Mississippi Supreme Court's judgment if and to the extent it holds that a *Witherspoon* violation constitutes harmless error when the prosecutor has an unexercised peremptory challenge that he states he would have used to excuse the juror. At least two of this Court's 1971 summary reversals stand as prior rejections of this "unexercised peremptories" argument.[14]

A fresh examination of this argument also leads us to conclude that it must be rejected.[15] The unexercised pe-

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afforded the opportunity to correct any errors at trial by way of a motion for a new trial." 472 So. 2d, at 423. In the situation presented by this case, the equivalent action would have been to dismiss the venire *sua sponte* and start afresh. The parties agreed that a new special capital venire could have been compiled in less than a month. Tr. of Oral Arg. 34–35, 46. The time period might have been even shorter in this case because the parties waived any right to have a special venire called. Tr. 52.

[14] In *People* v. *Bernette*, 45 Ill. 2d 227, 258 N. E. 2d 793 (1970), for example, the Supreme Court of Illinois had considered any *Witherspoon* violation to be harmless error because the State had 33 of its 40 peremptory challenges remaining that it otherwise might have used against the improperly excluded jurors. *Id.*, at 232, 258 N. E. 2d, at 796. This Court summarily reversed the Illinois Supreme Court's judgment. 403 U. S. 947 (1971). See also *Wigglesworth* v. *Ohio*, 403 U. S. 947 (1971), rev'g 18 Ohio St. 2d 171, 181, 248 N. E. 2d 607, 614 (1969).

[15] Other opinions expressly rejecting the unexercised peremptory argument are numerous. In *Moore* v. *Estelle*, 670 F. 2d 56, 57 (CA5), cert. denied, 458 U. S. 1111 (1982), the court rejected the argument because it refused to "countenance what amounts to an attempt to exercise—retroactively and by affidavit in defense of a collateral attack—peremptory challenges reserved at the time." See also *Hance* v. *Zant*, 696 F. 2d 940, 956 (CA11), cert. denied, 463 U. S. 1210 (1983) (existence of unexercised peremptory challenges does not render harmless exclusion of prospective alternate juror in violation of *Witherspoon*); *Blankenship* v. *State*, 247 Ga. 590, 277 S. E. 2d 505, 280 S. E. 2d 623 (1981) (see also specially concurring opinion on motion for reconsideration, *id.*, at 597, 280 S. E. 2d, at 624, demonstrating that unexercised peremptory harmless-error approach is inappropriate because in the jury selection process "there are too many variables which may give rise to the non-use of a peremptory challenge"); *Grijalva* v. *State*, 614 S. W. 2d 420, 424–425 (Tex. Crim. App. 1981) (re-

remptory argument assumes that the crucial question in the harmless-error analysis is whether a particular prospective juror is excluded from the jury due to the trial court's erroneous ruling. Rather, the relevant inquiry is "whether the composition of the *jury panel as a whole* could possibly have been affected by the trial court's error" (emphasis in original). *Moore* v. *Estelle*, 670 F. 2d 56, 58 (CA5) (specially concurring opinion), cert. denied, 458 U. S. 1111 (1982). Due to the nature of trial counsel's on-the-spot decisionmaking during jury selection, the number of peremptory challenges remaining for counsel's use clearly affects his exercise of those challenges. A prosecutor with fewer peremptory challenges in hand may be willing to accept certain jurors whom he would not accept given a larger reserve of peremptories. Even if one is to believe the prosecutor's statement that if his motion to remove Bounds for cause had been denied and he had had a peremptory remaining, he would have used it to remove her, we cannot know whether in fact he would have had this peremptory challenge left to use. That is, if the court had granted one or more of his earlier motions to remove for cause, the prosecutor may have used his peremptory challenges on other jurors whom he did not strike when he had fewer peremptory challenges to exercise. The nature of the jury selection process defies any attempt to establish that an erroneous *Witherspoon-Witt* exclusion of a juror is harmless.

The practical result of adoption of this unexercised peremptory argument would be to insulate jury selection error from meaningful appellate review. By simply stating during *voir dire* that the State is prepared to exercise a peremptory challenge if the court denies its motion for cause, a prosecutor could ensure that a reviewing court would consider any

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jecting argument as matter of state law because allowing retrospective exercise of peremptory challenges on appeal transforms "a peremptory strike against a prospective juror" into "a peremptory strike against a ground of error").

erroneous exclusion harmless. A prosecutor, as a routine matter, would likely append a statement to this effect to his motion for cause.

B

1

The State's argument that the erroneous exclusion of Bounds was a single technical error that should be considered harmless because it did not have any prejudicial effect is equally unavailing. The judgment of the Supreme Court of Georgia that was reversed in *Davis* rested on a similar analysis. See *Davis* v. *State*, 236 Ga. 804, 225 S. E. 2d 241 (1976). In this Court's *Davis* opinion, it cited three of its 1971 summary reversals which can be read as having rejected this argument.[16] 429 U. S., at 123. The State nevertheless urges us to apply the constitutional harmless-error analysis formulated in *Chapman* v. *California*, 386 U. S. 18 (1967), and affirm petitioner's death sentence.

In *Davis* v. *State*, the Georgia Supreme Court concluded that, despite the erroneous exclusion of a venire member whose scruples about the death penalty did not justify *Witherspoon* exclusion, Davis' death sentence could stand. The Georgia court correctly read *Witherspoon* to prohibit the State from "'entrust[ing] the determination of whether a man should live or die to a tribunal organized to return a verdict of death,'" and from "'stack[ing] the deck against the petitioner.'" 236 Ga., at 809, 225 S. E. 2d, at 244, quoting *Witherspoon* v. *Illinois*, 391 U. S., at 521, 523. It focused on *Witherspoon*'s statement that "'the decision whether a man deserves to live or die must be made on scales that are

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[16] In *State* v. *Adams*, 76 Wash. 2d 650, 458 P. 2d 558 (1969), the Supreme Court of Washington reasoned that the incorrect exclusion of one potential juror did not require reversal of the death sentence because there was not an improper systematic exclusion of venire members. *Id.*, at 680–681, 458 P. 2d, at 576. This Court summarily reversed. 403 U. S. 947 (1971). See also *Wigglesworth* v. *Ohio*, 403 U. S. 947 (1971), rev'g 18 Ohio St. 2d 171, 248 N. E. 2d 607 (1969), and *Harris* v. *Texas*, 403 U. S. 947 (1971), rev'g 457 S. W. 2d 903 (Tex. Crim. App. 1970).

not deliberately tipped toward death.'" 236 Ga., at 809, 225 S. E. 2d, at 244, further quoting *Witherspoon*, 391 U. S., at 521–522, n. 20. The Georgia court, however, then concluded: "The rationale of *Witherspoon* and its progeny is not violated where merely *one* of a qualified class or group is excluded where it is shown, as here, that others of such group were qualified to serve." 236 Ga., at 809, 225 S. E. 2d, at 244–245. The court observed that "other veniremen who initially expressed opposition to capital punishment . . . were not excused when upon further examination it was determined they were not unalterably opposed to the death penalty under all circumstances." *Id.*, at 810, 225 S. E. 2d, at 245. Nevertheless, this Court reversed the judgment and held that the subsequently imposed death sentence could not stand.

2

We reaffirm that ruling today in a case that brings into focus one of the real-world factors that render inappropriate the application of the harmless-error analysis to such erroneous exclusions for cause. Unlike *Davis* in which the state court found that the erroneous exclusion of the scrupled, yet eligible, venire member was an isolated incident because the record revealed that similar jurors were not excused, the record in the instant case does not support such a finding. In fact, it suggests the opposite—that the State exercised its peremptory challenges to remove all venire members who expressed any degree of hesitation against the death penalty.[17] Because courts do not generally review the prosecution's reasons for exercising peremptory challenges,[18] and because it

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[17] The prosecutor made his goal very clear at one point:

"[W]hat I am trying to do is to find twelve people who tells (sic) me that they have no conscientious scruples against Capital Punishment when imposed by the law." App. 16.

[18] Under our recent decision in *Batson* v. *Kentucky*, 476 U. S. 79 (1986), however, a prosecutor's use of peremptory challenges is subject to judicial review when a defendant establishes a prima facie case of purposeful dis-

appears that prosecutors often use peremptory challenges in this manner,[19] a court cannot say with confidence that an erroneous exclusion for cause of a scrupled, yet eligible, venire member is an isolated incident in that particular case. Therefore, we cannot say that courts may treat such an error as an isolated incident having no prejudicial effect.

Because the *Witherspoon-Witt* standard is rooted in the constitutional right to an impartial jury, *Wainwright* v. *Witt*, 469 U. S., at 416, and because the impartiality of the adjudicator goes to the very integrity of the legal system, the *Chapman* harmless-error analysis cannot apply. We have recognized that "some constitutional rights [are] so basic to a fair trial that their infraction can never be treated as harmless error." *Chapman* v. *California*, 386 U. S., at 23. The right to an impartial adjudicator, be it judge or jury, is such a right. *Id.*, at 23, n. 8, citing, among other cases, *Tumey* v. *Ohio*, 273 U. S. 510 (1927) (impartial judge). As was stated in *Witherspoon*, a capital defendant's constitutional right not to be sentenced by a "tribunal organized to return a verdict of death" surely equates with a criminal defendant's right not to have his culpability determined by a "tribunal 'organized to convict.'" 391 U. S., at 521, quoting *Fay* v. *New York*, 332 U. S. 261, 294 (1947).

IV

The judgment of the Supreme Court of Mississippi, insofar as it imposes the death sentence, is reversed, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

It is so ordered.

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crimination based on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial.

[19] See Winick, Prosecutorial Peremptory Challenge Practices in Capital Cases: An Empirical Study and a Constitutional Analysis, 81 Mich. L. Rev. 1 (1982); Lindsay, Prosecutorial Abuse of Peremptory Challenges in Death Penalty Litigation: Some Constitutional and Ethical Considerations, 8 Campbell L. Rev. 71 (1985).

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

In *Davis* v. *Georgia*, 429 U. S. 122 (1976) *(per curiam)*, we held that if a single venire member is erroneously excluded for cause because of his views on the death penalty, a subsequently imposed capital sentence is invalid. The facts of this case show that Mrs. Bounds, although at times confused by the inartful *voir dire* questioning, finally stated explicitly that she would carry out her duty as a juror. Cf. *Wainwright* v. *Witt*, 469 U. S. 412, 424 (1985) (juror not excludable for cause unless his views would "'prevent or substantially impair the performance of his duties as a juror'" (quoting *Adams* v. *Texas*, 448 U. S. 38, 45 (1980))). Given Mrs. Bounds' willingness to impose a capital sentence in an appropriate case, I agree that the trial court erred in removing her for cause. We therefore are presented with the precise issue addressed in *Davis*.

I joined the *per curiam* opinion in *Davis*, and continue to believe that an improper exclusion of a juror in a capital case on these grounds should not be subject to a harmless-error analysis. The facts before us illustrate why a harmless-error analysis is inappropriate. JUSTICE SCALIA's dissent concludes that the exclusion of Mrs. Bounds had no effect on the composition of the jury because the prosecutor should have been allowed to exclude her peremptorily. The dissent points out that the prosecutor was required to exhaust his peremptory challenges because the trial judge erroneously refused to exclude other jurors for cause, despite their unequivocal opposition to the death penalty. *Post*, at 673. I agree that a number of these earlier jurors should have been excused.[1] Nevertheless, I cannot assume that the prosecu-

[1] As the dissent states, several of the potential jurors who were challenged unsuccessfully for cause explicitly stated that they would not impose the death sentence in any circumstance. See, *e. g.*, App. 3 (juror Ruiz would not impose the death sentence in "[a]ny type case"); *id.*, at 6 (juror Coker "would never vote for [capital punishment] in any case").

tor would have excluded Mrs. Bounds "but for" these mistakes. As the Court notes, it is difficult on appeal to reconstruct the prosecutor's *voir dire* strategy, and to predict who would have been excluded had the facts been different. If the prosecutor had not been compelled to use his challenges on other jurors, he certainly *may* have excluded Bounds. It also is possible, however, that the prosecutor would have saved his challenges on the chance that a more objectionable juror would come along, or perhaps he would have excluded an earlier juror on other grounds. Given our requirement of enhanced reliability in capital cases, I would hesitate to conclude that the composition of the venire "definitely" would have been the same, based solely on speculation as to how the prosecutor might have acted.[2] I therefore join in the judgment, and generally in the opinion except for Part III–B–2.

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[2]JUSTICE SCALIA's dissent takes a somewhat different approach in arguing that the error in this case was harmless. He asserts that the above analysis misses the point, because it improperly focuses on the trial judge's failure to excuse the earlier jurors for cause, rather than on the judge's failure to revise these earlier rulings and permit the prosecutor to exercise another peremptory challenge. *Post*, at 678–679, n. 4. I agree with the dissent about which of the trial judge's rulings caused the harm; I simply disagree as to what inferences properly may be drawn in light of the error. There is no dispute that the ruling that prejudiced petitioner was the improper removal of Mrs. Bounds. Thus the only question is whether there is a reasonable doubt that the composition of the venire would have been different as a result. The dissent is convinced that the panel would not have changed, because if the judge had not excused Bounds for cause, he nevertheless would have reversed his earlier rulings and "returned" at least one of the State's peremptory challenges. I do not think the record supports such an inference. The trial judge was aware that he may have erred in not excusing the earlier panel members for cause, and was asked specifically to change some of these decisions. Although this procedure apparently is permitted under state law, and although the judge was plainly aware that the excusal of Bounds created a disputed question under the *Witherspoon* line of cases, the judge refused to change his rulings. See App. 26. I therefore am unpersuaded that but for the *Witherspoon* error, the prosecutor both could and would have removed Mrs. Bounds from the panel.

I disagree with the plurality to the extent that its decision rests on "real-world factors" such as the prosecutor's use of peremptory challenges. The plurality notes that *Davis* involved the exclusion of a single qualified venire member. *Ante*, at 667. The state court in *Davis* found no error because the exclusion was an isolated incident, a conclusion that this Court expressly rejected. See 429 U. S., at 123. In my view, our decision in *Davis* is sufficient to resolve the case, given that we cannot know what effect the excluded juror would have had on the panel as a whole. For unexplained reasons, however, the plurality seeks to distinguish *Davis* by pointing out that here the State "exercised its peremptory challenges to remove all venire members who expressed any degree of hesitation against the death penalty." *Ante*, at 667 (footnote omitted). I do not see the relevance of this observation. The plurality surely is not suggesting that this case would have come out differently if the prosecutor had *not* removed other jurors because of their attitude about capital punishment. Such a conclusion would restrict *Davis* rather than reaffirm it. Presumably, then, the plurality simply is expressing disapproval of the prosecutor's exclusion of jurors who could not be removed for cause.

There can be no dispute that a prosecutor has the right, indeed the duty, to use all legal and ethical means to obtain a conviction, including the right to remove peremptorily jurors whom he believes may not be willing to impose lawful punishment. Of course, defense counsel has the same right and duty to remove jurors he believes may be prosecution oriented. This Court's precedents do not suggest that the *Witherspoon* line of cases restricts the traditional rights of prosecutors and defense counsel to exercise their peremptory

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It is irrelevant, of course, that the trial judge had the *authority* to remove Bounds for permissible reasons. In order for the error to be harmless, it must be shown that on the facts of this case, she definitely *would* have been removed, and thus that the venire would have been the same in the absence of the erroneous excusal for cause.

challenges in this manner. I therefore cannot agree that the prejudice created by Mrs. Bounds' removal was exacerbated by the proper exclusion of other jurors who may have shared her views.

The plurality acknowledges that judges normally may not inquire into the prosecutor's use of these challenges. *Ante*, at 667, n. 18. This Court has recognized one exception to that rule, when the defendant has established a prima facie case of racial bias in the selection of a particular venire. See *Batson* v. *Kentucky*, 476 U. S. 79 (1986). Our decision in *Batson*, however, was justified by the compelling need to remove all vestiges of invidious racial discrimination in the selection of jurors, a concern that obviously is not implicated on these facts. Nothing in *Batson* suggests that courts may examine the prosecutor's motives whenever he has excluded peremptorily those whom the court may not remove for cause. See *Brown* v. *North Carolina*, 479 U. S. 940 (1986) (O'CONNOR, J., concurring in denial of certiorari). Because the improper exclusion of even a single juror is sufficient to require resentencing in a capital case,[3] and because the prosecutor is free to exclude panel members who express doubt as to whether they could vote to impose capital punishment, I would attach no significance to the peremptory exclusion of the other jurors.

I join in the Court's judgment and in the opinion except for Part III–B–2.

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

The Court holds that petitioner's sentence must be vacated because Mrs. Bounds was improperly excluded for cause from the sentencing jury. I dissent because it is clear that she should in any event have been excluded on other

[3] The decision today has no bearing on the validity of petitioner's conviction, only on the sentence. See *Witherspoon* v. *Illinois*, 391 U. S. 521, 523, n. 21 (1968).

grounds. The trial judge's error, if any, consisted of no more than giving the wrong reason for lawful action—which could not conceivably have affected the fairness of the sentence.

Before Mrs. Bounds' *voir dire*, the State moved to exclude nine potential jurors for cause. The trial judge granted only one of those motions, and the State excluded the other eight potential jurors by peremptory challenge. Five of those eight had unambiguously stated that they would never vote to impose the death penalty. See Record 368–369 (Mr. Ruiz), 381–383 (Mrs. Coker), 392–393 (Mrs. Bush), 394–395 and 398–399 (Mrs. Price), 401–403 (Mrs. Walker). These statements undoubtedly rendered them excludable for cause. See, *e. g.*, *Adams* v. *Texas*, 448 U. S. 38, 45 (1980) (a potential juror may be excluded for cause if his views about capital punishment "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath"). See also *Darden* v. *Wainwright*, 477 U. S. 168, 175 (1986); *Wainwright* v. *Witt*, 469 U. S. 412, 420 (1985). Cf. *Witherspoon* v. *Illinois*, 391 U. S. 510 (1968). The trial judge eventually realized that he had erred. See Record 554 ("[I] cheated the State by making . . . the District Attorney use his peremptory challenges in at least five instances"); *ibid.* (five potential jurors "were unequivocally opposed to [capital punishment] and answered, in substance, if not even stronger language than the question set forth in *[Witherspoon]*"); *id.*, at 548 ("Of course, I admit that they were unequivocal, about five of them . . .").[1] The

[1] Despite these statements, the Court asserts that it is not clear that the trial judge believed himself to have erred. *Ante*, at 655, 662–663, and n. 12. It rests that assertion solely on the trial judge's expressions of regret that he had not questioned the jurors himself and that the prosecutor had not used language precisely patterned after the holding in *Witherspoon* v. *Illinois*, 391 U. S. 510 (1968). Record 548, 552–553. But these expressions of regret are completely consistent with the trial judge's unambiguous conclusion that at least five potential jurors should have been but were not excluded for cause. Moreover, if the trial judge did not think he had

Mississippi Supreme Court agreed. 472 So. 2d 409, 421–422 (1985) (several potential jurors' "responses clearly indicated that they could properly be . . . dismissed both under *Witherspoon* and [under] *Adams*"); *id.*, at 422–423 (the trial judge erred "in refusing to dismiss other [potential] jurors for cause after they had unequivocally stated that they could not vote to impose the death penalty in any circumstance").

Despite the unequivocal responses of the potential jurors and the agreement of the state courts that they could have been excluded, the plurality—without even discussing the potential jurors' responses—claims to be unable to determine whether any of them was excludable for cause.[2] *Ante*, at 662. According to the plurality,

> "despite their initial responses, the venire members might have clarified their positions upon further questioning and revealed that their concerns about the death penalty were weaker than they originally stated. . . . The inadequate questioning regarding the venire members' views in effect precludes an appellate court from determining whether the trial judge erred in refusing to remove them for cause." *Ante*, at 662–663 (footnote omitted).

In this brief passage, the plurality invents—but unfortunately does not justify—a new constitutional doctrine, not rooted in any constitutional provision and contradicted by our prior cases. The plurality suggests that potential jurors can-

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erred, it is hard to imagine why he excluded Mrs. Bounds for cause after making what the Court believes was an "unambiguous finding" that he "was not authorized under the *Witherspoon-Witt* standard" to do so, *ante*, at 661, n. 10. See 472 So. 2d 409, 423 (1985) ("the trial court . . . recognized the error in its prior rulings and took affirmative action to correct that error").

[2] Although JUSTICE POWELL has joined the section of the Court's opinion containing this claim, he concludes that at least some of the potential jurors should have been excluded for cause. *Ante*, at 669. He thus necessarily rejects the plurality's reasoning in support of the contrary conclusion.

not properly be excluded for cause if "further questioning" *might* reveal that they did not really mean it when they said they would never vote to impose a death sentence. The Court has never before even hinted at such a requirement (perhaps because of the obvious difficulty of saying how much further questioning is necessary to satisfy it—a point on which the plurality understandably provides no guidance) and in fact has implicitly rejected it. That rejection is made clear by a comparison of the *voir dire* the Court found sufficient to justify an exclusion for cause in *Witt* with the *voir dire* of the potential jurors in this case. The entirety of the *voir dire* at issue in *Witt* was as follows:

> "[Prosecutor (P)]: Now, let me ask you a question, ma'am. Do you have any religious beliefs or personal beliefs against the death penalty?
> "[Prospective Juror (J)]: I am afraid personally but not—
> "[P]: Speak up, please.
> "[J]: I am afraid of being a little personal, but definitely not religious.
> "[P]: Now, would that interfere with you sitting as a juror in this case?
> "[J]: I am afraid it would.
> "[P]: You are afraid it would?
> "[J]: Yes, sir.
> "[P]: Would it interfere with judging the guilt or innocence of the Defendant in this case?
> "[J]: I think so.
> "[P]: You think it would.
> "[J]: I think it would." 469 U. S., at 415–416.

The *voir dire* of each of the five potential jurors at issue in this case was at least as extensive, and the responses of the potential jurors far more categorical. For example, the *voir dire* of Mrs. Coker went as follows:

"[P]: Mrs. Coker, do you have any conscientious scruples against Capital Punishment when imposed by the law?
"[Mrs. Coker]: I do not believe in it.
"[P]: You do not believe in Capital Punishment. Now, Mrs. Coker, do you tell me you don't believe in Capital Punishment in this type of case or in any type of case?
"[Mrs. Coker]: In any type of case.
"[P]: You mean to tell me that if the Court instructed you that this is a case, gave you the law and told you that this is a case whereby *[sic]* you could impose the Death Penalty, that you would not follow the law, if it meant imposing the Death Penalty?
"[Mrs. Coker]: [Inaudible.]
"[P]: Ma'am?
"[Mrs. Coker]: I would not.
"[P]: You would not do it?
"[Mrs. Coker]: I would not do it.
"[P]: You just don't believe in Capital Punishment.
"[Mrs. Coker]: That's right.
"[P]: And you would never vote for Capital Punishment, are you telling me, in any case or just this type case?
"[Mrs. Coker]: In any case. I would never vote for it in any case." Record 381–383.

The plurality makes no effort to reconcile its conclusion that the *voir dire* of the five potential jurors at issue in this case was inadequate to justify their exclusion for cause with our decision in *Witt*. I think it beyond doubt that the trial judge erroneously denied at least five of the State's motions to exclude potential jurors for cause.

The plurality also hints that these potential jurors may not have been properly excludable for cause because they were merely feigning objections to capital punishment in order to avoid jury service. *Ante*, at 652–653, 656, and n. 4. But the Constitution certainly permits the exclusion for cause of potential jurors who lie under oath about their views of capi-

tal punishment. Moreover, although there is no doubt that the trial judge and the prosecutor were concerned that some potential jurors were dissembling, Record 410, 445, 540, they agreed that only one or two had acted in this fashion, *id.*, at 540. Thus, even if those were not properly excludable for cause, three others were.

I also conclude that there is no federal constitutional obstacle to the trial judge's granting the State's request that it be given back a peremptory challenge for use to remove Mrs. Bounds.[3] (It is clear from the Mississippi Supreme Court's opinion that this would have been permissible under state law, see 472 So. 2d, at 423.) It is true that doing so would have produced a jury different from that which would have been impaneled had the trial judge denied the request and left his error uncorrected—and might have produced a jury different from that which would have been impaneled had the error not been made in the first place. But we have never suggested, and it simply could not be, that the Constitution prevents trial judges from correcting errors in jury selection that favor defendants if doing so might affect the composition of the jury. The Court implicitly concedes as much when it states that the trial judge in this case could have remedied his erroneous rulings in petitioner's favor by dismissing the *venire* and starting anew. *Ante*, at 663–664, n. 13. That would have replaced all 12 members of the jury rather than merely Mrs. Bounds. The less drastic means of remedying the error must be permissible.

We come, then, to the last difficulty—which is that the trial judge in fact did *not* restore to the State the erroneously

[3] Since the State's request was for a peremptory challenge *for use to exclude Mrs. Bounds*, see Record 546, it is certain that Mrs. Bounds would have been excluded in this fashion had the trial judge not excluded her for cause. This case is therefore quite different from those discussed by the Court, *ante*, at 664–665, in which the State argued that an improper exclusion for cause was rendered harmless by the fact that it had peremptory challenges remaining at the end of the *voir dire* which it *might have used* to exclude the potential juror.

denied peremptory challenge, but instead excluded Mrs. Bounds for cause. I assume for purposes of this opinion that she was not constitutionally excludable on those grounds. As the Court observes, we have said that "if a venireman is improperly excluded [for cause], any subsequently imposed death penalty cannot stand." *Davis* v. *Georgia*, 429 U. S. 122, 123 (1976) *(per curiam)*. We have not, however, extended this language so far as to vacate a sentence when it was *certain* that the jury that was impaneled was identical to the jury that would have been impaneled had the trial judge not erred. In fact, the Court itself indicates that such an extension would be misguided, stating that "the relevant inquiry is 'whether the composition of the *jury panel as a whole* could possibly have been affected by the trial court's error.'" *Ante*, at 665 (quoting *Moore* v. *Estelle*, 670 F. 2d 56, 58 (CA5) (specially concurring opinion), cert. denied, 458 U. S. 1111 (1982)).

The standard that the Court endorses requires that petitioner's sentence be upheld. As I have described, the trial judge could lawfully have granted the State's request that it be given a peremptory challenge for use to remove Mrs. Bounds. It is certain that the trial judge's decision to exclude Mrs. Bounds for cause rather than granting that request did not affect the composition of the jury in any way. In either event, Mrs. Bounds would have been excluded. The difference in the *form* of her exclusion—essentially the utterance of one set of words rather than another—could not possibly have affected the composition of the jury. There is thus no reason to vacate petitioner's sentence.[4]

[4] I agree with JUSTICE POWELL that it cannot be assumed "that the prosecutor would have excluded Mrs. Bounds 'but for'" the trial judge's erroneous failure to exclude a number of potential jurors for cause. *Ante*, at 669–670. See *supra*, at 677. But the identity of outcome that is relevant to this case is an identity between what occurred and what would have occurred *without the error that violated the defendant's constitutional rights*. Here, as JUSTICE POWELL concedes, *ante*, at 670–671, n. 2, that error was not the earlier failure to exclude other jurors for cause (which

Finally, I cannot omit commenting upon the plurality's *dictum* implying that it is unconstitutional for prosecutors to use peremptory challenges consistently to exclude potential jurors who express reservations about capital punishment. *Ante*, at 667–668. I disagree. Prosecutors can use peremptory challenges for many reasons, some of which might well be constitutionally insufficient to support a legislative exclusion. For example, I assume that a State could not legislate that those who are more sympathetic toward defendants than is the average person may not serve as jurors. But that surely does not mean that prosecutors violate the Constitution by using peremptory challenges to exclude such people. Since defendants presumably use their peremptory challenges in the opposite fashion, the State's action simply does not result in juries "deliberately tipped toward" conviction. The same reasoning applies to the exercise of peremptory challenges to remove potential jurors on the basis of the perceived likelihood that they would vote to impose a death sen-

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aggrieved the State rather than the defendant), but rather the later decision to exclude Mrs. Bounds for cause instead of granting the State's request for restoration of a peremptory challenge. *That* decision, as I have explained, is certain to have had no effect on the composition of the jury.

JUSTICE POWELL does not dispute that the jury that sentenced petitioner was *identical* to the one that would have sentenced him had the trial judge granted the State's motion to exclude Mrs. Bounds by peremptory challenge. Nor does he dispute that the trial judge could, and indeed should, have granted that motion. Nevertheless, he believes that petitioner's sentence must be vacated because, had Mrs. Bounds not been excluded for cause, the trial judge might have refused to grant the State's motion, persisting in his mistaken failure to exclude earlier potential jurors. *Ibid.* But I cannot imagine why petitioner's sentence should be vacated merely because it is possible that the exclusion of Mrs. Bounds for cause deprived petitioner of the undeserved benefit of the trial judge's earlier errors. It seems to me that both in law and in logic the conclusion that petitioner's sentence should be sustained follows inevitably from the fact that petitioner was sentenced by a jury identical to the one that would have been impaneled had the trial judge, instead of excluding Mrs. Bounds for cause, taken a different, lawful course.

tence. In this case, for example, it appears that the defendant used peremptory challenges to exclude at least two potential jurors whose remarks suggested that they were relatively likely to vote to impose a death sentence. See Record 522 and 579 (Mr. Cavode), 573–577 and 579 (Mr. Hester).

For the foregoing reasons, I respectfully dissent.

Syllabus

UNITED STATES *v.* JOHNSON, PERSONAL REPRESENTATIVE OF THE ESTATE OF JOHNSON

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

No. 85–2039. Argued February 24, 1987—Decided May 18, 1987

Under *Feres* v. *United States*, 340 U. S. 135, the Government has no Federal Tort Claims Act (FTCA) liability for injuries to members of the military service arising out of or in the course of activity incident to service. Respondent's husband, a helicopter pilot for the Coast Guard, was killed when his helicopter crashed during a rescue mission. Shortly before the crash, air traffic controllers from the Federal Aviation Administration, a civilian agency of the Federal Government, had assumed positive radar control over the helicopter. After receiving veterans' benefits for her husband's death, respondent filed an FTCA action seeking damages from the Government on the ground that the controllers' negligence had caused the crash. The Federal District Court dismissed the complaint, relying exclusively on *Feres*. However, the Court of Appeals reversed, distinguishing *Feres* from cases such as the present in which negligence is alleged on the part of a Government employee who is not a member of the military. Finding the effect of a suit on military discipline to be the *Feres* doctrine's primary justification, the court ruled that *Feres* did not bar respondent's suit since there was no indication that the conduct or decisions of military personnel would be subjected to scrutiny if the case proceeded to trial.

Held: The *Feres* doctrine bars an FTCA action on behalf of a service member killed during an activity incident to service, even if the alleged negligence is by civilian employees of the Federal Government. Pp. 686–692.

(a) This Court and the lower federal courts have consistently applied the *Feres* doctrine since its inception, and have never suggested that the military status of the alleged tortfeasor is crucial. Nor has Congress seen fit to change the *Feres* standard in the more than 35 years since it was articulated. Pp. 686–688.

(b) The three broad rationales underlying *Feres* refute the critical significance ascribed to the status of the alleged tortfeasor by the Court of Appeals. First, the distinctively federal character of the relationship between the Government and Armed Forces personnel necessitates a federal remedy that provides simple, certain, and uniform compensation, unaffected by the fortuity of the situs of the alleged negligence. Second, the statutory veterans' disability and death benefits system

provides the sole remedy for service-connected injuries. Third, even if military negligence is not specifically alleged in a service member's FTCA suit, military discipline may be impermissibly affected by the suit since the judgments and decisions underlying the military mission are necessarily implicated, and the duty and loyalty that service members owe to their services and the country may be undermined. Pp. 688–691.

(c) Respondent's husband's death resulted from the rescue mission, a primary duty of the Coast Guard, and the mission was an activity incident to his service. Respondent received statutory veterans' benefits on behalf of her husband's death. Because respondent's husband was acting pursuant to standard Coast Guard Operating Procedures, the potential that this suit could implicate military discipline is substantial. Thus, this case falls within the heart of the *Feres* doctrine. Pp. 691–692.

779 F. 2d 1492, reversed and remanded.

POWELL, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, BLACKMUN, and O'CONNOR, JJ., joined. SCALIA, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and STEVENS, JJ., joined, *post*, p. 692.

Deputy Solicitor General Ayer argued the cause for the United States. With him on the briefs were *Solicitor General Fried*, *Assistant Attorney General Willard*, *Christopher J. Wright*, and *Nicholas S. Zeppos*.

Joel D. Eaton argued the cause and filed a brief for respondent.*

JUSTICE POWELL delivered the opinion of the Court

This case presents the question whether the doctrine established in *Feres* v. *United States*, 340 U. S. 135 (1950), bars an action under the Federal Tort Claims Act on behalf of a service member killed during the course of an activity incident to service, where the complaint alleges negligence on the part of civilian employees of the Federal Government.

I

Lieutenant Commander Horton Winfield Johnson was a helicopter pilot for the United States Coast Guard, stationed

**Donald L. Salem* filed a brief for William H. Gilardy, Jr., et al., as *amici curiae* urging affirmance.

in Hawaii. In the early morning of January 7, 1982, Johnson's Coast Guard station received a distress call from a boat lost in the area. Johnson and a crew of several other Coast Guard members were dispatched to search for the vessel. Inclement weather decreased the visibility, and so Johnson requested radar assistance from the Federal Aviation Administration (FAA), a civilian agency of the Federal Government. The FAA controllers assumed positive radar control over the helicopter. Shortly thereafter, the helicopter crashed into the side of a mountain on the island of Molokai. All the crew members, including Johnson, were killed in the crash.

Respondent, Johnson's wife, applied for and received compensation for her husband's death pursuant to the Veterans' Benefits Act, 72 Stat. 1118, as amended, 38 U. S. C. § 301 *et seq.* (1982 ed. and Supp. III).[1] In addition, she filed suit in the United States District Court for the Southern District of Florida under the Federal Tort Claims Act (FTCA), 28 U. S. C. §§ 1346, 2671–2680. Her complaint sought damages from the United States on the ground that the FAA flight controllers negligently caused her husband's death. The Government filed a motion to dismiss, asserting that because Johnson was killed during the course of his military duties, respondent could not recover damages from the United States. The District Court agreed and dismissed the complaint, relying exclusively on this Court's decision in *Feres*.

The Court of Appeals for the Eleventh Circuit reversed. 749 F. 2d 1530 (1985). It noted the language of *Feres* that precludes suits by service members against the Government

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[1] Respondent has received $35,690.66 in life insurance and a $3,000 death gratuity, and receives approximately $868 per month in dependency and compensatory benefits. Brief for United States 3, n. 1. The dependency and compensatory benefits normally are payable for the life of the surviving spouse and include an extra monthly sum for any surviving child of the veteran below age 18. See 38 U. S. C. §§ 410, 411 (1982 ed. and Supp. III); 38 CFR § 3.461 (1986).

for injuries that "arise out of or are in the course of activity incident to service." 340 U. S., at 146. The court found, however, that the evolution of the doctrine since the *Feres* decision warranted a qualification of the original holding according to the status of the alleged tortfeasor. The court identified what it termed "the typical *Feres* factual paradigm" that exists when a service member alleges negligence on the part of another member of the military. 749 F. 2d, at 1537. "[W]hen the *Feres* factual paradigm is present, the issue is whether the injury arose out of or during the course of an activity incident to service." *Ibid.* But when negligence is alleged on the part of a Federal Government employee who is not a member of the military, the court found that the propriety of a suit should be determined by examining the rationales that underlie the *Feres* doctrine. Although it noted that this Court has articulated numerous rationales for the doctrine,[2] it found the effect of a suit on military discipline to be the doctrine's primary justification.

Applying its new analysis to the facts of this case, the court found "absolutely no hint . . . that the conduct of any alleged tortfeasor even remotely connected to the military will be scrutinized if this case proceeds to trial." 749 F. 2d, at 1539.

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[2] We have identified three factors that underlie the *Feres* doctrine:

"First, the relationship between the Government and members of its Armed Forces is '"distinctively federal in character"'; it would make little sense to have the Government's liability to members of the Armed Services dependent on the fortuity of where the soldier happened to be stationed at the time of the injury. Second, the Veterans' Benefits Act establishes, as a substitute for tort liability, a statutory 'no fault' compensation scheme which provides generous pensions to injured servicemen, without regard to any negligence attributable to the Government. A third factor . . . [is] '[t]he peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty . . . .'" *Stencel Aero Engineering Corp.* v. *United States*, 431 U. S. 666, 671–672 (1977) (citations omitted).

Accordingly, it found that *Feres* did not bar respondent's suit. The court acknowledged that the Court of Appeals for the Ninth Circuit, "in a case strikingly similar to this one, has reached the opposite conclusion." 749 F. 2d, at 1539 (citing *Uptegrove* v. *United States*, 600 F. 2d 1248 (1979), cert. denied, 444 U. S. 1044 (1980)).[3] It concluded, however, that "*Uptegrove* was wrongly decided," 749 F. 2d, at 1539, and declined to reach the same result.

The Court of Appeals granted the Government's suggestion for rehearing en banc. The en banc court found that this Court's recent decision in *United States* v. *Shearer*, 473 U. S. 52 (1985), "reinforc[ed] the analysis set forth in the panel opinion," 779 F. 2d 1492, 1493 (1986) *(per curiam)*, particularly the "[s]pecial emphasis . . . upon military discipline and whether or not the claim being considered would require civilian courts to second-guess military decisions," *id.*, at 1493–1494. It concluded that the panel properly had evaluated the claim under *Feres* and therefore reinstated the panel opinion. Judge Johnson, joined by three other judges, strongly dissented. The dissent rejected the "*Feres* factual paradigm" as identified by the court, finding that because "Johnson's injury was undoubtedly sustained incident to service, . . . under current law our decision ought to be a relatively straightforward affirmance." *Id.*, at 1494.

We granted certiorari, 479 U. S. 811 (1986), to review the Court of Appeals' reformulation of the *Feres* doctrine and to resolve the conflict among the Circuits on the issue.[4] We now reverse.

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[3] In *Uptegrove*, the wife of a Navy lieutenant killed while flying home on an Air Force C–141 transport brought suit against the Government under the FTCA, alleging negligence on the part of three FAA air traffic controllers. The court in *Uptegrove* dismissed the suit on the basis of *Feres*.

[4] In addition to the decision of the Court of Appeals for the Ninth Circuit in *Uptegrove* v. *United States*, 600 F. 2d 1248 (1979), cert. denied, 444 U. S. 1044 (1980), specifically acknowledged by the Court of Appeals in this case, the decision conflicts in principle with the decisions of the Courts of Appeals cited in n. 8, *infra*.

II

In *Feres*, this Court held that service members cannot bring tort suits against the Government for injuries that "arise out of or are in the course of activity incident to service." 340 U. S., at 146. This Court has never deviated from this characterization of the *Feres* bar.[5] Nor has Congress changed this standard in the close to 40 years since it was articulated, even though, as the Court noted in *Feres*, Congress "possesses a ready remedy" to alter a misinterpretation of its intent. *Id.*, at 138.[6] Although all of the cases decided by this Court under *Feres* have involved allegations of negligence on the part of members of the military, this Court has never suggested that the military status of the alleged tortfeasor is crucial to the application of the doctrine.[7]

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[5] See *United States* v. *Brown*, 348 U. S. 110, 112 (1954); *United States* v. *Muniz*, 374 U. S. 150, 159 (1963); *Stencel Aero Engineering Corp.* v. *United States*, *supra*, at 671; *Chappell* v. *Wallace*, 462 U. S. 296, 299 (1983); *United States* v. *Shearer*, 473 U. S. 52, 57 (1985).

[6] Congress has recently considered, but not enacted, legislation that would allow service members to bring medical malpractice suits against the Government. See H. R. 1161, 99th Cong., 1st Sess. (1985); H. R. 1942, 98th Cong., 1st Sess. (1983).

[7] In two places in the *Feres* opinion, the Court suggested that the military status of the tortfeasor might be relevant to its decision. First, the Court identified "[t]he common fact underlying the three cases" as being "that each claimant, while on active duty and not on furlough, sustained injury *due to negligence of others in the armed forces.*" 340 U. S., at 138 (emphasis added). Second, in discussing one of several grounds for the holding, the Court stated: "It would hardly be a rational plan of providing for those disabled in service *by others in service* to leave them dependent upon geographic considerations over which they have no control." *Id.*, at 143 (emphasis added). Nevertheless, the language of the opinion, viewed as a whole, is broad: "We know of no American law which ever has permitted a soldier to recover for negligence, against either his superior officers *or the Government he is serving*," *id.*, at 141 (emphasis added; footnote omitted); " 'To whatever extent state law may apply to govern the relations between soldiers or others in the armed forces and persons outside them or *nonfederal governmental agencies*, the scope, nature, legal incidents and consequences of the relation between persons in service *and the Govern-*

Nor have the lower courts understood this fact to be relevant under *Feres*.[8] Instead, the *Feres* doctrine has been applied consistently to bar all suits on behalf of service members

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ment are fundamentally derived from federal sources and governed by federal authority.'" *Id.*, at 143–144 (quoting *United States* v. *Standard Oil Co.*, 332 U. S. 301, 305–306 (1947)) (emphasis added; citations omitted). See *id.*, at 142 (finding relevant "the status of *both* the wronged and the wrongdoer") (emphasis added).

Although one decision since *Feres* noted the military status of the tortfeasors, see *United States* v. *Brown*, *supra*, at 112, it did not rely on that fact. See 348 U. S., at 113 ("We adhere . . . to the line drawn in the *Feres* case between injuries that did and injuries that did not arise out of or in the course of military duty"). Moreover, it is the broad language that consistently has been repeated in recent decisions describing the *Feres* doctrine. See *Chappell* v. *Wallace*, *supra*, at 299 ("Congress did not intend to subject *the Government* to . . . claims [for injuries suffered in service] by a member of the Armed Forces") (emphasis added); *Stencel Aero Engineering Corp.* v. *United States*, 431 U. S., at 669 ("In *Feres* . . . the Court held that an on-duty serviceman who is injured due to *the negligence of Government officials* may not recover against the United States under the Federal Tort Claims Act") (emphasis added); *Dalehite* v. *United States*, 346 U. S. 15, 31, n. 25 (1953) (characterizing the *Feres* cases as involving "injuries . . . allegedly caused by *negligence of employees of the United States*") (emphasis added).

[8] The list of cases compiled by the dissent below, 779 F. 2d 1492, 1495–1496 (1986), in which the lower courts have interpreted *Feres* to bar suit against the Government even though the negligence alleged was on the part of a civilian employee is worth repeating: *Potts* v. *United States*, 723 F. 2d 20 (CA6 1983) (Navy corpsman injured when struck by a broken cable from a hoist operated by civilians), cert. denied, 466 U. S. 959 (1984); *Warner* v. *United States*, 720 F. 2d 837 (CA5 1983) (off-duty Army enlisted man injured on base when motorcycle collided with shuttle bus driven by civilian Government employee); *Jaffee* v. *United States*, 663 F. 2d 1226 (CA3 1981) (serviceman injured by radiation exposure allegedly due in part to intentional tort of civilian Department of Defense employees), cert. denied, 456 U. S. 972 (1982); *Lewis* v. *United States*, 663 F. 2d 889 (CA9 1981) (Marine Corps pilot killed in crash allegedly due to negligence of Government maintenance employees), cert. denied, 457 U. S. 1133 (1982); *Carter* v. *Cheyenne*, 649 F. 2d 827 (CA10 1981) (Air Force captain killed in crash at city airport for which city brought third-party claim against FAA air traffic controllers); *Woodside* v. *United States*, 606 F. 2d 134 (CA6 1979)

against the Government based upon service-related injuries. We decline to modify the doctrine at this late date.[9]

A

This Court has emphasized three broad rationales underlying the *Feres* decision. See *Stencel Aero Engineering Corp.*

(Air Force officer killed in plane crash allegedly due to negligence of civilian flight instructor employed by military flight club), cert. denied, 445 U. S. 904 (1980); *Uptegrove* v. *United States*, 600 F. 2d 1248 (CA9 1979) (see n. 3, *supra*), cert. denied, 444 U. S. 1044 (1980); *Watkins* v. *United States*, 462 F. Supp. 980 (SD Ga. 1977) (serviceman killed on base when motorcycle collided with shuttle bus driven by civilian Government employee), aff'd, 587 F. 2d 279 (CA5 1979); *Hass* v. *United States*, 518 F. 2d 1138 (CA4 1975) (suit by serviceman against civilian manager of military-owned horse stable); *United States* v. *Lee*, 400 F. 2d 558 (CA9 1968) (serviceman killed in crash of military aircraft allegedly due to FAA air traffic controller negligence), cert. denied, 393 U. S. 1053 (1969); *Sheppard* v. *United States*, 369 F. 2d 272 (CA3 1966) (same), cert. denied, 386 U. S. 982 (1967); *Layne* v. *United States*, 295 F. 2d 433 (CA7 1961) (National Guardsman killed on training flight allegedly due to negligence of civilian air traffic controllers), cert. denied, 368 U. S. 990 (1962); *United Air Lines, Inc.* v. *Wiener*, 335 F. 2d 379 (CA9) (serviceman injured in part due to alleged CAA employee negligence), cert. dismissed *sub nom. United Air Lines, Inc.* v. *United States*, 379 U. S. 951 (1964).

[9] JUSTICE SCALIA indicates that he would consider overruling *Feres* had this been requested by counsel, but in the absence of such a request he would "confine the unfairness and irrationality [of] that decision" to cases where the allegations of negligence are limited to other members of the military. *Post*, at 703. In arguing "unfairness" in this case, JUSTICE SCALIA assumes that had respondent been "piloting a commercial helicopter" his family might recover substantially more in damages than it now may recover under the benefit programs available for a serviceman and his family. *Ibid.* It hardly need be said that predicting the outcome of any damages suit—both with respect to liability and the amount of damages—is hazardous, whereas veterans' benefits are guaranteed by law. *Post*, at 697. If "fairness"—in terms of pecuniary benefits—were the issue, one could respond to the dissent's assumption by noting that had the negligent instructions that led to Johnson's death been given by another serviceman, the consequences—under the dissent's view—would be equally "unfair." "Fairness" provides no more justification for the line drawn by the dissent than it does for the line upon which application of the

v. *United States*, 431 U. S. 666, 671–673 (1977), and n. 2, *supra*. An examination of these reasons for the doctrine demonstrates that the status of the alleged tortfeasor does not have the critical significance ascribed to it by the Court of Appeals in this case. First, "[t]he relationship between the Government and members of its armed forces is 'distinctively federal in character.'" *Feres*, 340 U. S., at 143 (quoting *United States* v. *Standard Oil Co.*, 332 U. S. 301, 305 (1947)). This federal relationship is implicated to the greatest degree when a service member is performing activities incident to his federal service. Performance of the military function in diverse parts of the country and the world entails a "[s]ignificant risk of accidents and injuries." *Stencel Aero Engineering Corp.* v. *United States*, *supra*, at 672. Where a service member is injured incident to service—that is, because of his military relationship with the Government—it "makes no sense to permit the fortuity of the situs of the alleged negligence to affect the liability of the Government to [the] serviceman." 431 U. S., at 672. Instead, application of the underlying federal remedy that provides "simple, certain, and uniform compensation for injuries or death of those in armed services," *Feres*, *supra*, at 144 (footnote omitted), is appropriate.

Second, the existence of these generous statutory disability and death benefits is an independent reason why the *Feres* doctrine bars suit for service-related injuries.[10] In *Feres*, the Court observed that the primary purpose of the

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Feres doctrine has always depended: whether the injury was "incident to service?" In sum, the dissent's argument for changing the interpretation of a congressional statute, when Congress has failed to do so for almost 40 years, is unconvincing.

[10] Service members receive numerous other benefits unique to their service status. For example, members of the military and their dependents are eligible for educational benefits, extensive health benefits, home-buying loan benefits, and retirement benefits after a minimum of 20 years of service. See generally Uniformed Services Almanac (L. Sharff & S. Gordon eds. 1985).

FTCA "was to extend a remedy to those who had been without; if it incidentally benefited those already well provided for, it appears to have been unintentional." 340 U. S., at 140. Those injured during the course of activity incident to service not only receive benefits that "compare extremely favorably with those provided by most workmen's compensation statutes," *id.*, at 145, but the recovery of benefits is "swift [and] efficient," *Stencel Aero Engineering Corp.* v. *United States*, *supra*, at 673, "normally requir[ing] no litigation," *Feres*, *supra*, at 145. The Court in *Feres* found it difficult to believe that Congress would have provided such a comprehensive system of benefits while at the same time contemplating recovery for service-related injuries under the FTCA. Particularly persuasive was the fact that Congress "omitted any provision to adjust these two types of remedy to each other." 340 U. S., at 144. Congress still has not amended the Veterans' Benefits Act or the FTCA to make any such provision for injuries incurred during the course of activity incident to service. We thus find no reason to modify what the Court has previously found to be the law: the statutory veterans' benefits "provid[e] an upper limit of liability for the Government as to service-connected injuries." *Stencel Aero Engineering Corp.* v. *United States*, *supra*, at 673. See *Hatzlachh Supply Co.* v. *United States*, 444 U. S. 460, 464 (1980) *(per curiam)* ("[T]he Veterans' Benefits Act provided compensation to injured servicemen, which we understood Congress intended to be the sole remedy for service-connected injuries").

Third, *Feres* and its progeny indicate that suits brought by service members against the Government for injuries incurred incident to service are barred by the *Feres* doctrine because they are the "*type[s]* of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness." *United States* v. *Shearer*, 473 U. S., at 59 (emphasis in original). In every respect the military is, as this Court has rec-

ognized, "a specialized society." *Parker* v. *Levy*, 417 U. S. 733, 743 (1974). "[T]o accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps." *Goldman* v. *Weinberger*, 475 U. S. 503, 507 (1986). Even if military negligence is not specifically alleged in a tort action, a suit based upon service-related activity necessarily implicates the military judgments and decisions that are inextricably intertwined with the conduct of the military mission.[11] Moreover, military discipline involves not only obedience to orders, but more generally duty and loyalty to one's service and to one's country. Suits brought by service members against the Government for service-related injuries could undermine the commitment essential to effective service and thus have the potential to disrupt military discipline in the broadest sense of the word.

B

In this case, Lieutenant Commander Johnson was killed while performing a rescue mission on the high seas, a primary duty of the Coast Guard. See 14 U. S. C. §§ 2, 88(a)(1).[12] There is no dispute that Johnson's injury arose directly out of the rescue mission, or that the mission was an activity incident to his military service. Johnson went on the rescue mission specifically because of his military status. His wife received and is continuing to receive statutory benefits on account of his death. Because Johnson was acting pursuant to standard operating procedures of the Coast

[11] Civilian employees of the Government also may play an integral role in military activities. In this circumstance, an inquiry into the civilian activities would have the same effect on military discipline as a direct inquiry into military judgments. For example, the FAA and the United States Armed Services have an established working relationship that provides for FAA participation in numerous military activities. See FAA, United States Dept. of Transportation, Handbook 7610.4F: Special Military Operations (Jan. 21, 1981).

[12] The Coast Guard, of course, is a military service, and an important branch of the Armed Services. 14 U. S. C. § 1.

Guard, the potential that this suit could implicate military discipline is substantial. The circumstances of this case thus fall within the heart of the *Feres* doctrine as it consistently has been articulated.

III

We reaffirm the holding of *Feres* that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." 340 U. S., at 146. Accordingly, we reverse the judgment of the Court of Appeals for the Eleventh Circuit and remand for proceedings consistent with this opinion.

It is so ordered.

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

As it did almost four decades ago in *Feres* v. *United States*, 340 U. S. 135 (1950), the Court today provides several reasons why Congress might have been wise to exempt from the Federal Tort Claims Act (FTCA), 28 U. S. C. §§ 1346(b), 2671–2680, certain claims brought by servicemen. The problem now, as then, is that Congress not only failed to provide such an exemption, but quite plainly excluded it. We have not been asked by respondent here to overrule *Feres;* but I can perceive no reason to accept petitioner's invitation to extend it as the Court does today.

I

Much of the sovereign immunity of the United States was swept away in 1946 with passage of the FTCA, which renders the Government liable

> "for money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United

> States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U. S. C. § 1346(b).

Read as it is written, this language renders the United States liable to *all* persons, including servicemen, injured by the negligence of Government employees. Other provisions of the Act set forth a number of exceptions, but none generally precludes FTCA suits brought by servicemen. One, in fact, excludes "[a]ny claim arising out of the *combatant activities* of the military or naval forces, or the Coast Guard, *during time of war*," § 2680(j) (emphasis added), demonstrating that Congress specifically considered, and provided what it thought needful for, the special requirements of the military. There was no proper basis for us to supplement—*i. e.*, revise—that congressional disposition.

In our first encounter with an FTCA suit brought by a serviceman, we gave effect to the plain meaning of the statute. In *Brooks* v. *United States*, 337 U. S. 49 (1949), military personnel had been injured in a collision with an Army truck while off duty. We rejected the Government's argument that those injured while enlisted in the military can never recover under the FTCA. We noted that the Act gives the District Courts "jurisdiction over *any* claim founded on negligence brought against the United States" and found the Act's exceptions "too lengthy, specific, and close to the present problem" to permit an inference that, notwithstanding the literal language of the statute, Congress intended to bar all suits brought by servicemen. *Id.*, at 51. Particularly in light of the exceptions for claims arising out of combatant activities, 28 U. S. C. § 2680(j), and in foreign countries, § 2680(k), we said, "[i]t would be absurd to believe that Congress did not have the servicemen in mind" in passing the FTCA. 337 U. S., at 51. We therefore concluded that the plaintiffs in *Brooks* could sue under the Act. In dicta, however, we cautioned that an attempt by a serviceman to recover for injuries suffered "incident to . . . service" would

present "a wholly different case," *id.*, at 52, and that giving effect to the "literal language" of the FTCA in such a case might lead to results so "outlandish" that recovery could not be permitted, *id.*, at 53.

That "wholly different case" reached us one year later in *Feres*. We held that servicemen could not recover under the FTCA for injuries that "arise out of or are in the course of activity incident to service," 340 U. S., at 146, and gave three reasons for our holding. First, the parallel private liability required by the FTCA was absent. *Id.*, at 141–142. Second, Congress could not have intended that local tort law govern the "distinctively federal" relationship between the Government and enlisted personnel. *Id.*, at 142–144. Third, Congress could not have intended to make FTCA suits available to servicemen who have already received veterans' benefits to compensate for injuries suffered incident to service. *Id.*, at 144–145. Several years after *Feres* we thought of a fourth rationale: Congress could not have intended to permit suits for service-related injuries because they would unduly interfere with military discipline. *United States* v. *Brown*, 348 U. S. 110, 112 (1954).

In my view, none of these rationales justifies the result. Only the first of them, the "parallel private liability" argument, purports to be textually based, as follows: The United States is liable under the FTCA "in the same manner and to the same extent as a private individual under like circumstances," 28 U. S. C. § 2674; since no "private individual" can raise an army, and since no State has consented to suits by members of its militia, § 2674 shields the Government from liability in the *Feres* situation. 340 U. S., at 141–142. Under this reasoning, of course, many of the Act's exceptions are superfluous, since private individuals typically do not, for example, transmit postal matter, 28 U. S. C. § 2680(b), collect taxes or customs duties, § 2680(c), impose quarantines, § 2680(f), or regulate the monetary system, § 2680(i). In any event, we subsequently recognized our error and rejected

Feres' "parallel private liability" rationale. See *Rayonier, Inc.* v. *United States*, 352 U. S. 315, 319 (1957); *Indian Towing Co.* v. *United States*, 350 U. S. 61, 66–69 (1955).

Perhaps without that scant (and subsequently rejected) textual support, which could be pointed to as the embodiment of the legislative intent that its other two rationales speculated upon, the *Feres* Court would not as an original matter have reached the conclusion that it did. Be that as it may, the speculation outlived the textual support, and the *Feres* rule is now sustained only by three disembodied estimations of what Congress *must* (despite what it enacted) have intended. They are bad estimations at that. The first of them, *Feres*' second rationale, has barely escaped the fate of the "parallel private liability" argument, for though we have not yet acknowledged that it is erroneous we have described it as "no longer controlling." *United States* v. *Shearer*, 473 U. S. 52, 58, n. 4 (1985). The rationale runs as follows: Liability under the FTCA depends upon "the law of the place where the [negligent] act or omission occurred," 28 U. S. C. § 1346(b); but Congress could not have intended local, and therefore geographically diverse, tort law to control important aspects of the "distinctively federal" relationship between the United States and enlisted personnel. 340 U. S., at 142–144. *Feres* itself was concerned primarily with the *unfairness to the soldier* of making his recovery turn upon where he was injured, a matter outside of his control. *Id.*, at 142–143. Subsequent cases, however, have stressed the *military's need for uniformity* in its governing standards. See, *e. g.*, *Stencel Aero Engineering Corp.* v. *United States*, 431 U. S. 666, 672 (1977). Regardless of how it is understood, this second rationale is not even a good excuse in policy, much less in principle, for ignoring the plain terms of the FTCA.

The unfairness to servicemen of geographically varied recovery is, to speak bluntly, an absurd justification, given that, as we have pointed out in another context, nonuniform

recovery cannot possibly be worse than (what *Feres* provides) uniform nonrecovery. See *United States* v. *Muniz*, 374 U. S. 150, 162 (1963). We have abandoned this peculiar rule of solicitude in allowing federal prisoners (who have no more control over their geographical location than servicemen) to recover under the FTCA for injuries caused by the negligence of prison authorities. See *ibid.* There seems to me nothing "unfair" about a rule which says that, just as a serviceman injured by a negligent *civilian* must resort to state tort law, so must a serviceman injured by a negligent Government employee.

To the extent that the rationale rests upon the military's need for uniformity, it is equally unpersuasive. To begin with, that supposition of congressional intent is positively contradicted by the text. Several of the FTCA's exemptions show that Congress considered the uniformity problem, see, *e. g.*, 28 U. S. C. §§ 2680(b), 2680(i), 2680(k), yet it chose to retain sovereign immunity for only some claims affecting the military. § 2680(j). Moreover, we have effectively disavowed this "uniformity" justification—and rendered its benefits to military planning illusory—by permitting servicemen to recover under the FTCA for injuries suffered not incident to service, and permitting *civilians* to recover for injuries caused by military negligence. See, *e. g.*, *Indian Towing Co.* v. *United States*, *supra*. Finally, it is difficult to explain why uniformity (assuming our rule were achieving it) is indispensable for the military, but not for the many other federal departments and agencies that can be sued under the FTCA for the negligent performance of their "unique, nationwide function[s]," *Stencel Aero Engineering Corp.* v. *United States*, *supra*, at 675 (MARSHALL, J., dissenting), including, as we have noted, the federal prison system which may be sued under varying state laws by its inmates. See *United States* v. *Muniz*, *supra*. In sum, the second *Feres* rationale, regardless of how it is understood, is not a plausible estima-

tion of congressional intent, much less a justification for importing that estimation, unwritten, into the statute.

Feres's third basis has similarly been denominated "no longer controlling." *United States* v. *Shearer*, *supra*, at 58, n. 4. Servicemen injured or killed in the line of duty are compensated under the Veterans' Benefits Act (VBA), 72 Stat. 1118, as amended, 38 U. S. C. §301 *et seq.* (1982 ed. and Supp. III), and the *Feres* Court thought it unlikely that Congress meant to permit additional recovery under the FTCA, 340 U. S., at 144–145. *Feres* described the absence of any provision to adjust dual recoveries under the FTCA and VBA as "persuasive [evidence] that there was no awareness that the Act might be interpreted to permit recovery for injuries incident to military service." *Id.*, at 144. Since *Feres* we have in dicta characterized recovery under the VBA as "the sole remedy for service-connected injuries," *Hatzlachh Supply Co.* v. *United States*, 444 U. S. 460, 464 (1980) *(per curiam)*, and have said that the VBA "provides an upper limit of liability for the Government" for those injuries, *Stencel Aero Engineering Corp.* v. *United States*, *supra*, at 673.

The credibility of this rationale is undermined severely by the fact that both before and after *Feres* we permitted injured servicemen to bring FTCA suits, *even though they had been compensated under the VBA.* In *Brooks* v. *United States*, 337 U. S. 49 (1949), we held that two servicemen injured off duty by a civilian Army employee could sue the Government. The fact that they had already received VBA benefits troubled us little. We pointed out that "nothing in the Tort Claims Act or the veterans' laws . . . provides for exclusiveness of remedy" and we refused to "call either remedy . . . exclusive . . . when Congress has not done so." *Id.*, at 53. We noted further that Congress had included three exclusivity provisions in the FTCA, 28 U. S. C. §§2672, 2676, 2679, but had said nothing about servicemen plaintiffs, 337 U. S., at 53. We indicated, however, that VBA com-

pensation could be taken into account in adjusting recovery under the FTCA. *Id.*, at 53–54; see also *United States* v. *Brown*, 348 U. S., at 111, and n. That *Brooks* remained valid after *Feres* was made clear in *United States* v. *Brown*, *supra*, in which we stressed again that because "Congress had given no indication that it made the right to compensation [under the VBA] the veteran's exclusive remedy, . . . the receipt of disability payments . . . did not preclude recovery under the Tort Claims Act." *Id.*, at 113.

Brooks and *Brown* (neither of which has ever been expressly disapproved) plainly hold that the VBA is *not* an "exclusive" remedy which places an "upper limit" on the Government's liability. Because of *Feres* and today's decision, however, the VBA will in fact be exclusive for service-connected injuries, but not for others. Such a result can no more be reconciled with the text of the VBA than with that of the FTCA, since the VBA compensates servicemen without regard to whether their injuries occur "incident to service" as *Feres* defines that term. See 38 U. S. C. § 105. Moreover, the VBA is not, as *Feres* assumed, identical to federal and state workers' compensation statutes in which exclusivity provisions almost invariably appear. See, *e. g.*, 5 U. S. C. § 8116(c). Recovery is possible under workers' compensation statutes more often than under the VBA, and VBA benefits can be terminated more easily than can workers' compensation. See Note, From *Feres* to *Stencel:* Should Military Personnel Have Access to FTCA Recovery?, 77 Mich. L. Rev. 1099, 1106–1108 (1979). In sum, "the presence of an alternative compensation system [neither] explains [n]or justifies the *Feres* doctrine; it only makes the effect of the doctrine more palatable." *Hunt* v. *United States*, 204 U. S. App. D. C. 308, 326, 636 F. 2d 580, 598 (1980).

The foregoing three rationales—the only ones actually relied upon in *Feres*—are so frail that it is hardly surprising that we have repeatedly cited the later-conceived-of "military discipline" rationale as the "best" explanation for that deci-

sion. See *United States* v. *Shearer*, 473 U. S., at 57; *Chappell* v. *Wallace*, 462 U. S. 296, 299 (1983); *United States* v. *Muniz*, 374 U. S., at 162. Applying the FTCA as written would lead, we have reasoned, to absurd results, because if suits could be brought on the basis of alleged negligence towards a serviceman by other servicemen, military discipline would be undermined and civilian courts would be required to second-guess military decisionmaking. See *Stencel Aero Engineering Corp.* v. *United States*, 431 U. S., at 671–672, 673. (Today the Court goes further and suggests that permitting enlisted men and women to sue their Government on the basis of negligence towards them *by any Government employee* seriously undermines "duty and loyalty to one's service and to one's country." *Ante*, at 691.) I cannot deny the possibility that some suits brought by servicemen will adversely affect military discipline, and if we were interpreting an ambiguous statute perhaps we could take that into account. But I do not think the effect upon military discipline is so certain, or so certainly substantial, that we are justified in holding (if we can ever be justified in holding) that Congress did not mean what it plainly said in the statute before us.

It is strange that Congress' "obvious" intention to preclude *Feres* suits because of their effect on military discipline was discerned neither by the *Feres* Court nor by the Congress that enacted the FTCA (which felt it necessary expressly to exclude recovery for combat injuries). Perhaps Congress recognized that the likely effect of *Feres* suits upon military discipline is not as clear as we have assumed, but in fact has long been disputed. See Bennett, The *Feres* Doctrine, Discipline, and the Weapons of War, 29 St. Louis U. L. J. 383, 407–411 (1985). Or perhaps Congress assumed that the FTCA's explicit exclusions would bar those suits most threatening to military discipline, such as claims based upon combat command decisions, 28 U. S. C. § 2680(j); claims based upon performance of "discretionary" functions, § 2680(a); claims

arising in foreign countries, § 2680(k); intentional torts, § 2680 (h); and claims based upon the execution of a statute or regulation, § 2680(a). Or perhaps Congress assumed that, since liability under the FTCA is imposed upon the Government, and not upon individual employees, military decisionmaking was unlikely to be affected greatly. Or perhaps—most fascinating of all to contemplate—Congress thought that *barring* recovery by servicemen might adversely affect military discipline. After all, the morale of Lieutenant Commander Johnson's comrades-in-arms will not likely be boosted by news that his widow and children will receive only a fraction of the amount they might have recovered had he been piloting a commercial helicopter at the time of his death.

To the extent that reading the FTCA as it is written will require civilian courts to examine military decisionmaking and thus influence military discipline, it is outlandish to consider that result "outlandish," *Brooks* v. *United States*, 337 U. S., at 53, since in fact it occurs frequently, even under the *Feres* dispensation. If Johnson's helicopter had crashed into a civilian's home, the homeowner could have brought an FTCA suit that would have invaded the sanctity of military decisionmaking no less than respondent's. If a soldier is injured *not* "incident to service," he can sue his Government regardless of whether the alleged negligence was military negligence. And if a soldier suffers service-connected injury because of the negligence of a civilian (such as the manufacturer of an airplane), he can sue that civilian, even if the civilian claims contributory negligence and subpoenas the serviceman's colleagues to testify against him.

In sum, neither the three original *Feres* reasons nor the *post hoc* rationalization of "military discipline" justifies our failure to apply the FTCA as written. *Feres* was wrongly decided and heartily deserves the "widespread, almost universal criticism" it has received. *In re "Agent Orange"*

Product Liability Litigation, 580 F. Supp. 1242, 1246 (EDNY), appeal dism'd, 745 F. 2d 161 (CA2 1984).*

II

The *Feres* Court claimed its decision was necessary to make "the entire statutory system of remedies against the Government . . . a workable, consistent and equitable whole." 340 U. S., at 139. I am unable to find such beauty in what we have wrought. Consider the following hypothetical (similar to one presented by Judge Weinstein in *In re "Agent Orange" Product Liability Litigation*, *supra*, at 1252): A serviceman is told by his superior officer to deliver some papers to the local United States Courthouse. As he nears his destination, a wheel on his Government vehicle breaks, causing the vehicle to injure him, his daughter (whose class happens to be touring the courthouse that day), and a United States marshal on duty. Under our case law and federal statutes, the serviceman may not sue the Government *(Feres);* the guard may not sue the Government (because of the exclusivity provision of the Federal Employees' Compensation Act (FECA),

*See, *e. g.*, *Sanchez* v. *United States*, 813 F. 2d 593, 595 (CA2 1987); *Bozeman* v. *United States*, 780 F. 2d 198, 200 (CA2 1985); *Hinkie* v. *United States*, 715 F. 2d 96, 97 (CA3 1983), cert. denied, 465 U. S. 1023 (1984); *Mondelli* v. *United States*, 711 F. 2d 567, 569 (CA3 1983), cert. denied, 465 U. S. 1021 (1984); *Scales* v. *United States*, 685 F. 2d 970, 974 (CA5 1982), cert. denied, 460 U. S. 1082 (1983); *LaBash* v. *United States Dept. of Army*, 668 F. 2d 1153, 1156 (CA10), cert. denied, 456 U. S. 1008 (1982); *Monaco* v. *United States*, 661 F. 2d 129, 132 (CA9 1981), cert. denied, 456 U. S. 989 (1982); *Hunt* v. *United States*, 204 U. S. App. D. C. 308, 317, 636 F. 2d 580, 589 (1980); *Veillette* v. *United States*, 615 F. 2d 505, 506 (CA9 1980); *Parker* v. *United States*, 611 F. 2d 1007, 1011 (CA5 1980); *Peluso* v. *United States*, 474 F. 2d 605, 606 (CA3), cert. denied, 414 U. S. 879 (1973); Bennett, The *Feres* Doctrine, Discipline, and the Weapons of War, 29 St. Louis U. L. J. 383 (1985); Hitch, The Federal Tort Claims Act and Military Personnel, 8 Rutgers L. Rev. 316 (1954); Rhodes, The Feres Doctrine After Twenty-Five Years, 18 A. F. L. Rev. 24 (Spring 1976); Note, 51 J. Air L. & Com. 1087 (1986); Note, 6 Cardozo L. Rev. 391 (1984); Note, 77 Mich. L. Rev. 1099 (1979); Note, 43 St. John's L. Rev. 455 (1969).

5 U. S. C. § 8116); the daughter may not sue the Government for the loss of her father's companionship *(Feres)*, but may sue the Government for her own injuries (FTCA). The serviceman and the guard may sue the manufacturer of the vehicle, as may the daughter, both for her own injuries and for the loss of her father's companionship. The manufacturer may assert contributory negligence as a defense in any of the suits. Moreover, the manufacturer may implead the Government in the daughter's suit (*United States* v. *Yellow Cab Co.*, 340 U. S. 543 (1951)) and in the guard's suit (*Lockheed Aircraft Corp.* v. *United States*, 460 U. S. 190 (1983)), even though the guard was compensated under a statute that contains an exclusivity provision (FECA). But the manufacturer may *not* implead the Government in the serviceman's suit (*Stencel Aero Engineering Corp.* v. *United States*, 431 U. S. 666 (1977)), even though the serviceman was compensated under a statute that does *not* contain an exclusivity provision (VBA).

The point is not that all of these inconsistencies are attributable to *Feres* (though some of them assuredly are), but merely that bringing harmony to the law has hardly been the consequence of our ignoring what Congress wrote and imagining what it should have written. When confusion results from our applying the unambiguous text of a statute, it is at least a confusion validated by the free play of the democratic process, rather than what we have here: unauthorized rationalization gone wrong. We realized seven years too late that "[t]here is no justification for this Court to read exemptions into the Act beyond those provided by Congress. If the Act is to be altered that is a function for the same body that adopted it." *Rayonier, Inc.* v. *United States*, 352 U. S., at 320 (footnote omitted).

I cannot take comfort, as the Court does, *ante*, at 686, and n. 6, from Congress' failure to amend the FTCA to overturn *Feres*. The unlegislated desires of later Congresses with regard to one thread in the fabric of the FTCA could hardly

have any bearing upon the proper interpretation of the entire fabric of compromises that their predecessors enacted into law in 1946. And even if they could, intuiting those desires from congressional *failure* to act is an uncertain enterprise which takes as its starting point disregard of the checks and balances in the constitutional scheme of legislation designed to assure that not all desires of a majority of the Legislature find their way into law.

We have not been asked by respondent to overrule *Feres*, and so need not resolve whether considerations of *stare decisis* should induce us, despite the plain error of the case, to leave bad enough alone. As the majority acknowledges, however, "all of the cases decided by this Court under *Feres* have involved allegations of negligence on the part of members of the military." *Ante*, at 686. I would not extend *Feres* any further. I confess that the line between FTCA suits alleging military negligence and those alleging civilian negligence has nothing to recommend it except that it would limit our clearly wrong decision in *Feres* and confine the unfairness and irrationality that decision has bred. But that, I think, is justification enough.

Had Lieutenant Commander Johnson been piloting a commercial helicopter when he crashed into the side of a mountain, his widow and children could have sued and recovered for their loss. But because Johnson devoted his life to serving in his country's Armed Forces, the Court today limits his family to a fraction of the recovery they might otherwise have received. If our imposition of that sacrifice bore the legitimacy of having been prescribed by the people's elected representatives, it would (insofar as we are permitted to inquire into such things) be just. But it has not been, and it is not. I respectfully dissent.

HODEL, SECRETARY OF THE INTERIOR *v.* IRVING ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 85–637. Argued October 6, 1986—Decided May 18, 1987

As a means of ameliorating the problem of extreme fractionation of Indian lands that, pursuant to federal statutes dating back to the end of the 19th century, were allotted to individual Indians and held in trust by the United States, and that, through successive generations, had been splintered into multiple undivided interests by descent or devise, Congress enacted § 207 (later amended) of the Indian Land Consolidation Act of 1983. As originally enacted, § 207 provided that no undivided fractional interest in such lands shall descend by intestacy or devise, but, instead, shall escheat to the tribe "if such interest represents 2 per centum or less of the total acreage in such tract and has earned to its owner less than $100 in the preceding year before it is due to escheat." No provision for the payment of compensation to the owners of the interests covered by § 207 was made. Appellees are members of the Oglala Sioux Tribe and either are, or represent, heirs or devisees of Tribe members who died while the original terms of § 207 were in effect and who owned fractional interests subject to § 207. Appellees filed suit in Federal District Court, claiming that § 207 resulted in a taking of property without just compensation in violation of the Fifth Amendment. The District Court held that the statute was constitutional, but the Court of Appeals reversed, concluding that appellees' decedents had a right, derived from the original Sioux allotment statute, to control disposition of their property at death, that appellees had standing to invoke such right, and that the taking of the right without compensation to decedents' estates violated the Fifth Amendment.

Held:

1. Appellees have standing to challenge § 207, which has deprived them of the fractional interests they otherwise would have inherited. This is sufficient injury-in-fact to satisfy the case-or-controversy requirement of Article III of the Constitution. Moreover, the concerns of the prudential standing doctrine are also satisfied, even though appellees do not assert that their own property rights have been taken unconstitutionally, but rather that their decedents' right to pass the property at death has been taken. For decedent Indians with trust property, federal statutes require the Secretary of the Interior to assume the gen-

eral role of the executor or administrator of the estate in asserting the decedent's surviving claims. Here, however, the Secretary's responsibilities in that capacity include the administration of the statute that appellees claim is unconstitutional, so that he cannot be expected to assert decedents' rights to the extent that they turn on the statute's constitutionality. Under these circumstances, appellees can appropriately serve as their decedents' representatives for purposes of asserting the latters' Fifth Amendment rights. Pp. 711–712.

2. The original version of § 207 effected a "taking" of appellees' decedents' property without just compensation. Determination of the question whether a governmental property regulation amounts to a "taking" requires ad hoc factual inquiries as to such factors as the impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the governmental action. Here, the relative impact of § 207 upon appellees' decedents can be substantial. Even assuming, *arguendo*, that the income generated by the parcels in question may be properly thought of as *de minimis*, their value may not be. Although appellees' decedents retain full beneficial use of the property during their lifetimes as well as the right to convey it *inter vivos*, the right to pass on valuable property to one's heirs is itself a valuable right. However, the extent to which any of appellees' decedents had investment-backed expectations in passing on the property is dubious. Also weighing weakly in favor of the statute is the fact that there is something of an "average reciprocity of advantage," *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 415, to the extent that owners of escheatable interests maintain a nexus to the Tribe, and consolidation of lands in the Tribe benefits Tribe members since consolidated lands are more productive than fractionated lands. But the character of the Government regulation here is extraordinary since it amounts to virtually the abrogation of the right to pass on property to one's heirs, which right has been part of the Anglo-American legal system since feudal times. Moreover, § 207 effectively abolishes both descent and devise of the property interest even when the passing of the property to the heir might result in consolidation of property—as, for instance, when the heir already owns another undivided interest in the property—which is the governmental purpose sought to be advanced. Pp. 712–718.

758 F. 2d 1260, affirmed.

O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BRENNAN, MARSHALL, BLACKMUN, POWELL, and SCALIA, JJ., joined. BRENNAN, J., filed a concurring opinion, in which MARSHALL and BLACKMUN, JJ., joined, *post*, p. 718. SCALIA, J., filed a concurring opinion, in which REHNQUIST, C. J., and POWELL, J., joined, *post*, p. 719.

STEVENS, J., filed an opinion concurring in the judgment, in which WHITE, J., joined, *post*, p. 719.

Edwin S. Kneedler argued the cause for appellant. With him on the briefs were *Solicitor General Fried*, *Assistant Attorney General Habicht*, *Deputy Solicitor General Wallace*, *Anne S. Almy*, and *Blake A. Watson*.

Yvette Hall War Bonnet argued the cause for appellees. With her on the brief was *Nora K. Kelley*.*

JUSTICE O'CONNOR delivered the opinion of the Court.

The question presented is whether the original version of the "escheat" provision of the Indian Land Consolidation Act of 1983, Pub. L. 97–459, Tit. II, 96 Stat. 2519, effected a "taking" of appellees' decedents' property without just compensation.

I

Towards the end of the 19th century, Congress enacted a series of land Acts which divided the communal reservations of Indian tribes into individual allotments for Indians and unallotted lands for non-Indian settlement. This legislation seems to have been in part animated by a desire to force Indians to abandon their nomadic ways in order to "speed the Indians' assimilation into American society," *Solem* v. *Bartlett*, 465 U. S. 463, 466 (1984), and in part a result of pressure to free new lands for further white settlement. *Ibid.* Two years after the enactment of the General Allotment Act of 1887, ch. 119, 24 Stat. 388, Congress adopted a specific statute authorizing the division of the Great Reservation of the Sioux Nation into separate reservations and the allotment of specific tracts of reservation land to individual Indians, con-

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**Bertram E. Hirsch* filed a brief for the Sisseton-Wahpeton Sioux Tribe as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for Pacific Legal Foundation by *Ronald A. Zumbrun* and *Robert K. Best;* and for the Yakima Indian Nation by *James B. Hovis*.

ditioned on the consent of three-fourths of the adult male Sioux. Act of Mar. 2, 1889, ch. 405, 25 Stat. 888. Under the Act, each male Sioux head of household took 320 acres of land and most other individuals 160 acres. 25 Stat. 890. In order to protect the allottees from the improvident disposition of their lands to white settlers, the Sioux allotment statute provided that the allotted lands were to be held in trust by the United States. *Id.*, at 891. Until 1910, the lands of deceased allottees passed to their heirs "according to the laws of the State or Territory" where the land was located, *ibid.*, and after 1910, allottees were permitted to dispose of their interests by will in accordance with regulations promulgated by the Secretary of the Interior. 36 Stat. 856, 25 U. S. C. § 373. Those regulations generally served to protect Indian ownership of the allotted lands.

The policy of allotment of Indian lands quickly proved disastrous for the Indians. Cash generated by land sales to whites was quickly dissipated, and the Indians, rather than farming the land themselves, evolved into petty landlords, leasing their allotted lands to white ranchers and farmers and living off the meager rentals. Lawson, Heirship: The Indian Amoeba, reprinted in Hearing on S. 2480 and S. 2663 before the Senate Select Committee on Indian Affairs, 98th Cong., 2d Sess., 82–83 (1984). The failure of the allotment program became even clearer as successive generations came to hold the allotted lands. Thus 40-, 80-, and 160-acre parcels became splintered into multiple undivided interests in land, with some parcels having hundreds, and many parcels having dozens, of owners. Because the land was held in trust and often could not be alienated or partitioned, the fractionation problem grew and grew over time.

A 1928 report commissioned by the Congress found the situation administratively unworkable and economically wasteful. L. Meriam, Institute for Government Research, The

Problem of Indian Administration 40–41. Good, potentially productive, land was allowed to lie fallow, amidst great poverty, because of the difficulties of managing property held in this manner. Hearings on H. R. 11113 before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs, 89th Cong., 2d Sess., 10 (1966) (remarks of Rep. Aspinall). In discussing the Indian Reorganization Act of 1934, Representative Howard said:

> "It is in the case of the inherited allotments, however, that the administrative costs become incredible. . . . On allotted reservations, numerous cases exist where the shares of each individual heir from lease money may be 1 cent a month. Or one heir may own minute fractional shares in 30 or 40 different allotments. The cost of leasing, bookkeeping, and distributing the proceeds in many cases far exceeds the total income. The Indians and the Indian Service personnel are thus trapped in a meaningless system of minute partition in which all thought of the possible use of land to satisfy human needs is lost in a mathematical haze of bookkeeping." 78 Cong. Rec. 11728 (1934).

In 1934, in response to arguments such as these, the Congress acknowledged the failure of its policy and ended further allotment of Indian lands. Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984, 25 U. S. C. § 461 *et seq.*

But the end of future allotment by itself could not prevent the further compounding of the existing problem caused by the passage of time. Ownership continued to fragment as succeeding generations came to hold the property, since, in the order of things, each property owner was apt to have more than one heir. In 1960, both the House and the Senate undertook comprehensive studies of the problem. See House Committee on Interior and Insular Affairs, Indian Heirship Land Study, 86th Cong., 2d Sess. (Comm. Print

1961); Senate Committee on Interior and Insular Affairs, Indian Heirship Land Survey, 86th Cong., 2d Sess. (Comm. Print 1960–1961). These studies indicated that one-half of the approximately 12 million acres of allotted trust lands were held in fractionated ownership, with over 3 million acres held by more than six heirs to a parcel. *Id.*, at pt. 2, p. x. Further hearings were held in 1966, Hearings on H. R. 11113, *supra*, but not until the Indian Land Consolidation Act of 1983 did the Congress take action to ameliorate the problem of fractionated ownership of Indian lands.

Section 207 of the Indian Land Consolidation Act—the escheat provision at issue in this case—provided:

> "No undivided fractional interest in any tract of trust or restricted land within a tribe's reservation or otherwise subjected to a tribe's jurisdiction shall descedent *[sic]* by intestacy or devise but shall escheat to that tribe if such interest represents 2 per centum or less of the total acreage in such tract and has earned to its owner less than $100 in the preceding year before it is due to escheat." 96 Stat. 2519.

Congress made no provision for the payment of compensation to the owners of the interests covered by § 207. The statute was signed into law on January 12, 1983, and became effective immediately.

The three appellees—Mary Irving, Patrick Pumpkin Seed, and Eileen Bissonette—are enrolled members of the Oglala Sioux Tribe. They are, or represent, heirs or devisees of members of the Tribe who died in March, April, and June 1983. Eileen Bissonette's decedent, Mary Poor Bear-Little Hoop Cross, purported to will all her property, including property subject to § 207, to her five minor children in whose name Bissonette claims the property. Chester Irving, Charles Leroy Pumpkin Seed, and Edgar Pumpkin Seed all died intestate. At the time of their deaths, the four dece-

dents owned 41 fractional interests subject to the provisions of § 207. App. 20, 22–28, 32–33, 37–39. The Irving estate lost two interests whose value together was approximately $100; the Bureau of Indian Affairs placed total values of approximately $2,700 on the 26 escheatable interests in the Cross estate and $1,816 on the 13 escheatable interests in the Pumpkin Seed estates. But for § 207, this property would have passed, in the ordinary course, to appellees or those they represent.

Appellees filed suit in the United States District Court for the District of South Dakota, claiming that § 207 resulted in a taking of property without just compensation in violation of the Fifth Amendment. The District Court concluded that the statute was constitutional. It held that appellees had no vested interest in the property of the decedents prior to their deaths and that Congress had plenary authority to abolish the power of testamentary disposition of Indian property and to alter the rules of intestate succession. App. to Juris. Statement 21a–26a.

The Court of Appeals for the Eighth Circuit reversed. *Irving* v. *Clark*, 758 F. 2d 1260 (1985). Although it agreed that appellees had no vested rights in the decedents' property, it concluded that their decedents had a right, derived from the original Sioux allotment statute, to control disposition of their property at death. The Court of Appeals held that appellees had standing to invoke that right and that the taking of that right without compensation to decedents' estates violated the Fifth Amendment.[1]

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[1] The Court of Appeals, without explanation, went on to "declare" that not only the original version of § 207, but also the amended version not before it, 25 U. S. C. § 2206 (1982 ed., Supp. III), unconstitutionally took property without compensation. Since none of the property which escheated in this case did so pursuant to the amended version of the statute, this "declaration" is, at best, dicta. We express no opinion on the constitutionality of § 207 as amended.

II

The Court of Appeals concluded that appellees have standing to challenge § 207. 758 F. 2d, at 1267–1268. The Government does not contest this ruling. As the Court of Appeals recognized, however, the existence of a case or controversy is a jurisdictional prerequisite to a federal court's deliberations. *Id.*, at 1267, n. 12. We are satisfied that the necessary case or controversy exists in this case. Section 207 has deprived appellees of the fractional interests they otherwise would have inherited. This is sufficient injury-in-fact to satisfy Article III of the Constitution. See *Singleton* v. *Wulff*, 428 U. S. 106, 112 (1976).

In addition to the constitutional standing requirements, we have recognized prudential standing limitations. As the court below recognized, one of these prudential principles is that the plaintiff generally must assert his own legal rights and interests. 758 F. 2d, at 1267–1268. That general principle, however, is subject to exceptions. Appellees here do not assert that their own property rights have been taken unconstitutionally, but rather that their decedents' right to pass the property at death has been taken. Nevertheless, we have no difficulty in finding the concerns of the prudential standing doctrine met here.

For obvious reasons, it has long been recognized that the surviving claims of a decedent must be pursued by a third party. At common law, a decedent's surviving claims were prosecuted by the executor or administrator of the estate. For Indians with trust property, statutes require the Secretary of the Interior to assume that general role. 25 U. S. C. §§ 371–380. The Secretary's responsibilities in that capacity, however, include the administration of the statute that the appellees claim is unconstitutional, see 25 U. S. C. §§ 2202, 2209, so that he can hardly be expected to assert appellees' decedents' rights to the extent that they turn on that point. Under these circumstances, appellees can appropriately serve as their decedents' representatives for purposes of asserting

the latters' Fifth Amendment rights. They are situated to pursue the claims vigorously, since their interest in receiving the property is indissolubly linked to the decedents' right to dispose of it by will or intestacy. A vindication of decedents' rights would ensure that the fractional interests pass to appellees; pressing these rights unsuccessfully would equally guarantee that appellees take nothing. In short, permitting appellees to raise their decedents' claims is merely an extension of the common law's provision for appointment of a decedent's representative. It is therefore a "settled practice of the courts" not open to objection on the ground that it permits a litigant to raise third parties' rights. *Tyler* v. *Judges of Court of Registration*, 179 U. S. 405, 406 (1900).

III

The Congress, acting pursuant to its broad authority to regulate the descent and devise of Indian trust lands, *Jefferson* v. *Fink*, 247 U. S. 288, 294 (1918), enacted § 207 as a means of ameliorating, over time, the problem of extreme fractionation of certain Indian lands. By forbidding the passing on at death of small, undivided interests in Indian lands, Congress hoped that future generations of Indians would be able to make more productive use of the Indians' ancestral lands. We agree with the Government that encouraging the consolidation of Indian lands is a public purpose of high order. The fractionation problem on Indian reservations is extraordinary and may call for dramatic action to encourage consolidation. The Sisseton-Wahpeton Sioux Tribe, appearing as *amicus curiae* in support of the Secretary of the Interior, is a quintessential victim of fractionation. Forty-acre tracts on the Sisseton-Wahpeton Lake Traverse Reservation, leasing for about $1,000 annually, are commonly subdivided into hundreds of undivided interests, many of which generate only pennies a year in rent. The average tract has 196 owners and the average owner undivided interests in 14 tracts. The administrative headache this rep-

resents can be fathomed by examining Tract 1305, dubbed "one of the most fractionated parcels of land in the world." Lawson, Heirship: The Indian Amoeba, reprinted in Hearing on S. 2480 and S. 2663 before the Senate Select Committee on Indian Affairs, 98th Cong., 2d Sess., 85 (1984). Tract 1305 is 40 acres and produces $1,080 in income annually. It is valued at $8,000. It has 439 owners, one-third of whom receive less than $.05 in annual rent and two-thirds of whom receive less than $1. The largest interest holder receives $82.85 annually. The common denominator used to compute fractional interests in the property is 3,394,923,840,000. The smallest heir receives $.01 every 177 years. If the tract were sold (assuming the 439 owners could agree) for its estimated $8,000 value, he would be entitled to $.000418. The administrative costs of handling this tract are estimated by the Bureau of Indian Affairs at $17,560 annually. *Id.*, at 86, 87. See also Comment, Too Little Land, Too Many Heirs—The Indian Heirship Land Problem, 46 Wash. L. Rev. 709, 711–713 (1971).

This Court has held that the Government has considerable latitude in regulating property rights in ways that may adversely affect the owners. See *Keystone Bituminous Coal Assn.* v. *DeBenedictis*, 480 U. S. 470, 491–492 (1987); *Penn Central Transportation Co.* v. *New York City*, 438 U. S. 104, 125–127 (1978); *Goldblatt* v. *Hempstead*, 369 U. S. 590, 592–593 (1962). The framework for examining the question whether a regulation of property amounts to a taking requiring just compensation is firmly established and has been regularly and recently reaffirmed. See, *e. g.*, *Keystone Bituminous Coal Assn.* v. *DeBenedictis*, *supra*, at 485; *Ruckelshaus* v. *Monsanto Co.*, 467 U. S. 986, 1004–1005 (1984); *Hodel* v. *Virginia Surface Mining and Reclamation Assn., Inc.*, 452 U. S. 264, 295 (1981); *Agins* v. *Tiburon*, 447 U. S. 255, 260–261 (1980); *Kaiser Aetna* v. *United States*, 444 U. S. 164, 174–175 (1979); *Penn Central Transportation Co.*

v. *New York City*, *supra*, at 124. As THE CHIEF JUSTICE has written:

> "[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.' [*Penn Central Transportation Co.* v. *New York City*, 438 U. S.], at 124. 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 governmental action—that have particular significance. *Ibid.*" *Kaiser Aetna* v. *United States*, *supra*, at 175.

There is no question that the relative economic impact of § 207 upon the owners of these property rights can be substantial. Section 207 provides for the escheat of small undivided property interests that are unproductive during the year preceding the owner's death. Even if we accept the Government's assertion that the income generated by such parcels may be properly thought of as *de minimis*, their value may not be. While the Irving estate lost two interests whose value together was only approximately $100, the Bureau of Indian Affairs placed total values of approximately $2,700 and $1,816 on the escheatable interests in the Cross and Pumpkin Seed estates. See App. 20, 21–28, 29–39. These are not trivial sums. There are suggestions in the legislative history regarding the 1984 amendments to § 207 that the failure to "look back" more than one year at the income generated by the property had caused the escheat of potentially valuable timber and mineral interests. S. Rep. No. 98–632, p. 12 (1984); Hearing on H. J. Res. 158 before the Senate Select Committee on Indian Affairs, 98th Cong., 2d Sess., 20, 26, 32, 75 (1984); Amendments to the Indian

Land Consolidation Act: Hearing on H. J. Res. 158 before the Senate Select Committee on Indian Affairs, 98th Cong., 1st Sess., 8, 29 (1983). Of course, the whole of appellees' decedents' property interests were not taken by § 207. Appellees' decedents retained full beneficial use of the property during their lifetimes as well as the right to convey it *inter vivos*. There is no question, however, that the right to pass on valuable property to one's heirs is itself a valuable right. Depending on the age of the owner, much or most of the value of the parcel may inhere in this "remainder" interest. See 26 CFR § 20.2031–7(f) (Table A) (1986) (value of remainder interest when life tenant is age 65 is approximately 32% of the whole).

The extent to which any of appellees' decedents had "investment-backed expectations" in passing on the property is dubious. Though it is conceivable that some of these interests were purchased with the expectation that the owners might pass on the remainder to their heirs at death, the property has been held in trust for the Indians for 100 years and is overwhelmingly acquired by gift, descent, or devise. Because of the highly fractionated ownership, the property is generally held for lease rather than improved and used by the owners. None of the appellees here can point to any specific investment-backed expectations beyond the fact that their ancestors agreed to accept allotment only after ceding to the United States large parts of the original Great Sioux Reservation.

Also weighing weakly in favor of the statute is the fact that there is something of an "average reciprocity of advantage," *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 415 (1922), to the extent that owners of escheatable interests maintain a nexus to the Tribe. Consolidation of Indian lands in the Tribe benefits the members of the Tribe. All members do not own escheatable interests, nor do all owners belong to the Tribe. Nevertheless, there is substantial overlap between the two groups. The owners of escheatable inter-

ests often benefit from the escheat of others' fractional interests. Moreover, the whole benefit gained is greater than the sum of the burdens imposed since consolidated lands are more productive than fractionated lands.

If we were to stop our analysis at this point, we might well find § 207 constitutional. But the character of the Government regulation here is extraordinary. In *Kaiser Aetna* v. *United States*, 444 U. S., at 176, we emphasized that the regulation destroyed "one of the most essential sticks in the bundle of rights that are commonly characterized as property—the right to exclude others." Similarly, the regulation here amounts to virtually the abrogation of the right to pass on a certain type of property—the small undivided interest—to one's heirs. In one form or another, the right to pass on property—to one's family in particular—has been part of the Anglo-American legal system since feudal times. See *United States* v. *Perkins*, 163 U. S. 625, 627–628 (1896). The fact that it may be possible for the owners of these interests to effectively control disposition upon death through complex *inter vivos* transactions such as revocable trusts is simply not an adequate substitute for the rights taken, given the nature of the property. Even the United States concedes that total abrogation of the right to pass property is unprecedented and likely unconstitutional. Tr. of Oral Arg. 12–14. Moreover, this statute effectively abolishes both descent and devise of these property interests even when the passing of the property to the heir might result in consolidation of property—as for instance when the heir already owns another undivided interest in the property.[2] Cf. 25 U. S. C.

[2] JUSTICE STEVENS argues that weighing in the balance the fact that § 207 takes the right to pass property even when descent or devise results in consolidation of Indian lands amounts to an unprecedented importation of overbreadth analysis into our Fifth Amendment jurisprudence. *Post*, at 724–726. The basis for this argument is his assertion that none of appellees' decedents actually attempted to pass the property in a way that might have resulted in consolidation. But the fact of the matter remains that before § 207 was enacted appellees' decedents had the power to pass on

§ 2206(b) (1982 ed., Supp. III). Since the escheatable interests are not, as the United States argues, necessarily *de minimis*, nor, as it also argues, does the availability of *inter vivos* transfer obviate the need for descent and devise, a *total* abrogation of these rights cannot be upheld. But cf. *Andrus* v. *Allard*, 444 U. S. 51 (1979) (upholding abrogation of the right to sell endangered eagles' parts as necessary to environmental protection regulatory scheme).

In holding that complete abolition of both the descent and devise of a particular class of property may be a taking, we reaffirm the continuing vitality of the long line of cases recognizing the States', and where appropriate, the United States', broad authority to adjust the rules governing the descent and devise of property without implicating the guarantees of the Just Compensation Clause. See, *e. g.*, *Irving Trust Co.* v. *Day*, 314 U. S. 556, 562 (1942); *Jefferson* v. *Fink*, 247 U. S., at 294. The difference in this case is the fact that both descent and devise are completely abolished;

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their property at death to those who already owned an interest in the subject property. This right too was abrogated by § 207; each of the appellees' decedents lost this stick in their bundles of property rights upon the enactment of § 207. It is entirely proper to note the extent of the rights taken from appellees' decedents in assessing whether the statute passes constitutional muster under the *Penn Central* balancing test. This is neither overbreadth analysis nor novel. See, *e. g.*, *Keystone Bituminous Coal Assn.* v. *DeBenedictis*, 480 U. S. 470, 493–502 (1987) (discussing, in general terms, the extent of the abrogation of coal extraction rights caused by the Subsidence Act); *Penn Central Transportation Co.* v. *New York City*, 438 U. S. 104, 136–137 (1978) (discussing extent to which air rights abrogated by the designation of Grand Central Station as a landmark, noting that not all new construction prohibited, and noting the availability of transferable development rights).

JUSTICE STEVENS' objections are perhaps better directed at the question whether there is third-party standing to challenge this statute under the Fifth Amendment's Just Compensation Clause. But as we have shown, there is certainly no Article III bar to permitting appellees to raise their decedents' claims, *supra*, at 711, and JUSTICE STEVENS himself concedes that prudential considerations do not bar consideration of the Fifth Amendment claim. *Post*, at 724.

indeed they are abolished even in circumstances when the governmental purpose sought to be advanced, consolidation of ownership of Indian lands, does not conflict with the further descent of the property.

There is little doubt that the extreme fractionation of Indian lands is a serious public problem. It may well be appropriate for the United States to ameliorate fractionation by means of regulating the descent and devise of Indian lands. Surely it is permissible for the United States to prevent the owners of such interests from further subdividing them among future heirs on pain of escheat. See *Texaco, Inc.* v. *Short*, 454 U. S. 516, 542 (1982) (BRENNAN, J., dissenting). It may be appropriate to minimize further compounding of the problem by abolishing the descent of such interests by rules of intestacy, thereby forcing the owners to formally designate an heir to prevent escheat to the Tribe. What is certainly not appropriate is to take the extraordinary step of abolishing both descent and devise of these property interests even when the passing of the property to the heir might result in consolidation of property. Accordingly, we find that this regulation, in the words of Justice Holmes, "goes too far." *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S., at 415. The judgment of the Court of Appeals is

Affirmed.

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

I find nothing in today's opinion that would limit *Andrus* v. *Allard*, 444 U. S. 51 (1979), to its facts. Indeed, largely for reasons discussed by the Court of Appeals, I am of the view that the unique negotiations giving rise to the property rights and expectations at issue here make this case the unusual one. See *Irving* v. *Clark*, 758 F. 2d 1260, 1266–1269, and n. 10 (CA8 1985). Accordingly, I join the opinion of the Court.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE and JUSTICE POWELL join, concurring.

I join the opinion of the Court. I write separately to note that in my view the present statute, insofar as concerns the balance between rights taken and rights left untouched, is indistinguishable from the statute that was at issue in *Andrus* v. *Allard*, 444 U. S. 51 (1979). Because that comparison is determinative of whether there has been a taking, see *Penn Central Transportation Co.* v. *New York City*, 438 U. S. 104, 136 (1978); *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 413 (1922), in finding a taking today our decision effectively limits *Allard* to its facts.

JUSTICE STEVENS, with whom JUSTICE WHITE joins, concurring in the judgment.

The Government has a legitimate interest in eliminating Indians' fractional holdings of real property. Legislating in pursuit of this interest, the Government might constitutionally have consolidated the fractional land interests affected by § 207 of the Indian Land Consolidation Act of 1983, 96 Stat. 2519, 25 U. S. C. § 2206 (1982 ed., Supp. III), in three ways: It might have purchased them; it might have condemned them for a public purpose and paid just compensation to their owners; or it might have left them untouched while conditioning their descent by intestacy or devise upon their consolidation by voluntary conveyances within a reasonable period of time.

Since Congress plainly did not authorize either purchase or condemnation and the payment of just compensation, the statute is valid only if Congress, in § 207, authorized the third alternative. In my opinion, therefore, the principal question in this case is whether § 207 represents a lawful exercise of the sovereign's prerogative to condition the retention of fee simple or other ownership interests upon the performance of a modest statutory duty within a reasonable period of time.

I

The Court's opinion persuasively demonstrates that the Government has a strong interest in solving the problem of fractionated land holdings among Indians. It also indicates that the specific escheat provision at issue in this case was one of a long series of congressional efforts to address this problem. The Court's examination of the legislative history, however, is incomplete. An examination of the circumstances surrounding Congress' enactment of § 207 discloses the abruptness and lack of explanation with which Congress added the escheat section to the other provisions of the Indian Land Consolidation Act that it enacted in 1983. See *ante*, at 708–709.

In 1982, the Senate passed a special bill for the purpose of authorizing the Devils Lake Sioux Tribe of North Dakota to adopt a land consolidation program with the approval of the Secretary of the Interior.[1] That bill provided that the Tribe would compensate individual owners for any fractional interest that might be acquired; the bill did not contain any provision for escheat.[2]

When the Senate bill was considered by the House Committee on Indian Affairs, the Committee expanded the coverage of the legislation to authorize any Indian tribe to adopt a land consolidation program with the approval of the Secretary, and it also added § 207—the escheat provision at issue in this case—to the bill. H. R. Rep. No. 97–908, pp. 5, 9

[1] S. 503, 97th Cong., 2d Sess. (1982).

[2] The Report of the Senate Select Committee on Indian Affairs described the purpose of the bill as follows:

"The purpose of S. 503 is to authorize the purchase, sale, and exchange of lands by the Devils Lake Sioux Tribe of the Devils Lake Sioux Reservation, North Dakota. The bill is designed to allow the Tribe to consolidate land ownership with the reservation in order to maximize utilization of the reservation land base. The bill also would restrict inheritance of trust property to members of the Tribe provided that the Tribe paid fair market value to the Secretary of the Interior on behalf of the decedent's estate." S. Rep. No. 97–507, p. 3 (1982).

(1982).[3] The Report on the House Amendments does not specifically discuss § 207. In its general explanation of how Indian trust or restricted lands pass out of Indian ownership, resulting in a need for statutory authorization to tribes to enact laws to prevent the erosion of Indian land ownership, the Report unqualifiedly stated that, "if an Indian allottee dies intestate, his heirs will inherit his property, whether they are Indian or non-Indian." *Id.*, at 11.

The House returned the amended bill to the Senate, which accepted the House addition without hearings and without any floor discussion of § 207. 128 Cong. Rec. 32466–32468 (1982). Section 207 provided:

> "No undivided fractional interest in any tract of trust or restricted land within a tribe's reservation or otherwise subjected to a tribe's jurisdiction shall [descend[4]] by intestacy or devise but shall escheat to that tribe if such interest represents 2 per centum or less of the

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[3] The House additions were themselves an amended version of H. R. 5856, the Indian Land Consolidation Act. H. R. Rep. No. 97–908, p. 9 (1982). The House Committee on Interior and Insular Affairs had held hearings on H. R. 5856, but these hearings were not published. H. R. Legislative Calendar, 97th Cong., 2d Sess., 72 (1982).

The purposes of the legislation were summarized by the House Committee on Interior and Insular Affairs as (1) to provide mechanisms for the tribes to consolidate their tribal landholdings; (2) to allow Indian tribes or allottees to buy all of the fractionated interests in the tracts without having to obtain the consent of all the owners; and (3) to keep trust lands in Indian ownership by allowing tribes to restrict inheritance of Indian lands to Indians. H. R. Rep. No. 97–908, *supra*, at 9–11.

[4] The word "descedent"—an obvious error—appears in the original text. The Act of Oct. 30, 1984, 98 Stat. 3171—which is not relevant to our consideration of this case—corrected the error by substituting the word "descend" for "descedent" in § 207. The Senate Report accompanying the Act described how "descedent" made its way into the 1983 statute: "[T]he bill actually voted on by the House and Senate was garbled in the printing. It was this garbled version of Title II that was signed by the President." S. Rep. No. 98–632, p. 2 (1984).

total acreage in such tract and has earned to its owner less than $100 in the preceding year before it is due to escheat."

In the text of the Act, Congress took pains to specify that fractional interests acquired by a tribe pursuant to an approved plan must be purchased at a fair price. See §§ 204, 205, and 206. There is no comparable provision in § 207. The text of the Act also does not explain why Congress omitted a grace period for consolidation of the fractional interests that were to escheat to the tribe pursuant to that section.

The statute was signed into law on January 12, 1983, and became effective immediately. On March 2, the Bureau of Indian Affairs of the Department of the Interior issued a memorandum to all its area directors to advise them of the enactment of § 207 and to provide them with interim instructions pending the promulgation of formal regulations. The memorandum explained:

> "Section 207 effects a major change in testate and intestate heirship succession for certain undivided fractional interests in trust and restricted Indian land. Under this section, certain interests in land, as explained below, will no longer be capable of descending by intestate succession or being devised by will. Such property interests will, upon the death of the current owner, escheat to the tribe. . . .
>
> . . . . .
>
> "Because Section 207 of P. L. 97–459 constitutes a major change in Indian heirship succession, Area Offices and Agencies are urged to provide all Indian landowners under their jurisdiction with notice of its effects."[5]

The memorandum then explained how Indian landowners who wanted their heirs or devisees, rather than the tribe, to

[5] App. to Juris. Statement 38a–39a.

acquire their fractional interests could avoid the impact of § 207. It outlined three ways by which the owner of a fractional interest of less than two percent of a tract could enlarge that interest to more than two percent.[6]

The three appellees—Mary Irving, Patrick Pumpkin Seed, and Eileen Bissonette—are enrolled members of the Oglala Sioux Tribe. They represent heirs or devisees of members of the Tribe who died in March, April, and June 1983.[7] At the time of their deaths, the decedents owned 41 fractional interests subject to the provisions of § 207. App. 20, 22–28, 32–33, 37–39. The size and value of those interests varied widely—the smallest was a $^1/_{3645}$ interest in a 320-acre tract, having an estimated value of only $12.30, whereas the largest was the equivalent of 3½ acres valued at $284.44. *Id.*, at 22 and 23. If § 207 is valid, all of those interests escheated to the Tribe; if § 207 had not been enacted—or if it is invalid—the interests would have passed to appellees.

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[6] The memorandum stated:

"To assure the effectiveness of a will or heirship succession under state law, any Indian owner within the above category (if he or she is concerned that the tribe rather than his or her heirs or devisees will take these interests) may purchase additional interests from coowners pursuant to 25 CFR 151.7 and thereby increase his/her ownership interest to more than two percent. Another alternative is for such an owner to convey his/her interest to coowners or relatives pursuant to 25 CFR 152.25 and reserve a life estate, thus retaining the benefits of the interest while assuring its continued individual, rather than tribal, ownership. A third alternative, if feasible, is to partition the tract in such a way as to enlarge the owner's interest in a portion of said tract.

"Indians falling within the above category and who are presently occupying, or in any other way using, the tract in question should especially be advised of the aforementioned alternatives." *Id.*, at 39a–40a.

[7] Mary Irving is the daughter of Chester Irving who died on March 18, 1983, see App. 18; Eileen Bissonette is the guardian for the five minor children of Geraldine Mary Poor Bear-Little Hoop Cross who died on March 23, 1983, see *id.*, at 21; and Patrick Pumpkin Seed is the son of Charles Leroy Pumpkin Seed who died on April 2, 1983, see *id.*, at 34, and the nephew of Edgar Pumpkin Seed who died on June 23, 1983.

II

I agree with the Court's explanation of why these appellees "can appropriately serve as their decedents' representatives for purposes of asserting the latters' Fifth Amendment rights." *Ante*, at 711–712. But the reason the Court asserts for finding that § 207 effects a taking is not one that appellees press, or could press, on behalf of *their* decedents. A substantial gap separates the claims that the Court allows these appellees to advance from the rationale that the Court ultimately finds persuasive.

The Court's grant of relief to appellees based on the rights of hypothetical decedents therefore necessarily rests on the implicit adoption of an overbreadth analysis that has heretofore been restricted to the First Amendment area. The Court uses the language of takings jurisprudence to express its conclusion that § 207 violates the Fifth Amendment, but the stated reason is that § 207 "goes too far," see *ante*, at 718, because it might interfere with testamentary dispositions, or inheritances, that result in the consolidation of property interests rather than their increased fractionation.[8] That reasoning may apply to some decedents, but it does not apply to these litigants' decedents. In one case, the property of Mary Poor Bear-Little Hoop Cross was divided among her five children. In two other cases, the fractional interests passed to the next generation.[9] I had thought it well settled

[8] The crux of the Court's holding is stated as follows:

"What is certainly not appropriate is to take the extraordinary step of abolishing both descent and devise of these property interests even when the passing of the property to the heir might result in consolidation of property. Accordingly, we find that this regulation, in the words of Justice Holmes, 'goes too far.'" *Ante*, at 718.

[9] Patrick Pumpkin Seed was a potential heir to four pieces of property in which both his father and his uncle had interests. However, because both his father and his uncle had other potential heirs, the net effect of the distribution of the uncle's and the father's estates would have been to increase the fractionalization of their property interests. Furthermore, even if the statute were considered invalid as applied to Patrick Pumpkin Seed, the

by our precedents that "one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." *United States* v. *Raines*, 362 U. S. 17, 21 (1960) (citing cases). This rule rests on the wisdom that the "delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases thus imagined." *Id.*, at 22.[10] In order to

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Court does not explain why it would also be considered invalid as applied to Mary Irving and Eileen Bissonette.

[10] We have made a limited exception to this rule when a "statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Broadrick* v. *Oklahoma*, 413 U. S. 601, 612 (1973). This exception does not apply to § 207. Even if overbreadth analysis were appropriate in a case outside of the First Amendment area, the Court's use of it on these facts departs from precedent. The Court generally does not grant relief unless there has been a showing that the invalid applications of the statute represent a substantial portion of its entire coverage. "[W]e believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Id.*, at 615. See also *City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U. S. 789, 799 (1984) (requirement of substantiality prevents overbreadth doctrine from abolishing ordinary standing requirements); *New York* v. *Ferber*, 458 U. S. 747, 767–771 (1982) (a law should not be invalidated as overbroad unless it is substantially so). As I wrote in *New York* v. *Ferber:*

"My reasons for avoiding overbreadth analysis in this case are more qualitative than quantitative. When we follow our traditional practice of adjudicating difficult and novel constitutional questions only in concrete factual situations, the adjudications tend to be crafted with greater wisdom. Hypothetical rulings are inherently treacherous and prone to lead us into unforeseen errors; they are qualitatively less reliable than the products of case-by-case adjudication." *Id.*, at 780–781 (opinion concurring in judgment).

Section 207 is obviously not "substantially overbroad." The notion that a regulatory statute unrelated to freedom of expression is invalid simply because the conditions prompting its enactment are not present in every situation to which it applies is a startling doctrine for which the Court cites no authority.

review the judgment of the Court of Appeals granting relief to these litigants, an analysis different from the Court's novel overbreadth approach is required.

III

The Secretary argues that special features of this legislation make it a reasonable exercise of Congress' power to regulate Indian property interests. The Secretary does not suggest that it is generally permissible to modify the individual's presently recognized right to dispose of his property at death without giving him a reasonable opportunity to make *inter vivos* dispositions that will avoid the consequences of a newly enacted change in the laws of intestacy and testamentary disposition. The Secretary does not even contend that this power is unlimited as applied to the property of Indians. Rather, the Secretary contends that § 207 falls within the permissible boundaries of legislation that may operate to limit or extinguish property rights. The Secretary places great emphasis on the minimal value of the property interests affected by § 207, the legitimacy of the governmental purpose in consolidating such interests, and the fact that the tribe, rather than the United States, is the beneficiary of the so-called "escheat." These points, considered in turn and as a whole, provide absolutely no basis for reversing the judgment of the Court of Appeals.

The value of a property interest does not provide a yardstick for measuring "the scope of the dual constitutional guarantees that there be no taking of property without just compensation, and no deprivation of property without the due process of law." *Texaco, Inc.* v. *Short*, 454 U. S. 516, 540–541 (1982) (BRENNAN, J., dissenting). The sovereign has no license to take private property without paying for it and without providing its owner with any opportunity to avoid or mitigate the consequences of the deprivation simply because the property is relatively inexpensive. *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U. S. 419, 436–

437, and 438, n. 16 (1982). The Fifth Amendment draws no distinction between grand larceny and petty larceny.

The legitimacy of the governmental purposes served by § 207 demonstrates that the statute is not arbitrary, see *Delaware Tribal Business Committee* v. *Weeks*, 430 U. S. 73 (1977), and that the alleged "taking" is for a valid "public use" within the meaning of the Fifth Amendment. Those facts, however, do not excuse or mitigate whatever obligation to pay just compensation arises when an otherwise constitutional enactment effects a taking of property. Nor does it lessen the importance of giving a property owner fair notice of a major change in the rules governing the disposition of his property.

The fact that § 207 provides for an "escheat" to the tribe rather than to the United States does not change the unwarned impact of the statute on an individual Indian who wants to leave his property to his children. The statute takes the disposition of decedent's fractional land interests out of the control of the decedent's will or the laws of intestate succession; whether the United States or the tribe retains the property, the landowner's loss is the same. The designation of the tribe as beneficiary is an essential feature, however, in two respects. Since the tribe is the beneficiary, its own interests conflict with its duty to bring the workings of the statute to the attention of the property owner. In addition, the designation of the tribe as beneficiary highlights the inappropriateness of the majority's takings analysis. The use of the term "escheat" in § 207 differs in a substantial way from the more familiar uses of that term. At common law the property of a person who died intestate and without lawful heirs would escheat to the sovereign; thus the doctrine provided a mechanism for determining ownership of what otherwise would have remained abandoned property. In contrast, under § 207 the statutory escheat supersedes the rights of claimants who would otherwise inherit the property; it allocates property between two contending parties.

Section 207 differs from more conventional escheats in another important way. It contains no provisions assuring that the property owner was given a fair opportunity to make suitable arrangements to avoid the operation of the statute. Legislation authorizing the escheat of unclaimed property, such as real estate, bank accounts, and other earmarked funds, typically provides as a condition precedent to the escheat an appropriate lapse of time and the provision of adequate notice to make sure that the property may fairly be treated as abandoned.[11] Similarly, interpleader proceedings in District Court provide procedural safeguards, including an opportunity to appear, for those whose rights will be affected by the judgment. See 28 U. S. C. § 1335; Fed. Rule Civ. Proc. 22. The statute before us, in contrast, contained no such mechanism, apparently relying on the possibility that appellees' decedents would simply learn about the statute's consequences one way or another.

While § 207 therefore does not qualify as an escheat of the kind recognized at common law, it might be regarded as a statute imposing a duty on the owner of highly fractionated interests in allotted lands to consolidate his interests with

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[11] For example, the Government both provides a grace period and bears an affirmative responsibility to prevent escheat in the distribution of funds to which enrolled members of the Peoria Tribe are statutorily entitled under 84 Stat. 688, 25 U. S. C. § 1222. See 25 U. S. C. § 1226 ("Any per capita share, whether payable to a living enrollee or to the heirs or legatees of a deceased enrollee, which the Secretary of the Interior is unable to deliver within two years after the date the check is issued . . . shall revert to the Peoria Tribe").

State statutes governing abandoned property typically provide for a grace period and notice. See, *e. g.*, N. Y. Aband. Prop. Law §§ 300–302 (McKinney 1944 and Supp. 1987) (property held by banking organizations); Ill. Rev. Stat., ch. 141, ¶¶ 102, 112 (1985) (property held by banking or financial organizations). Statutes governing the escheat of property of decedents intestate and without heirs also provide for notice and an opportunity for interested parties to assert their claims. See, *e. g.*, Cal. Civ. Proc. Code Ann. §§ 1420, 1423 (West 1982); Tex. Prop. Code Ann. §§ 71.101–71.106 (1984 and Supp. 1987).

those of other owners of similar interests. The method of enforcing such a duty is to treat its nonperformance during the owner's lifetime as an abandonment of the fractional interests. This release of dominion over the property might justify its escheat to the use of the sovereign.

Long ago our cases made it clear that a State may treat real property as having been abandoned if the owner fails to take certain affirmative steps to protect his ownership interest. We relied on these cases in upholding Indiana's Mineral Lapse Act, a statute that extinguished an interest in coal, oil, or other minerals that had not been used for 20 years:

> "These decisions clearly establish that the State of Indiana has the power to enact the kind of legislation at issue. In each case, the Court upheld the power of the State to condition the retention of a property right upon the performance of an act within a limited period of time. In each instance, as a result of the failure of the property owner to perform the statutory condition, an interest in fee was deemed as a matter of law to be abandoned and to lapse." *Texaco, Inc.* v. *Short*, 454 U. S., at 529.

It is clear, however, that a statute providing for the lapse, escheat, or abandonment of private property cannot impose conditions on continued ownership that are unreasonable, either because they cost too much or because the statute does not allow property owners a reasonable opportunity to perform them and thereby to avoid the loss of their property. In the *Texaco* case, both conditions were satisfied: The conditions imposed by the Indiana Legislature were easily met,[12]

[12] "It is also clear that the State has not exercised this power in an arbitrary manner. The Indiana statute provides that a severed mineral interest shall not terminate if its owner takes any one of three steps to establish his continuing interest in the property. If the owner engages in actual production, or collects rents or royalties from another person who does or proposes to do so, his interest is protected. If the owner pays taxes, no matter how small, the interest is secure. If the owner files a written statement of claim in the county recorder's office, the interest remains via-

and the 2-year grace period included in the statute foreclosed any argument that mineral owners did not have an adequate opportunity to familiarize themselves with the terms of the legislation and to comply with its provisions before their mineral interests were extinguished. As the Court recognized in *United States* v. *Locke*, 471 U. S. 84, 106, n. 15 (1985), "[l]egislatures can enact substantive rules of law that treat property as forfeited under conditions that the common law would not consider sufficient to indicate abandonment." These rules, however, are only reasonable if they afford sufficient notice to the property owners and a reasonable opportunity to comply. *Ibid.*

The Due Process Clause of the Fifth Amendment thus applies to § 207's determination of which acts and omissions may validly constitute an abandonment, just as the Takings Clause applies to whether the statutory escheat of property must be accompanied by the payment of just compensation.[13] It follows, I believe, that § 207 deprived decedents of due process of law by failing to provide an adequate "grace period" in which they could arrange for the consolidation of fractional interests in order to avoid abandonment. Because the statutory presumption of abandonment is invalid under the precise facts of this case, I do not reach the ground relied upon by the Court of Appeals—that the resulting escheat of

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ble. Only if none of these actions is taken for a period of 20 years does a mineral interest lapse and revert to the surface owner." 454 U. S., at 529.

It would appear easier for the owner of a mineral interest to meet these conditions than for appellees' decedents to meet the implicit conditions imposed by § 207. Paying taxes or filing a written statement of claim are simple and unilateral acts, but an Indian owner of a fractional interest cannot consolidate interests or collect $100 per annum from it without the willing participation of other parties.

[13] The Fifth Amendment to the Constitution provides that no person shall "be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

abandoned property would effect a taking of private property for public use without just compensation.[14]

Critical to our decision in *Texaco* was the fact that an owner could readily avoid the risk of abandonment in a variety of ways,[15] and the further fact that the statute afforded the affected property owners a reasonable opportunity to familiarize themselves with its terms and to comply with its provisions. We explained:

> "The first question raised is simply how a legislature must go about advising its citizens of actions that must be taken to avoid a valid rule of law that a mineral interest that has not been used for 20 years will be deemed to be abandoned. The answer to this question is no different from that posed for any legislative enactment affecting substantial rights. Generally, a legislature need do nothing more than enact and publish the law, and afford the citizenry a reasonable opportunity to familiarize itself with its terms and to comply. In this case, the 2-year grace period included in the Indiana statute forecloses any argument that the statute is invalid because mineral owners may not have had an opportunity to become familiar with its terms. It is well established that persons owning property within a State are charged with knowledge of relevant statutory provisions affecting the

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[14] I am unable to join the Court's largely inapposite Fifth Amendment takings analysis. As I have demonstrated, the statute, analogous to those authorizing the escheat of abandoned property, is rooted in the sovereign's authority to oversee and supervise the transfer of property ownership. Instead of analyzing § 207 in relation to our precedents recognizing and limiting the exercise of such authority, however, the Court ignores this line of cases, implicitly questions their validity, and appears to invite widespread challenges under the Fifth Amendment Takings Clause to a variety of statutes of the kind that we upheld in *Texaco* v. *Short*.

[15] See n. 12, *supra*.

control or disposition of such property." 454 U. S., at 531–532.[16]

Assuredly Congress has ample power to require the owners of fractional interests in allotted lands to consolidate their holdings during their lifetimes or to face the risk that their interests will be deemed to have been abandoned. But no such abandonment may occur unless the owners have a fair opportunity to avoid that consequence. In this case, it is palpably clear that they were denied such an opportunity.

This statute became effective the day it was signed into law. It took almost two months for the Bureau of Indian Affairs to distribute an interim memorandum advising its area directors of the major change in Indian heirship succession effected by § 207. Although that memorandum identified three ways in which Indian landowners could avoid the consequences of § 207, it is not reasonable to assume that appellees' decedents—who died on March 18, March 23, April 2, and June 23, 1983—had anything approaching a reasonable

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[16] Earlier in the opinion we noted that in *Wilson* v. *Iseminger*, 185 U. S. 55 (1902), the Court had upheld a Pennsylvania statute that provided for the extinguishment of certain interests in realty "since the statute contained a reasonable grace period in which owners could protect their rights." 454 U. S., at 527, n. 21. We quoted the following passage from the *Wilson* case:

"It may be properly conceded that all statutes of limitation must proceed on the idea that the party has full opportunity afforded him to try his right in the courts. A statute could not bar the existing rights of claimants without affording this opportunity; if it should attempt to do so, it would not be a statute of limitations, but an unlawful attempt to extinguish rights arbitrarily, whatever might be the purport of its provisions. It is essential that such statutes allow a reasonable time after they take effect for the commencement of suits upon existing causes of action; though what shall be considered a reasonable time must be settled by the judgment of the legislature, and the courts will not inquire into the wisdom of its decision in establishing the period of legal bar, unless the time allowed is manifestly so insufficient that the statute becomes a denial of justice." 185 U. S., at 62–63.

opportunity to arrange for the consolidation of their respective fractional interests with those of other owners.[17] With respect to these appellees' decedents, "the time allowed is manifestly so insufficient that the statute becomes a denial of justice." *Wilson* v. *Iseminger*, 185 U. S. 55, 63 (1902).[18]

While citizens "are presumptively charged with knowledge of the law," *Atkins* v. *Parker*, 472 U. S. 115, 130 (1985), that presumption may not apply when "the statute does not allow a sufficient 'grace period' to provide the persons affected by a change in the law with an adequate opportunity to become familiar with their obligations under it." *Ibid.* (citing *Texaco, Inc.*, 454 U. S., at 532). Unlike the food stamp recipients in *Parker*, who received a grace period of over 90 days and individual notice of the substance of the new law, 472 U. S., at 130–131, the Indians affected by § 207 did not receive a reasonable grace period. Nothing in the record suggests that appellees' decedents received an adequate opportunity to put their affairs in order.[19]

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[17] The legislative history of the Indian Land Consolidation Act of 1983 is mute with respect to § 207. See n. 4, *supra*. This silence is illuminating; it suggests that Indian landowners cannot reasonably be expected to have received notice about the statute before it took effect and to have arranged their affairs accordingly. The lack of legislative history concerning § 207 also demonstrates that Congress paid scant or no attention to whether, in light of its longstanding fiduciary obligation to Indians, it was constitutionally required to afford a reasonable postenactment "grace period" for compliance.

[18] A statute which denies the affected party a reasonable opportunity to avoid the consequences of noncompliance may work an injustice similar to that of invalid retroactive legislation. In both instances, the party who "could have anticipated the potential liability attaching to his chosen course of conduct would have avoided the liability by altering his conduct." *Usery* v. *Turner Elkhorn Mining Co.*, 428 U. S. 1, 17, n. 16 (1976) (citing *Welch* v. *Henry*, 305 U. S. 134, 147 (1938)). See also *United States* v. *Hemme*, 476 U. S. 558, 568–569 (1986) (following *Welch* v. *Henry*, *supra*).

[19] Nothing in the record contradicts the possibility that appellees themselves only became aware of the statute upon receiving notices that hearings had been scheduled for the week of October 24, 1983, to determine if their Tribe had a right through escheat to any lands that might other-

The conclusion that Congress has failed to provide appellees' decedents with a reasonable opportunity for compliance implies no rejection of Congress' plenary authority over the affairs and the property of Indians. The Constitution vests Congress with plenary power "to deal with the special problems of Indians." *Morton* v. *Mancari*, 417 U. S. 535, 551 (1974). As the Secretary acknowledges, however, the Government's plenary power over the property of Indians "is subject to constitutional limitations." Brief for Appellant 24–25. The Due Process Clause of the Fifth Amendment required Congress to afford reasonable notice and opportunity for compliance to Indians that § 207 would prevent fractional interests in land from descending by intestate or testate succession.[20] In omitting any opportunity at all for owners of fractional interests to order their affairs in light of § 207, Congress has failed to afford the affected Indians the due process of law required by the Fifth Amendment.

Accordingly, I concur in the judgment.

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wise have passed to appellees. *Irving* v. *Clark*, 758 F. 2d 1260, 1262 (CA8 1985). The notices were issued on October 4, 1983, after the death of appellees' decedents, and therefore afforded no opportunity for decedents to comply with § 207 or for appellees to advise their decedents of the possibility of escheat.

[20] I need express no view on the constitutionality of § 207 as amended by the Act of Oct. 30, 1984, 98 Stat. 3171. All of the interests of appellees' decedents at issue in this case are governed by the original version of § 207. The decedents all died between January 12, 1983, and October 30, 1984, the period in which the original version of § 207 was in effect. The parties in this case present no case or controversy with respect to the application of the *amended* version of § 207.

PENSION BENEFIT GUARANTY CORPORATION *v.* YAHN & McDONNELL, INC., ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 86–231. Argued April 27, 1987—Decided May 18, 1987*

787 F. 2d 128, affirmed by an equally divided Court.

Gary M. Ford argued the cause for appellants in both cases. With him on the briefs for appellant in No. 86–231 were *Peter H. Gould*, *David F. Power*, *Kenneth S. Geller*, *Kathryn A. Oberly*, and *Mitchell L. Strickler*. *Richard H. Markowitz* and *Paula R. Markowitz* filed briefs for appellants in No. 86–253.

Carl L. Taylor argued the cause for appellees in both cases. With him on the brief were *Glenn Summers* and *William H. Ewing*.†

PER CURIAM.

The judgment is affirmed by an equally divided Court.

JUSTICE WHITE took no part in the consideration or decision of these cases.

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*Together with No. 86–253, *United Retail & Wholesale Employees Teamsters Union Local No. 115 Pension Plan et al.* v. *Yahn & McDonnell, Inc., et al.*, also on appeal from the same court.

†Briefs of *amici curiae* urging reversal in No. 86–231 were filed for the National Coordinating Committee for Multiemployer Plans by *Gerald M. Feder*, *David R. Levin*, and *Nik B. Edes;* and for the Trustees of the United Mine Workers of America 1950 and 1974 Pension Plans by *Israel Goldowitz*.

Briefs of *amici curiae* urging affirmance in both cases were filed for the Chamber of Commerce of the United States by *Stephen A. Bokat* and *Robin S. Conrad;* and for Flying Tiger Line Inc., et al. by *Douglas D. Broadwater*, *R. Franklin Balotti*, *Jesse A. Finkelstein*, *William W. Bowser*, and *Lawrence M. Nagin*.

RAY *v.* UNITED STATES

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

No. 86–281. Argued April 28, 1987—Decided May 18, 1987

Upon his convictions for one count of conspiracy to possess cocaine with intent to distribute and two counts of possession of cocaine with intent to distribute, petitioner was sentenced to concurrent prison terms on all three counts and to concurrent special parole terms on the two possession counts. The Court of Appeals affirmed the conspiracy conviction and one of the possession convictions, but, applying the so-called "concurrent sentence doctrine," declined to review the second possession conviction because the sentences on the two possession counts were concurrent.

Held: The judgment below is vacated, and the case is remanded for the Court of Appeals to consider petitioner's challenge to his second possession conviction. Since, in addition to the concurrent prison and parole terms, the District Court imposed a $50 assessment on petitioner on each count pursuant to 18 U. S. C. § 3013 (1982 ed., Supp. III), and since petitioner's liability to pay the total $150 assessment depends on the validity of each of his three convictions, petitioner is not in fact serving concurrent sentences.

791 F. 2d 929, vacated and remanded.

Joseph A. Connors III argued the cause for petitioner. With him on the brief was *Matias Morin, Jr.*

Deputy Solicitor General Bryson argued the cause for the United States. With him on the brief were *Solicitor General Fried, Assistant Attorney General Weld,* and *Andrew J. Pincus.*

PER CURIAM.

Petitioner was found guilty of one count of conspiracy to possess cocaine with intent to distribute, and two counts of possession of cocaine with intent to distribute. He was sentenced to concurrent 7-year prison terms on all three counts, and to concurrent special parole terms of five years on the two possession counts. The Court of Appeals affirmed peti-

tioner's conspiracy conviction and one of his possession convictions. *United States* v. *Sandoval,* 791 F. 2d 929 (CA5 1986) (judg. order). Applying the so-called "concurrent sentence doctrine," the court declined to review the second possession conviction because the sentences on the two possession counts were concurrent. We granted certiorari to review the role of the concurrent sentence doctrine in the federal courts. 479 U. S. 960 (1986).

It now appears, however, that petitioner is not in fact serving concurrent sentences. Title 18 U. S. C. § 3013 (1982 ed., Supp. III) provides that district courts shall assess a monetary charge "on any person convicted of an offense against the United States." Pursuant to this section, the District Court imposed a $50 assessment on each count, in addition to the concurrent prison and parole terms, for a total of $150. Since petitioner's liability to pay this total depends on the validity of each of his three convictions, the sentences are not concurrent. The judgment of the Court of Appeals is therefore vacated, and the cause is remanded to that court so that it may consider petitioner's challenge to his second possession conviction.

It is so ordered.

VAN DRASEK *v.* WEBB, SECRETARY OF THE NAVY, ET AL.

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

No. 86-319. Argued April 29, 1987—Decided May 18, 1987

Certiorari dismissed. Reported below: 790 F. 2d 90.

Stephen G. Milliken argued the cause and filed briefs for petitioner.

Michael K. Kellogg argued the cause for respondents. With him on the brief were *Solicitor General Fried, Assistant Attorney General Willard, Albert G. Lauber, Jr., Richard A. Olderman, Charles R. Gross,* and *Keith T. Sefton.**

PER CURIAM.

The writ of certiorari is dismissed as improvidently granted.

**Barton F. Stichman, David F. Addlestone,* and *Alvin J. Bronstein* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging reversal.

Syllabus

UNITED STATES *v.* SALERNO ET AL.

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

No. 86–87. Argued January 21, 1987—Decided May 26, 1987

The Bail Reform Act of 1984 (Act) requires courts to detain prior to trial arrestees charged with certain serious felonies if the Government demonstrates by clear and convincing evidence after an adversary hearing that no release conditions "will reasonably assure . . . the safety of any other person and the community." 18 U. S. C. § 3142(e) (1982 ed., Supp. III). The Act provides arrestees with a number of procedural rights at the detention hearing, including the right to request counsel, to testify, to present witnesses, to proffer evidence, and to cross-examine other witnesses. The Act also specifies the factors to be considered in making the detention decision, including the nature and seriousness of the charges, the substantiality of the Government's evidence, the arrestee's background and characteristics, and the nature and seriousness of the danger posed by his release. Under the Act, a decision to detain must be supported by written findings of fact and a statement of reasons, and is immediately reviewable. After a hearing under the Act, the District Court ordered the detention of respondents, who had been charged with 35 acts of racketeering activity. The Court of Appeals reversed, holding that § 3142(e)'s authorization of pretrial detention on the ground of future dangerousness is facially unconstitutional as violative of the Fifth Amendment's substantive due process guarantee.

Held:

1. Given the Act's legitimate and compelling regulatory purpose and the procedural protections it offers, § 3142(e) is not facially invalid under the Due Process Clause. Pp. 746–752.

(a) The argument that the Act violates substantive due process because the detention it authorizes constitutes impermissible punishment before trial is unpersuasive. The Act's legislative history clearly indicates that Congress formulated the detention provisions not as punishment for dangerous individuals, but as a potential solution to the pressing societal problem of crimes committed by persons on release. Preventing danger to the community is a legitimate regulatory goal. Moreover, the incidents of detention under the Act are not excessive in relation to that goal, since the Act carefully limits the circumstances under which detention may be sought to the most serious of crimes, the arrestee is entitled to a prompt hearing, the maximum length of deten-

tion is limited by the Speedy Trial Act, and detainees must be housed apart from convicts. Thus, the Act constitutes permissible regulation rather than impermissible punishment. Pp. 746–748.

(b) The Court of Appeals erred in ruling that the Due Process Clause categorically prohibits pretrial detention that is imposed as a regulatory measure on the ground of community danger. The Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest. Such circumstances exist here. The Act narrowly focuses on a particularly acute problem—crime by arrestees—in which the Government's interests are overwhelming. Moreover, the Act operates only on individuals who have been arrested for particular extremely serious offenses, and carefully delineates the circumstances under which detention will be permitted. Pp. 748–751.

(c) The Act's extensive procedural safeguards are specifically designed to further the accuracy of the likelihood-of-future-dangerousness determination, and are sufficient to withstand respondents' facial challenge, since they are more than "adequate to authorize the pretrial detention of at least some [persons] charged with crimes." *Schall* v. *Martin*, 467 U. S. 253, 264. Pp. 751–752.

2. Section 3142(e) is not facially unconstitutional as violative of the Excessive Bail Clause of the Eighth Amendment. The contention that the Act violates the Clause because it allows courts essentially to set bail at an infinite amount for reasons not related to the risk of flight is not persuasive. Nothing in the Clause's text limits the Government's interest in the setting of bail solely to the prevention of flight. Where Congress has mandated detention on the basis of some other compelling interest—here, the public safety—the Eighth Amendment does not require release on bail. Pp. 752–755.

794 F. 2d 64, reversed.

REHNQUIST, C. J., delivered the opinion of the Court, in which WHITE, BLACKMUN, POWELL, O'CONNOR, and SCALIA, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 755. STEVENS, J., filed a dissenting opinion, *post*, p. 767.

Solicitor General Fried argued the cause for the United States. With him on the briefs were *Assistant Attorney General Weld, Deputy Solicitor General Bryson, Jeffrey P. Minear, Samuel Rosenthal*, and *Maury S. Epner.*

Anthony M. Cardinale argued the cause for respondents. With him on the brief was *Kimberly Homan.**

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

The Bail Reform Act of 1984 (Act) allows a federal court to detain an arrestee pending trial if the Government demonstrates by clear and convincing evidence after an adversary hearing that no release conditions "will reasonably assure . . . the safety of any other person and the community." The United States Court of Appeals for the Second Circuit struck down this provision of the Act as facially unconstitutional, because, in that court's words, this type of pretrial detention violates "substantive due process." We granted certiorari because of a conflict among the Courts of Appeals regarding the validity of the Act.[1] 479 U. S. 929 (1986). We hold that, as against the facial attack mounted by these respondents, the Act fully comports with constitutional requirements. We therefore reverse.

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*Briefs of *amici curiae* urging affirmance were filed for the National Association of Criminal Defense Lawyers by *Jon May* and *Mark King Leban;* and for the Public Defender Service by *Cheryl M. Long, James Klein,* and *David A. Reiser.*

Briefs of *amici curiae* were filed for the American Bar Association by *Eugene C. Thomas, Charles G. Cole,* and *David A. Schlueter;* for the American Civil Liberties Union et al. by *William J. Genego, Dennis E. Curtis, Mark Rosenbaum, Paul Hoffman, Richard Emery, Martin Guggenheim, Alvin Bronstein,* and *David Goldstein;* and for Howard Perry by *Allen N. Brunwasser.*

[1] Every other Court of Appeals to have considered the validity of the Bail Reform Act of 1984 has rejected the facial constitutional challenge. *United States* v. *Walker,* 805 F. 2d 1042 (CA11 1986); *United States* v. *Rodriguez,* 803 F. 2d 1102 (CA11 1986); *United States* v. *Simpkins,* 255 U. S. App. D. C. 306, 801 F. 2d 520 (1986); *United States* v. *Zannino,* 798 F. 2d 544 (CA1 1983); *United States* v. *Perry,* 788 F. 2d 100 (CA3), cert. denied, 479 U. S. 864 (1986); *United States* v. *Portes,* 786 F. 2d 758 (CA7 1985).

I

Responding to "the alarming problem of crimes committed by persons on release," S. Rep. No. 98–225, p. 3 (1983), Congress formulated the Bail Reform Act of 1984, 18 U. S. C. § 3141 *et seq.* (1982 ed., Supp. III), as the solution to a bail crisis in the federal courts. The Act represents the National Legislature's considered response to numerous perceived deficiencies in the federal bail process. By providing for sweeping changes in both the way federal courts consider bail applications and the circumstances under which bail is granted, Congress hoped to "give the courts adequate authority to make release decisions that give appropriate recognition to the danger a person may pose to others if released." S. Rep. No. 98–225, at 3.

To this end, § 3141(a) of the Act requires a judicial officer to determine whether an arrestee shall be detained. Section 3142(e) provides that "[i]f, after a hearing pursuant to the provisions of subsection (f), the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community, he shall order the detention of the person prior to trial." Section 3142(f) provides the arrestee with a number of procedural safeguards. He may request the presence of counsel at the detention hearing, he may testify and present witnesses in his behalf, as well as proffer evidence, and he may cross-examine other witnesses appearing at the hearing. If the judicial officer finds that no conditions of pretrial release can reasonably assure the safety of other persons and the community, he must state his findings of fact in writing, § 3142(i), and support his conclusion with "clear and convincing evidence," § 3142(f).

The judicial officer is not given unbridled discretion in making the detention determination. Congress has specified the considerations relevant to that decision. These factors include the nature and seriousness of the charges, the substantiality of the Government's evidence against the arrestee, the

arrestee's background and characteristics, and the nature and seriousness of the danger posed by the suspect's release. § 3142(g). Should a judicial officer order detention, the detainee is entitled to expedited appellate review of the detention order. §§ 3145(b), (c).

Respondents Anthony Salerno and Vincent Cafaro were arrested on March 21, 1986, after being charged in a 29-count indictment alleging various Racketeer Influenced and Corrupt Organizations Act (RICO) violations, mail and wire fraud offenses, extortion, and various criminal gambling violations. The RICO counts alleged 35 acts of racketeering activity, including fraud, extortion, gambling, and conspiracy to commit murder. At respondents' arraignment, the Government moved to have Salerno and Cafaro detained pursuant to § 3142(e), on the ground that no condition of release would assure the safety of the community or any person. The District Court held a hearing at which the Government made a detailed proffer of evidence. The Government's case showed that Salerno was the "boss" of the Genovese crime family of La Cosa Nostra and that Cafaro was a "captain" in the Genovese family. According to the Government's proffer, based in large part on conversations intercepted by a court-ordered wiretap, the two respondents had participated in wide-ranging conspiracies to aid their illegitimate enterprises through violent means. The Government also offered the testimony of two of its trial witnesses, who would assert that Salerno personally participated in two murder conspiracies. Salerno opposed the motion for detention, challenging the credibility of the Government's witnesses. He offered the testimony of several character witnesses as well as a letter from his doctor stating that he was suffering from a serious medical condition. Cafaro presented no evidence at the hearing, but instead characterized the wiretap conversations as merely "tough talk."

The District Court granted the Government's detention motion, concluding that the Government had established by

clear and convincing evidence that no condition or combination of conditions of release would ensure the safety of the community or any person:

> "The activities of a criminal organization such as the Genovese Family do not cease with the arrest of its principals and their release on even the most stringent of bail conditions. The illegal businesses, in place for many years, require constant attention and protection, or they will fail. Under these circumstances, this court recognizes a strong incentive on the part of its leadership to continue business as usual. When business as usual involves threats, beatings, and murder, the present danger such people pose in the community is self-evident." 631 F. Supp. 1364, 1375 (SDNY 1986).[2]

Respondents appealed, contending that to the extent that the Bail Reform Act permits pretrial detention on the ground that the arrestee is likely to commit future crimes, it is unconstitutional on its face. Over a dissent, the United States Court of Appeals for the Second Circuit agreed. 794 F. 2d 64 (1986). Although the court agreed that pretrial detention could be imposed if the defendants were likely to intimidate witnesses or otherwise jeopardize the trial process, it found "§ 3142(e)'s authorization of pretrial detention [on the ground of future dangerousness] repugnant to the concept of substantive due process, which we believe prohibits the total deprivation of liberty simply as a means of preventing future crimes." *Id.*, at 71–72. The court concluded that the Government could not, consistent with due process, detain persons who had not been accused of any crime merely because they were thought to present a danger to the community. *Id.*, at 72, quoting *United States* v. *Melendez-Carrion*, 790 F.

[2] Salerno was subsequently sentenced in unrelated proceedings before a different judge. To this date, however, Salerno has not been confined pursuant to that sentence. The authority for Salerno's present incarceration remains the District Court's pretrial detention order. The case is therefore very much alive and is properly presented for our resolution.

2d 984, 1000–1001 (CA2 1986) (opinion of Newman, J.). It reasoned that our criminal law system holds persons accountable for past actions, not anticipated future actions. Although a court could detain an arrestee who threatened to flee before trial, such detention would be permissible because it would serve the basic objective of a criminal system—bringing the accused to trial. The court distinguished our decision in *Gerstein* v. *Pugh*, 420 U. S. 103 (1975), in which we upheld police detention pursuant to arrest. The court construed *Gerstein* as limiting such detention to the "'administrative steps incident to arrest.'" 794 F. 2d, at 74, quoting *Gerstein*, *supra*, at 114. The Court of Appeals also found our decision in *Schall* v. *Martin*, 467 U. S. 253 (1984), upholding postarrest, pretrial detention of juveniles, inapposite because juveniles have a lesser interest in liberty than do adults. The dissenting judge concluded that on its face, the Bail Reform Act adequately balanced the Federal Government's compelling interests in public safety against the detainee's liberty interests.

II

A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that the Bail Reform Act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an "overbreadth" doctrine outside the limited context of the First Amendment. *Schall* v. *Martin*, *supra*, at 269, n. 18. We think respondents have failed to shoulder their heavy burden to demonstrate that the Act is "facially" unconstitutional.[3]

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[3] We intimate no view on the validity of any aspects of the Act that are not relevant to respondents' case. Nor have respondents claimed that the Act is unconstitutional because of the way it was applied to the particular facts of their case.

Respondents present two grounds for invalidating the Bail Reform Act's provisions permitting pretrial detention on the basis of future dangerousness. First, they rely upon the Court of Appeals' conclusion that the Act exceeds the limitations placed upon the Federal Government by the Due Process Clause of the Fifth Amendment. Second, they contend that the Act contravenes the Eighth Amendment's proscription against excessive bail. We treat these contentions in turn.

A

The Due Process Clause of the Fifth Amendment provides that "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." This Court has held that the Due Process Clause protects individuals against two types of government action. So-called "substantive due process" prevents the government from engaging in conduct that "shocks the conscience," *Rochin* v. *California*, 342 U. S. 165, 172 (1952), or interferes with rights "implicit in the concept of ordered liberty," *Palko* v. *Connecticut*, 302 U. S. 319, 325–326 (1937). When government action depriving a person of life, liberty, or property survives substantive due process scrutiny, it must still be implemented in a fair manner. *Mathews* v. *Eldridge*, 424 U. S. 319, 335 (1976). This requirement has traditionally been referred to as "procedural" due process.

Respondents first argue that the Act violates substantive due process because the pretrial detention it authorizes constitutes impermissible punishment before trial. See *Bell* v. *Wolfish*, 441 U. S. 520, 535, and n. 16 (1979). The Government, however, has never argued that pretrial detention could be upheld if it were "punishment." The Court of Appeals assumed that pretrial detention under the Bail Reform Act is regulatory, not penal, and we agree that it is.

As an initial matter, the mere fact that a person is detained does not inexorably lead to the conclusion that the government has imposed punishment. *Bell* v. *Wolfish*, *supra*, at

537. To determine whether a restriction on liberty constitutes impermissible punishment or permissible regulation, we first look to legislative intent. *Schall* v. *Martin*, 467 U. S., at 269. Unless Congress expressly intended to impose punitive restrictions, the punitive/regulatory distinction turns on "'whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it].'" *Ibid.*, quoting *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144, 168–169 (1963).

We conclude that the detention imposed by the Act falls on the regulatory side of the dichotomy. The legislative history of the Bail Reform Act clearly indicates that Congress did not formulate the pretrial detention provisions as punishment for dangerous individuals. See S. Rep. No. 98–225, at 8. Congress instead perceived pretrial detention as a potential solution to a pressing societal problem. *Id.*, at 4–7. There is no doubt that preventing danger to the community is a legitimate regulatory goal. *Schall* v. *Martin*, *supra*.

Nor are the incidents of pretrial detention excessive in relation to the regulatory goal Congress sought to achieve. The Bail Reform Act carefully limits the circumstances under which detention may be sought to the most serious of crimes. See 18 U. S. C. § 3142(f) (detention hearings available if case involves crimes of violence, offenses for which the sentence is life imprisonment or death, serious drug offenses, or certain repeat offenders). The arrestee is entitled to a prompt detention hearing, *ibid.*, and the maximum length of pretrial detention is limited by the stringent time limitations of the Speedy Trial Act.[4] See 18 U. S. C. § 3161 *et seq.* (1982 ed. and Supp. III). Moreover, as in *Schall* v. *Martin*, the conditions of confinement envisioned by the Act "appear to reflect the regulatory purposes relied upon by the" Government.

[4] We intimate no view as to the point at which detention in a particular case might become excessively prolonged, and therefore punitive, in relation to Congress' regulatory goal.

467 U. S., at 270. As in *Schall*, the statute at issue here requires that detainees be housed in a "facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal." 18 U. S. C. § 3142(i)(2). We conclude, therefore, that the pretrial detention contemplated by the Bail Reform Act is regulatory in nature, and does not constitute punishment before trial in violation of the Due Process Clause.

The Court of Appeals nevertheless concluded that "the Due Process Clause prohibits pretrial detention on the ground of danger to the community as a regulatory measure, without regard to the duration of the detention." 794 F. 2d, at 71. Respondents characterize the Due Process Clause as erecting an impenetrable "wall" in this area that "no governmental interest—rational, important, compelling or otherwise—may surmount." Brief for Respondents 16.

We do not think the Clause lays down any such categorical imperative. We have repeatedly held that the Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest. For example, in times of war or insurrection, when society's interest is at its peak, the Government may detain individuals whom the Government believes to be dangerous. See *Ludecke* v. *Watkins*, 335 U. S. 160 (1948) (approving unreviewable executive power to detain enemy aliens in time of war); *Moyer* v. *Peabody*, 212 U. S. 78, 84–85 (1909) (rejecting due process claim of individual jailed without probable cause by Governor in time of insurrection). Even outside the exigencies of war, we have found that sufficiently compelling governmental interests can justify detention of dangerous persons. Thus, we have found no absolute constitutional barrier to detention of potentially dangerous resident aliens pending deportation proceedings. *Carlson* v. *Landon*, 342 U. S. 524, 537–542 (1952); *Wong Wing* v. *United States*, 163 U. S. 228 (1896). We have also held that the government may detain mentally unstable individuals who present a dan-

ger to the public, *Addington* v. *Texas*, 441 U. S. 418 (1979), and dangerous defendants who become incompetent to stand trial, *Jackson* v. *Indiana*, 406 U. S. 715, 731–739 (1972); *Greenwood* v. *United States*, 350 U. S. 366 (1956). We have approved of postarrest regulatory detention of juveniles when they present a continuing danger to the community. *Schall* v. *Martin*, *supra*. Even competent adults may face substantial liberty restrictions as a result of the operation of our criminal justice system. If the police suspect an individual of a crime, they may arrest and hold him until a neutral magistrate determines whether probable cause exists. *Gerstein* v. *Pugh*, 420 U. S. 103 (1975). Finally, respondents concede and the Court of Appeals noted that an arrestee may be incarcerated until trial if he presents a risk of flight, see *Bell* v. *Wolfish*, 441 U. S., at 534, or a danger to witnesses.

Respondents characterize all of these cases as exceptions to the "general rule" of substantive due process that the government may not detain a person prior to a judgment of guilt in a criminal trial. Such a "general rule" may freely be conceded, but we think that these cases show a sufficient number of exceptions to the rule that the congressional action challenged here can hardly be characterized as totally novel. Given the well-established authority of the government, in special circumstances, to restrain individuals' liberty prior to or even without criminal trial and conviction, we think that the present statute providing for pretrial detention on the basis of dangerousness must be evaluated in precisely the same manner that we evaluated the laws in the cases discussed above.

The government's interest in preventing crime by arrestees is both legitimate and compelling. *De Veau* v. *Braisted*, 363 U. S. 144, 155 (1960). In *Schall*, *supra*, we recognized the strength of the State's interest in preventing juvenile crime. This general concern with crime prevention is no less compelling when the suspects are adults. Indeed, "[t]he

harm suffered by the victim of a crime is not dependent upon the age of the perpetrator." *Schall* v. *Martin*, *supra*, at 264–265. The Bail Reform Act of 1984 responds to an even more particularized governmental interest than the interest we sustained in *Schall*. The statute we upheld in *Schall* permitted pretrial detention of any juvenile arrested on any charge after a showing that the individual might commit some undefined further crimes. The Bail Reform Act, in contrast, narrowly focuses on a particularly acute problem in which the Government interests are overwhelming. The Act operates only on individuals who have been arrested for a specific category of extremely serious offenses. 18 U. S. C. § 3142(f). Congress specifically found that these individuals are far more likely to be responsible for dangerous acts in the community after arrest. See S. Rep. No. 98–225, at 6–7. Nor is the Act by any means a scattershot attempt to incapacitate those who are merely suspected of these serious crimes. The Government must first of all demonstrate probable cause to believe that the charged crime has been committed by the arrestee, but that is not enough. In a full-blown adversary hearing, the Government must convince a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person. 18 U. S. C. § 3142(f). While the Government's general interest in preventing crime is compelling, even this interest is heightened when the Government musters convincing proof that the arrestee, already indicted or held to answer for a serious crime, presents a demonstrable danger to the community. Under these narrow circumstances, society's interest in crime prevention is at its greatest.

On the other side of the scale, of course, is the individual's strong interest in liberty. We do not minimize the importance and fundamental nature of this right. But, as our cases hold, this right may, in circumstances where the government's interest is sufficiently weighty, be subordinated

to the greater needs of society. We think that Congress' careful delineation of the circumstances under which detention will be permitted satisfies this standard. When the Government proves by clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or the community, we believe that, consistent with the Due Process Clause, a court may disable the arrestee from executing that threat. Under these circumstances, we cannot categorically state that pretrial detention "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder* v. *Massachusetts*, 291 U. S. 97, 105 (1934).

Finally, we may dispose briefly of respondents' facial challenge to the procedures of the Bail Reform Act. To sustain them against such a challenge, we need only find them "adequate to authorize the pretrial detention of at least some [persons] charged with crimes," *Schall*, *supra*, at 264, whether or not they might be insufficient in some particular circumstances. We think they pass that test. As we stated in *Schall*, "there is nothing inherently unattainable about a prediction of future criminal conduct." 467 U. S., at 278; see *Jurek* v. *Texas*, 428 U. S. 262, 274 (1976) (joint opinion of Stewart, POWELL, and STEVENS, JJ.); *id.*, at 279 (WHITE, J., concurring in judgment).

Under the Bail Reform Act, the procedures by which a judicial officer evaluates the likelihood of future dangerousness are specifically designed to further the accuracy of that determination. Detainees have a right to counsel at the detention hearing. 18 U. S. C. § 3142(f). They may testify in their own behalf, present information by proffer or otherwise, and cross-examine witnesses who appear at the hearing. *Ibid.* The judicial officer charged with the responsibility of determining the appropriateness of detention is guided by statutorily enumerated factors, which include the nature and the circumstances of the charges, the weight of the evidence, the history and characteristics of the putative of-

fender, and the danger to the community. § 3142(g). The Government must prove its case by clear and convincing evidence. § 3142(f). Finally, the judicial officer must include written findings of fact and a written statement of reasons for a decision to detain. § 3142(i). The Act's review provisions, § 3145(c), provide for immediate appellate review of the detention decision.

We think these extensive safeguards suffice to repel a facial challenge. The protections are more exacting than those we found sufficient in the juvenile context, see *Schall*, *supra*, at 275–281, and they far exceed what we found necessary to effect limited postarrest detention in *Gerstein* v. *Pugh*, 420 U. S. 103 (1975). Given the legitimate and compelling regulatory purpose of the Act and the procedural protections it offers, we conclude that the Act is not facially invalid under the Due Process Clause of the Fifth Amendment.

B

Respondents also contend that the Bail Reform Act violates the Excessive Bail Clause of the Eighth Amendment. The Court of Appeals did not address this issue because it found that the Act violates the Due Process Clause. We think that the Act survives a challenge founded upon the Eighth Amendment.

The Eighth Amendment addresses pretrial release by providing merely that "[e]xcessive bail shall not be required." This Clause, of course, says nothing about whether bail shall be available at all. Respondents nevertheless contend that this Clause grants them a right to bail calculated solely upon considerations of flight. They rely on *Stack* v. *Boyle*, 342 U. S. 1, 5 (1951), in which the Court stated that "[b]ail set at a figure higher than an amount reasonably calculated [to ensure the defendant's presence at trial] is 'excessive' under the Eighth Amendment." In respondents' view, since the Bail Reform Act allows a court essentially to set bail at an infinite amount for reasons not related to the risk of flight, it

violates the Excessive Bail Clause. Respondents concede that the right to bail they have discovered in the Eighth Amendment is not absolute. A court may, for example, refuse bail in capital cases. And, as the Court of Appeals noted and respondents admit, a court may refuse bail when the defendant presents a threat to the judicial process by intimidating witnesses. Brief for Respondents 21–22. Respondents characterize these exceptions as consistent with what they claim to be the sole purpose of bail—to ensure the integrity of the judicial process.

While we agree that a primary function of bail is to safeguard the courts' role in adjudicating the guilt or innocence of defendants, we reject the proposition that the Eighth Amendment categorically prohibits the government from pursuing other admittedly compelling interests through regulation of pretrial release. The above-quoted dictum in *Stack* v. *Boyle* is far too slender a reed on which to rest this argument. The Court in *Stack* had no occasion to consider whether the Excessive Bail Clause requires courts to admit all defendants to bail, because the statute before the Court in that case in fact allowed the defendants to be bailed. Thus, the Court had to determine only whether bail, admittedly available in that case, was excessive if set at a sum greater than that necessary to ensure the arrestees' presence at trial.

The holding of *Stack* is illuminated by the Court's holding just four months later in *Carlson* v. *Landon*, 342 U. S. 524 (1952). In that case, remarkably similar to the present action, the detainees had been arrested and held without bail pending a determination of deportability. The Attorney General refused to release the individuals, "on the ground that there was reasonable cause to believe that [their] release would be prejudicial to the public interest and *would endanger the welfare and safety of the United States.*" *Id.*, at 529 (emphasis added). The detainees brought the same challenge that respondents bring to us today: the Eighth Amend-

ment required them to be admitted to bail. The Court squarely rejected this proposition:

> "The bail clause was lifted with slight changes from the English Bill of Rights Act. In England that clause has never been thought to accord a right to bail in all cases, but merely to provide that bail shall not be excessive in those cases where it is proper to grant bail. When this clause was carried over into our Bill of Rights, nothing was said that indicated any different concept. The Eighth Amendment has not prevented Congress from defining the classes of cases in which bail shall be allowed in this country. Thus, in criminal cases bail is not compulsory where the punishment may be death. Indeed, the very language of the Amendment fails to say all arrests must be bailable." *Id.*, at 545–546 (footnotes omitted).

Carlson v. *Landon* was a civil case, and we need not decide today whether the Excessive Bail Clause speaks at all to Congress' power to define the classes of criminal arrestees who shall be admitted to bail. For even if we were to conclude that the Eighth Amendment imposes some substantive limitations on the National Legislature's powers in this area, we would still hold that the Bail Reform Act is valid. Nothing in the text of the Bail Clause limits permissible Government considerations solely to questions of flight. The only arguable substantive limitation of the Bail Clause is that the Government's proposed conditions of release or detention not be "excessive" in light of the perceived evil. Of course, to determine whether the Government's response is excessive, we must compare that response against the interest the Government seeks to protect by means of that response. Thus, when the Government has admitted that its only interest is in preventing flight, bail must be set by a court at a sum designed to ensure that goal, and no more. *Stack* v. *Boyle*, *supra*. We believe that when Congress has mandated detention on the basis of a compelling interest other than pre-

vention of flight, as it has here, the Eighth Amendment does not require release on bail.

III

In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception. We hold that the provisions for pretrial detention in the Bail Reform Act of 1984 fall within that carefully limited exception. The Act authorizes the detention prior to trial of arrestees charged with serious felonies who are found after an adversary hearing to pose a threat to the safety of individuals or to the community which no condition of release can dispel. The numerous procedural safeguards detailed above must attend this adversary hearing. We are unwilling to say that this congressional determination, based as it is upon that primary concern of every government—a concern for the safety and indeed the lives of its citizens—on its face violates either the Due Process Clause of the Fifth Amendment or the Excessive Bail Clause of the Eighth Amendment.

The judgment of the Court of Appeals is therefore

Reversed.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

This case brings before the Court for the first time a statute in which Congress declares that a person innocent of any crime may be jailed indefinitely, pending the trial of allegations which are legally presumed to be untrue, if the Government shows to the satisfaction of a judge that the accused is likely to commit crimes, unrelated to the pending charges, at any time in the future. Such statutes, consistent with the usages of tyranny and the excesses of what bitter experience teaches us to call the police state, have long been thought incompatible with the fundamental human rights protected by our Constitution. Today a majority of this Court holds otherwise. Its decision disregards basic principles of justice

established centuries ago and enshrined beyond the reach of governmental interference in the Bill of Rights.

I

A few preliminary words are necessary with respect to the majority's treatment of the facts in this case. The two paragraphs which the majority devotes to the procedural posture are essentially correct, but they omit certain matters which are of substantial legal relevance.

The Solicitor General's petition for certiorari was filed on July 21, 1986. On October 9, 1986, respondent Salerno filed a response to the petition. No response or appearance of counsel was filed on behalf of respondent Cafaro. The petition for certiorari was granted on November 3, 1986.

On November 19, 1986, respondent Salerno was convicted after a jury trial on charges unrelated to those alleged in the indictment in this case. On January 13, 1987, Salerno was sentenced on those charges to 100 years' imprisonment. As of that date, the Government no longer required a pretrial detention order for the purpose of keeping Salerno incarcerated; it could simply take him into custody on the judgment and commitment order. The present case thus became moot as to respondent Salerno.[1]

[1] Had this judgment and commitment order been executed immediately, as is the ordinary course, the present case would certainly have been moot with respect to Salerno. On January 16, 1987, however, the District Judge who had sentenced Salerno in the unrelated proceedings issued the following order, apparently with the Government's consent:

"Inasmuch as defendant Anthony Salerno was not ordered detained in this case, but is presently being detained pretrial in the case of *United States* v. *Anthony Salerno et al.*, SS 86 Cr. 245 (MJL),

"IT IS HEREBY ORDERED that the bail status of defendant Anthony Salerno in the above-captioned case shall remain the same as it was prior to the January 13, 1987 sentencing, pending further order of the Court." Order in SS 85 Cr. 139 (RO) (SDNY) (Owen, J.).

This order is curious. To release on bail pending appeal "a person who has been found guilty of an offense and sentenced to a term of imprisonment," the District Judge was required to find "by clear and convincing evidence

The situation with respect to respondent Cafaro is still more disturbing. In early October 1986, before the Solicitor General's petition for certiorari was granted, respondent Cafaro became a cooperating witness, assisting the Government's investigation "by working in a covert capacity."[2] The information that Cafaro was cooperating with the Government was not revealed to his codefendants, including respondent Salerno. On October 9, 1986, respondent Cafaro was released, ostensibly "temporarily for medical care and treatment," with the Government's consent. Docket, SS 86 Cr. 245–2, p. 6 (MJL) (SDNY) (Lowe, J.).[3] This release was conditioned upon execution of a personal recognizance bond in the sum of $1 million, under the general pretrial

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that the person is not likely to flee or pose a danger to the safety of any other person or the community if released . . . ." 18 U. S. C. § 3143(b)(1) (1982 ed., Supp. III). In short, the District Court which had sentenced Salerno to 100 years' imprisonment then found, with the Government's consent, that he was not dangerous, in a vain attempt to keep alive the controversy as to Salerno's dangerousness before this Court.

[2] This characterization of Cafaro's activities, along with an account of the process by which Cafaro became a Government agent, appears in an affidavit executed by a former Assistant United States Attorney and filed in the District Court during proceedings in the instant case which occurred after the case was submitted to this Court. Affidavit of Warren Neil Eggleston, dated March 18, 1987, SS 86 Cr. 245, p. 4 (MJL) (SDNY).

[3] Further particulars of the Government's agreement with Cafaro, including the precise terms of the agreement to release him on bail, are not included in the record, and the Court has declined to order that the relevant documents be placed before us.

In his reply brief in this Court, the Solicitor General stated: "On October 8, 1986, Cafaro was temporarily released for medical treatment. Because he is still subject to the pretrial detention order, Cafaro's case also continues to present a live controversy." Reply Brief for United States 1–2, n. 1. The Solicitor General did not inform the Court that this release involved the execution of a personal recognizance bond, nor did he reveal that Cafaro had become a cooperating witness. I do not understand how the Solicitor General's representation that Cafaro was "still subject to the pretrial detention order" can be reconciled with the fact of his release on a $1 million personal recognizance bond.

release provisions of 18 U. S. C. § 3141 (1982 ed., Supp. III). In short, respondent Cafaro became an informant and the Government agreed to his release on bail in order that he might better serve the Government's purposes. As to Cafaro, this case was no longer justiciable even before certiorari was granted, but the information bearing upon the essential issue of the Court's jurisdiction was not made available to us.

The Government thus invites the Court to address the facial constitutionality of the pretrial detention statute in a case involving two respondents, one of whom has been sentenced to a century of jail time in another case and released pending appeal with the Government's consent, while the other was released on bail *in this case*, with the Government's consent, because he had become an informant. These facts raise, at the very least, a substantial question as to the Court's jurisdiction, for it is far from clear that there is now an actual controversy between these parties. As we have recently said, "Article III of the Constitution requires that there be a live case or controversy at the time that a federal court decides the case; it is not enough that there may have been a live case or controversy when the case was decided by the court whose judgment we are reviewing." *Burke* v. *Barnes*, 479 U. S. 361, 363 (1987); see *Sosna* v. *Iowa*, 419 U. S. 393, 402 (1975); *Golden* v. *Zwickler*, 394 U. S. 103, 108 (1969). Only by flatly ignoring these matters is the majority able to maintain the pretense that it has jurisdiction to decide the question which it is in such a hurry to reach.

II

The majority approaches respondents' challenge to the Act by dividing the discussion into two sections, one concerned with the substantive guarantees implicit in the Due Process Clause, and the other concerned with the protection afforded by the Excessive Bail Clause of the Eighth Amendment. This is a sterile formalism, which divides a unitary argument

into two independent parts and then professes to demonstrate that the parts are individually inadequate.

On the due process side of this false dichotomy appears an argument concerning the distinction between regulatory and punitive legislation. The majority concludes that the Act is a regulatory rather than a punitive measure. The ease with which the conclusion is reached suggests the worthlessness of the achievement. The major premise is that "[u]nless Congress expressly intended to impose punitive restrictions, the punitive/regulatory distinction turns on '"whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it]."'" *Ante*, at 747 (citations omitted). The majority finds that "Congress did not formulate the pretrial detention provisions as punishment for dangerous individuals," but instead was pursuing the "legitimate regulatory goal" of "preventing danger to the community." *Ibid.*[4] Concluding that pretrial detention is not an excessive solution to the problem of preventing danger to the community, the majority thus finds that no substantive element of the guarantee of due process invalidates the statute.

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[4] Preventing danger to the community through the enactment and enforcement of criminal laws is indeed a legitimate goal, but in our system the achievement of that goal is left primarily to the States. The Constitution does not contain an explicit delegation to the Federal Government of the power to define and administer the general criminal law. The Bail Reform Act does not limit its definition of dangerousness to the likelihood that the defendant poses a danger to others through the commission of *federal* crimes. Federal preventive detention may thus be ordered under the Act when the danger asserted by the Government is the danger that the defendant will violate state law. The majority nowhere identifies the constitutional source of congressional power to authorize the federal detention of persons whose predicted future conduct would not violate any federal statute and could not be punished by a federal court. I can only conclude that the Court's frequently expressed concern with the principles of federalism vanishes when it threatens to interfere with the Court's attainment of the desired result.

This argument does not demonstrate the conclusion it purports to justify. Let us apply the majority's reasoning to a similar, hypothetical case. After investigation, Congress determines (not unrealistically) that a large proportion of violent crime is perpetrated by persons who are unemployed. It also determines, equally reasonably, that much violent crime is committed at night. From amongst the panoply of "potential solutions," Congress chooses a statute which permits, after judicial proceedings, the imposition of a dusk-to-dawn curfew on anyone who is unemployed. Since this is not a measure enacted for the purpose of punishing the unemployed, and since the majority finds that preventing danger to the community is a legitimate regulatory goal, the curfew statute would, according to the majority's analysis, be a mere "regulatory" detention statute, entirely compatible with the substantive components of the Due Process Clause.

The absurdity of this conclusion arises, of course, from the majority's cramped concept of substantive due process. The majority proceeds as though the only substantive right protected by the Due Process Clause is a right to be free from punishment before conviction. The majority's technique for infringing this right is simple: merely redefine any measure which is claimed to be punishment as "regulation," and, magically, the Constitution no longer prohibits its imposition. Because, as I discuss in Part III, *infra*, the Due Process Clause protects other substantive rights which are infringed by this legislation, the majority's argument is merely an exercise in obfuscation.

The logic of the majority's Eighth Amendment analysis is equally unsatisfactory. The Eighth Amendment, as the majority notes, states that "[e]xcessive bail shall not be required." The majority then declares, as if it were undeniable, that: "[t]his Clause, of course, says nothing about whether bail shall be available at all." *Ante*, at 752. If excessive bail is imposed the defendant stays in jail. The same result is achieved if bail is denied altogether. Whether the

magistrate sets bail at $1 billion or refuses to set bail at all, the consequences are indistinguishable. It would be mere sophistry to suggest that the Eighth Amendment protects against the former decision, and not the latter. Indeed, such a result would lead to the conclusion that there was no need for Congress to pass a preventive detention measure of any kind; every federal magistrate and district judge could simply refuse, despite the absence of any evidence of risk of flight or danger to the community, to set bail. This would be entirely constitutional, since, according to the majority, the Eighth Amendment "says nothing about whether bail shall be available at all."

But perhaps, the majority says, this manifest absurdity can be avoided. Perhaps the Bail Clause is addressed only to the Judiciary. "[W]e need not decide today," the majority says, "whether the Excessive Bail Clause speaks at all to Congress' power to define the classes of criminal arrestees who shall be admitted to bail." *Ante*, at 754. The majority is correct that this question need not be decided today; it was decided long ago. Federal and state statutes which purport to accomplish what the Eighth Amendment forbids, such as imposing cruel and unusual punishments, may not stand. See, *e. g.*, *Trop* v. *Dulles*, 356 U. S. 86 (1958); *Furman* v. *Georgia*, 408 U. S. 238 (1972). The text of the Amendment, which provides simply that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted," provides absolutely no support for the majority's speculation that both courts and Congress are forbidden to inflict cruel and unusual punishments, while only the courts are forbidden to require excessive bail.[5]

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[5] The majority refers to the statement in *Carlson* v. *Landon*, 342 U. S. 524, 545 (1952), that the Bail Clause was adopted by Congress from the English Bill of Rights Act of 1689, 1 Wm. & Mary, Sess. 2, ch. II, § I(10), and that "[i]n England that clause has never been thought to accord a right to bail in all cases, but merely to provide that bail shall not be excessive in those cases where it is proper to grant bail." A sufficient answer to this

The majority's attempts to deny the relevance of the Bail Clause to this case are unavailing, but the majority is nonetheless correct that the prohibition of excessive bail means that in order "to determine whether the Government's response is excessive, we must compare that response against the interest the Government seeks to protect by means of that response." *Ante*, at 754. The majority concedes, as it must, that "when the Government has admitted that its only interest is in preventing flight, bail must be set by a court at a sum designed to ensure that goal, and no more." *Ibid.* But, the majority says, "when Congress has mandated detention on the basis of a compelling interest other than prevention of flight, as it has here, the Eighth Amendment does not require release on bail." *Ante*, at 754–755. This conclusion follows only if the "compelling" interest upon which Congress acted is an interest which the Constitution permits Congress to further through the denial of bail. The majority does not ask, as a result of its disingenuous division of the analysis, if there are any substantive limits contained in both the Eighth Amendment and the Due Process Clause which render this system of preventive detention unconstitutional. The majority does not ask because the answer is apparent and, to the majority, inconvenient.

III

The essence of this case may be found, ironically enough, in a provision of the Act to which the majority does not refer. Title 18 U. S. C. § 3142(j) (1982 ed., Supp. III) provides that "[n]othing in this section shall be construed as modifying or limiting the presumption of innocence." But the very pith

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meager argument was made at the time by Justice Black: "The Eighth Amendment is in the American Bill of Rights of 1789, not the English Bill of Rights of 1689." *Carlson* v. *Landon*, *supra*, at 557 (dissenting opinion). Our Bill of Rights is contained in a written Constitution, one of whose purposes is to protect the rights of the people against infringement by the Legislature, and its provisions, whatever their origins, are interpreted in relation to those purposes.

and purpose of this statute is an abhorrent limitation of the presumption of innocence. The majority's untenable conclusion that the present Act is constitutional arises from a specious denial of the role of the Bail Clause and the Due Process Clause in protecting the invaluable guarantee afforded by the presumption of innocence.

"The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." *Coffin* v. *United States*, 156 U. S. 432, 453 (1895). Our society's belief, reinforced over the centuries, that all are innocent until the state has proved them to be guilty, like the companion principle that guilt must be proved beyond a reasonable doubt, is "implicit in the concept of ordered liberty," *Palko* v. *Connecticut*, 302 U. S. 319, 325 (1937), and is established beyond legislative contravention in the Due Process Clause. See *Estelle* v. *Williams*, 425 U. S. 501, 503 (1976); *In re Winship*, 397 U. S. 358, 364 (1970). See also *Taylor* v. *Kentucky*, 436 U. S. 478, 483 (1978); *Kentucky* v. *Whorton*, 441 U. S. 786, 790 (1979) (Stewart, J., dissenting).

The statute now before us declares that persons who have been indicted may be detained if a judicial officer finds clear and convincing evidence that they pose a danger to individuals or to the community. The statute does not authorize the Government to imprison anyone it has evidence is dangerous; indictment is necessary. But let us suppose that a defendant is indicted and the Government shows by clear and convincing evidence that he is dangerous and should be detained pending a trial, at which trial the defendant is acquitted. May the Government continue to hold the defendant in detention based upon its showing that he is dangerous? The answer cannot be yes, for that would allow the Government to imprison someone for uncommitted crimes based upon "proof" not beyond a reasonable doubt. The result must therefore be that once the indictment has failed, detention

cannot continue. But our fundamental principles of justice declare that the defendant is as innocent on the day before his trial as he is on the morning after his acquittal. Under this statute an untried indictment somehow acts to permit a detention, based on other charges, which after an acquittal would be unconstitutional. The conclusion is inescapable that the indictment has been turned into evidence, if not that the defendant is guilty of the crime charged, then that left to his own devices he will soon be guilty of something else. "'If it suffices to accuse, what will become of the innocent?'" *Coffin* v. *United States*, *supra*, at 455 (quoting Ammianus Marcellinus, Rerum Gestarum Libri Qui Supersunt, L. XVIII, c. 1, A. D. 359).

To be sure, an indictment is not without legal consequences. It establishes that there is probable cause to believe that an offense was committed, and that the defendant committed it. Upon probable cause a warrant for the defendant's arrest may issue; a period of administrative detention may occur before the evidence of probable cause is presented to a neutral magistrate. See *Gerstein* v. *Pugh*, 420 U. S. 103 (1975). Once a defendant has been committed for trial he may be detained in custody if the magistrate finds that no conditions of release will prevent him from becoming a fugitive. But in this connection the charging instrument is evidence of nothing more than the fact that there will be a trial, and

> "release before trial is conditioned upon the accused's giving adequate assurance that he will stand trial and submit to sentence if found guilty. Like the ancient practice of securing the oaths of responsible persons to stand as sureties for the accused, the modern practice of requiring a bail bond or the deposit of a sum of money subject to forfeiture serves as additional assurance of the

presence of an accused." *Stack* v. *Boyle*, 342 U. S. 1, 4–5 (1951) (citation omitted).[6]

The finding of probable cause conveys power to try, and the power to try imports of necessity the power to assure that the processes of justice will not be evaded or obstructed.[7] "Pretrial detention to prevent future crimes against society at large, however, is not justified by any concern for holding a trial on the charges for which a defendant has been arrested." 794 F. 2d 64, 73 (CA2 1986) (quoting *United States* v. *Melendez-Carrion*, 790 F. 2d 984, 1002 (CA2 1986) (opinion of Newman, J.)). The detention purportedly authorized by this statute bears no relation to the Government's power to try charges supported by a finding of probable cause, and thus the interests it serves are outside the scope of interests which may be considered in weighing the excessiveness of bail under the Eighth Amendment.

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[6] The majority states that denial of bail in capital cases has traditionally been the rule rather than the exception. And this of course is so, for it has been the considered presumption of generations of judges that a defendant in danger of execution has an extremely strong incentive to flee. If in any particular case the presumed likelihood of flight should be made irrebuttable, it would in all probability violate the Due Process Clause. Thus what the majority perceives as an exception is nothing more than an example of the traditional operation of our system of bail.

[7] It is also true, as the majority observes, that the Government is entitled to assurance, by incarceration if necessary, that a defendant will not obstruct justice through destruction of evidence, procuring the absence or intimidation of witnesses, or subornation of perjury. But in such cases the Government benefits from no presumption that any particular defendant is likely to engage in activities inimical to the administration of justice, and the majority offers no authority for the proposition that bail has traditionally been denied *prospectively*, upon speculation that witnesses would be tampered with. Cf. *Carbo* v. *United States*, 82 S. Ct. 662, 7 L. Ed. 2d 769 (1962) (Douglas, J., in chambers) (bail pending appeal denied when more than 200 intimidating phone calls made to witness, who was also severely beaten).

It is not a novel proposition that the Bail Clause plays a vital role in protecting the presumption of innocence. Reviewing the application for bail pending appeal by members of the American Communist Party convicted under the Smith Act, 18 U. S. C. § 2385, Justice Jackson wrote:

> "Grave public danger is said to result from what [the defendants] may be expected to do, in addition to what they have done since their conviction. If I assume that defendants are disposed to commit every opportune disloyal act helpful to Communist countries, it is still difficult to reconcile with traditional American law the jailing of persons by the courts because of anticipated but as yet uncommitted crimes. Imprisonment to protect society from predicted but unconsummated offenses is . . . unprecedented in this country and . . . fraught with danger of excesses and injustice . . . ." *Williamson* v. *United States*, 95 L. Ed. 1379, 1382 (1950) (opinion in chambers) (footnote omitted).

As Chief Justice Vinson wrote for the Court in *Stack* v. *Boyle*, *supra:* "Unless th[e] right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning." 342 U. S., at 4.

IV

There is a connection between the peculiar facts of this case and the evident constitutional defects in the statute which the Court upholds today. Respondent Cafaro was originally incarcerated for an indeterminate period at the request of the Government, which believed (or professed to believe) that his release imminently threatened the safety of the community. That threat apparently vanished, from the Government's point of view, when Cafaro agreed to act as a covert agent of the Government. There could be no more eloquent demonstration of the coercive power of authority to imprison upon prediction, or of the dangers which the almost

inevitable abuses pose to the cherished liberties of a free society.

"It is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people." *United States* v. *Rabinowitz*, 339 U. S. 56, 69 (1950) (Frankfurter, J., dissenting). Honoring the presumption of innocence is often difficult; sometimes we must pay substantial social costs as a result of our commitment to the values we espouse. But at the end of the day the presumption of innocence protects the innocent; the shortcuts we take with those whom we believe to be guilty injure only those wrongfully accused and, ultimately, ourselves.

Throughout the world today there are men, women, and children interned indefinitely, awaiting trials which may never come or which may be a mockery of the word, because their governments believe them to be "dangerous." Our Constitution, whose construction began two centuries ago, can shelter us forever from the evils of such unchecked power. Over 200 years it has slowly, through our efforts, grown more durable, more expansive, and more just. But it cannot protect us if we lack the courage, and the self-restraint, to protect ourselves. Today a majority of the Court applies itself to an ominous exercise in demolition. Theirs is truly a decision which will go forth without authority, and come back without respect.

I dissent.

JUSTICE STEVENS, dissenting.

There may be times when the Government's interest in protecting the safety of the community will justify the brief detention of a person who has not committed any crime, see *ante*, at 748–749, see also *United States* v. *Greene*, 497 F. 2d 1068, 1088–1089 (CA7 1974) (Stevens, J., dissenting).[1] To

[1] "If the evidence overwhelmingly establishes that a skyjacker, for example, was insane at the time of his act, and that he is virtually certain to

use Judge Feinberg's example, it is indeed difficult to accept the proposition that the Government is without power to detain a person when it is a virtual certainty that he or she would otherwise kill a group of innocent people in the immediate future. *United States* v. *Salerno*, 794 F. 2d 64, 77 (CA2 1986) (dissenting opinion). Similarly, I am unwilling to decide today that the police may never impose a limited curfew during a time of crisis. These questions are obviously not presented in this case, but they lurk in the background and preclude me from answering the question that is presented in as broad a manner as JUSTICE MARSHALL has. Nonetheless, I firmly agree with JUSTICE MARSHALL that the provision of the Bail Reform Act allowing pretrial detention on the basis of future dangerousness is unconstitutional. Whatever the answers are to the questions I have mentioned, it is clear to me that a pending indictment may not be given any weight in evaluating an individual's risk to the community or the need for immediate detention.

If the evidence of imminent danger is strong enough to warrant emergency detention, it should support that preventive measure regardless of whether the person has been charged, convicted, or acquitted of some other offense. In this case, for example, it is unrealistic to assume that the danger to the community that was present when respondents were at large did not justify their detention before they were indicted, but did require that measure the moment that the grand jury found probable cause to believe they had committed crimes in the past.[2] It is equally unrealistic to assume that the danger will vanish if a jury happens to acquit them.

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resume his violent behavior as soon as he is set free, must we then conclude that the only way to protect society from such predictable harm is to find an innocent man guilty of a crime he did not have the capacity to commit?" *United States* v. *Greene*, 497 F. 2d, at 1088.

[2] The Government's proof of future dangerousness was not dependent on any prediction that, as a result of the indictment, respondents posed a threat to potential witnesses or to the judicial system.

JUSTICE MARSHALL has demonstrated that the fact of indictment cannot, consistent with the presumption of innocence and the Eighth Amendment's Excessive Bail Clause, be used to create a special class, the members of which are, alone, eligible for detention because of future dangerousness.

Several factors combine to give me an uneasy feeling about the case the Court decides today. The facts set forth in Part I of JUSTICE MARSHALL's opinion strongly support the possibility that the Government is much more interested in litigating a "test case" than in resolving an actual controversy concerning respondents' threat to the safety of the community. Since Salerno has been convicted and sentenced on other crimes, there is no need to employ novel pretrial detention procedures against him. Cafaro's case is even more curious because he is apparently at large and was content to have his case argued by Salerno's lawyer even though his interests would appear to conflict with Salerno's. But if the merits must be reached, there is no answer to the arguments made in Parts II and III of JUSTICE MARSHALL's dissent. His conclusion, and not the Court's, is faithful to the "fundamental principles as they have been understood by the traditions of our people and our law." *Lochner* v. *New York*, 198 U. S. 45, 76 (1905) (Holmes, J., dissenting). Accordingly, I respectfully dissent.

HILTON, SUPERINTENDENT, NEW JERSEY STATE PRISON, ET AL. *v.* BRAUNSKILL

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

No. 86–108. Argued March 25, 1987—Decided May 26, 1987

Federal Rule of Appellate Procedure 23(c) provides that, when a State appeals a federal-court decision granting a writ of habeas corpus to a state prisoner, the habeas petitioner shall be released from custody "unless the court or justice or judge rendering the decision, or the court of appeals or the Supreme Court, or a judge or justice of either court shall otherwise order." Rule 23(d) states that initial orders issued pursuant to Rule 23(c) shall "govern review in the court of appeals and in the Supreme Court unless for special reasons shown . . . the order shall be modified, or an independent order respecting custody, enlargement or surety shall be made." Respondent, a prisoner serving a state-court sentence, filed a habeas corpus petition in the Federal District Court, which found that his constitutional rights had been violated at his state-court trial and ordered that a writ of habeas corpus "shall issue unless within 30 days" the State granted a new trial. The court subsequently denied petitioners' motion to stay its order pending appeal, basing its denial on Third Circuit authority that under Rules 23(c) and (d) a federal court deciding whether to release a successful habeas petitioner could consider only the risk that the prisoner would not appear for subsequent proceedings, not his danger to the community, and finding that petitioners had failed to show such risk here. The Court of Appeals denied petitioners' motion for a stay of the District Court's order releasing respondent.

Held: In deciding under Rules 23(c) and (d) whether to stay pending appeal a district court order granting relief to a habeas petitioner, federal courts are not restricted to considering only the petitioner's risk of flight. The history of federal habeas corpus practice indicates that a court has broad discretion in conditioning a judgment granting habeas relief, and a court's denial of enlargement to a successful habeas petitioner pending review of the habeas order has the same effect as a stay of that order. Since habeas corpus proceedings are civil in nature, federal courts, in deciding under the Rule whether to release a successful habeas petitioner pending the State's appeal, should be guided by the traditional standards governing stays of civil judgments—whether the stay applicant has made a strong showing that he is likely to succeed on the merits;

whether the applicant will be irreparably injured absent a stay; whether issuance of the stay will substantially injure the other parties interested in the proceeding; and where the public interest lies. Although Rule 23(c) creates a presumption favoring release of a successful habeas petitioner pending appeal, and Rule 23(d) creates a presumption of correctness of the District Court's order, such presumptions may be overcome if so indicated by the traditional stay factors, which contemplate individualized judgments in each case. Thus, consideration may be given to such factors as the possibility of the prisoner's flight; the risk that the prisoner will pose a danger to the public if released; the State's interest in continuing custody and rehabilitation pending a final determination on appeal; and the prisoner's substantial interest in release pending appeal. Respondent's contention that matters of "traditional state concern" such as the prisoner's danger to the community should not be considered in determining whether to release the prisoner pending appeal is unpersuasive. Any strain on federal-state relations that arises from federal habeas jurisdiction comes about because of the granting of habeas relief itself, not the existence of habeas courts' discretion to refuse enlargement of a successful habeas petitioner pending appeal. Nor is there any merit to respondent's contention that staying a successful habeas petitioner's release pending appeal because of dangerousness is repugnant to the concept of substantive due process. Pp. 774–779.

Vacated and remanded.

REHNQUIST, C. J., delivered the opinion of the Court, in which WHITE, POWELL, STEVENS, O'CONNOR, and SCALIA, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BRENNAN and BLACKMUN, JJ., joined, *post*, p. 780.

John G. Holl argued the cause for petitioners. With him on the briefs were *W. Cary Edwards*, Attorney General of New Jersey, and *Allan J. Nodes*, *J. Grall Robinson*, *Mary Ellen Halloran*, *Michael Weinstein*, and *Raymond S. Gurak*, Deputy Attorneys General.

Mark H. Friedman argued the cause and filed a brief for respondent.*

**Solicitor General Fried*, *Assistant Attorney General Weld*, *Deputy Solicitor General Bryson*, and *Paul J. Larkin, Jr.*, 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 *Leon Friedman*, *Brian Neary*, *Alvin*

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Federal Rule of Appellate Procedure 23(c) provides that, when the Government appeals a decision granting a writ of habeas corpus, the habeas petitioner shall be released from custody "unless the court or justice or judge rendering the decision, or the court of appeals or the Supreme Court, or a judge or justice of either court shall otherwise order." Federal Rule of Appellate Procedure 23(d) states that initial orders issued pursuant to Rule 23(c) shall "govern review in the court of appeals and in the Supreme Court unless for special reasons shown . . . the order shall be modified, or an independent order respecting custody, enlargement or surety shall be made."[1] In this case, we are asked to decide what factors these provisions allow a court to consider in determining whether to release a state prisoner pending appeal of a district court order granting habeas relief.

In January 1981, respondent Dana Braunskill was convicted in the Superior Court of New Jersey, Law Division, of sexual assault and unlawful possession of a weapon, in violation of N. J. Stat. Ann. §§ 2C:14–2, 2C:39–5(d) (West 1982 and Supp. 1986–1987), and was sentenced to eight years'

Bronstein, and *Eric Neisser;* and for the Coastal States Organization et al. by *David C. Slade*.

[1] Rules 23(c) and 23(d) provide in full:

"(c) *Release of prisoner pending review of decision ordering release.*—Pending review of a decision ordering the release of a prisoner in such a proceeding, the prisoner shall be enlarged upon his own recognizance, with or without surety, unless the court or justice or judge rendering the decision, or the court of appeals or the Supreme Court, or a judge or justice of either court shall otherwise order.

"(d) *Modification of initial order respecting custody.*—An initial order respecting the custody or enlargement of the prisoner and any recognizance or surety taken, shall govern review in the court of appeals and in the Supreme Court unless for special reasons shown to the court of appeals or to the Supreme Court, or to a judge or justice of either court, the order shall be modified, or an independent order respecting custody, enlargement or surety shall be made."

imprisonment. The Appellate Division of the Superior Court affirmed the convictions, and the New Jersey Supreme Court denied review.

Respondent then, in 1985, filed a petition for a writ of habeas corpus in the United States District Court for the District of New Jersey. Finding that respondent's Sixth Amendment rights had been violated at his trial, the District Court granted respondent's petition and ordered that "a writ of habeas corpus shall issue unless within 30 days the State of New Jersey shall afford [respondent] a new trial." 629 F. Supp. 511, 526 (1986). Petitioners subsequently moved the District Court to stay its order pending appeal. Relying on *Carter* v. *Rafferty*, 781 F. 2d 993, 997 (CA3 1986), the District Court determined that it could grant petitioners' request only if they demonstrated that there was risk that respondent would not appear for subsequent proceedings. The court found that petitioners had failed to make such a showing and denied the motion.

Petitioners then filed a motion in the United States Court of Appeals for the Third Circuit, seeking a stay of the District Court's order releasing respondent. The Court of Appeals denied the motion by order dated May 27, 1986. We granted certiorari to review the Court of Appeals' denial of the stay, 479 U. S. 881 (1986), and now vacate and remand the case to the Court of Appeals.[2]

In *Carter* v. *Rafferty*, *supra*, the authority governing the Court of Appeals decision in this case,[3] the court held that

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[2] On December 2, 1986, a three-judge panel of the Court of Appeals affirmed the District Court's grant of respondent's petition for a writ of habeas corpus. Subsequently, however, the Court of Appeals granted petitioners' petition for panel rehearing, and vacated its December 2 judgment. The matter is still pending before the Court of Appeals.

[3] The Court of Appeals summarily denied the stay application. The grounds upon which it relied are therefore not entirely clear. The parties have treated the denial as predicated on the conclusion that the stay application was foreclosed by the Court of Appeals' prior decision in *Carter* v. *Rafferty*, 781 F. 2d 993 (1986). We proceed from that assumption as well.

federal courts deciding whether to release a successful habeas petitioner pending appeal may consider the petitioner's risk of flight, but not his danger to the community. The court observed that Rule 23(c) creates a presumption that a prisoner who has received habeas relief is entitled to release from custody. Moreover, the *Carter* court reasoned, the principal interests that a federal court may consider under Rules 23(c) and (d) are those of ensuring the appearance of the prisoner in subsequent federal proceedings and returning the prisoner to state custody if the State prevails on appeal of the award of habeas relief. To conclude otherwise, the court determined, would result in federal-court intrusion into matters of traditional state concern.

We do not believe that federal courts, in deciding whether to stay pending appeal a district court order granting relief to a habeas petitioner, are as restricted as the *Carter* court thought. Rule 23(c) undoubtedly creates a presumption of release from custody in such cases,[4] but that presumption may be overcome if the judge rendering the decision, or an appellate court or judge, "otherwise orders." Rule 23(d) creates a presumption of correctness for the order of a district court entered pursuant to Rule 23(c), whether that order enlarges the petitioner or refuses to enlarge him, but this presumption may be overcome in the appellate court "for special reasons shown." We think a resort to the history of habeas practice in the federal courts and the traditional standards governing stays of civil judgments in those courts is helpful in illuminating the generality of these terms of Rules 23(c) and (d).

[4] Rule 23 derives from this Court's former Rule 34, promulgated in 1886. Former Rule 34 *required* enlargement of successful habeas corpus petitioners:

"3. Pending an appeal from the final decision of any court or judge discharging the prisoner, he shall be enlarged upon recognizance, with surety, for appearance to answer the judgment of the appellate court, except where, for special reasons, sureties ought not to be required." 117 U. S. 708 (1886).

Federal habeas corpus practice, as reflected by the decisions of this Court, indicates that a court has broad discretion in conditioning a judgment granting habeas relief. Federal courts are authorized, under 28 U. S. C. § 2243, to dispose of habeas corpus matters "as law and justice require." In construing § 2243 and its predecessors, this Court has repeatedly stated that federal courts may delay the release of a successful habeas petitioner in order to provide the State an opportunity to correct the constitutional violation found by the court. See, *e. g.*, *Rogers* v. *Richmond*, 365 U. S. 534, 549 (1961); *Dowd* v. *United States ex rel. Cook*, 340 U. S. 206, 210 (1951); *In re Bonner*, 151 U. S. 242, 261–262 (1894). Even in 1894, when this Court's Rule 34 indicated that enlargement of successful habeas petitioners pending the State's appeal was mandatory, see n. 4, *supra*, the Court interpreted the predecessor of § 2243 as vesting a federal court "with the largest power to control and direct the form of judgment to be entered in cases brought up before it on *habeas corpus*." *Id.*, at 261. We think it would make little sense if this broad discretion allowed in fashioning the judgment granting relief to a habeas petitioner were to evaporate suddenly when either the district court or the court of appeals turns to consideration of whether the judgment granting habeas relief should be stayed pending appeal. Although the predecessor of Rule 23 apparently required this strange result, see n. 4, *supra*, the language of the current Rule undoubtedly permits a more sensible interpretation.

In those instances where a Member of *this* Court has been confronted with the question whether a prevailing habeas petitioner should be released pending the Court's disposition of the State's petition for certiorari, our approach has been to follow the general standards for staying a civil judgment. See *Tate* v. *Rose*, 466 U. S. 1301 (1984) (O'CONNOR, J., in chambers); cf. *Sumner* v. *Mata*, 446 U. S. 1302 (1980) (REHNQUIST, J., in chambers). This practice reflects the common-sense notion that a court's denial of enlargement to a

successful habeas petitioner pending review of the order granting habeas relief has the same effect as the court's issuance of a stay of that order. Our decisions have consistently recognized that habeas corpus proceedings are civil in nature. See, *e. g.*, *Browder* v. *Director, Illinois Dept. of Corrections*, 434 U. S. 257, 269 (1978).[5] It is therefore logical to conclude that the general standards governing stays of civil judgments should also guide courts when they must decide whether to release a habeas petitioner pending the State's appeal; and such a conclusion is quite consistent with the general language contained in Rules 23(c) and (d).

Different Rules of Procedure govern the power of district courts and courts of appeals to stay an order pending appeal. See Fed. Rule Civ. Proc. 62(c); Fed. Rule App. Proc. 8(a). Under both Rules, however, the factors regulating the issuance of a stay are generally the same: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. See, *e. g.*, *Virginia Petroleum Jobbers Assn.* v. *FPC*, 104 U. S. App. D. C. 106, 110, 259 F. 2d 921, 925 (1958); *Washington Metropolitan Area Comm'n* v. *Holiday Tours, Inc.*, 182 U. S. App. D. C. 220, 221–222, 559 F. 2d 841, 842–844 (1977); *Garcia-Mir* v. *Meese*, 781 F. 2d 1450, 1453 (CA11 1986); *Accident Fund* v. *Baerwaldt*, 579 F. Supp. 724, 725 (WD Mich.

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[5] In light of the differences between general civil litigation and habeas corpus proceedings, we have recognized that there are some circumstances where a civil rule of procedure should not govern habeas proceedings. See *Harris* v. *Nelson*, 394 U. S. 286, 294 (1969); see also Fed. Rule Civ. Proc. 81(a)(2). Neither *Harris* v. *Nelson*, *supra*, nor Federal Rule of Civil Procedure 81(a)(2), however, forecloses the approach we uphold today. Where, as here, the need is evident for principles to guide the conduct of habeas proceedings, it is entirely appropriate to "use . . . [general civil] rules by analogy or otherwise." *Harris* v. *Nelson*, *supra*, at 294.

1984); see generally 11 C. Wright & A. Miller, Federal Practice and Procedure § 2904 (1973).

For the reasons stated, we think that a court making an initial custody determination under Rule 23(c) should be guided not only by the language of the Rule itself but also by the factors traditionally considered in deciding whether to stay a judgment in a civil case. There is presumption in favor of enlargement of the petitioner with or without surety, but it may be overcome if the traditional stay factors tip the balance against it. A court reviewing an initial custody determination pursuant to Rule 23(d) must accord a presumption of correctness to the initial custody determination made pursuant to Rule 23(c), whether that order directs release or continues custody, but that presumption, too, may be overcome if the traditional stay factors so indicate. The construction of Rule 23 we here adopt accords both the court making the initial custody determination and the court reviewing that determination considerably more latitude than that apparently thought appropriate by the Court of Appeals for the Third Circuit in this case.

Since the traditional stay factors contemplate individualized judgments in each case, the formula cannot be reduced to a set of rigid rules. The Court of Appeals in *Carter* v. *Rafferty*, 781 F. 2d 993 (CA3 1986), agreed that the possibility of flight should be taken into consideration, and we concur in that determination. We also think that, if the State establishes that there is a risk that the prisoner will pose a danger to the public if released, the court may take that factor into consideration in determining whether or not to enlarge him. The State's interest in continuing custody and rehabilitation pending a final determination of the case on appeal is also a factor to be considered; it will be strongest where the remaining portion of the sentence to be served is long, and weakest where there is little of the sentence remaining to be served.

The interest of the habeas petitioner in release pending appeal, always substantial, will be strongest where the factors

mentioned in the preceding paragraph are weakest. The balance may depend to a large extent upon determination of the State's prospects of success in its appeal. Where the State establishes that it has a strong likelihood of success on appeal, or where, failing that, it can nonetheless demonstrate a substantial case on the merits, continued custody is permissible if the second and fourth factors in the traditional stay analysis militate against release. Cf. *McSurely* v. *McClellan*, 225 U. S. App. D. C. 67, 75, 697 F. 2d 309, 317 (1982); *O'Bryan* v. *Estelle*, 691 F. 2d 706, 708 (CA5 1982), cert. denied, 465 U. S. 1013 (1984); *Ruiz* v. *Estelle*, 650 F. 2d 555, 565–566 (CA5 1981). Where the State's showing on the merits falls below this level, the preference for release should control.

Respondent contends, and the Court of Appeals apparently agreed, that matters of "traditional state concern" such as the petitioner's danger to the community ought not to be considered in determining whether a successful habeas petitioner should be enlarged pending appeal. Respondent supports his argument by stating that this Court's decisions embody the view that state governments should have the opportunity to vindicate state interests in their own court systems. We do not at all dispute this observation, but note that here we have the Attorney General of New Jersey speaking for that State and seeking a stay of the District Court order enlarging a habeas petitioner pending appeal. Whatever strain on federal-state relations arising as a result of federal habeas jurisdiction comes because of the granting of habeas relief itself, and not the existence of any discretion in habeas courts to refuse enlargement of a successful habeas petitioner pending appeal. Until the final determination of the petitioner's habeas claim, federal courts must decide applications for stay of release using factors similar to those used in deciding whether to stay other federal-court judgments.

Respondent finally contends that staying the release of a successful habeas petitioner pending appeal because of dan-

gerousness, even when guided by the standards we have enunciated, is "repugnant to the concept of substantive due process, which . . . prohibits the total deprivation of liberty simply as a means of preventing future crimes." *United States* v. *Salerno*, 794 F. 2d 64, 71–72 (CA2 1986). We have just held in reversing the judgment of the Court of Appeals for the Second Circuit in *Salerno*, however, that the quoted language is an incorrect statement of constitutional law. *Ante*, p. 739. But we also think that a successful habeas petitioner is in a considerably less favorable position than a pretrial arrestee, such as the respondent in *Salerno*, to challenge his continued detention pending appeal. Unlike a pretrial arrestee, a state habeas petitioner has been adjudged guilty beyond a reasonable doubt by a judge or jury, and this adjudication of guilt has been upheld by the appellate courts of the State. Although the decision of a district court granting habeas relief will have held that the judgment of conviction is constitutionally infirm, that determination itself may be overturned on appeal before the State must retry the petitioner. This being the case, we do not agree that the Due Process Clause prohibits a court from considering, along with the other factors that we previously described, the dangerousness of a habeas petitioner as part of its decision whether to release the petitioner pending appeal.

We think that the District Court and the Court of Appeals, in relying on the latter's decision in *Carter* v. *Rafferty*, *supra*, took too limited a view of the discretion allowed to federal courts under Rules 23(c) and (d) in staying pending appeal an order directing the release of a habeas petitioner. We therefore vacate the judgment of the Court of Appeals denying petitioner's application for a stay in this case, and remand the case to that court for further proceedings consistent with this opinion.

It is so ordered.

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

This Court construes Federal Rules of Appellate Procedure 23(c) and 23(d) to invest federal courts with broad discretion to keep a successful habeas petitioner in custody pending appeal by the State. Because I believe that this novel approach allows federal courts to usurp the role of the state courts and undermine the purpose of habeas corpus proceedings, I dissent.

I

In our federal system, state courts are the appropriate forums for deciding questions of release for those charged with state offenses. The law that applies in these state proceedings is state bail law; in this case, state law grants respondent a right to be admitted to bail. Federal courts are not free to deprive respondent of that right, merely because the State's representative asks them to. Federal Rules of Procedure cannot supplant either substantive rights guaranteed under the state law or the state processes developed to enforce those rights.

In holding that the federal courts can consider a prevailing habeas petitioner's danger to the community, the majority rejects the Third Circuit's well-reasoned decision to the contrary in *Carter* v. *Rafferty*, 781 F. 2d 993 (1986).[1] In that case, a Federal District Court had granted a writ of habeas corpus to Rubin "Hurricane" Carter, who had previously been convicted of murder in a New Jersey state court, and ordered him released from state custody. The State maintained that Carter was a danger to the community and sought an order from the Court of Appeals, pursuant to Rule 23(d), to keep him in custody pending appeal. The court's analysis of Rules 23(c) and 23(d) started with several general principles: first, there is a presumption that a successful habeas

[1] For reasons on which I can only speculate, the State did not seek review of *Carter* in this Court.

petitioner is entitled to release "immediately or, more commonly, after an appropriately circumscribed period to allow the state time to retry the accused." 781 F. 2d, at 994. Second, a federal court has a strong interest in ensuring the appearance of the petitioner in subsequent federal proceedings or, if the decision is overturned on appeal, in returning the petitioner to state custody. *Id.*, at 995. Third, neither federal nor state bail standards govern the release of state prisoners in federal habeas proceedings. *Ibid.*

Based on these principles and on the limited role of the federal courts in habeas corpus proceedings, namely, "to determine whether or not a constitutional infirmity infected the defendant's trial," *id.*, at 996, the court concluded that release of a state prisoner who prevailed in the district court can "only be challenged . . . if matters are put in issue relating to a petitioner's ability to respond to federal process, or which in some other respect relate to the federal interest." *Id.*, at 996–997. Because the sole reason advanced for Carter's incarceration was his alleged dangerousness, "a matter traditionally reserved to the state authorities to decide," *id.*, at 996, the court denied the State's motion to revoke Carter's release. It emphasized that its holding did not leave the State without recourse:

> "In those instances where the state is of the view that a petitioner should not, for other compelling reasons, remain at large, it may proceed before the state courts. Since questions of dangerousness *per se* and related issues are traditionally state concerns and since the victorious habeas petitioner generally still faces trial on a state indictment, the appropriate forum before which state authorities may seek relief is the state court with responsibility for pending or future proceedings concerning the underlying indictment." *Id.*, at 997–998.

The decision in *Carter* was based on traditional notions of federalism and comity. The majority rejects this approach, deferring instead to the State's interest *as an adversary*

party in litigation. This peculiar brand of federalism finds no support in our prior cases, which reflect deference to state *courts* and state-court *decisions*, not *litigants* representing the State.[2]

Even more disturbing is the fact that the majority's result has no apparent basis in state law. The Attorney General for the State of New Jersey has failed to cite a single state statute, state rule of court, or state decision that permits preventive detention pending trial or, for that matter, pending appeal of an order granting state postconviction relief. This is hardly surprising, since New Jersey law does not permit a state court to consider a defendant's future dangerousness in determining whether to order pretrial confinement. *State* v. *Johnson*, 61 N. J. 351, 294 A. 2d 245 (1972). Except in capital cases, the State Constitution provides a right to bail. See N. J. Const., Art. I, ¶11; see also N. J. Rule Crim. Prac. 3:26–1(a); N. J. Rule App. Prac. 2:9–3(d). The State Attorney General has asked the federal courts to confine respondent on a basis that New Jersey courts hold invalid. Such a request is clearly not proper, much less deserving of deference.

The majority suggests that refusal to allow federal courts to consider danger to the community is somehow inconsistent with the practice of granting "conditional writs" of habeas corpus,[3] in which a federal court orders that the State re-

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[2] See, *e. g.*, *Rose* v. *Lundy*, 455 U. S. 509, 514 (1982) (requiring exhaustion of state-court remedies); *Sumner* v. *Mata*, 449 U. S. 539, 550 (1981) (strict construction of § 2254(d)'s presumption of correctness for determination of factual issues in state courts); *Wainwright* v. *Sykes*, 433 U. S. 72, 87 (1977) (doctrine of procedural bar ordinarily dictates that federal courts decline to consider claims not raised in state courts in the manner prescribed by state procedural rules).

[3] The writ issued in this case was conditional. The District Court's February 27, 1986, order stated that a writ of habeas corpus would issue in 30 days unless the State afforded respondent a new trial within that period. App. 3; 629 F. Supp. 511, 526 (NJ 1986). The day before the 30-day period was due to expire, the State applied to the District Court for a stay of

lease the habeas petitioner within a specified period unless it retries him within that time. I do not believe that the traditional practice of issuing conditional writs is implicated by the decision in this case, which turns on fundamental principles of federal noninterference with the procedures for vindication of state-law rights in state courts. I note, however, that the practice is entirely consistent with the traditional concept of deference to state courts. By delaying issuance of the writ for a reasonable period, the federal court gives the State an opportunity to correct the constitutional defect itself through retrial *in its own courts*.

II

Under today's decision a federal court can disregard both state law and state processes and authorize the indefinite detention of a successful habeas petitioner, without a full-blown adversary hearing, without appointing counsel, without providing immediate appellate review of its decision, and without satisfying any elevated burden of proof. Compare *United States* v. *Salerno*, *ante*, at 747, 751–752. The Court's analysis in this area strikes me as result oriented, to say the least. Writing for the Court in *Salerno*, THE CHIEF JUSTICE chose to rely on the "numerous procedural safeguards" contained in the Bail Reform Act of 1984 to sustain the statute's constitutionality. *Ante*, at 755. Recognizing the "individual's strong interest in liberty," CHIEF JUSTICE REHNQUIST stated:

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release, App. 6, but the application was denied. *Id.*, at 17–18. The State waited two months before moving for a stay in the Court of Appeals, *id.*, at 19, apparently because respondent was incarcerated on another charge until May 20, 1986.

Had the State moved promptly for expedited consideration of its appeal of the District Court's initial order, it seems likely that the merits of the appeal could have been resolved in the three months before respondent would have been released, thus obviating any need for a stay and for this litigation.

> "We do not minimize the importance and fundamental nature of this right. But, as our cases hold, this right may, in circumstances where the government's interest is sufficiently weighty, be subordinated to the greater needs of society. We think that Congress' *careful delineation of the circumstances under which detention will be permitted satisfies this standard.*" *Ante*, at 750–751 (emphasis added).

Yet in this case, where the same important and fundamental right is at stake, THE CHIEF JUSTICE, again writing for the Court, disregards the total absence of safeguards against erroneous or unnecessary deprivations of liberty.

The majority attempts to distinguish the successful habeas petitioner from the pretrial detainee in *Salerno*, observing that "a state habeas petitioner has been adjudged guilty beyond a reasonable doubt by a judge or jury, and this adjudication of guilt has been upheld by the appellate courts of the State." *Ante*, at 779. The Court concedes, as it must, that this conviction has been found constitutionally infirm by a Federal District Court, but it notes that this "determination itself may be overturned on appeal before the State must retry the petitioner." *Ibid.* This observation trivializes the District Court's ruling that the State obtained its conviction in violation of respondent's constitutional rights. Respondent's conviction has been rendered null and void by a federal court of competent jurisdiction; it provides no basis for continuation of punishment or, as the majority so delicately puts it, "continuing custody and rehabilitation." *Ante*, at 777. See *Bell* v. *Wolfish*, 441 U. S. 520, 535 (1979) ("[A] detainee may not be punished prior to an adjudication of guilt in accordance with due process of law"). The fact that the ruling *might* later be reversed does not diminish its current validity. We do not discount federal-court rulings simply because they "may be overturned on appeal."

Granting broad discretion to deny release pending appeal undermines the central purpose of habeas corpus proceed-

ings: to provide "protection against illegal custody." *Brown* v. *Allen*, 344 U. S. 443, 465 (1953); see also *Preiser* v. *Rodriguez*, 411 U. S. 475, 485–486 (1973). In this case, at the time the writ issued, respondent had spent five years in prison. He would have been eligible for parole in approximately eight months.[4] Had the State obtained a stay of release, he undoubtedly would have to serve the entire sentence imposed pursuant to a conviction now determined to be unconstitutional. The writ of habeas corpus would have provided him no protection against illegal custody. If a prisoner's confinement is to continue pending appeal, it should only be for reasons consistent with, or at least not in conflict with, the primary purpose of habeas corpus. These reasons cannot include continuation of punishment, as the majority implies. See *ante*, at 777.

Finally, continued reliance on the state conviction in this case ignores the nature of the constitutional defect identified by the District Court: the error in this case directly implicates the truth-finding process. Respondent has consistently maintained that this is a case of mistaken identity and that he was elsewhere on the night of the crime. As part of his defense, he sought to introduce the testimony of an alibi witness. Because his counsel failed to file a timely notice of alibi testimony, the trial court refused to allow him to do so. Even without the benefit of the witness' testimony, the jury deliberated for 2½ days before returning a guilty verdict. The District Court noted that an alibi witness would have strengthened respondent's case and created reasonable doubt, 629 F. Supp. 511, 523 (NJ 1986); it concluded that the trial court's refusal to allow respondent to introduce this testimony violated his Sixth Amendment right to present witnesses to establish a defense. *Ibid.*

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[4] Letter from Allan J. Nodes, Deputy Chief, Appellate Section, N. J. Dept. of Law and Public Safety, Division of Criminal Justice, dated Apr. 6, 1987.

III

Title 28 U. S. C. § 2243, cited by the majority, *ante*, at 775, authorizes federal courts to dispose of habeas corpus matters "as law and justice require." The majority's construction of Rules 23(c) and 23(d) is contrary to both law and justice. It is inconsistent with this Court's longstanding notions of federalism and comity. It allows federal courts to substitute their own ad hoc standards for the rules and procedures the States have established for regulating the pretrial release of those accused of state-law offenses.

I therefore dissent.

Syllabus

YOUNG *v.* UNITED STATES EX REL. VUITTON ET FILS S. A. ET AL.

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

No. 85–1329. Argued January 13, 1987—Decided May 26, 1987*

In an agreement settling a suit in which they had been named as defendants, two of the petitioners consented to the entry of a permanent injunction prohibiting them from infringing the trademark of respondent leather goods manufacturer (hereinafter respondent). Subsequently, upon submission of an affidavit by respondent's attorneys, the District Court found probable cause to believe that petitioners were engaged in conduct violative of the injunction. The court therefore granted the request of respondent's attorneys for appointment as special counsel to represent the Government in the investigation and prosecution of a criminal contempt action against petitioners. Ultimately, a jury convicted petitioners of either criminal contempt or of aiding and abetting that contempt. The Court of Appeals affirmed, rejecting petitioners' contention that the appointment of respondent's attorneys as special counsel violated their right to be prosecuted by an impartial prosecutor. The court stated, *inter alia*, that the judge's supervision of a contempt prosecution is generally sufficient to prevent the danger that the special prosecutor will use the threat of prosecution as a bargaining chip in civil negotiations.

Held: The judgment is reversed.

780 F. 2d 179, reversed.

JUSTICE BRENNAN delivered the opinion of the Court as to Parts I, II, III–A, and IV, concluding that:

1. District courts have authority to appoint private attorneys to prosecute criminal contempt actions. Pp. 793–802.

(a) Although Federal Rule of Criminal Procedure 42(b) does not authorize the appointment of private attorneys, its reference to such appointments acknowledges the long-settled rule that courts possess inherent authority to initiate contempt proceedings for disobedience to their orders, which authority necessarily includes the ability to appoint a private attorney to prosecute the contempt. The contention that only the United States Attorney's Office may bring a contempt prosecution is unavailing, since the Judiciary must have an independent means to vindi-

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*Together with No. 85–6207, *Klayminc* v. *United States ex rel. Vuitton et Fils S. A. et al.*, also on certiorari to the same court.

cate its own authority without dependence on another Branch to decide whether proceedings should be initiated. Pp. 793–796.

(b) Courts' authority to initiate contempt prosecutions is not limited to the summary punishment of in-court contempts, but extends to out-of-court contempts as well. The underlying basis for the contempt power is the need to address disobedience to court orders regardless of whether such disobedience interferes with the conduct of trial. The distinction between in-court and out-of-court contempts has been drawn not to define when a court has authority to initiate a contempt prosecution, but to prescribe the procedures that must attend the exercise of that authority. Thus, although proceedings in response to out-of-court contempts are sufficiently criminal in nature to warrant the imposition of many procedural protections, this does not mean that their prosecution can be undertaken only by the Executive Branch, and it should not obscure the fact that the limited purpose of such proceedings is to vindicate judicial authority. Pp. 797–801.

(c) In order to ensure that courts will exercise their inherent power of self-protection only as a last resort, they should ordinarily request the appropriate prosecuting authority to prosecute contempt actions, and should appoint a private prosecutor only if that request is denied. Pp. 801–802.

2. Counsel for a party that is the beneficiary of a court order may not be appointed to undertake criminal contempt prosecutions for alleged violations of that order. A private attorney appointed to prosecute a criminal contempt should be as disinterested as a public prosecutor, since the attorney is appointed solely to pursue the public interest in vindication of the court's authority. In a case where a prosecutor also represents an interested party, however, the legal profession's ethical rules may *require* that the prosecutor take into account an interest other than the Government's. This creates an intolerable danger that the public interest will be compromised and produces at least the appearance of impropriety. The fact that the judge makes the initial decision to proceed with a contempt prosecution is not sufficient to quell concern that the interested prosecutor may be influenced by improper motives, since the prosecutor exercises considerable discretion in matters that are critical to the case but outside the court's supervision. The requirement of a disinterested prosecutor is consistent with this Court's earlier decisions recognizing that prosecutors need not be as disinterested as judges. Most such cases require the court's informed speculation as to whether the prosecutor is subject to extraneous influence, whereas such influence is a virtual certainty in cases such as the present. Pp. 802–809.

JUSTICE BRENNAN, joined by JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS, concluded in Part III–B that the harmless-

error doctrine cannot apply when a court appoints counsel for an interested party as contempt prosecutor, since such error is so fundamental and pervasive that it requires reversal without regard to the facts or circumstances of the particular case. Pp. 809–814.

JUSTICE SCALIA concluded that the District Court's error in appointing respondent's attorneys to prosecute the contempts requires reversal of the convictions. The appointments were defective because the federal courts have no constitutional power to prosecute contemners for disobedience of court judgments, and no power derivative of that to appoint attorneys to conduct contempt prosecutions. In light of the discretion allowed prosecutors, which is so broad that decisions not to prosecute are ordinarily unreviewable, it would be impossible to conclude with any certainty that these prosecutions would have been brought had the court simply referred the matter to the Executive Branch. P. 825.

BRENNAN, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III–A, and IV, in which REHNQUIST, C. J., and MARSHALL, BLACKMUN, POWELL, STEVENS, and O'CONNOR, JJ., joined, and an opinion with respect to Part III–B, in which MARSHALL, BLACKMUN, and STEVENS, JJ., joined. BLACKMUN, J., filed a concurring opinion, *post*, p. 814. SCALIA, J., filed an opinion concurring in the judgment, *post*, p. 815. POWELL, J., filed an opinion concurring in part and dissenting in part, in which REHNQUIST, C. J., and O'CONNOR, J., joined, *post*, p. 825. WHITE, J., filed a dissenting opinion, *post*, p. 827.

James A. Cohen argued the cause for petitioners. With him on the briefs were *Leonard J. Comden* and *William Weininger*.

Deputy Solicitor General Bryson argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Fried*, *Assistant Attorney General Trott*, *Edwin S. Kneedler*, and *Gloria C. Phares*.

J. Joseph Bainton argued the cause for respondents. With him on the brief was *Robert P. Devlin*.

JUSTICE BRENNAN delivered the opinion of the Court with respect to Parts I, II, III–A, and IV, and an opinion with respect to Part III–B, in which JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS join.

Petitioners in these cases were found guilty of criminal contempt by a jury, pursuant to 18 U. S. C. § 401(3), for their

violation of the District Court's injunction prohibiting infringement of respondent's trademark. They received sentences ranging from six months to five years.[1] On appeal to the Court of Appeals for the Second Circuit, petitioners urged that the District Court erred in appointing respondent's attorneys, rather than a disinterested attorney, to prosecute the contempt. The Court of Appeals affirmed, 780 F. 2d 179 (1985), and we granted certiorari, 477 U. S. 903 (1986). We now reverse, exercising our supervisory power, and hold that counsel for a party that is the beneficiary of a court order may not be appointed to undertake contempt prosecutions for alleged violations of that order.

I

The injunction that petitioners violated in these cases is a result of the settlement of a lawsuit brought in December 1978, in the District Court for the Southern District of New York, by Louis Vuitton, S. A., a French leather goods manufacturer, against Sol Klayminc, his wife Sylvia, his son Barry (the Klaymincs), and their family-owned businesses, Karen Bags, Inc., Jade Handbag Co., Inc., and Jak Handbag, Inc. Vuitton alleged in its suit that the Klaymincs were manufacturing imitation Vuitton goods for sale and distribution. Vuitton's trademark was found valid in *Vuitton et Fils S. A.* v. *J. Young Enterprises, Inc.*, 644 F. 2d 769 (CA9 1981), and Vuitton and the Klaymincs then entered into a settlement agreement in July 1982. Under this agreement, the Klaymincs agreed to pay Vuitton $100,000 in damages, and consented to the entry of a permanent injunction prohibiting them from, *inter alia*, "manufacturing, producing, distributing, circulating, selling, offering for sale, advertising, promoting or displaying any product bearing any simulation, reproduction, counterfeit, copy, or colorable imitation" of

[1] Petitioners' sentences were as follows: Sol Klayminc, 5 years; Gerald Young, 2½ years; Barry Klayminc, 9 months; George Cariste, 9 months; Nathan Helfand, 6 months. App. 162–164.

Vuitton's registered trademark. App. to Pet. for Cert. 195–A to 196–A.

In early 1983, Vuitton and other companies concerned with possible trademark infringement were contacted by a Florida investigation firm with a proposal to conduct an undercover "sting" operation. The firm was retained, and Melvin Weinberg and Gunner Askeland, two former Federal Bureau of Investigation agents, set out to pose as persons who were interested in purchasing counterfeit goods. Weinberg expressed this interest to petitioner Nathan Helfand, who then discussed with Klayminc and his wife the possibility that Weinberg and Askeland might invest in a Haitian factory devoted to the manufacture of counterfeit Vuitton and Gucci goods. Klayminc signed documents that described the nature of the factory operation and that provided an estimate of the cost of the counterfeited goods. In addition, Klayminc delivered some sample counterfeit Vuitton bags to Helfand for Weinberg and Askeland's inspection.

Four days after Helfand met with Klayminc, on March 31, 1983, Vuitton attorney J. Joseph Bainton requested that the District Court appoint him and his colleague Robert P. Devlin as special counsel to prosecute a criminal contempt action for violation of the injunction against infringing Vuitton's trademark. App. 18. Bainton's affidavit in support of this request recounted the developments with Helfand and Klayminc and pointed out that he and Devlin previously had been appointed by the court to prosecute Sol Klayminc for contempt of an earlier preliminary injunction in the Vuitton lawsuit. Bainton also indicated that the next step of the "sting" was to be a meeting among Sol and Barry Klayminc, Weinberg, and Askeland, at which Sol was to deliver 25 counterfeit Vuitton handbags. Bainton sought permission to conduct and videotape this meeting, and to continue to engage in undercover investigative activity.

The court responded to Bainton on the day of this request. It found probable cause to believe that petitioners were en-

gaged in conduct contumacious of the court's injunctive order, and appointed Bainton and Devlin to represent the United States in the investigation and prosecution of such activity, as proposed in Bainton's affidavit. *Id.*, at 27. A week after Bainton's appointment, on April 6, the court suggested that Bainton inform the United States Attorney's Office of his appointment and the impending investigation. Bainton did so, offering to make available any tape recordings or other evidence, but the Chief of the Criminal Division of that Office expressed no interest beyond wishing Bainton good luck.

Over the course of the next month, more than 100 audio and video tapes were made of meetings and telephone conversations between petitioners and investigators. On the basis of this evidence, Bainton requested, and the District Court signed, an order on April 26 directing petitioners to show cause why they and other parties should not be cited for contempt for either violating or aiding and abetting the violation of the court's July 1982 permanent injunction. App. to Pet. for Cert. 205–A. Petitioners' pretrial motions opposing the order to show cause and the appointment of Bainton and Devlin as special prosecutors were denied, *United States ex rel. Vuitton et Fils S. A.* v. *Karen Bags, Inc.*, 592 F. Supp. 734 (SDNY 1984), and two of the defendants subsequently entered guilty pleas. Sol Klayminc ultimately was convicted, following a jury trial, of criminal contempt under 18 U. S. C. § 401(3),[2] and the other petitioners were convicted of aiding and abetting that contempt. The trial court denied their post-trial motions. *United States ex rel. Vuitton et Fils S. A.* v. *Karen Bags, Inc.*, 602 F. Supp. 1052 (SDNY 1985).

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[2] That provision states: "A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as . . . (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command."

On appeal to the Court of Appeals for the Second Circuit petitioners argued, *inter alia*, that the appointment of Bainton and Devlin as special prosecutors violated their right to be prosecuted only by an impartial prosecutor. The court rejected their contention, 780 F. 2d 179 (1985), citing its decision in *Musidor, B. V.* v. *Great American Screen*, 658 F. 2d 60 (1981), cert. denied, 455 U. S. 944 (1982).[3] It suggested that an interested attorney will often be the only source of information about contempts occurring outside the court's presence, 780 F. 2d, at 183, and stated that the supervision of contempt prosecutions by the judge is generally sufficient to prevent the "danger that the special prosecutor will use the threat of prosecution as a bargaining chip in civil negotiations . . . ." *Id.*, at 184. Furthermore, the court stated that the authority to prosecute encompasses the authority to engage in necessary investigative activity such as the "sting" conducted in this case. *Id.*, at 184–185. The Court of Appeals therefore affirmed petitioners' contempt convictions.

II

A

Petitioners first contend that the District Court lacked authority to appoint *any* private attorney to prosecute the contempt action against them, and that, as a result, only the United States Attorney's Office could have permissibly brought such a prosecution. We disagree. While it is true that Federal Rule of Criminal Procedure 42(b) does not provide authorization for the appointment of a private attorney, it is long settled that courts possess inherent authority to initiate contempt proceedings for disobedience to their orders, authority which necessarily encompasses the ability to appoint a private attorney to prosecute the contempt.

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[3] That case held that it was proper for the District Court to appoint as special prosecutor the counsel for plaintiffs in a civil action who were the beneficiaries of the injunction allegedly violated.

By its terms, Rule 42(b) speaks only to the procedure for *providing notice* of criminal contempt.[4] The court is required to "state the essential facts constituting the criminal contempt charged and describe it as such." This notice must be given by the judge in open court, "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 Rule's reference to the appointment of a private attorney to submit a show cause order assumes a *pre-existing practice* of private prosecution of contempts, but does not itself purport to serve as authorization for that practice.[5] Rule 42(b) simply requires that, when a private prosecutor is appointed, sufficient notice must be provided that the contempt proceeding is criminal in nature.[6]

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[4] The Rule provides in relevant part:

"(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."

[5] See Wright, Byrne, Haakh, Westbrook, & Wheat, Civil and Criminal Contempt in the Federal Courts, 17 F. R. D. 167, 172 (1955) ("Before the Fed. R. Crim. P., private parties were entitled to prosecute criminal contempt actions").

[6] Respondents claim that the reference to the appointment of an attorney to request a show cause order is meant to bestow authority on the court to appoint a private prosecutor. In support of this proposition they point to the Advisory Committee Notes, which cite with approval the decision in *McCann* v. *New York Stock Exchange*, 80 F. 2d 211 (CA2 1935), cert. denied, 299 U. S. 603 (1936).

In *McCann*, Judge Learned Hand expressed concern that the practice of using private attorneys to prosecute contempt actions might leave defendants unclear about whether the proceeding against them was civil or criminal, 80 F. 2d, at 214, and declared the need for "some simple and certain test by which the character of the prosecution can be determined." *Ibid.*

The Rule's assumption that private attorneys may be used to prosecute contempt actions reflects the longstanding acknowledgment that the initiation of contempt proceedings to punish disobedience to court orders is a part of the judicial function. As this Court declared in *Michaelson* v. *United States ex rel. Chicago, St. P., M., & O. R. Co.*, 266 U. S. 42 (1924):

> "That the power to punish for contempts is inherent in all courts, has been many times decided and may be regarded as settled law. It is essential to the administration of justice. The courts of the United States, when called into existence and vested with jurisdiction over any subject, at once became possessed of the power." *Id.*, at 65–66.[7]

Judge Hand suggested that if the trial court decides to use the attorney of a party to the underlying dispute to prosecute the action, the criminal nature of the proceeding would be made plain by the entry of an order directing the attorney to prosecute the defendant criminally on behalf of the court. *Ibid.*

The Advisory Committee's Notes to Rule 42(b), 18 U. S. C. App., p. 644, state: "The requirement *in the second sentence that the notice shall describe the criminal contempt as such* is intended to obviate the frequent confusion between criminal and civil contempt proceedings and follows the suggestion made in *McCann* v. *New York Stock Exchange*, 80 F. 2d 211 [(CA2 1935)]" (emphasis added). This passage makes clear that Rule 42(b) was intended to respond to Judge Hand's general exhortation that the defendant be plainly advised if a contempt proceeding is to be criminal in nature. The requirement of detailed notice in the second sentence serves this purpose. As this Court said in *United States* v. *Mine Workers*, 330 U. S. 258 (1947), Rule 42(b) "was designed to insure a realization by contemnors that a prosecution for criminal contempt is contemplated," *id.*, at 298, and "[t]he rule in this respect follows the suggestion made in *McCann*." *Id.*, at 298, n. 66. The Notes give no indication, however, that the reference in the *third* sentence of the Rule to the use of private attorneys to serve notice by means of a show cause order was intended to codify *McCann*'s suggestion that private attorneys be appointed as prosecutors.

[7] See also *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 450 (1911) ("[T]he power of courts to punish for contempts is a necessary and

The ability to punish disobedience to judicial orders is regarded as essential to ensuring that the Judiciary has a means to vindicate its own authority without complete dependence on other Branches. "If a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls 'the judicial power of the United States' would be a mere mockery." *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 450 (1911). As a result, "there could be no more important duty than to render such a decree as would serve to vindicate the jurisdiction and authority of courts to enforce orders and to punish acts of disobedience." *Ibid.* Courts cannot be at the mercy of another Branch in deciding whether such proceedings should be initiated. The ability to appoint a private attorney to prosecute a contempt action satisfies the need for an independent means of self-protection, without which courts would be "mere boards of arbitration whose judgments and decrees would be only advisory." *Ibid.*[8]

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integral part of the independence of the judiciary, and is absolutely essential to the performance of the duties imposed on them by law"); *Ex parte Robinson*, 19 Wall. 505, 510 (1874) ("The power to punish for contempts is inherent in all courts"); J. Fox, History of Contempt of Court 1 (1927) ("Contempt of Court . . . has been a recognized phrase in English law [since] the twelfth century"); R. Goldfarb, Contempt Power 9 (1963) ("The power of courts to punish contempts is one which wends historically back to the early days of England and the crown"); 1 J. Kent, Commentaries on American Law *300, n. b (commenting on "immemorially exercised discretion of the courts in respect to contempts"). The power to initiate a contempt proceeding has of necessity encompassed the authority to appoint an attorney to prosecute such a matter. See, *e. g.*, *United States ex rel. Brown* v. *Lederer*, 140 F. 2d 136, 138 (CA7), cert. denied, 322 U. S. 734 (1944); *Western Fruit Growers, Inc.* v. *Gotfried*, 136 F. 2d 98, 100–101 (CA9 1943).

[8] JUSTICE SCALIA's concurrence suggests that our precedents regarding a court's inherent contempt authority have lost their force because of our decision in *Bloom* v. *Illinois*, 391 U. S. 194 (1968). *Post*, at 823–824. The argument is that since *Bloom* rejected the holding in *In re Debs*, 158 U. S. 564 (1895), that courts have inherent power summarily to punish serious contempts, and since the cases between *Bloom* and *Debs* assumed the

B

Petitioners contend that the ability of courts to initiate contempt prosecutions is limited to the summary punishment of in-court contempts that interfere with the judicial process. They argue that out-of-court contempts, which require prosecution by a party other than the court, are essentially conventional crimes, prosecution of which may be initiated only by the Executive Branch.

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existence of this summary power, these precedents cannot provide guidance for a court's authority with respect to contempts of court. These precedents, however, both acknowledge the inherent power of a court to institute contempt proceedings, and assume that in such proceedings the court may summarily determine guilt with respect to serious criminal contempts. *Bloom* held that the second assumption was incorrect, but did nothing to undermine the first. *Bloom*'s rejection of arguments regarding the need to vindicate judicial authority relates solely to exercise of the summary contempt power. See 391 U. S., at 208 ("[W]hen serious punishment for contempt is contemplated, rejecting a demand for jury trial cannot be squared with . . . the desirability of vindicating the authority of the court"); *ibid.* ("We place little credence in the notion that the independence of the judiciary hangs on the power to try contempts summarily"). That case therefore cannot justify ignoring our consistent pronouncements on the inherent authority of a court to institute contempt proceedings.

Nor is it the case that "as a practical matter the impairment of judicial power produced by requiring the Executive to prosecute contempts is no more substantial than the impairment produced by requiring a jury." *Post*, at 824. The concern about impairment of a court's authority is based on the fear that an alleged contemnor will consider himself or herself beyond the reach of the law. As we said in *Gompers*, *supra:*

"If a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls the 'judicial power of the United States' would be a mere mockery." 221 U. S., at 450.

The need to vindicate a court's authority is thus satisfied by ensuring that an alleged contemner will have to account for his or her behavior in a legal proceeding, regardless of whether the party is ultimately convicted or acquitted. A court's ability to institute a contempt proceeding is therefore essential to the vindication of its authority in a way that the ability to determine guilt or innocence is not.

The underlying concern that gave rise to the contempt power was not, however, merely the disruption of court proceedings. Rather, it was disobedience to the orders of the Judiciary, regardless of whether such disobedience interfered with the conduct of trial. See *Bessette* v. *W. B. Conkey Co.*, 194 U. S. 324, 333 (1904) (contempt power "has been uniformly held to be necessary to the protection of the court from insults and oppressions while in the ordinary course of its duties, *and* to enable it to enforce its judgments and orders necessary to the due administration of law and the protection of the rights of suitors") (emphasis added); *Ex parte Robinson*, 19 Wall. 505, 510 (1874) (existence of contempt power "essential to the preservation of order in judicial proceedings, *and* to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice") (emphasis added); *Anderson* v. *Dunn*, 6 Wheat. 204, 227 (1821) (courts by their creation vested with power "to impose silence, respect, and decorum in their presence, *and* submission to their lawful mandates") (emphasis added).

The distinction between in-court and out-of-court contempts has been drawn not to define when a court has or has not the authority to initiate prosecution for contempt, but for the purpose of prescribing what procedures must attend the exercise of that authority. As we said in *Bloom* v. *Illinois*, 391 U. S. 194, 204 (1968), "[b]efore the 19th century was out, a distinction had been carefully drawn between contempts occurring within the view of the court, for which a hearing and formal presentation of evidence were dispensed with, and all other contempts where more normal adversary procedures were required." Thus, for instance, this Court has found that defendants in criminal contempt proceedings must be presumed innocent, proved guilty beyond a reasonable doubt, and accorded the right to refuse to testify against themselves, *Gompers*, *supra*, at 444; must be advised of

charges, have a reasonable opportunity to respond to them, and be permitted the assistance of counsel and the right to call witnesses, *Cooke* v. *United States*, 267 U. S. 517, 537 (1925); must be given a public trial before an unbiased judge, *In re Oliver*, 333 U. S. 257 (1948); and must be afforded a jury trial for serious contempts, *Bloom*, *supra*. Congress also has regulated the manner in which courts exercise their power to prosecute contempts, narrowing the class of contempts subject to summary punishment, Act of Mar. 2, 1831, 4 Stat. 487. Furthermore, Rule 42 itself distinguishes between contempt committed in the presence of the court, which may be summarily punished, and all other contempts, which may be punished only upon notice and hearing.[9]

The manner in which the court's prosecution of contempt is exercised therefore may be regulated by Congress, *Michaelson*, 266 U. S., at 65–66, and by this Court through constitutional review, *Bloom*, *supra*, at 201–208, or supervisory power, *Cheff* v. *Schnackenberg*, 384 U. S. 373, 384 (1966). However, while the exercise of the contempt power is subject to reasonable regulation, "the attributes which inhere in that power and are inseparable from it can neither be abrogated nor rendered practically inoperative." *Michaelson*, *supra*, at 66. Thus, while the prosecution of in-court and out-of-court contempts must proceed in a different manner, they both proceed at the instigation of the court.

The fact that we have come to regard criminal contempt as "a crime in the ordinary sense," *Bloom*, *supra*, at 201, does not mean that any prosecution of contempt must now be con-

[9] These measures, carefully instituted over time on the basis of experience with contempt proceedings, undercut JUSTICE SCALIA's argument that court appointment of contempt prosecutors raises the prospect of "'the most tyrannical licentiousness,'" *post*, at 822 (quoting *Anderson* v. *Dunn*, 6 Wheat. 204, 228 (1821)), representing a situation in which "judge[s] in effect mak[e] the laws, prosecut[e] their violation, and si[t] in judgment of those prosecutions," *post*, at 822, and in which we "permi[t] a judge to promulgate a rule of behavior, prosecute its violation, and adjudicate whether the violation took place." *Post*, at 824.

sidered an execution of the criminal law in which only the Executive Branch may engage. Our insistence on the criminal character of contempt prosecutions has been intended to rebut earlier characterizations of such actions as undeserving of the protections normally provided in criminal proceedings. See, *e. g.*, *In re Debs*, 158 U. S. 564, 596 (1895) (no jury trial in criminal contempt actions because a court in such a case is "only securing to suitors the rights which it has adjudged them entitled to"). That criminal procedure protections are now required in such prosecutions should not obscure the fact that these proceedings are not intended to punish conduct proscribed as harmful by the general criminal laws. Rather, they are designed to serve the limited purpose of vindicating the authority of the court. In punishing contempt, the Judiciary is sanctioning conduct that violates specific duties imposed by the court itself, arising directly from the parties' participation in judicial proceedings.[10]

Petitioners' assertion that the District Court lacked authority to appoint a private attorney to prosecute the contempt action in these cases is thus without merit. While contempt proceedings are sufficiently criminal in nature to warrant the imposition of many procedural protections, their fundamental purpose is to preserve respect for the judicial system itself. As a result, courts have long had, and must

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[10] JUSTICE SCALIA's concurrence suggests that the logic of resting a court's ability to institute a contempt proceeding on the need to vindicate the court's authority would support "an inherent power on the part of Congress to prosecute and punish disobedience of its laws." *Post*, at 821. A court's authority is inherently limited, however, by the nature of the judicial power, for the court has jurisdiction in a contempt proceeding only over those particular persons whose legal obligations result from their earlier participation in proceedings before the court. By contrast, the congressional prosecutorial power the concurrence hypothesizes would admit of no such limit; the parties potentially subject to such power would include the entire population. Acknowledging the limited authority of courts to appoint contempt prosecutors thus provides no principle that can be wielded to eradicate fundamental separation-of-powers boundaries.

continue to have, the authority to appoint private attorneys to initiate such proceedings when the need arises.

C

While a court has the authority to initiate a prosecution for criminal contempt, its exercise of that authority must be restrained by the principle that "only '[t]he least possible power adequate to the end proposed' should be used in contempt cases." *United States* v. *Wilson*, 421 U. S. 309, 319 (1975) (quoting *Anderson* v. *Dunn*, 6 Wheat., at 231). We have suggested, for instance, that, when confronted with a witness who refuses to testify, a trial judge should first consider the feasibility of prompting testimony through the imposition of civil contempt, utilizing criminal sanctions only if the civil remedy is deemed inadequate. *Shillitani* v. *United States*, 384 U. S. 364, 371, n. 9 (1966).

This principle of restraint in contempt counsels caution in the exercise of the power to appoint a private prosecutor. We repeat that the rationale for the appointment authority is necessity. If the Judiciary were completely dependent on the Executive Branch to redress direct affronts to its authority, it would be powerless to protect itself if that Branch declined prosecution. The logic of this rationale is that a court ordinarily should first request the appropriate prosecuting authority to prosecute contempt actions, and should appoint a private prosecutor only if that request is denied. Such a procedure ensures that the court will exercise its inherent power of self-protection only as a last resort.

In practice, courts can reasonably expect that the public prosecutor will accept the responsibility for prosecution. Indeed, the United States Attorney's Manual § 9–39.318 (1984) expressly provides: "In the great majority of cases the dedication of the executive branch to the preservation of respect for judicial authority makes the acceptance by the U. S. Attorney of the court's request to prosecute a mere formality . . . ." Referral will thus enhance the prospect that investi-

gative activity will be conducted by trained prosecutors pursuant to Justice Department guidelines.[11]

In this case, the District Court did not first refer the case to the United States Attorney's Office before the appointment of Bainton and Devlin as special prosecutors.[12] We need not address the ramifications of that failure, however. Even if a referral had been made, we hold, in the exercise of our supervisory power, that the court erred in appointing as prosecutors counsel for an interested party in the underlying civil litigation.

III

A

In *Berger* v. *United States*, 295 U. S. 78, 88 (1935), this Court declared:

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[11] See FBI Undercover Activities, Authorization, and H. R. 3232: Oversight Hearings before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 98th Cong., 1st Sess., 264–374 (1983) (setting forth Attorney General's detailed guidelines for conduct of undercover investigations).

[12] Bainton did send the following letter to the United States Attorney's Office one week after his appointment as special prosecutor:

"Dear Mr. Pedowitz:

"At the suggestion of Judge Brieant, I am bringing to your attention an order signed by Judge Lasker in Judge Brieant's absence in the above-entitled criminal contempt proceedings, together with an affidavit of mine submitted in support of that order.

"The criminally contumacious events predicted in my affidavit have come to pass. Should anyone from your office have any interest in this matter I am obviously willing to make the tape recordings and other evidence available for your review in a manner which will not compromise its chain of custody.

"Very truly yours,
"J. Joseph Bainton"

App. 64.

This letter plainly was not sent to request the United States Attorney's Office to prosecute the contempt; rather it was simply notice to that office that Bainton would be prosecuting the action.

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape nor innocence suffer."

This distinctive role of the prosecutor is expressed in Ethical Consideration (EC) 7–13 of Canon 7 of the American Bar Association (ABA) Model Code of Professional Responsibility (1982): "The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict."

Because of this unique responsibility, federal prosecutors are prohibited from representing the Government in any matter in which they, their family, or their business associates have any interest. 18 U. S. C. § 208(a).[13] Furthermore, the Justice Department has applied to its attorneys the ABA Model Code of Professional Responsibility, 28 CFR

[13] Section 208(a) provides:

"Except as permitted by subsection (b) hereof, whoever, being an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, a Federal Reserve bank director, officer, or employee, or of the District of Columbia, including a special Government employee, participates personally and substantially as a Government officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which, to his knowledge, he, his spouse, minor child, partner, organization in which he is serving as officer, director, trustee, partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest—

"Shall be fined not more than $10,000, or imprisoned not more than two years, or both."

45.735–1(b) (1986), which contains numerous provisions relating to conflicts of interest.[14] The concern that representation of other clients may compromise the prosecutor's pursuit of the Government's interest rests on recognition that a prosecutor would owe an ethical duty to those other clients. "Indeed, it is the highest claim on the most noble advocate which causes the problem—fidelity, unquestioned, continuing fidelity to the client." *Brotherhood of Locomotive Firemen & Enginemen* v. *United States*, 411 F. 2d. 312, 319 (CA5 1969).

Private attorneys appointed to prosecute a criminal contempt action represent the United States, not the party that is the beneficiary of the court order allegedly violated. As we said in *Gompers*, criminal contempt proceedings arising out of civil litigation "are between the public and the defendant, and are not a part of the original cause." 221 U. S., at 445. The prosecutor is appointed solely to pursue the public interest in vindication of the court's authority. A private attorney appointed to prosecute a criminal contempt therefore certainly should be as disinterested as a public prosecutor who undertakes such a prosecution.[15]

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[14] See, *e. g.*, Disciplinary Rule (DR) 5–105 (lawyer should refuse to accept or continue employment if the interests of another client may impair the exercise of his or her independent judgment); EC 5–1 (professional judgment of lawyer should be exercised solely for the benefit of client, free of "compromising influences and loyalties"); EC 5–2 (lawyer should not accept proffered employment if reasonable probability that personal interests will "affect adversely the advice to be given or services to be rendered the prospective client"); EC 5–14 (independent professional judgment compromised when lawyer asked to represent two or more clients "who may have differing interests, whether such interests be conflicting, inconsistent, diverse, or otherwise discordant"); EC 5–15 (if possibility of conflict in representation of multiple clients, lawyer "should resolve all doubts against the propriety of the representation"); EC 9–6 (lawyer has duty to avoid "not only professional impropriety but also the appearance of impropriety"). See also United States Attorney's Manual § 10–2.664 (1984) (cautioning against activity that "creates or appears to create a conflict of interest").

[15] Furthermore, aside from any concern for the standards to which prosecutors are held, the attorney for an interested party who prosecutes a

If a Justice Department attorney pursued a contempt prosecution for violation of an injunction benefiting any client of that attorney involved in the underlying civil litigation, that attorney would be open to a charge of committing a felony under § 208(a). Furthermore, such conduct would violate the ABA ethical provisions, since the attorney could not discharge the obligation of undivided loyalty to both clients where both have a direct interest.[16] The Government's interest is in dispassionate assessment of the propriety of criminal charges for affronts to the Judiciary. The private party's interest is in obtaining the benefits of the court's order. While these concerns sometimes may be congruent, sometimes they may not. A prosecutor may be tempted to bring a tenuously supported prosecution if such a course promises financial or legal rewards for the private client. Conversely, a prosecutor may be tempted to abandon a meritorious prosecution if a settlement providing benefits to the private client is conditioned on a recommendation against criminal charges.

Regardless of whether the appointment of private counsel in this case resulted in any prosecutorial impropriety (an issue on which we express no opinion), that appointment illustrates the *potential* for private interest to influence the discharge of public duty. Vuitton's California litigation had culminated in a permanent injunction and consent decree in favor of Vuitton against petitioner Young relating to various trademark infringement activities. This decree contained a liquidated damages provision of $750,000 for violation of the injunction. The prospect of such a damages award had the potential to influence whether Young was selected as a target

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contempt action must reckon with the proscriptions on conflicts of interest applicable to all lawyers. See n. 11, *supra*.

[16] See, *e. g.*, EC 5–1, *supra;* EC 5–18 ("A lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity. In advising the entity, a lawyer should keep paramount its interests and his professional judgment should not be influenced by the personal desires of any person or organization").

of investigation, whether he might be offered a plea bargain, or whether he might be offered immunity in return for his testimony. In addition, Bainton was the defendant in a defamation action filed by Klayminc arising out of Bainton's involvement in the litigation resulting in the injunction whose violation was at issue in this case. This created the possibility that the investigation of Klayminc might be shaped in part by a desire to obtain information useful in the defense of the defamation suit. Furthermore, Vuitton had various civil claims pending against some of the petitioners. These claims theoretically could have created temptation to use the criminal investigation to gather information of use in those suits, and could have served as bargaining leverage in obtaining pleas in the criminal prosecution. In short, as will generally be the case, the appointment of counsel for an interested party to bring the contempt prosecution in this case at a minimum created *opportunities* for conflicts to arise, and created at least the *appearance* of impropriety.[17]

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[17] The potential for misconduct that is created by the appointment of an interested prosecutor is not outweighed by the fact that counsel for the beneficiary of the court order may often be most familiar with the allegedly contumacious conduct. That familiarity may be put to use in *assisting* a disinterested prosecutor in pursuing the contempt action, but cannot justify permitting counsel for the private party to be in control of the prosecution. Nor does a concern for reimbursement of the prosecutor support such an appointment, as the Court of Appeals for the Second Circuit suggested in *Musidor, B. V.* v. *Great American Screen*, 658 F. 2d 60, 65 (1981). The Solicitor General has represented to the Court that the General Counsel of the Administrative Office for the United States Courts has construed the statutes appropriating funds for the operation of the federal courts to permit reimbursement of legal fees to attorneys appointed as special prosecutors in contempt actions, Brief for United States as *Amicus Curiae* 25–26, and that such payments have been approved in the past at the hourly rate at which Justice Department attorneys are compensated. *Id.*, at 26, n. 20. Furthermore, the normal practice of first referring the matter to the United States Attorney's Office should minimize the number of instances in which such reimbursement is necessary.

As should be apparent, the fact that the judge makes the initial decision that a contempt prosecution should proceed is not sufficient to quell concern that prosecution by an interested party may be influenced by improper motives. A prosecutor exercises considerable discretion in matters such as the determination of which persons should be targets of investigation, what methods of investigation should be used, what information will be sought as evidence, which persons should be charged with what offenses, which persons should be utilized as witnesses, whether to enter into plea bargains and the terms on which they will be established, and whether any individuals should be granted immunity. These decisions, critical to the conduct of a prosecution, are all made outside the supervision of the court.

The requirement of a disinterested prosecutor is consistent with our recognition that prosecutors may not necessarily be held to as stringent a standard of disinterest as judges. "In an adversary system, [prosecutors] are necessarily permitted to be zealous in their enforcement of the law," *Marshall* v. *Jerrico, Inc.*, 446 U. S. 238, 248 (1980). We have thus declined to find a conflict of interest in situations where the potential for conflict on the part of a judge might have been intolerable. See *id.*, at 250–252 (fact that sums collected as civil penalties returned to agency to defray administrative costs presented too remote a potential for conflict in agency enforcement efforts). Ordinarily we can only speculate whether other interests are likely to influence an enforcement officer, and it is this speculation that is informed by appreciation of the prosecutor's role. In a case where a prosecutor represents an interested party, however, the ethics of the legal profession *require* that an interest other than the Government's be taken into account. Given this inherent conflict in roles, there is no need to speculate whether the prosecutor will be subject to extraneous influence.[18]

[18] An arrangement represents an actual conflict of interest if its potential for misconduct is deemed intolerable. The determination whether there

As we said in *Bloom*, "In modern times, procedures in criminal contempt cases have come to mirror those used in ordinary criminal cases." 391 U. S., at 207. The requirement of a disinterested prosecutor is consistent with that trend, since "[a] scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision."[19]

The use of this Court's supervisory authority has played a prominent role in ensuring that contempt proceedings are conducted in a manner consistent with basic notions of fairness. See, *e. g.*, *Cheff*, 384 U. S., at 380 (requiring jury trial for imposition of contempt sentences greater than six months); *Yates* v. *United States*, 356 U. S. 363, 366–367 (1958) (reducing contempt sentence in light of miscalculation

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is an actual conflict of interest is therefore distinct from the determination whether that conflict resulted in any actual misconduct.

It is true that prosecutors may on occasion be overzealous and become overly committed to obtaining a conviction. That problem, however, is personal, not structural. As the Court of Appeals for the Sixth Circuit said in disapproving the appointment of an interested contempt prosecutor in *Polo Fashions, Inc.* v. *Stock Buyers Int'l, Inc.*, 760 F. 2d 698, 705 (1985), cert. pending, No. 85–455, such overzealousness

"does not have its roots in a conflict of interest. When it manifests itself the courts deal with it on a case-by-case basis as an aberration. This is quite different from approving a practice which would permit the appointment of prosecutors whose undivided loyalty is pledged to a party interested only in a conviction."

[19] *Marshall* v. *Jerrico, Inc.*, 446 U. S. 238, 249–250 (1980). See *Polo Fashions, Inc., supra* (appointment of interested prosecutor disapproved through exercise of supervisory authority); *Brotherhood of Locomotive Firemen & Enginemen* v. *United States*, 411 F. 2d 312, 319 (CA5 1969) (appointment of interested prosecutor characterized as due process violation). Most States have acknowledged this principle as well. "[W]hen a private attorney is also interested in related civil litigation, the majority of states will not permit him to participate in a criminal prosecution." Note, Private Prosecutors in Criminal Contempt Actions Under Rule 42(b) of the Federal Rules of Criminal Procedure, 54 Ford. L. Rev. 1141, 1155 (1986) (footnote omitted). See also *id.*, at 1154, n. 54 (listing cases).

of number of offenses committed); *Offutt* v. *United States*, 348 U. S. 11, 13, 17–18 (1954) (contempt conviction reversed in case in which judge involved in personal conflict with contemner). The exercise of supervisory authority is especially appropriate in the determination of the procedures to be employed by courts to enforce their orders, a subject that directly concerns the functioning of the Judiciary. We rely today on that authority to hold that counsel for a party that is the beneficiary of a court order may not be appointed as prosecutor in a contempt action alleging a violation of that order.[20]

B

The next question we must confront is whether the Government should have the opportunity to demonstrate that it was harmless error for the court to appoint counsel for an interested party as contempt prosecutor. See *Chapman* v. *California*, 386 U. S. 18 (1967).[21] We have held that some errors "are so fundamental and pervasive that they require

[20] We see no need to distinguish between "serious" contempts, involving sentences exceeding six months, and other contempts in imposing this requirement. Our decision in *Bloom* v. *Illinois*, 391 U. S. 194 (1968), made such a distinction for the purpose of determining those contempt proceedings requiring a jury trial. That distinction rested, however, on recognition that historically the right to jury trial was not available for petty crimes. *Id.*, at 197–198. Aside from the right to jury trial, our decisions constituting the general trend toward greater procedural protections for defendants in contempt trials, *id.*, at 207, have not distinguished between types of contempt proceedings in imposing these protections.

[21] In this case, we rely on our supervisory authority to avoid the necessity of reaching any constitutional issues. We are mindful that "reversals of convictions under the court's supervisory power must be approached 'with some caution' and with a view toward balancing the interests involved." *United States* v. *Hasting*, 461 U. S. 499, 506–507 (1983) (citations omitted) (quoting *United States* v. *Payner*, 447 U. S. 727, 734 (1980)). Where the interest infringed is sufficiently important, however, we have not hesitated to find actual prejudice irrelevant when utilizing supervisory authority. See, *e. g.*, *Ballard* v. *United States*, 329 U. S. 187 (1946) (using supervisory power to find error in exclusion of women from grand jury, and dismissing indictment).

reversal without regard to the facts or circumstances of the particular case." *Delaware* v. *Van Arsdall*, 475 U. S. 673, 681 (1986). We find that the appointment of an interested prosecutor is such an error.

An error is fundamental if it undermines confidence in the integrity of the criminal proceeding. *Rose* v. *Clark*, 478 U. S. 570, 577–578 (1986); *Van Arsdall*, *supra*, at 681–682; *Vasquez* v. *Hillery*, 474 U. S. 254, 263–264 (1986). The appointment of an interested prosecutor raises such doubts. Prosecution by someone with conflicting loyalties "calls into question the objectivity of those charged with bringing a defendant to judgment." *Vasquez*, *supra*, at 263. It is a fundamental premise of our society that the state wield its formidable criminal enforcement powers in a rigorously disinterested fashion, for liberty itself may be at stake in such matters. We have always been sensitive to the possibility that important actors in the criminal justice system may be influenced by factors that threaten to compromise the performance of their duty. We have held, for instance, that it cannot be harmless error for racial discrimination to infect the selection of the grand jury, *Vasquez*, *supra;* for a petit jury to be exposed to publicity unfavorable to the defendant, *Sheppard* v. *Maxwell*, 384 U. S. 333, 351–352 (1966); or for adjudication to be performed by a judical officer faced with a conflict of interest, *Ward* v. *Village of Monroeville*, 409 U. S. 57 (1972); *Tumey* v. *Ohio*, 273 U. S. 510 (1927).

It is true that we have indicated that the standards of neutrality for prosecutors are not necessarily as stringent as those applicable to judicial or quasi-judicial officers. See *Jerrico*, 446 U. S., at 248–250.[22] This difference in treatment is relevant to *whether* a conflict is found, however, not

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[22] We did expressly observe in *Jerrico*, however, that "we need not say whether different considerations might be held to apply if the alleged biasing influence contributed to prosecutions against particular persons, rather than to a general zealousness in the enforcement process." *Marshall* v. *Jerrico, Inc.*, *supra*, at 250, n. 12.

to its gravity once identified. We may require a stronger showing for a prosecutor than a judge in order to conclude that a conflict of interest exists. Once we have drawn that conclusion, however, we have deemed the prosecutor subject to influences that undermine confidence that a prosecution can be conducted in disinterested fashion. If this is the case, we cannot have confidence in a proceeding in which this officer plays the critical role of preparing and presenting the case for the defendant's guilt.

Furthermore, appointment of an interested prosecutor creates an appearance of impropriety that diminishes faith in the fairness of the criminal justice system in general. The narrow focus of harmless-error analysis is not sensitive to this underlying concern. If a prosecutor uses the expansive prosecutorial powers to gather information for private purposes, the prosecution function has been seriously abused even if, in the process, sufficient evidence is obtained to convict a defendant. Prosecutors "have available a terrible array of coercive methods to obtain information," such as "police investigation and interrogation, warrants, informers and agents whose activities are immunized, authorized wiretapping, civil investigatory demands, [and] enhanced subpoena power." C. Wolfram, Modern Legal Ethics 460 (1986). The misuse of those methods "would unfairly harass citizens, give unfair advantage to [the prosecutor's personal interests], and impair public willingness to accept the legitimate use of those powers." *Ibid.* Notwithstanding this concern, the determination whether an error was harmful focuses only on "'whether there is a reasonable possibility that the [error] complained of might have contributed to the conviction.'" *Chapman*, *supra*, at 23 (quoting *Fahy* v. *Connecticut*, 375 U. S. 85, 86–87 (1963)). A concern for actual prejudice in such circumstances misses the point, for what is at stake is the public perception of the integrity of our criminal justice system. "[J]ustice must satisfy the appearance of justice," *Offutt*, *supra*, at 14, and a prosecutor

with conflicting loyalties presents the appearance of precisely the opposite. Society's interest in disinterested prosecution therefore would not be adequately protected by harmless-error analysis, for such analysis would not be sensitive to the fundamental nature of the error committed.[23]

Appointment of an interested prosecutor is also an error whose effects are pervasive. Such an appointment calls into question, and therefore requires scrutiny of, the conduct of an entire prosecution, rather than simply a discrete prosecutorial decision. Determining the effect of this appointment

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[23] For this reason, "none of the [state] cases that prohibit the public prosecutor from participating in a civil trial arising out of the same facts as a pending criminal prosecution are concerned with the good faith of the prosecutor or with a showing of prejudice. Rather, the mere existence of an unethical situation is sufficient to require reversal because the potential for abuse is so great." Comment, The Outmoded Concept of Private Prosecution, 25 Am. U. L. Rev. 754, 778 (1976) (footnote omitted). See, *e. g.*, *State* v. *Burns*, 322 S. W. 2d 736, 742 (Mo. 1959) (in case involving prosecutor's conflict of interest, court "shall not attempt to weigh or measure the actual prejudice").

The situation confronted by the court in *United States* v. *Heldt*, 215 U. S. App. D. C. 206, 668 F. 2d 1238 (1981), is distinguishable from the situation in this case. In *Heldt*, defendants sought a reversal of their conviction on the ground of an alleged conflict of interest under 18 U. S. C. § 208(a) on the part of two assistant prosecutors, even though defendants had failed to move for disqualification in the trial court. The Court of Appeals held that in such circumstances defendants were required to show actual prejudice in order to obtain a reversal. *Id.*, at 244–245, 668 F. 2d, at 1276–1277. In contrast, because of the bright-line rule we establish in this case, a defendant subject to contempt prosecution by counsel for the beneficiary of the court order allegedly violated would not be *alleging* the equivalent of a violation of § 208—he or she could point to the *established fact* of one. *Heldt* would be analogous only if defendants in that case had obtained a trial court disqualification of the prosecutors in question on the ground that prosecution by them would violate § 208. If those prosecutors had nonetheless continued to participate in the prosecution, defendants would have been in the same position as defendants prosecuted in violation of the rule we establish today—they would have been subject to prosecution by prosecutors whose involvement *expressly* had been found an intolerable conflict of interest.

thus would be extremely difficult. A prosecution contains a myriad of occasions for the exercise of discretion, each of which goes to *shape* the record in a case, but few of which are *part* of the record. As we said in *Holloway* v. *Arkansas*, 435 U. S. 475, 490–491 (1978), in rejecting application of the harmless-error rule to a defense attorney's conflict in representing three codefendants:

> "In the normal case where a harmless-error rule is applied, the error occurs at trial and its scope is readily identifiable. Accordingly, the reviewing court can undertake with some confidence its relatively narrow task of assessing the likelihood that the error materially affected the deliberations of the jury. But in a case of joint representation of conflicting interests the evil—it bears repeating—is in what the advocate finds himself compelled to *refrain* from doing, not only at trial but also as to possible pretrial negotiations and in the sentencing process. It may be possible in some cases to identify from the record the prejudice resulting from an attorney's failure to undertake certain trial tasks, but even with a record of the sentencing hearing available it would be difficult to judge intelligently the impact of a conflict on the attorney's representation of a client. And to assess the impact of a conflict of interests on the attorney's options, tactics, and decisions in plea negotiations would be virtually impossible. Thus, an inquiry into a claim of harmless error here would require, unlike most cases, unguided speculation." (Citations omitted.)

Cf. *Vasquez*, 474 U. S., at 264 ("Once having found discrimination in the selection of a grand jury, we simply cannot know that the need to indict would have been assessed in the same way by a grand jury properly constituted").

The case before us involves the citizen's primary adversary in a criminal proceeding, who is armed with expansive powers and wide-ranging discretion. Public confidence in the disinterested conduct of that official is essential. Harmless-

error analysis is not equal to the task of assuring that confidence. It is best suited for the review of discrete exercises of judgment by lower courts, where information is available that makes it possible to gauge the effect of a decision on the trial as a whole. In this case, however, we establish a categorical rule against the appointment of an interested prosecutor, adherence to which requires no subtle calculations of judgment. Given the fundamental and pervasive effects of such an appointment, we therefore hold that harmless-error analysis is inappropriate in reviewing the appointment of an interested prosecutor in a case such as this. Cf. *United States* v. *Sells Engineering, Inc.*, 463 U. S. 418, 432 (1983) (prosecutorial use of grand jury to elicit evidence for use in civil case "improper *per se*").

IV

Between the private life of the citizen and the public glare of criminal accusation stands the prosecutor. That state official has the power to employ the full machinery of the state in scrutinizing any given individual. Even if a defendant is ultimately acquitted, forced immersion in criminal investigation and adjudication is a wrenching disruption of everyday life. For this reason, we must have assurance that those who would wield this power will be guided solely by their sense of public responsibility for the attainment of justice. A prosecutor of a contempt action who represents the private beneficiary of the court order allegedly violated cannot provide such assurance, for such an attorney is required by the very standards of the profession to serve two masters. The appointment of counsel for Vuitton to conduct the contempt prosecution in these cases therefore was improper. Accordingly, the judgment of the Court of Appeals is

Reversed.

JUSTICE BLACKMUN, concurring.

I join JUSTICE BRENNAN's opinion. I would go further, however, and hold that the practice—federal or state—of

appointing an interested party's counsel to prosecute for criminal contempt is a violation of due process. This constitutional concept, in my view, requires a disinterested prosecutor with the unique responsibility to serve the public, rather than a private client, and to seek justice that is unfettered. See *Brotherhood of Locomotive Firemen & Enginemen* v. *United States*, 411 F. 2d 312, 319 (CA5 1969); see generally Note, Private Prosecutors in Criminal Contempt Actions under Rule 42(b) of the Federal Rules of Criminal Procedure, 54 Ford. L. Rev. 1141, 1146–1166 (1986).

JUSTICE SCALIA, concurring in the judgment.

I agree with the Court that the District Court's appointment of J. Joseph Bainton and Robert P. Devlin as special counsel to prosecute petitioners for contempt of an injunction earlier issued by that court was invalid, and that that action requires reversal of petitioners' convictions. In my view, however, those appointments were defective because of a failing more fundamental than that relied upon by the Court. Prosecution of individuals who disregard court orders (except orders necessary to protect the courts' ability to function) is not an exercise of "[t]he judicial power of the United States," U. S. Const., Art. III, §§ 1, 2. Since that is the only grant of power that has been advanced as authorizing these appointments, they were void. And since we cannot know whether petitioners would have been prosecuted had the matter been referred to a proper prosecuting authority, the convictions are likewise void.

I

With the possible exception of the power to appoint inferior federal officers, which is irrelevant to the present cases,[1]

[1] Article II, § 2, cl. 2, provides that "Congress may *by Law* vest the Appointment of such inferior Officers, as they think proper, . . . in the Courts of Law." (Emphasis added.) There was some suggestion in the Solicitor General's brief that the appointments in the present cases might be authorized by that provision. Brief for United States as *Amicus Curiae* 17–19, and n. 14. The contention was abandoned at argument, however, Tr. of

the only power the Constitution permits to be vested in federal courts is "[t]he judicial power of the United States." Art. III, § 1. That is accordingly the only kind of power that federal judges may exercise by virtue of their Article III commissions. *Muskrat* v. *United States*, 219 U. S. 346, 354–356 (1911); *United States* v. *Ferreira*, 13 How. 40 (1852).

The judicial power is the power to decide, in accordance with law, who should prevail in a case or controversy. See Art. III, § 2. That includes the power to serve as a neutral adjudicator in a criminal case, but does not include the power to seek out law violators in order to punish them—which would be quite incompatible with the task of neutral adjudication. It is accordingly well established that the judicial power does not generally include the power to prosecute crimes. See *United States* v. *Cox*, 342 F. 2d 167 (CA5) (en banc), cert. denied, 381 U. S. 935 (1965), and authorities cited therein; 342 F. 2d, at 182 (Brown, J., concurring); *id.*, at 185 (Wisdom, J., concurring); see generally *United States* v. *Thompson*, 251 U. S. 407, 413–417 (1920). Rather, since the prosecution of law violators is part of the implementation of the laws, it is—at least to the extent that it is publicly exercised[2]—executive power, vested by the Constitution in the

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Oral Arg. 26–28, and properly so, since regardless of whether Congress *could* "by law" authorize judicial appointment of an officer of this sort—a question we need not decide here—it has in fact not done so. The closest thing to a law cited by the Government was Federal Rule of Criminal Procedure 42(b), which, as the Court notes, *ante*, at 794–795, and n. 6, does not purport to bestow appointment power but rather assumes its preexistence. In any event the Rule could not confer Article II appointment authority, since it is a Rule of court rather than an enactment of Congress. See 18 U. S. C. § 3772 (1982 ed. and Supp. III).

[2] In order to resolve the present cases it is only necessary to decide that the power to prosecute is not part of the "judicial power" conferred on Article III courts. It is not necessary to decide whether the Constitution's vesting of the executive power in the President, Art. II, § 1, cl. 1, forbids Congress from conferring prosecutory authority on private persons. At the time of the Constitution, there existed in England a longstanding custom of private prosecution, see Comment, The Outmoded Concept of Pri-

President. Art. II, § 2, cl. 1. See *Heckler* v. *Chaney*, 470 U. S. 821, 832 (1985); *Buckley* v. *Valeo*, 424 U. S. 1, 138 (1976).

These well-settled general principles are uncontested. The Court asserts, however, that there is a special exception for prosecutions of criminal contempt, which are the means of securing compliance with court orders. Unless these can be prosecuted by the courts themselves, the argument goes, efficaciousness of judicial judgments will be at the mercy of the Executive, an arrangement presumably too absurd to contemplate. *Ante*, at 796.

Far from being absurd, however, it is a carefully designed and critical element of our system of Government. There are numerous instances in which the Constitution leaves open the theoretical possibility that the actions of one Branch may be brought to nought by the actions or inactions of another. Such dispersion of power was central to the scheme of forming a Government with enough power to serve the expansive purposes set forth in the preamble of the Constitution, yet one that would "secure the blessings of liberty" rather than use its power tyranically. Congress, for example, is dependent on the Executive and the courts for enforcement of the laws it enacts. Even complete failure by the Executive to prosecute law violators, or by the courts to convict them, has never been thought to authorize congressional prosecution and trial. The Executive, in its turn, cannot perform its function of enforcing the laws if Congress declines to appropriate the necessary funds for that purpose; or if the courts decline to entertain its valid prosecutions. Yet no one sug-

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vate Prosecution, 25 Am. U. L. Rev. 754, 758 (1976). I am unaware, however, of any private prosecution of federal crimes. The Judiciary Act of 1789 provided for the appointment in each judicial district of "a meet person learned in the law to act as attorney for the United States . . . whose duty it shall be to prosecute in such district all delinquents for crimes and offences, cognizable under the authority of the United States." § 35, 1 Stat. 92; see generally Comment, 25 Am. U. L. Rev., *supra*, at 762–764.

gests that some doctrine of necessity authorizes the Executive to raise money for its operations without congressional appropriation, or to jail malefactors without conviction by a court of law. Why, one must wonder, are the courts alone immune from this interdependence?

The Founding Fathers, of a certainty, thought that they were not. It is instructive to compare the Court's claim that "[c]ourts cannot be at the mercy of another branch in deciding whether [contempt] proceedings should be initiated," *ante*, at 796, with the views expressed in one of the most famous passages from The Federalist:

> "[T]he judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the constitution; because it will be least in a capacity to annoy or injure them. . . . The judiciary . . . has no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither Force nor Will but merely judgment; *and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.*" The Federalist No. 78, pp. 522–523 (J. Cooke ed. 1961) (A. Hamilton) (emphasis added).

Even as a purely analytic proposition the Court's thesis is faulty, because it proves too much. If the courts must be able to investigate and prosecute contempt of their judgments, why must they not also be able to arrest and punish those whom they have adjudicated to be in contempt? Surely the Executive's refusal to enforce a judgment of contempt would impair the efficacy of the court's acts at least as much as its failure to investigate and prosecute a contempt. Yet no one has ever supposed that the Judiciary has an inherent power to arrest and incarcerate.

II

The Court appeals to a "longstanding acknowledgment that the initiation of contempt proceedings to punish disobedience to court orders is a part of the judicial function." *Ante*, at 795. Except, however, for a line of cases beginning in 1895 with *In re Debs*, 158 U. S. 564, whose holding and rationale we have since repudiated, no holding of this Court has ever found inherent judicial power to punish those violating court judgments with contempt, much less to appoint officers to prosecute such contempts. Our first reference to the special status of the federal courts' contempt powers appeared in *United States* v. *Hudson*, 7 Cranch 32 (1812), where the question presented was whether circuit courts had the power to decide common-law criminal cases. Congress had not conferred such power, but the prosecution argued that it was part of the National Government's inherent power to preserve its own existence. *Id.*, at 33–34. The Court ruled that such an argument could establish, at most, that *Congress* had inherent power to pass criminal laws, not that the federal courts had inherent power without legislation to adjudge common-law crimes. At the end of its discussion, the Court noted:

> "Certain implied powers must necessarily result to our Courts of justice from the nature of their institution. But jurisdiction of crimes against the state is not among those powers. To fine for contempt—imprison for contumacy—inforce the observance of order, &c. are powers which cannot be dispensed with in a Court, because they are necessary to the exercise of all others: and so far our Courts no doubt possess powers not immediately derived from statute; but all exercise of criminal jurisdiction in common law cases we are of opinion is not within their implied powers." *Id.*, at 34.

Thus, the holding of *Hudson* was against the existence of broad inherent powers in the federal courts. Its discussion

recognized as inherent only those powers "necessary to the exercise of all others," that is, necessary to permit the courts to function, among which it included the contempt power when used to prevent interference with the conduct of judicial business. It made no mention of the enforcement of judgments, much less of an investigative or prosecutory authority.

Nine years later, in *Anderson* v. *Dunn*, 6 Wheat. 204, 227 (1821), the Court reiterated its view that the contempt power was an inherent component of the judicial power. That case presented an issue more closely related to the questions of the source and scope of the federal courts' contempt power, although still not directly on point: whether the House of Representatives could direct its Sergeant at Arms to seek out a person who had disrupted its proceedings, bring him before the House to be tried for contempt, and hold him in custody until completion of the proceedings. The Court noted that "there is no power given by the constitution to either House to punish for contempts, except when committed by their own members," *id.*, at 225, and that

> "if this power . . . is to be asserted on the plea of necessity, the ground is too broad, and the result too indefinite; . . . the executive, and every co-ordinate, and even subordinate, branch of government, may resort to the same justification, and the whole assume to themselves, in the exercise of this power, the most tyrannical licentiousness." *Id.*, at 228.

Nevertheless, the Court upheld the House's action, concluding that any other course "leads to the total annihilation of the power of the House of Representatives to guard itself from contempts, and leaves it exposed to every indignity and interruption that rudeness, caprice, or even conspiracy, may meditate against it." *Ibid.*

It was in the course of recognizing this limited power of self-defense in the House that the Court pronounced the dictum cited in today's opinion that "[c]ourts of justice are uni-

versally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates, and, as a corollary to this proposition, to preserve themselves and their officers from the approach and insults of pollution." *Id.*, at 227. Read in the context of the case, it seems to me likely that all the Court meant by "mandates" was orders necessary to the conduct of a trial, such as subpoenas. In any event, the statement was not a carefully considered opinion as to the outer limits of the federal courts' inherent contempt powers. As was the case in *Hudson*, moreover, the statement did not suggest that the courts should play any role in the contempt process other than that of neutral adjudicator, and was dictum not only because the judicial contempt power was not at issue but because the Judiciary Act of 1789 had already conferred the authority said to be inherently possessed. § 17, 1 Stat. 83.

I recognize, however, that the narrow principle of necessity underlying *Anderson*—that the Legislative, Executive, and Judicial Branches must each possess those powers necessary to protect the functioning of its own processes, although those implicit powers may take a form that appears to be nonlegislative, nonexecutive, or nonjudicial, respectively—does have logical application to the federal courts' contempt powers. But that principle would at most require that courts be empowered to prosecute for contempt those who interfere with the orderly conduct of their business or disobey orders necessary to the conduct of that business (such as subpoenas). It would not require that they be able to prosecute and punish, not merely disruption of their functioning, but disregard of the *product* of their functioning, their judgments. The correlative of the latter power, in the congressional context, would be an inherent power on the part of Congress to prosecute and punish disobedience of its laws—which neither *Anderson* nor any rational person would suggest. I can imagine no basis, except self-love, for limiting

this extension of the necessity doctrine to the courts alone. And even if illogically limited to the courts it is pernicious enough. In light of the broad sweep of modern judicial decrees, which have the binding effect of laws for those to whom they apply, the notion of judges' in effect making the laws, prosecuting their violation, and sitting in judgment of those prosecutions, summons forth much more vividly than *Anderson* could ever have imagined the prospect of "the most tyrannical licentiousness." *Anderson*, *supra*, at 228.

III

Our only holdings conferring an inherent contempt power to enforce judgments emanate from *In re Debs*, 158 U. S. 564 (1895), whose outcome and reasoning we have disapproved. There a Circuit Court, which had enjoined union officers and organizers from engaging in activities disruptive of interstate rail traffic, held them in contempt for failing to comply with the injunction and sentenced them to jail for terms from three to six months. This Court rejected the argument that they had thereby been deprived of their right to a jury trial, stating:

> "[T]he power of a court to make an order carries with it the equal power to punish for a disobedience of that order, and the inquiry as to the question of disobedience has been, from time immemorial, the special function of the court. And this is no technical rule. In order that a court may compel obedience to its orders it must have the right to inquire whether there has been any disobedience thereof. To submit the question of disobedience to another tribunal, be it a jury or another court, would operate to deprive the proceeding of half its efficiency." *Id.*, at 594–595.

At the time, many considered *Debs* a dangerous decision, see Dunbar, Government by Injunction, 13 L. Q. Rev. 347 (1897); Gregory, Government by Injunction, 11 Harv. L. Rev. 487 (1898); Lewis, Strikes and Courts of Equity, 46 Am.

L. Reg. 1 (1898); Lewis, A Protest Against Administering Criminal Law by Injunction, 42 Am. L. Reg. 879 (1894); and the opinion continued to be criticized long after it was handed down. See *Green* v. *United States*, 356 U. S. 165, 193–216, especially 196, and n. 6 (1958) (Black, J., dissenting). Ultimately, its holding was repudiated in *Bloom* v. *Illinois*, 391 U. S. 194 (1968), where we ruled that courts are required to afford persons charged with criminal contempt a jury trial to the same extent they are required to afford a jury trial in other criminal cases. But *Bloom* repudiated more than *Debs*' holding. It specifically rejected *Debs*' rationale that courts must have self-contained power to punish disobedience of their judgments, because "'[t]o submit the question of disobedience to another tribunal, be it a jury or another court, would operate to deprive the proceeding of half its efficiency.'" 391 U. S., at 208, quoting *Debs*, *supra*, at 595. The *Bloom* Court, to the contrary, "place[d] little credence in the notion that the independence of the judiciary hangs on the power to try contempts summarily and [was] not persuaded that the additional time and expense possibly involved in submitting serious contempts to juries will seriously handicap the effective functioning of the courts." *Bloom*, *supra*, at 208–209.

The Court argues that *Bloom* does not control these cases, because "[t]he fact that we have come to regard criminal contempt as 'a crime in the ordinary sense,' *Bloom*, *supra*, at 201, does not mean that any prosecution of contempt must now be considered an execution of the criminal law in which only the Executive Branch may engage." *Ante*, at 799–800. To this argument it could be added that *Bloom* did not draw the distinction relied on here between the narrow *Anderson* necessity principle, that the courts must be able to conduct their business free of interference, and the broad necessity principle, that courts must be able to do anything required to give effect to their decisions.

While both these points are true, it seems to me that *Bloom* is nonetheless highly relevant to the present cases. First, it eliminates this Court's only holdings that the courts must have autonomous power to hold litigants in contempt as a means of enforcing their judgments. And second, it makes clear that the argument from necessity to the existence of an inherent power must be restrained by the totality of the Constitution, lest it swallow up the carefully crafted guarantees of liberty. 391 U. S., at 209. While this principle may have varying application to the jury-trial and separation-of-powers guarantees, it is inconceivable to me that it would not prevent so flagrant a violation of the latter as permitting a judge to promulgate a rule of behavior, prosecute its violation, and adjudicate whether the violation took place. That arrangement is no less fundamental a threat to liberty than is deprivation of a jury trial, since "there is no liberty if the power of judging be not separated from the legislative and executive powers." 1 Montesquieu, Spirit of the Laws 181, as quoted in The Federalist No. 78, p. 523 (J. Cooke ed. 1961). Moreover, as a practical matter the impairment of judicial power produced by requiring the Executive to prosecute contempts is no more substantial than the impairment produced by requiring a jury. The power to acquit is as decisive as the power not to prosecute; and a jury may abuse the former power with impunity, whereas a United States Attorney must litigate regularly before the judges whose violated judgments he ignores.

Finally, the Court suggests that the various procedural protections that the Constitution requires us to provide contemners undercut the separation-of-powers argument against judicial prosecution. *Ante*, at 799, n. 9. The reverse argument—that the structural provisions of the Constitution were not only sufficient but indeed were the only sure mechanism for protecting liberty—was made against adoption of a Bill of Rights. Ultimately, the people elected to have both checks. The Court is right that disregard of one of these raises less of a prospect of "tyrannical licentiousness" than

disregard of both. But that is no argument for disregard of either.

I would therefore hold that the federal courts have no power to prosecute contemners for disobedience of court judgments, and no derivative power to appoint an attorney to conduct contempt prosecutions. That is not to say, of course, that the federal courts may not impose criminal sentences for such contempts. But they derive that power from the same source they derive the power to pass on other crimes which it has never been contended they may prosecute: a statute enacted by Congress criminalizing the conduct which has been on the books in one form or another since the Judiciary Act of 1789, *supra*, at 821. See 18 U. S. C. § 401.

IV

I agree with the Court that the District Judge's error in appointing Bainton and Devlin to prosecute these contempts requires reversal of the convictions. The very argument given for permitting a court to appoint an attorney to prosecute contempts—that the United States Attorney might exercise his prosecutorial discretion not to pursue the contemners—makes clear that that is the result required. In light of the discretion our system allows to prosecutors, which is so broad that we ordinarily find decisions not to prosecute unreviewable, see *Heckler* v. *Chaney*, 470 U. S. 821 (1985), it would be impossible to conclude with any certainty that these prosecutions would have been brought had the court simply referred the matter to the Executive Branch.

JUSTICE POWELL, with whom THE CHIEF JUSTICE and JUSTICE O'CONNOR join, concurring in part and dissenting in part.

In this case, the District Court appointed counsel for a party in a civil suit as a prosecutor in a related criminal contempt proceeding. The Court of Appeals for the Second Circuit found that the District Court did not abuse its discretion in making such an appointment. The Court today reaches a contrary conclusion. I agree that the District Court abused

its discretion in this case, and that, as a general matter, courts should not appoint interested private lawyers to prosecute charges of criminal contempt. But while I agree with the underlying rationale of the Court's opinion, I do not believe that this Court's precedents call for *per se* reversal. I therefore cannot join the Court's judgment.

The ethical rules of the legal profession prohibit representation of two clients who "*may* have differing interests." Ethical Consideration 5–14, American Bar Association, Model Code of Professional Responsibility (1982) (emphasis added). This is the situation the Court today correctly finds to exist. I agree that "the appointment of counsel for an interested party to bring the contempt prosecution in this case at a minimum created *opportunities* for conflicts to arise." *Ante*, at 806 (emphasis in original). A prosecutor occupies a unique role in our criminal justice system and it is essential that he carry out his duties fairly and impartially. Where a private prosecutor appointed by a District Court also represents an interested party, the possibility that his prosecutorial judgment will be compromised is significant. This potential for a conflict of interest warrants an exercise of this Court's supervisory powers to hold that it is improper to appoint such a lawyer to prosecute a charge of criminal contempt.

While the potential for prosecutorial impropriety may justify the conclusion that such appointments are inappropriate, it does not justify invalidation of the conviction and sentence in this case. Even where constitutional errors are found to have occurred, this Court has found harmless-error analysis to be appropriate. *Chapman* v. *California*, 386 U. S. 18 (1967). As the Court recently noted: "[I]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless-error analysis." *Rose* v. *Clark*, 478 U. S. 570, 579 (1986).

Here, the error is not of constitutional dimension. Moreover, the defendants had counsel and were convicted of crimi-

nal contempt by an impartial jury. The Court of Appeals found "[no] reason to believe" that the private prosecutor in this case acted unethically. 780 F. 2d 179, 185 (CA2 1985). The court also found the evidence offered at trial "ample" to support the convictions. *Ibid.* These findings strongly imply that the error of appointing the private counsel in this case to prosecute the contempt proceeding was harmless.

Although this Court has the authority to review a record to evaluate a harmless-error claim, *United States* v. *Hasting*, 461 U. S. 499, 510 (1983), I share the Court's concern that the effect of conflicting interests on the integrity of prosecutorial decisions may be subtle. Accordingly, I would remand these cases to the Court of Appeals—in light of our decision today—to determine whether the error of appointing the private attorney to prosecute the contempt proceeding at issue was harmless.

JUSTICE WHITE, dissenting.

I agree with the Court that as a general rule contempt cases such as this should in the first instance be referred to the United States Attorney and that a district court's well-established authority to appoint private counsel to prosecute should be exercised only after that official declines to prosecute. I would also prefer that district courts not appoint the attorney for an interested party to prosecute a contempt case such as this. But as I understand Rule 42, it was intended to embrace the prior practice and to authorize, but not to require, the appointment of attorneys for interested parties. I would leave amendment of the Rule to the rulemaking process. I agree with the Court of Appeals that there was no error, constitutional or otherwise, in the appointments made in this action and that petitioners were not denied due process of law by being tried and convicted of contempt. Because I discern no ground for concluding that petitioners did not receive a fair trial, I would affirm the Court of Appeals.

UNITED STATES *v.* MENDOZA-LOPEZ ET AL.

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

No. 85–2067. Argued March 3, 1987—Decided May 26, 1987

Title 8 U. S. C. § 1326 provides that any alien who has been deported and thereafter enters the United States is guilty of a felony. Respondents, Mexican nationals, were arrested and deported after a group hearing at which they purportedly waived their rights to apply for suspension of deportation and to appeal. Subsequently, respondents were again arrested in this country and indicted on charges of violating § 1326. However, the District Court dismissed the indictments, ruling that respondents could collaterally attack their previous deportation orders. The court found that they had not understood the Immigration Judge's explanation of suspension of deportation, and concluded that the reliability of the proceedings had been totally undermined by the fact that they had not made knowing and intelligent waivers of their right to that remedy or their right to appeal. The Court of Appeals affirmed, holding that, since a material element of the offense prohibited by § 1326 was a "lawful" deportation order, principles of fundamental fairness required a pretrial review of the underlying deportation to determine whether respondents received due process of law. Because they did not fully understand the proceedings, the court found a due process violation rendering the deportation order unlawful and therefore not a proper basis for the charges against respondents.

Held:

1. The text, legislative history, and background of § 1326 indicate that Congress did not intend the validity of an underlying deportation order to be contestable in a § 1326 prosecution. Section 1326's express language does not suggest that only a "lawful" deportation may be an element of the offense, thereby permitting a collateral challenge. Moreover, in enacting § 1326, Congress had available to it at least one predecessor statute containing express language that would have permitted collateral challenges, but failed to include that language in § 1326. While there was, at the time of § 1326's enactment, some case law suggesting that collateral attacks might be permissible under certain circumstances, that principle was not so unequivocally established that Congress must have intended to incorporate it into § 1326. Furthermore, the Immigration and Nationality Act does include sections—particularly 8 U. S. C. § 1105(a)—dealing with judicial review of deportation

orders, which, although not directly applicable to this case, indicate that Congress considered and addressed some of the various circumstances in which challenges to deportation orders might arise without mentioning § 1326. Pp. 833–837.

2. Due process requires that a collateral challenge to the use of a deportation proceeding as an element of a criminal offense be permitted where the deportation proceeding effectively eliminates the right of the alien to obtain judicial review. Pp. 837–842.

(a) Depriving an alien of the right to have the disposition of a deportation hearing reviewed in a judicial forum requires, at a minimum, that review be made available in any subsequent proceeding in which the result of the deportation proceeding is used to establish an element of a criminal offense. Pp. 837–839.

(b) Respondents' deportation hearing was fundamentally unfair and violated due process. By permitting waivers of the right to appeal that were not the result of considered or intelligent judgment by respondents, the Immigration Judge completely deprived them of their right to judicial review of the deportation proceeding. This deprivation precludes the use of the deportation orders to prove § 1326 violations. Pp. 839–840.

(c) *Lewis* v. *United States*, 445 U. S. 55, is distinguishable from the instant case since it assumed the opportunity to challenge the underlying decision in a judicial forum, precisely that which was denied respondents here. Pp. 840–842.

781 F. 2d 111, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which BRENNAN, BLACKMUN, POWELL, and STEVENS, JJ., joined. REHNQUIST, C. J., filed a dissenting opinion, in which WHITE and O'CONNOR, JJ., joined, *post*, p. 842. SCALIA, J., filed a dissenting opinion, *post*, p. 846.

Christopher J. Wright argued the cause for the United States. With him on the briefs were *Solicitor General Fried*, *Assistant Attorney General Weld*, and *Deputy Solicitor General Bryson*.

Kathy Goudy, by appointment of the Court, 479 U. S. 981, argued the cause and filed a brief for respondents.*

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*Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *Richard F. Ziegler*, *Lucas Guttentag*, *Alvin J. Bronstein*, and *Kip Steinberg;* and for the American Immigration Lawyers Association by *Susan M. Lydon* and *Bill Ong Hing*.

JUSTICE MARSHALL delivered the opinion of the Court.

In this case, we must determine whether an alien who is prosecuted under 8 U. S. C. § 1326 for illegal entry following deportation may assert in that criminal proceeding the invalidity of the underlying deportation order.

I

Respondents, Jose Mendoza-Lopez and Angel Landeros-Quinones, were arrested at separate locations in Lincoln, Nebraska, on October 23, 1984, by agents of the Immigration and Naturalization Service. On October 30, 1984, they were transported to Denver, Colorado, where a group deportation hearing was held for respondents along with 11 other persons, all of whom were, like respondents, Mexican nationals.[1] After the hearing, respondents were ordered deported and were bused to El Paso, Texas. They were deported from El Paso on November 1, 1984. Each received, at the time of his deportation, a copy of Form I–294, which advised, in both Spanish and English, that a return to the United States without permission following deportation would constitute a felony.

On December 12, 1984, both respondents were once again separately arrested in Lincoln, Nebraska. They were subsequently indicted by a grand jury in the District of Nebraska on charges of violating 8 U. S. C. § 1326, which provides:

"Any alien who—

"(1) has been arrested and deported or excluded and deported, and thereafter

"(2) enters, attempts to enter, or is at any time found in the United States . . .

[1] Respondents have at no point raised, and we do not express any opinion regarding, the propriety of the group deportation procedure used in this case. Compare *United States* v. *Barraza-Leon*, 575 F. 2d 218, 219–220 (CA9 1978), with *United States* v. *Calles-Pineda*, 627 F. 2d 976, 977 (CA9 1980).

> "shall be guilty of a felony, and upon conviction thereof, be punished by imprisonment of not more than two years, or by a fine of not more than $1,000, or both."[2]

Respondents moved in the District Court to dismiss their indictments, on the ground that they were denied fundamentally fair deportation hearings. They contended that the Immigration Law Judge inadequately informed them of their right to counsel at the hearing, and accepted their unknowing waivers of the right to apply for suspension of deportation.[3]

The District Court ruled that respondents could collaterally attack their previous deportation orders. *United States* v. *Landeros-Quinones*, CR 85–L–06 (Feb. 28, 1985). It rejected their claims that they were not adequately informed of their right to counsel. It found, however, that respondents had apparently failed to understand the Immigration Judge's explanation of suspension of deportation.[4] The District

[2] The statute excepts those aliens who have either received the express consent of the Attorney General to reapply for admission or who otherwise establish that they were not required to obtain such consent. 8 U. S. C. §§ 1326 (2)(A), (B). Respondents do not contend that either exception applies to them.

[3] Suspension of deportation is a discretionary remedy providing relief from deportation. The statutory section applicable to respondents makes the remedy available to a deportable alien who has been physically present in the United States for at least seven years, who was during that time a person of good moral character, and whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or his spouse, parent, or child, who is a United States citizen or an alien lawfully admitted to the United States for permanent residence. 8 U. S. C. § 1254(a). Suspension of deportation not only provides relief from deportation, but enables the alien to adjust his status to that of an alien lawfully admitted for permanent residence. *Ibid.*

[4] The District Court found that the Immigration Judge did not answer a question from one of the respondents regarding application for suspension of deportation; that the Immigration Judge addressed the wrong respondent while discussing eligibility for the remedy; that the Immigration Judge did not make clear how much time he would allow respondents to apply for suspension; and that Landeros-Quinones asked a question which demonstrated that he did not understand the concept of suspension of deporta-

Court concluded that respondents had not made knowing and intelligent waivers of their rights to apply for suspension of deportation or their rights to appeal, finding it "inconceivable that they would so lightly waive their rights to appeal, and thus to the relief they now claim entitlement, *[sic]* if they had been fully apprised of the ramifications of such a choice." App. to Pet. for Cert. 23a. Holding that the "failure to overcome these defendants' lack of understanding about the proceedings, which is apparent from listening to the tape recording, totally undermined the reliability of the proceedings" and that "substantial justice was not done," the District Court dismissed the indictments in both cases. *Id.*, at 26a.

The Court of Appeals for the Eighth Circuit affirmed. 781 F. 2d 111 (1985). Noting a conflict among the Circuits regarding whether a defendant prosecuted under § 1326 may collaterally attack a deportation order, the court agreed with those Courts of Appeals that had concluded that a material element of the offense prohibited by § 1326 was a "lawful" deportation. *Id.*, at 112. It went on to state that principles of fundamental fairness required a pretrial review of the underlying deportation to examine whether the alien received due process of law. The Court of Appeals affirmed the District Court's conclusion that there was a due process violation in this case, holding that, "[b]ecause the defendants did not fully understand the proceedings, the hearing was fundamentally unfair, and the deportation order was obtained unlawfully. Thus, it cannot stand as a material element forming the basis of the charges against the defendants." *Id.*, at 113.[5]

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tion, but that the Immigration Judge failed to explain further. The District Court contrasted this cursory and confusing treatment of the issue of suspension of deportation with the extensive inquiry that took place when two of the other aliens sought voluntary departure in lieu of deportation, one of whom was ultimately granted voluntary departure. App. to Pet. for Cert. 20a–22a.

[5] One judge dissented on the ground that a challenge to the propriety of a previous deportation order may never be asserted in a criminal proceeding under § 1326. 781 F. 2d, at 113–114.

To resolve the conflict among the Circuits,[6] we granted certiorari. 479 U. S. 811 (1986). We affirm.

II

In *United States* v. *Spector*, 343 U. S. 169 (1952), we left open whether the validity of an underlying order of deportation may be challenged in a criminal prosecution in which that prior deportation is an element of the crime.[7] Today, we

[6] Compare, *e. g.*, *United States* v. *Nicholas-Armenta*, 763 F. 2d 1089, 1090 (CA9 1985), and *United States* v. *Bowles*, 331 F. 2d 742, 749–750 (CA3 1964) (collateral attack on legality of deportation permitted in § 1326 proceeding), with *United States* v. *Petrella*, 707 F. 2d 64, 66 (CA2), cert. denied, 464 U. S. 921 (1983), *United States* v. *Gonzalez-Parra*, 438 F. 2d 694, 697 (CA5), cert. denied, 402 U. S. 1010 (1971), and *Arriaga-Ramirez* v. *United States*, 325 F. 2d 857, 859 (CA10 1963) (collateral attacks barred in prosecutions under § 1326); see also *United States* v. *Rosal-Aguilar*, 652 F. 2d 721, 723 (CA7 1981) (trial *de novo* on the factual basis of the underlying deportation is not a constitutional prerequisite to conviction under § 1326, but "the Government must prove the underlying deportation to have been based on a valid legal predicate and obtained according to law"); *Petrella* v. *United States*, 464 U. S. 921, 922 (1983) (WHITE, J., dissenting from denial of certiorari) (internal quotation omitted).

[7] In *Spector*, an alien against whom an order of deportation was outstanding was prosecuted for failure to make timely application for documents necessary to his departure. He challenged the statute on vagueness grounds and prevailed in the District Court. The case was appealed directly to this Court, which ruled that the statute was not void for vagueness. 343 U. S., at 171–172. The Court noted the argument that the statute was unconstitutional because it afforded no opportunity for the court trying the criminal charge to pass on the validity of the order of deportation, but declined to address the issue because it "was neither raised by the appellee nor briefed nor argued here." *Id.*, at 172. "It will be time to consider whether the validity of the order of deportation may be tried in the criminal trial . . . when and if the appellee seeks to have it tried. That question is not foreclosed by this opinion. We reserve decision on it." *Id.*, at 172–173.

Justice Jackson, with whom Justice Frankfurter joined, dissented on the ground that the statute at issue impermissibly allowed the use of an administrative determination as conclusive evidence of a fact in a criminal prosecution. "Having thus dispensed with important constitutional safeguards in obtaining an administrative adjudication that the alien is guilty of conduct making him deportable on the ground it is only a civil proceeding, the

squarely confront this question in the context of § 1326, which imposes a criminal penalty on any alien who has been deported and subsequently enters, attempts to enter, or is found in, the United States. The issue before us is whether a federal court must *always* accept as conclusive the fact of the deportation order, even if the deportation proceeding was not conducted in conformity with due process.[8]

The first question we must address is whether the statute itself provides for a challenge to the validity of the deportation order in a proceeding under § 1326. Some of the Courts of Appeals considering the question have held that a deportation is an element of the offense defined by § 1326 only if it is "lawful,"[9] and that § 1326 therefore permits collateral

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Government seeks to turn around and use the result as a conclusive determination of that fact in a criminal proceeding. We think it cannot make that use of such an order." *Id.*, at 179.

Congress resolved the potential problem in *Spector* when, in 1961, it enacted 8 U. S. C. § 1105a(a)(6), which provides explicitly that, if the validity of a deportation order has not been judicially determined, it may be challenged in a criminal proceeding against the alien under 8 U. S. C. § 1252(e) for willfully failing or refusing to make timely application in good faith for travel or other documents necessary to his departure. Section 1105a does not explicitly address the availability of collateral attack under § 1326.

[8] In its petition for certiorari, the United States did not seek review of the Court of Appeals' holding that the deportation proceeding in this case was fundamentally unfair and that the deportation order was therefore unlawful. Pet. for Cert. 7.

[9] See, *e. g.*, *United States* v. *Gasca-Kraft*, 522 F. 2d 149, 152 (CA9 1975) ("A material element of the offense defined by 8 U. S. C. § 1326 is a *lawful* deportation"); *United States* v. *Bowles*, *supra*, at 749 ("When Congress made use of the word 'deported' in the statute, it meant 'deported according to law'"). The Court of Appeals for the Eighth Circuit, in deciding this case, noted that other courts had permitted collateral attack on the ground that "a material element of the offense prohibited by 8 U. S. C. § 1326 is a 'lawful' deportation" and stated that it "agree[d] with this rationale." 781 F. 2d, at 112. The court does not appear to have relied entirely on the statute in ruling that the propriety of the deportation could be reviewed in the § 1326 proceeding, since it then continued: "Allowing a pretrial review of the underlying deportation to examine whether due process

challenge to the legality of an underlying deportation order. The language of the statute, however, suggests no such limitation, stating simply that "[a]ny alien who has been arrested and deported or excluded and deported," 8 U. S. C. § 1326 (1), will be guilty of a felony if the alien thereafter enters, attempts to enter, or is at any time found in, the United States, 8 U. S. C. § 1326(2).

Nor does the sparse legislative history contain any evidence that Congress intended to permit challenge to the validity of the deportation in the § 1326 proceeding. Before § 1326 was enacted, three statutory sections imposed criminal penalties upon aliens who reentered the country after deportation: 8 U. S. C. § 180(a) (1946 ed.) (repealed 1952), which provided that any alien who had been "deported in pursuance of law" and subsequently entered the United States would be guilty of a felony; 8 U. S. C. § 138 (1946 ed.) (repealed 1952), which provided that an alien deported for prostitution, procuring, or similar immoral activity, and who thereafter reentered the United States, would be guilty of a misdemeanor and subject to a different penalty; and 8 U. S. C. § 137–7(b) (1946 ed., Supp. V) (repealed 1952), which stated that any alien who reentered the country after being deported for subversive activity would be guilty of a felony and subject to yet a third, more severe penalty.[10] See H. R. Rep. No. 1365, 82d Cong., 2d Sess., 219–220 (1952).

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was provided insures fundamental fairness to the rights of the criminal defendant. Accordingly, we conclude that defendants in section 1326 prosecutions may collaterally attack their previous deportation orders on the ground that they were not accorded due process at the deportation hearing." *Id.*, at 112–113.

[10] Section 180(a) provided for punishment by imprisonment of not more than two years or a fine of not more than $1,000, or both; § 138 provided solely for imprisonment for up to two years; § 137–7(b) provided for imprisonment for up to five years. The purpose of § 1326 was to impose the same penalty on any person who returned to the United States without permission after deportation, regardless of the basis of the original deportation. See S. Rep. No. 1515, 81st Cong., 2d Sess., 655, 656 (1950).

Congress thus had available to it in at least one of the predecessor sections—§ 180(a)—express language that would have permitted collateral challenges to the validity of deportation proceedings in a criminal prosecution for reentry after deportation.[11] It nonetheless failed to include in § 1326 the "in pursuance of law" language of § 180(a). And while there was, at the time of the enactment of § 1326, some case law suggesting that a collateral attack on a deportation proceeding might under certain circumstances be permitted, that principle was not so unequivocally established as to persuade us that Congress must have intended to incorporate that prior law into § 1326.[12]

The Immigration and Nationality Act does include sections that limit judicial review of deportation orders. 8 U. S. C. § 1105a provides that, outside of enumerated exceptions, the procedures prescribed by Title 28 of the United States Code for review of federal agency orders "shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation." The enumerated exceptions permit an alien to challenge a deportation order, the validity of which has not previously been judicially determined, in a criminal proceeding against the alien for violation of 8 U. S. C. §§ 1252(d) or (e), 8 U. S. C. § 1105a(a)(6), and any alien held in custody

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[11] That Congress had before it the text of all three sections was clear—their text was in all pertinent respects reproduced as "existing law" in the House Report on the statute that included § 1326. H. R. Rep. No. 1365, 82d Cong., 2d Sess., 219–220 (1952).

[12] See, *e. g.*, *United States ex rel. Beck* v. *Neelly*, 202 F. 2d 221, 222, 224 (CA7) (declining to decide whether deported alien may challenge prior deportation in habeas corpus proceeding), cert. denied, 345 U. S. 997 (1953); *United States ex rel. Steffner* v. *Carmichael*, 183 F. 2d 19, 20 (CA5) (collateral attack on deportation proceeding in later deportation proceeding impermissible unless there was "gross miscarriage of justice" in the former proceeding; prior order here was valid), cert. denied, 340 U. S. 829 (1950); *Daskaloff* v. *Zurbrick*, 103 F. 2d 579, 580–581 (CA6 1939) (alien deported as a prostitute who reentered country and was detained on warrant of deportation under 8 U. S. C. § 155 (1946 ed.) (repealed 1952) could not collaterally attack validity of earlier deportation through habeas corpus).

pursuant to an order of deportation may obtain judicial review of that order in a habeas corpus proceeding, 8 U. S. C. § 1105a(a)(9). These sections are not directly applicable to this case, since respondents did not ask the District Court to vacate their deportation orders and the court did not do so. It ruled only that the orders could not properly be used as the predicate for a § 1326 conviction. Yet the text of § 1105a indicates that Congress considered and addressed some of the various circumstances in which challenges to deportation orders might arise and did not mention § 1326. See also 8 U. S. C. § 1101(g) ("For the purposes of this chapter any alien ordered deported . . . who has left the United States, shall be considered to have been deported in pursuance of law . . ."); but see *Mendez* v. *INS*, 563 F. 2d 956, 959 (CA9 1977).[13]

The text and background of § 1326 thus indicate no congressional intent to sanction challenges to deportation orders in proceedings under § 1326.

III

A

That Congress did not intend the validity of the deportation order to be contestable in a § 1326 prosecution does not end our inquiry. If the statute envisions that a court may impose a criminal penalty for reentry after *any* deportation, regardless of how violative of the rights of the alien the deportation proceeding may have been, the statute does not comport with the constitutional requirement of due process.[14]

Our cases establish that where a determination made in an administrative proceeding is to play a critical role in the sub-

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[13] Contrary to JUSTICE SCALIA's suggestion, *post*, at 849, our opinion today does not reject the holding in *Mendez*, as to which we express no view.

[14] The Government stated at oral argument that it was the position of the United States that there were "absolutely no due process limitations to the enforcement of Section 1326." Tr. of Oral Arg. 10.

sequent imposition of a criminal sanction, there must be *some* meaningful review of the administrative proceeding. See *Estep* v. *United States*, 327 U. S. 114, 121–122 (1946); *Yakus* v. *United States*, 321 U. S. 414, 444 (1944); cf. *McKart* v. *United States*, 395 U. S. 185, 196–197 (1969).[15] This principle means at the very least that where the defects in an administrative proceeding foreclose judicial review of that proceeding, an alternative means of obtaining judicial review must be made available before the administrative order may be used to establish conclusively an element of a criminal offense.[16] The result of those proceedings may subsequently be used to convert the misdemeanor of unlawful entry into

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[15] Even with this safeguard, the use of the result of an administrative proceeding to establish an element of a criminal offense is troubling. See *United States* v. *Spector*, 343 U. S. 169, 179 (1952) (Jackson, J., dissenting). While the Court has permitted criminal conviction for violation of an administrative regulation where the validity of the regulation could not be challenged in the criminal proceeding, *Yakus* v. *United States*, 321 U. S. 414 (1944), the decision in that case was motivated by the exigencies of wartime, dealt with the propriety of regulations rather than the legitimacy of an adjudicative procedure, and, most significantly, turned on the fact that adequate judicial review of the validity of the regulation was available in another forum. Under different circumstances, the propriety of using an administrative ruling in such a way remains open to question. We do not reach this issue here, however, holding that, at a minimum, the result of an administrative proceeding may not be used as a conclusive element of a criminal offense where the judicial review that legitimated such a practice in the first instance has effectively been denied.

[16] A number of commentators have expressed the notion that, where the deportation proceeding violated fundamental fairness, its validity may be challenged in a criminal proceeding under § 1326. See, *e. g.*, Comment, Collateral Attacks on Deportation Orders in Prosecutions for Illegal Reentry, 48 U. Chi. L. Rev. 83, 90–91, 102–103 (1981) (where alien was denied fundamental fairness at the deportation hearing, collateral attacks in § 1326 proceedings would be proper); Note, Collaterally Attacking Deportation Orders in Criminal Prosecutions for Illegal Reentry Under Section 276 of the Immigration and Nationality Act of 1952, 56 Notre Dame Law. 677, 686–688 (1981) (fundamental fairness requires some form of collateral review of civil deportation proceedings which have criminal consequences).

the felony of unlawful entry after a deportation. Depriving an alien of the right to have the disposition in a deportation hearing reviewed in a judicial forum requires, at a minimum, that review be made available in any subsequent proceeding in which the result of the deportation proceeding is used to establish an element of a criminal offense.[17]

B

Having established that a collateral challenge to the use of a deportation proceeding as an element of a criminal offense must be permitted where the deportation proceeding effectively eliminates the right of the alien to obtain judicial review, the question remains whether that occurred in this case. The United States did not seek this Court's review of the determination of the courts below that respondents' rights to due process were violated by the failure of the Immigration Judge to explain adequately their right to suspension of deportation or their right to appeal. Pet. for Cert. 7. The United States has asked this Court to assume that respondents' deportation hearing was fundamentally unfair in considering whether collateral attack on the hearing may be

[17] We decline at this stage to enumerate which procedural errors are so fundamental that they may functionally deprive the alien of judicial review, requiring that the result of the hearing in which they took place not be used to support a criminal conviction. We have previously recognized, however, in the context of criminal proceedings, that "some errors necessarily render a trial fundamentally unfair," *Rose* v. *Clark*, 478 U. S. 570, 577 (1986) (use of coerced confession, adjudication by a biased judge); see also *Rose* v. *Lundy*, 455 U. S. 509, 543–544 (1982) (STEVENS, J., dissenting) (mob violence, knowing use of perjured testimony). While the procedures required in an administrative proceeding are less stringent than those demanded in a criminal trial, analogous abuses could operate, under some circumstances, to deny effective judicial review of administrative determinations.

We note parenthetically that permitting collateral challenge to the validity of deportation orders in proceedings under § 1326 does not create an opportunity for aliens to delay deportation, since the collateral challenge we recognize today is available only in criminal proceedings instituted after reentry.

permitted. Tr. of Oral Arg. 6–7. We consequently accept the legal conclusions of the court below that the deportation hearing violated due process. If the violation of respondents' rights that took place in this case amounted to a complete deprivation of judicial review of the determination, that determination may not be used to enhance the penalty for an unlawful entry under § 1326. We think that it did. The Immigration Judge permitted waivers of the right to appeal that were not the result of considered judgments by respondents, and failed to advise respondents properly of their eligibility to apply for suspension of deportation. Because the waivers of their rights to appeal were not considered or intelligent, respondents were deprived of judicial review of their deportation proceeding. The Government may not, therefore, rely on those orders as reliable proof of an element of a criminal offense.

C

The United States asserts that our decision in *Lewis* v. *United States*, 445 U. S. 55 (1980), answered any constitutional objections to the scheme employed in § 1326. In *Lewis*, the Court held that a state-court conviction, even though it was uncounseled and therefore obtained in violation of the Sixth and Fourteenth Amendment rights of the defendant under *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), could be used as a predicate for a subsequent conviction under § 1202(a)(1) of Title VII of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, 18 U. S. C. App. § 1202(a)(1), which forbade any person convicted of a felony from receiving, possessing, or transporting a firearm. We do not consider *Lewis* to control the issues raised by this case. The question in *Lewis* was whether Congress could define that "class of persons who should be disabled from dealing in or possessing firearms," 445 U. S., at 67, by reference to prior state felony convictions, even if those convictions had resulted from procedures, such as the denial of

counsel, subsequently condemned as unconstitutional.[18] The Court there rejected Lewis' statutory challenge, holding that Congress had manifested no intent to permit collateral attacks upon the prior state convictions in federal criminal proceedings, and further held that this use of uncounseled prior convictions did not violate the equal protection component of the Due Process Clause of the Fifth Amendment. In rejecting the notion that the statute permitted, or the Constitution required, this "new form of collateral attack" on prior convictions, the Court pointed to the availability of alternative means to secure judicial review of the conviction: "[I]t is important to note that a convicted felon may challenge the validity of a prior conviction, or otherwise remove his disability, before obtaining a firearm." *Ibid.*

It is precisely the unavailability of effective judicial review of the administrative determination at issue here that sets this case apart from *Lewis*. The fundamental procedural defects of the deportation hearing in this case rendered direct review of the Immigration Judge's determination unavailable to respondents. What was assumed in *Lewis*, namely the opportunity to challenge the predicate conviction in a judicial forum, was precisely that which was denied to respondents here. Persons charged with crime are entitled to have the factual and legal determinations upon which convictions are based subjected to the scrutiny of an impartial judicial offi-

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[18] Cf. *Burgett* v. *Texas*, 389 U. S. 109, 115 (1967); see also *Baldasar* v. *Illinois*, 446 U. S. 222, 226–227 (1980) (MARSHALL, J., concurring) (court may not constitutionally use prior uncounseled misdemeanor conviction collaterally to enhance a subsequent misdemeanor to a felony with an increased term of imprisonment); *United States* v. *Tucker*, 404 U. S. 443 (1972) (court may not consider constitutionally invalid prior convictions in imposing sentence on unrelated offense); see also 8 U. S. C. § 1325, which provides that an unlawful entry into the United States constitutes a misdemeanor. Section 1326 serves to enhance the penalty for unlawful entry, imposing a steeper punishment on individuals who violate § 1325 *and* who have previously been deported.

cer. *Lewis* does not reject that basic principle, and our decision today merely reaffirms it.

Because respondents were deprived of their rights to appeal, and of any basis to appeal since the only relief for which they would have been eligible was not adequately explained to them, the deportation proceeding in which these events occurred may not be used to support a criminal conviction, and the dismissal of the indictments against them was therefore proper. The judgment of the Court of Appeals is

Affirmed.

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

I agree with the Court's ruling that the language of 8 U. S. C. § 1326, its history, and other provisions of the Immigration and Nationality Act suggest that Congress did not intend to allow challenges to the validity of a deportation order in a § 1326 proceeding. I also agree with the view that there may be exceptional circumstances where the Due Process Clause prohibits the Government from using an alien's prior deportation as a basis for imposing criminal liability under § 1326. In my view, however, respondents have fallen far short of establishing such exceptional circumstances here. The Court, in reaching a contrary conclusion, misreads the decision of the District Court.

As the Court acknowledges, respondents, in the District Court, claimed only that "the Immigration Law Judge inadequately informed them of their right to counsel at the [deportation] hearing, and accepted their unknowing waivers of the right to apply for suspension of deportation." *Ante*, at 831; see also *United States* v. *Landeros-Quinones*, No. CR85–L–06, p. 8 (Neb., Feb. 28, 1985). Respondents did not claim that the judge failed to explain adequately their rights to appeal or that their waivers of these rights were, as we are told today, "not considered or intelligent." *Ante*, at 840.

It is true that the District Court, *sua sponte*, raised the issue whether respondents knowingly waived their rights to appeal the deportation orders. The court, however, treated the issue as subsidiary to its determination that the Immigration Judge did not fully apprise respondents of their rights to apply for suspension of deportation. In ultimately disposing of the issue, the court stated:

> "In light of their claimed eligibility for suspension of deportation, . . . I find it inconceivable that they would so lightly waive their rights to appeal, and thus to the relief they now claim entitlement, *[sic]* if they had been fully apprised of the ramifications of such a choice." *United States* v. *Landeros-Quinones*, *supra*, at 12.

The narrow scope of the District Court's resolution of the question whether respondents had effectively waived their appeal rights is further demonstrated by the District Court's examination of the prejudice resulting from the manner in which the deportation hearing was conducted. Determining that a showing of prejudice was a necessary predicate to a successful collateral attack to a prior deportation order, the court concluded that there was a substantial likelihood that respondents were harmed by "the failure of the Immigration Law Judge to fully comply with the provisions of 8 C.F.R. § 242.17," the regulation governing notification of apparent eligibility for suspension of deportation. *Id.*, at 14. Yet, aside from possible harm to respondents resulting from their failure to pursue suspension of deportation relief, the District Court did not identify any prejudice from respondents' failure to appeal. From these findings of the District Court, the most that can be said with certainty is that the court determined that respondents did not understand that they could pursue their claimed eligibility for suspension of deportation in further proceedings.

In affirming the District Court's decision in this case, the Court of Appeals did not at all address the question whether respondents knowingly waived their rights to appeal, but in-

stead limited its discussion to respondents' failure to understand that they could seek suspension of deportation. The Court of Appeals decision thus also does not support this Court's sweeping assertion that "[t]he fundamental procedural defects of the deportation hearing in this case rendered direct review of the Immigration Judge's determination unavailable to respondents." *Ante*, at 841.

The Court's desire to inject into this case a finding that respondents suffered from a denial of their rights to appeal for all purposes is understandable. Without such a finding, the only articulated basis for the Court's due process holding is respondents' claim that their deportation orders were invalid because they were not adequately informed that they could apply for suspension of deportation. The Court's acceptance of this latter claim provides little foundation for its decision.

Recognizing that Congress intended to limit the number of aliens qualifying for suspension of deportation, we have interpreted the statutory section providing for such relief, 8 U. S. C. § 1254(a)(1), as establishing strict threshold criteria that must be met before the Attorney General may grant the relief. See *INS* v. *Rios-Pineda*, 471 U. S. 444 (1985); *INS* v. *Phinpathya*, 464 U. S. 183 (1984); *INS* v. *Jong Ha Wang*, 450 U. S. 139 (1981). Even if all of the requirements of § 1254(a)(1) are satisfied, we have recognized that "it remains in the discretion of the Attorney General to . . . refuse to suspend deportation." *INS* v. *Rios-Pineda*, 471 U. S., at 446. Moreover, if the Attorney General decides that relief should be denied as a matter of discretion, he need not even inquire whether an alien meets the threshold statutory requirements. *Id.*, at 449.

The District Court, in deciding whether respondents were adequately apprised of their ability to apply for suspension of their deportations, concluded that the Immigration Judge complied with the technical notice requirements of 8 CFR § 242.17 (1987). Given that suspension of deportation is provided only as a matter of legislative grace and entrusted to

the broad discretion of the Attorney General, the Immigration Judge's failure to undertake further efforts to make certain that respondents were fully knowledgeable of this privilege hardly compares to the procedural defects this Court has previously identified as fundamentally unfair. See *Rose* v. *Clark*, 478 U. S. 570, 577 (1986) (use of a coerced confession, adjudication by a biased judge), cited *ante*, at 839, n. 17. The judge's failure to engage respondents in an extended colloquy concerning suspension of their deportations neither "aborted the basic trial process" nor rendered it presumptively prejudicial. 478 U. S., at 578, n. 6.

Conspicuously absent from respondents' arguments to this Court is any suggestion that the Immigration Law Judge employed improper procedures or erroneously applied the law in determining that respondents were deportable. In fact, several factual findings by the District Court below, not mentioned by the Court, suggest that the Immigration Judge expended considerable effort to ensure the fairness of the hearing. For example, the District Court noted that the Immigration Judge commenced the hearing by instructing respondents "that if any of them did not understand any of the proceedings, to raise their hands and their misunderstandings would be addressed so as to eliminate any confusion." *United States* v. *Landeros-Quinones*, No. CR85–L–06, p. 9 (Neb., Feb. 28, 1985). Respondents indicated their understanding of this arrangement. Moreover, the Immigration Judge informed respondents that they were entitled to be represented by counsel, and made certain that they received a list of the free legal services available to them. At the conclusion of the hearing, the judge asked respondents whether they wished to accept his ruling that they were deportable, appeal the ruling, or reserve decision, and respondents each stated that they accepted the judge's ruling. Under these circumstances, I cannot say that respondents' deportation proceedings violated the dictates of the Due

Process Clause.* I would therefore hold that the courts below erred in concluding that respondents' prior deportation orders may not be used in the § 1326 proceedings brought against them.

JUSTICE SCALIA, dissenting.

When respondents were deported from the United States in October 1984, they were specifically warned that 8 U. S. C. § 1326 made it a felony for them to reenter the United States illegally. Two months later, they were apprehended in the United States and charged with violating § 1326. Respondents assert that even if their reentry was illegal, they cannot lawfully be punished for violating § 1326, because the proceedings in which they were originally deported violated the Due Process Clause.[1] I agree with the

*Because the Government took the position before this Court that deportation orders may *never* be collaterally attacked in a § 1326 proceeding, it did not request the Court to pass on the question whether respondents' deportation proceedings violated their due process rights. The Government, however, has not conceded that the deportation proceedings were fundamentally unfair. See, *e. g.*, Tr. of Oral Arg. 13–14. Because the fairness of these proceedings was litigated in the courts below and is a matter subsumed in the precise question presented for this Court's review, it cannot be seriously argued that the issue is not properly before this Court. Indeed, the Court itself has chosen to decide the issue, albeit in a manner different from that suggested here.

[1]The District Court and the Court of Appeals both held that the proceedings in question violated the Due Process Clause. I agree with the Court that, because the Government did not ask us to review those holdings, see Pet. for Cert. 7, n. 6; Brief for United States 5–6, n. 5; Tr. of Oral Arg. 6–7, it is not appropriate to do so. See this Court's Rule 21.1(a) ("Only the questions set forth in the petition or fairly included therein will be considered by the Court"). See also, *e. g.*, *INS* v. *Cardoza-Fonseca*, 480 U. S. 421, 448–449, n. 32 (1987). In arguing to the contrary, THE CHIEF JUSTICE first observes that the lawfulness of respondents' deportation proceedings was litigated in the Court of Appeals, and that the Government has not conceded the point. *Ante*, this page, n. While these observations dispose of other possible objections to consideration of the unchallenged holdings, they in no way displace the application of Rule 21.1(a). THE CHIEF JUSTICE also suggests that the dissent is free to consider the

Court that the lawfulness of respondents' original deportation proceedings is irrelevant to the question whether respondents violated § 1326. I dissent, however, because I do not share the Court's view that the lawfulness of those proceedings is relevant to the question whether respondents may constitutionally be punished if they violated § 1326.

I think it clear that Congress may constitutionally make it a felony for deportees—irrespective of the legality of their deportations—to reenter the United States illegally. See *Lewis* v. *United States*, 445 U. S. 55 (1980) (Congress may constitutionally make it a felony for convicted felons—irrespective of the legality of their convictions—to deal in or possess firearms).[2] The sole ground upon which the Court attempts to distinguish *Lewis* is that in this case respondents were completely foreclosed from obtaining "effective judicial review" of their deportations, while in *Lewis* the felons could

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due process holdings because the Court itself does. *Ibid.* But I understand the Court to accept rather than review the holdings. See *ante*, at 840. Finally, THE CHIEF JUSTICE asserts that the question of the correctness of the holdings is "subsumed in the precise question presented for this Court's review." *Ante*, at 846, n. I disagree. As formulated by the Government, the question presented is "Whether a defendant prosecuted under 8 U. S. C. § 1326 for reentering the United States after having been deported may collaterally attack the validity of his deportation proceeding?" Pet. for Cert. I. I fail to see how there is subsumed within this the question whether a collateral attack in the present case would be successful. But for these points, I would agree with THE CHIEF JUSTICE that no due process violation occurred.

[2] *Lewis* involved a statute that relied upon the fact of a prior *criminal* conviction, rather than, as in this case, the fact of a prior *civil* deportation. As the Court notes, *ante*, at 838, n. 15, it has been suggested that the Constitution may in some circumstances forbid use of the outcomes of administrative proceedings—even those lawfully conducted and subject to judicial review—in subsequent criminal proceedings. Whether or not that is so, I do not believe this case presents such circumstances. In any event, respondents have not claimed that it does, instead arguing only that they must be permitted to show that their deportation proceedings were not lawfully conducted. The validity of that argument can have nothing to do with whether the proceedings were administrative or criminal.

have obtained collateral review of their convictions before obtaining firearms. *Ante*, at 837–840, 841. It is true that the Court in *Lewis* relied on the availability of collateral review. 445 U. S., at 64, 67. But, contrary to the Court's implication, *ante*, at 837, neither *Lewis* nor any of the other cases relied upon by the Court squarely holds that the Due Process Clause invariably forbids reliance upon the outcome of unreviewable administrative determinations in subsequent criminal proceedings. See *McKart* v. *United States*, 395 U. S. 185 (1969) (interpreting a statute to permit collateral attack of prior administrative orders); *Estep* v. *United States*, 327 U. S. 114 (1946) (same); *Yakus* v. *United States*, 321 U. S. 414 (1944) (interpreting a statute to forbid collateral attack of earlier administrative orders).

The Court's apparent adoption of that conclusion today seems to me wrong. To illustrate that point by one out of many possible examples, imagine that a State establishes an administrative agency that (after investigation and full judicial-type administrative hearings) periodically publishes a list of unethical businesses. Further imagine that the State, having discovered that a number of previously listed businesses are bribing the agency's investigators to avoid future listing, passes a law making it a felony for a business that has been listed to bribe agency investigators. It cannot be that the Due Process Clause forbids the State to punish violations of that law unless it either makes the agency's listing decisions judicially reviewable or permits those charged with violating the law to defend themselves on the ground that the original listing decisions were in some way unlawful.

Even if I believed the availability of "effective judicial review" to be relevant, I would still dissent, because review was available here. It is true, as the Court notes, that the District Court found that respondents' waivers of any appeal from the Immigration Judge's deportation order were "not the result of considered judgments," App. to Pet. for Cert.

23a, because they were affected by the Immigration Judge's failure adequately to explain to respondents that they could apply for suspension of deportation, *ante*, at 839. There is a world of difference, however, between denial of a right to appeal and failure to assure that parties understand the available grounds for appeal and forgo them in a "considered" fashion. Since to my knowledge administrative agencies rarely undertake such assurance, the Court's unbounded and unexplained conception of "effective" denial of a right of appeal, see *ante*, at 839, n. 17, apparently leads to the peculiar conclusion that administrative proceedings are almost always without judicial review. I reject this conclusion.

Moreover, in concluding that the Immigration Judge's acceptance of respondents' unconsidered waivers effectively denied respondents their rights to appeal, the Court completely ignores the possibility that, notwithstanding their waivers and the fact that they had been deported, respondents could still have appealed their deportations on the ground that the deportations were unlawful and the waivers were unlawfully secured, cf., *e. g.*, *Mendez* v. *INS*, 563 F. 2d 956, 959 (CA9 1977), or could have brought other collateral challenges to their deportations. I express no view on the question whether such suits would have been permissible under the applicable statutes, see, *e. g.*, 8 U. S. C. § 1101(g), but merely note that a negative answer to that question is a necessary, and entirely unexplained, component of the Court's holding.[3]

[3] Nor could it be argued that, although avenues of judicial review were theoretically available, respondents—not having been informed of the grounds upon which they should seek relief—could not reasonably have been expected to pursue them. That argument plainly is foreclosed by *Lewis* v. *United States*, 445 U. S. 55 (1980), in which the Court rejected the analogous argument, advanced by the dissent, that it was unreasonable to rely on the availability of collateral relief where the defect in the original proceeding was that the felon lacked the assistance of counsel. See *id.*, at 73 (BRENNAN, J., dissenting).

For these reasons, I think that if respondents' reentry into the United States was unlawful, respondents may constitutionally be punished for violating § 1326. I would reverse the contrary judgment of the Court of Appeals.

Syllabus

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL–CIO, ET AL. *v.* HECHLER

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

No. 85–1360. Argued January 20, 1987—Decided May 26, 1987

Respondent, an electrical apprentice employed by Florida Power and Light Company (Florida Power), was injured while assigned to a job that required her to perform tasks allegedly beyond the scope of her training and experience. She brought suit in a Florida court against petitioner unions (collectively referred to as the Union), alleging that "pursuant to contracts and agreements" between the Union and Florida Power, "to which . . . [she] was a third-party beneficiary," and "pursuant to the relationship by and between" the Union and her, the Union had a duty of care to ensure her a safe workplace, which it had breached by allowing her to be assigned to work in a dangerous location. The Union removed the action to federal court on the grounds that its alleged duty arose solely from the collective-bargaining agreement, and therefore that any breach of its duty was actionable solely under § 301 of the Labor Management Relations Act, 1947. The Union then moved to dismiss the complaint as untimely under the applicable federal statute of limitations. Respondent argued that the basic nature of her action was a state common-law "suit in tort," and prayed that the case be remanded to the state court. The District Court granted the Union's motion to dismiss, holding that the Union's alleged duty flowed from the collective-bargaining agreement, and that respondent's claim thus was pre-empted by § 301 and was untimely under federal law. The Court of Appeals reversed.

Held:

1. Respondent's claim is not sufficiently independent of the collective-bargaining agreement to withstand § 301's pre-emptive force. Pp. 855–862.

(a) The interests in interpretive uniformity and predictability that require that labor-contract disputes be resolved by reference to federal common law also require that the meaning given a contract phrase or term be subject to uniform federal interpretation, whether the question arises in the context of a suit for breach of contract or in a suit alleging liability in tort. Thus, an employee's state-law tort action that necessarily rests on an interpretation of terms in the collective-bargaining

agreement is pre-empted by § 301. *Allis-Chalmers Corp.* v. *Lueck*, 471 U. S. 202. Pp. 855–859.

(b) Under Florida law, the employer, not the labor union, owes employees a duty to furnish a reasonably safe workplace. A union may assume a responsibility to employees by accepting a duty of care through a contractual arrangement, and, under Florida law, if a party breaches a contractual duty, the aggrieved party may bring either an action for breach of contract or a tort action for the injury suffered as a result of the contractual breach. However, the threshold inquiry for determining if a cause of action exists is an examination of the contract to ascertain what duties were accepted by each of the parties and the scope of those duties. Respondent's complaint alleges precisely this type of tortious breach-of-contract claim, and her allegations of negligence are significant only if the Union, under the collective-bargaining agreement, assumed the duty of care that it allegedly breached. Thus, questions of contract interpretation underlie any finding of tort liability, and respondent is precluded from evading § 301's pre-emptive force by casting her claim as a state-law tort action. Pp. 859–862.

2. If respondent's suit is treated as a § 301 claim, it must be determined whether the claim is time barred by the applicable statute of limitations under federal law. Because the Court of Appeals erroneously concluded that respondent's claim was not pre-empted, it is appropriate for that court to consider, in the first instance, whether the period of limitations adopted by the District Court is applicable to respondent's claim. Pp. 863–865.

772 F. 2d 788, vacated and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BRENNAN, WHITE, MARSHALL, POWELL, O'CONNOR, and SCALIA, JJ., joined. STEVENS, J., filed an opinion concurring in part and dissenting in part, *post*, p. 865.

Laurence Gold argued the cause for petitioners. With him on the briefs were *David M. Silberman*, *Laurence J. Cohen*, *Elihu I. Leifer*, and *Richard M. Resnick*.

Joel S. Perwin argued the cause for respondent. With him on the brief was *Sheldon J. Schlesinger*.

JUSTICE BLACKMUN delivered the opinion of the Court.

In *Allis-Chalmers Corp.* v. *Lueck*, 471 U. S. 202 (1985), this Court held that "when resolution of a state-law claim is substantially dependent upon analysis of the terms of

an agreement made between the parties in a labor contract," the plaintiff's claim is pre-empted by § 301 of the Labor Management Relations Act, 1947 (LMRA), 61 Stat. 156, 29 U. S. C. § 185. 471 U. S., at 220. The question presented by this case is whether a state-law tort claim that a union has breached its duty of care to provide a union member with a safe workplace is sufficiently independent of the collective-bargaining agreement to withstand the pre-emptive force of § 301.

I

At all times relevant to this case, plaintiff-respondent Sally Hechler was employed by Florida Power and Light Company (Florida Power) as an electrical apprentice. Petitioners, the International Brotherhood of Electrical Workers and its Local 759 (collectively referred to as the Union), are the exclusive bargaining representatives for the bargaining unit in which respondent was employed. On January 11, 1982, Florida Power assigned respondent to a job in an electrical substation that required her to perform tasks she alleges were beyond the scope of her training and experience. Shortly after commencing her new assignment, respondent was injured when she came into contact with highly energized components at the substation.

Two years later, respondent sued the Union in state court in Broward County, Fla. In her complaint, she alleged that "pursuant to contracts and agreements entered into by and between" the Union and Florida Power, and "pursuant to the relationship by and between" the Union and respondent, the Union had a duty to ensure that respondent "was provided safety in her work place and a safe work place," and to ensure that respondent "would not be required or allowed to take undue risks in the performance of her duties which were not commensurate with her training and experience." App. 4. The Union, pursuant to 28 U. S. C. § 1441, removed the lawsuit to the United States District Court for the Southern District of Florida on the grounds that the "alleged duty arises

solely from the alleged collective bargaining agreement between [the Union] and Florida Power," and therefore that any breach of this duty was actionable under § 301. 1 Record 3. Respondent at that time raised no objection to the removal.

In federal court, the Union moved to dismiss the complaint. It argued that respondent's claim arose solely under federal labor law and was untimely under the applicable federal statute of limitations. *Id.*, at 66–70. Respondent conceded: "The nature and scope of the duty of care owed [her] is determined by reference to the collective bargaining agreement." *Id.*, at 98. She argued, however, that the basic nature of her action was a state common-law "suit in tort" for the Union's negligence in failing to provide her a safe workplace. *Id.*, at 100–102. Respondent prayed that the case be remanded to the state court.

The District Court granted the Union's motion to dismiss. The court observed that the gravamen of the complaint was that the Union had breached a duty of care to respondent to provide her a safe workplace. "Significantly, the duty allegedly owed to [Hechler] flows from the collective bargaining agreement, which imposes a duty on the [Union] to monitor the safety and training of its members." App. to Pet. for Cert. 3a. The court concluded that because respondent had failed "to demonstrate that the [Union's] allegedly negligent activity was unrelated to the collective bargaining agreement or beyond the scope of the employee-union fiduciary relationship," her claim was pre-empted by federal labor law. *Id.*, at 4a. Having found that respondent's suit was governed by federal law, the court then held that the 6-month statute of limitations adopted in *DelCostello* v. *Teamsters*, 462 U. S. 151 (1983), applied to Hechler's case, and dismissed the suit as untimely.

The Court of Appeals for the Eleventh Circuit reversed. 772 F. 2d 788 (1985). It ruled that the complaint "on its face states a common law negligence claim that may be cognizable

in state court and is not preempted by the federal labor laws." *Id.*, at 790–791. The court concluded: "Though the [collective-bargaining] contract may be of use in defining the scope of the duty owed, liability will turn on basic negligence principles as developed by state law." *Id.*, at 794. Finding that "federal labor law was not invoked in plaintiff's complaint," *id.*, at 799, the court directed that the District Court remand the case to the state court for adjudication on the merits.

Because the Eleventh Circuit's decision appeared to conflict with the decision of the Sixth Circuit in *Michigan Mutual Ins. Co.* v. *Steelworkers*, 774 F. 2d 104 (1985), we granted certiorari. 476 U. S. 1113 (1986).

II

A

In *Allis-Chalmers Corp.* v. *Lueck*, 471 U. S. 202 (1985), we reviewed the pre-emptive scope of § 301.[1] We think it useful, at the outset, to repeat briefly the background outlined in the opinion in *Allis-Chalmers*. In *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448 (1957), the Court held that § 301 does more than simply confer jurisdiction on federal courts to hear suits charging violations of collective-bargaining agreements. *Id.*, at 450–451. The Court concluded that Congress, through § 301, had authorized federal courts to create a body of federal law for the enforcement of collective-bargaining agreements—law "which the courts must fashion from the policy of our national labor laws." *Id.*, at 456. It was explained in *Allis-Chalmers*, 471 U. S., at

[1] Section 301 of the Labor Management Relations Act, 1947 (LMRA) states:

"Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." 29 U. S. C. § 185(a).

209, that the Court in *Lincoln Mills* "understood § 301 as a congressional mandate to the federal courts to fashion a body of federal common law to be used to address disputes arising out of labor contracts."

Not long after *Lincoln Mills* was decided, the Court held that state courts have concurrent jurisdiction over § 301 claims. *Charles Dowd Box Co.* v. *Courtney*, 368 U. S. 502 (1962). Although the Court in *Dowd* proceeded upon the hypothesis that state courts would apply federal law when they exercised jurisdiction over § 301 claims,[2] it was in another case that same Term, *Teamsters* v. *Lucas Flour Co.*, 369 U. S. 95 (1962), that the Court expressly held that federal law, and not state law, must be used in adjudicating § 301 claims. There the Court observed: "The dimensions of § 301 require the conclusion that substantive principles of federal labor law must be paramount in the area covered by the statute." 369 U. S., at 103. The need for this uniformity was clearly explained:

> "The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements. Because neither party could be certain of the rights which it had obtained or conceded, the process of negotiating an agreement would be made immeasurably more difficult by the necessity of trying to formulate contract provisions in such a way as to contain the same meaning under two or more systems of law which might someday be invoked in enforcing the contract. Once the collective bargain was made, the possibility of conflicting substantive interpretation under competing legal sys-

[2] See *Teamsters* v. *Lucas Flour Co.*, 369 U. S. 95, 102 (1962), discussing *Charles Dowd Box Co.* v. *Courtney*, 368 U. S. 502 (1962). In *Dowd*, the Court impliedly referred to state courts as working with the federal courts "as there evolves in this field of labor management relations that body of federal common law of which *Lincoln Mills* spoke." *Id.*, at 514.

tems would tend to stimulate and prolong disputes as to its interpretation." *Id.*, at 103–104.

The Court thus concluded that "in enacting § 301 Congress intended doctrines of federal labor law uniformly to prevail over inconsistent local rules." *Id.*, at 104.

While the Court in *Lucas Flour* observed that federal law was paramount in "the area covered by" § 301, 369 U. S., at 103, in *Allis-Chalmers* the Court defined the range of claims that should be considered as coming within that coverage. The ordinary § 301 case is a contract claim in which a party to the collective-bargaining agreement expressly asserts that a provision of the agreement has been violated. See, *e. g.*, *Lucas Flour*, 369 U. S., at 104 (claim by employer that strike by union violated provision of collective-bargaining agreement). In *Allis-Chalmers*, however, the Court considered an employee's state-law tort action against his employer for bad-faith handling of disability-benefit payments due under a collective-bargaining agreement, and concluded that the interests supporting the uniform interpretation of collective-bargaining agreements under federal common law apply equally in the context of certain state-law tort claims. The Court set forth this basic principle:

> "The interests in interpretive uniformity and predictability that require that labor-contract disputes be resolved by reference to federal law also require that the meaning given a contract phrase or term be subject to uniform federal interpretation. Thus, questions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement, must be resolved by reference to uniform federal law, whether such questions arise in the context of a suit for breach of contract or in a suit alleging liability in tort. Any other result would elevate form over substance and allow parties to evade the requirements of § 301 by relabeling their contract claims as

claims for tortious breach of contract." 471 U. S., at 211.

The Court pointed out that if state law, in the context of a tort action, were allowed to determine the meaning of particular contract phrases or terms in a collective-bargaining agreement, "all the evils addressed in *Lucas Flour* would recur"; the "parties would be uncertain as to what they were binding themselves to" in a collective-bargaining agreement, and, as a result, "it would be more difficult to reach agreement, and disputes as to the nature of the agreement would proliferate." *Ibid.*

In *Allis-Chalmers*, the Court applied the rule that a tort claim "inextricably intertwined with consideration of the terms of the labor contract" is pre-empted under § 301, 471 U. S., at 213, and concluded that the claim in *Allis-Chalmers* fell within that category. The employee's allegation there was that his employer and its insurance company intentionally had failed to make required disability payments under a plan negotiated in a collective-bargaining agreement, and that, in so doing, they had breached a state-law insurance duty to act "in good faith" in paying disability benefits. *Id.*, at 206. The Court observed that any attempt to assess liability on the part of the employer would inevitably involve interpretation of the underlying collective-bargaining contract. First, the disability plan adopted in the collective-bargaining agreement might itself have included an implied requirement of good faith that the employer breached by its conduct. The Court explained: "[I]t is a question of federal contract interpretation whether there was an obligation under this labor contract to provide the payments in a timely manner, and, if so, whether Allis-Chalmers' conduct breached that implied contract provision." *Id.*, at 215. Second, under the relevant state law, the duty of "good faith" on which the plaintiff relied "intrinsically relate[d] to the nature and existence of the contract." *Id.*, at 216. The concept of "good faith" meant "'being faithful to one's duty or obliga-

tion,'" *ibid.*, quoting *Hilker* v. *Western Automobile Ins. Co.*, 204 Wis. 1, 13, 235 N. W. 413, 414 (1931), and, under state law, that duty was determined primarily by analyzing the responsibilities agreed to by the insurer in the written contract. The Court reasoned: "Because the right asserted not only derives from the contract, but is defined by the contractual obligation of good faith, any attempt to assess liability here inevitably will involve contract interpretation." 471 U. S., at 218. Inasmuch as federal law must control the uniform meaning given to contract terms in a collective-bargaining agreement, however, an employee's state-law tort action that necessarily rests on an interpretation of those terms is pre-empted by § 301. *Id.*, at 218–219.[3]

B

Under the principle set forth in *Allis-Chalmers*, we must determine if respondent's claim is sufficiently independent of the collective-bargaining agreement to withstand the pre-emptive force of § 301. Respondent's state-law tort claim is based on her allegation that the Union owed a duty of care to provide her with a safe workplace and to monitor her work assignments to ensure that they were commensurate with her skills and experience. Under the common law, however, it is the *employer*, not a labor union, that owes employees a duty to exercise reasonable care in providing a safe workplace. See, *e. g.*, W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on The Law of Torts 569 (5th ed.

[3] The Court took care in *Allis-Chalmers* to define the precise limits of its holding. The rule there set forth is that, when a state-law claim is substantially dependent on analysis of a collective-bargaining agreement, a plaintiff may not evade the pre-emptive force of § 301 of the LMRA by casting the suit as a state-law claim. 471 U. S., at 220. The Court emphasized, however: "In extending the pre-emptive effect of § 301 beyond suits for breach of contract, it would be inconsistent with congressional intent under that section to pre-empt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract." *Id.*, at 212.

1984); *White* v. *Consolidated Freight Lines*, 192 Wash. 146, 148, 73 P. 2d 358, 359 (1937). Under Florida case law, as under the general common law, the employer "owes a duty to his employees to furnish a reasonably safe place to work, and must use ordinary care and diligence to keep it safe." 2 Fla. Jur. 2d, Agency and Employment § 154, p. 343 (1977) (footnote omitted); see, *e. g.*, *Putnam Lumber Co.* v. *Berry*, 146 Fla. 595, 604–607, 2 So. 2d 133, 137–138 (1941). See also Fla. Stat. § 440.56(1) (1981) ("Every employer . . . shall furnish employment which shall be safe for the employees therein, furnish and use safety devices and safeguards . . . and do every other thing reasonably necessary to protect the life, health, and safety of such employees").

Another party, such as a labor union, of course, may assume a responsibility towards employees by accepting a duty of care through a contractual arrangement. If a party breaches a contractual duty, the settled rule under Florida law is that the aggrieved party may bring either an action for breach of contract or a tort action for the injuries suffered as a result of the contractual breach. See, *e. g.*, *Banfield* v. *Addington*, 104 Fla. 661, 669–670, 140 So. 893, 897 (1932); *Parrish* v. *Clark*, 107 Fla. 598, 603, 145 So. 848, 850 (1933) ("[A]n action may arise for the breach of the contract, or for the positive tort committed by the violation of a duty arising out of the assumption of the contractual relation"); *Safeco Title Ins. Co.* v. *Reynolds*, 452 So. 2d 45, 48 (Fla. App. 1984) (it is a "long-established general principle that injuries caused by the allegedly negligent performance of a contractual duty may be redressed through a tort action"). The threshold inquiry for determining if a cause of action exists is an examination of the contract to ascertain what duties were accepted by each of the parties and the scope of those duties. See 38 Fla. Jur. 2d, Negligence § 17, p. 29 (1982); *Vorndran* v. *Wright*, 367 So. 2d 1070 (Fla. App. 1979) (architect's contract did not include a duty to ensure compliance with safety regulations and thus employee injured on the job had no cause of action

against the architect); *Schauer* v. *Blair Construction Co.*, 374 So. 2d 1160, 1161 (Fla. App. 1979) (summary judgment in favor of architect improperly granted when genuine issue of material fact existed regarding architect's alleged contractual obligation to supervise construction).

In her complaint, respondent alleges precisely this type of tortious breach-of-contract claim. She asserts that "pursuant to contracts and agreements" between the Union and Florida Power, "to which contracts and agreements the Plaintiff was a third-party beneficiary," the Union owed respondent a duty of care to ensure her a safe working environment. App. 4. Having assumed this duty under the collective-bargaining agreement, the Union—according to the complaint—was then negligent "by allowing [Hechler] to be assigned to work in . . . a dangerous location and environment and by failing to provide her with or ascertaining that she had the necessary training, experience, background, and education to work in such a dangerous environment," and was further negligent in failing to "provid[e] and/or enforc[e] safety rules, regulations and requirements which would preclude such persons with inadequate and insufficient background, training, education, and experience, such as the Plaintiff, . . . from being placed in such an inherently dangerous working environment." *Id.*, at 5.

Respondent's allegations of negligence assume significance if—and only if—the Union, in fact, had assumed the duty of care that the complaint alleges the Union breached. The collective-bargaining agreement between the Union and Florida Power, and ancillary agreements between those parties, contain provisions on safety and working requirements for electrical apprentices on which Hechler could try to base an argument that the Union assumed an implied duty of care.[4]

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[4] The provision on "Safety" in the collective-bargaining agreement reads:

"The safety of the employees is a matter of paramount importance, shall receive first consideration, and no employee shall be allowed or required to

In order to determine the Union's tort liability, however, a court would have to ascertain, first, whether the collective-bargaining agreement in fact placed an implied duty of care on the Union to ensure that Hechler was provided a safe workplace, and, second, the nature and scope of that duty, that is, whether, and to what extent, the Union's duty extended to the particular responsibilities alleged by respondent in her complaint. Thus, in this case, as in *Allis-Chalmers*, it is clear that "questions of contract interpretation . . . underlie any finding of tort liability." 471 U. S., at 218. The need for federal uniformity in the interpretation of contract terms therefore mandates that here, as in *Allis-Chalmers*, respondent is precluded from evading the pre-emptive force of § 301 by casting her claim as a state-law tort action.[5]

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take any undue risk in the performance of his duties which he or his Foreman or Supervisor consider unsafe to himself or to his fellow workers. Supervisors and Foreman will be held strictly responsible for the enforcement of safe working rules." App. 13–14.

The provision also establishes a labor-management "Joint Safety Committee" which is "responsible for developing and recommending an effective safety program for all employees covered by this Agreement, including changes or additions to present safety rules, conducting investigations of accidents when deemed necessary." *Id.*, at 14.

A second provision, present in a side agreement entitled "The Manner An Electrical Apprentice Will Work" states:

"It is recognized that an Electrical Apprentice is in training under Journeymen to become a qualified Journeyman. It is also recognized that as he progresses in his apprenticeship, he becomes qualified to perform productive work, and will be expected to perform all the duties of a Journeyman which he has become qualified to do. It is not the intention of the Company to use an Apprentice on any type of work which the Apprentice has not become qualified to perform through experience and training. In this regard, the Company will not require an Apprentice to work on, climb through or work above energized conductors carrying more than 500 volts during his first year of apprenticeship." *Id.*, at 17.

[5] In her brief to this Court, respondent argues, for the first time, that her claim is not dependent on an interpretation of the collective-bargaining agreement, because the Union's duty of care to her may arise through inde-

III

If respondent's suit is treated as a § 301 claim, a court must determine whether her claim is time barred by the applicable

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pendent state-law responsibilities placed upon the Union simply by virtue of its relationship with its members, rather than as a result of the collective-bargaining agreement. Brief for Respondent 15–19. Respondent points out that she alleged that the Union owed her a duty of care "pursuant to contracts and agreements" entered into between the Union and Florida Power "*and* pursuant to the relationship by and between" the Union and Hechler. App. 4 (emphasis added).

Even assuming that respondent's pleadings may be construed liberally as stating that various, unenumerated Florida laws place a duty of care on a union to provide a safe workplace for its members, respondent effectively abandoned that theory in the lower courts and we decline to consider the argument here. Hechler argued below simply that the Union's duty of care arose from and was determined by the collective-bargaining agreement to which she was a third-party beneficiary. In opposing the Union's motion to dismiss in the District Court, Hechler conceded: "The nature and scope of the duty of care owed Plaintiff is determined by reference to the collective bargaining agreement." 1 Record 98. She made no reference to an alternative theory that the "nature and scope" of the Union's duty of care also may be determined by reference to state law operating independently of the collective-bargaining agreement. Although she repeated her statement that the duty of care owed her by the Union arose "by virtue of the parties *[sic]* relationship and the collective bargaining agreement," *ibid.*, she never suggested that the "relationship" between the parties gave rise to a duty of care distinct from the duty created by the collective-bargaining agreement. Not surprisingly, the District Court, relying on Hechler's formulation of her claim, observed: "Significantly, the duty allegedly owed to plaintiff flows from the collective bargaining agreement." App. to Pet. for Cert. 3a.

On appeal to the Court of Appeals, Hechler continued to characterize the Union's duty of care as grounded in the collective-bargaining agreement. She described the issue presented as "whether the federal labor laws preempt a worker's state common-law action against her union for negligence in breaching its duty—*created by the union's contract with the employer*—to insure that the plaintiff was properly trained for her work assignment." Brief for Appellant in No. 84–5799 (CA11), p. ii (emphasis added). See also *id.*, at 1, 45, n. 47. Again, there was no mention by Hechler of the existence of other state law that might form an alternative source of the Union's duty. The Court of Appeals accepted the proposition that the Un-

statute of limitations under federal law. The Union argues that respondent's claim can be characterized only as a "duty of fair representation" claim against the Union for failing properly to represent Hechler's interests before the employer, and that her claim must therefore be governed by the 6-month period of limitations prescribed by *DelCostello* v. *Teamsters*, 462 U. S. 151 (1983).[6] Respondent argues, however, that her suit is not a "duty of fair representation" claim, but is simply a § 301 claim, on the basis of her status as a third-party beneficiary of the collective-bargaining agree-

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ion's duty of care would arise from the collective-bargaining agreement, but agreed with Hechler that, "[t]hough the contract may be of use in defining the scope of the duty owed," the suit essentially remained a state-law claim of negligence. 772 F. 2d 788, 794 (1985).

Respondent repeated the theory adopted by the Court of Appeals in her opposition to the Union's certiorari petition in this Court. Brief in Opposition 4, 8–9. In her brief on the merits to this Court, she argued for the first time that the Union possibly was subject to an independent state-law duty of care, unconnected to the collective-bargaining agreement, and arising simply from the relationship of a union to its members. Even if such a state-law obligation, which would directly regulate the responsibility of a union in a workplace, could survive the pre-emptive power of federal labor law, we conclude that it is too late in the day for respondent to present to the Court this newfound legal theory. We decline to rule on the impact of hypothetical state law when the relevance of such law was neither presented to or passed on by the courts below, nor presented to us in the response to the petition for certiorari.

[6] In *DelCostello*, the Court concluded that a hybrid suit, consisting of a § 301 claim against an employer and a duty-of-fair-representation claim against a union, is similar to an unfair labor practices charge, and that federal courts should therefore borrow the 6-month limitations period established in § 10(b) of the National Labor Relations Act, 29 U. S. C. § 160(b), for such charges. A duty-of-fair-representation claim arises when a union that represents an employee in a grievance or arbitration procedure acts in a "discriminatory, dishonest, arbitrary, or perfunctory" fashion. 462 U. S., at 164. See *Vaca* v. *Sipes*, 386 U. S. 171 (1967); *Hines* v. *Anchor Motor Freight, Inc.*, 424 U. S. 554 (1976). The Court in *DelCostello* expressly distinguished the hybrid § 301/duty-of-fair-representation claim before it from "a straightforward breach-of-contract suit under § 301." 462 U. S., at 165.

ment and the Union's breach of duties assumed under that agreement.[7]

The Court of Appeals did not review the District Court's holding that the 6-month period of limitations adopted in *DelCostello* governs Hechler's suit, because it concluded that respondent's claim was not pre-empted under federal labor law. We believe it appropriate for the Court of Appeals to consider, in the first instance, whether the period of limitations adopted in *DelCostello* is applicable to Hechler's claim.

The judgment of the Court of Appeals for the Eleventh Circuit therefore is vacated, and the case is remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE STEVENS, concurring in part and dissenting in part.

Respondent has alleged nothing more than a breach of the Union's federal duty of fair representation. She has not alleged that the Union breached any specific promise made to her, and her argument that Florida law has augmented the Union's representational duties is plainly pre-empted by federal law. The suggestion that she is a "third-party beneficiary" of the collective-bargaining agreement that the Union negotiated and executed on her behalf is a concept I simply do not understand. Whatever rights she has under that contract are rights against her employer, not against the party that represented her in its negotiation. Since her claim

[7] An individual employee may bring a § 301 claim against an employer for violation of the collective-bargaining agreement between the union and the employer. *Smith* v. *Evening News Assn.*, 371 U. S. 195 (1962). Although employees usually bring duty-of-fair-representation claims against their union rather than § 301 claims, see, *e. g.*, *Vaca* v. *Sipes*, *supra*, third-party beneficiaries to a contract ordinarily have the right to bring a claim based on the contract. The Union has not contested respondent's right to bring a § 301 claim against it based on her status as a third-party beneficiary to the collective-bargaining agreement, although it has attempted to recast her suit as a duty-of-fair-representation claim.

against the Union is a duty-of-fair-representation claim, her complaint is barred by the 6-month period of limitations prescribed by this Court's decision in *DelCostello* v. *Teamsters*, 462 U. S. 151 (1983).* Remanding the case to the Court of Appeals is therefore unnecessary. I would simply reverse the judgment of the Court of Appeals and reinstate the District Court's order dismissing the complaint.

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*The District Court found that respondent had sued the union "over two years after she sustained her injury." App. to Pet. for Cert. 5a.

Reporter's Note

The next page is purposely numbered 1001. The numbers between 866 and 1001 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FROM APRIL 6 THROUGH MAY 29, 1987

APRIL 6, 1987

Dismissals Under Rule 53

No. 86–843. CONTINENTAL TRAILWAYS, INC. *v.* DIRECTOR, NEW JERSEY DIVISION OF MOTOR VEHICLES; and

No. 86–879. DIRECTOR, NEW JERSEY DIVISION OF MOTOR VEHICLES *v.* CONTINENTAL TRAILWAYS, INC. Sup. Ct. N. J. Certiorari dismissed under this Court's Rule 53. Reported below: 102 N. J. 526, 509 A. 2d 769.

Appeal Dismissed

No. 86–5656. BAIRNSFATHER *v.* LOUISIANA. Appeal from Ct. App. La., 2d Cir., dismissed for want of substantial federal question. JUSTICE BRENNAN, JUSTICE POWELL, and JUSTICE SCALIA would note probable jurisdiction and set case for oral argument. JUSTICE STEVENS would dismiss the appeal for want of jurisdiction.

Certiorari Granted—Vacated and Remanded

No. 84–1936. CORPORATE CITY OF SOUTH BEND ET AL. *v.* JANOWIAK. C. A. 7th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Johnson* v. *Transportation Agency*, 480 U. S. 616 (1987), and *Wygant* v. *Jackson Board of Education*, 476 U. S. 267 (1986). Reported below: 750 F. 2d 557.

No. 86–468. TISCH, POSTMASTER GENERAL OF THE UNITED STATES *v.* SHIDAKER. C. A. 7th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Johnson* v. *Transportation Agency*, 480 U. S. 616 (1987). Reported below: 782 F. 2d 746.

No. 86–1351. UTICA MUTUAL INSURANCE CO. *v.* TALLEY ET AL. C. A. 11th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Burlington Northern R. Co.* v. *Woods*, 480 U. S. 1 (1987).

Miscellaneous Orders

No. A–674. KNOWLES *v.* UNITED STATES. Application for bail, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. A–693. LINNE *v.* UNITED STATES. Application for bail, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. A–716. WESTERN AIRLINES, INC., ET AL. *v.* INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, AIRLINE DIVISION, ET AL. Motions of Air Transport Employees and International Brotherhood of Teamsters, Airline Division, et al. to vacate the stay orders entered by JUSTICE O'CONNOR on April 1, 1987, and April 2, 1987, pending the timely filing and disposition of a petition for writ of certiorari, denied. JUSTICE STEVENS took no part in the consideration or decision of these motions.

No. D–624. IN RE DISBARMENT OF HALLOWS. It is ordered that Joseph H. Hallows, of Milwaukee, Wis., 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–625. IN RE DISBARMENT OF ERNST. It is ordered that Thomas J. Ernst, of Clayton, Mo., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–626. IN RE DISBARMENT OF MAZELIS. It is ordered that Morris Mazelis, of Baltimore, Md., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–627. IN RE DISBARMENT OF GERNS. It is ordered that Peter H. Gerns, of Charlotte, 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. 86–246. SUMNER, DIRECTOR, NEVADA DEPARTMENT OF PRISONS, ET AL. *v.* SHUMAN. C. A. 9th Cir. [Certiorari

granted, 479 U. S. 948.] Out-of-time motion of Johnny Harris et al. for leave to participate in oral argument as *amici curiae* and for divided argument denied. The order, heretofore entered on December 8, 1986 [479 U. S. 1004], appointing N. Patrick Flanagan III, Esquire, is vacated and it is ordered that M. Daniel Markoff, Esquire, of Las Vegas, Nev., be appointed to serve as counsel for respondent in this case.

No. 86–344. OHIO ET AL. *v.* FLEET AEROSPACE CORP. ET AL. Appeal from C. A. 6th Cir. Motion of appellants to defer consideration in No. 86–71, *CTS Corp.* v. *Dynamics Corporation of America* [probable jurisdiction noted, 479 U. S. 810], and No. 86–97, *Indiana v. Dynamics Corporation of America* [probable jurisdiction noted, 479 U. S. 811], and to note probable jurisdiction in this case denied.

No. 86–870. PHILLIPS PETROLEUM CO. ET AL. *v.* MISSISSIPPI ET AL. Sup. Ct. Miss. [Certiorari granted, 479 U. S. 1084.] Motion of respondent Mississippi to dismiss the writ of certiorari as improvidently granted is denied.

No. 86–1172. GOODYEAR ATOMIC CORP. *v.* MILLER ET AL. Appeal from Sup. Ct. Ohio; and

No. 86–1387. MACKEY ET AL. *v.* LANIER COLLECTION AGENCY & SERVICE, INC. Sup. Ct. Ga. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 86–6367. IN RE GRAY. Petition for writ of mandamus denied.

Certiorari Granted

No. 86–1408. HAYNIE ET AL. *v.* ROSS GEAR DIVISION OF TRW, INC., ET AL. C. A. 6th Cir. Certiorari granted. JUSTICE MARSHALL took no part in the consideration or decision of this petition. Reported below: 799 F. 2d 237.

Certiorari Denied

No. 86–1030. COUNTY OF SANTA CLARA *v.* RAMIREZ. C. A. 9th Cir. Certiorari denied. Reported below: 795 F. 2d 1494.

No. 86–1059. BELL *v.* BELL. C. A. 5th Cir. Certiorari denied. Reported below: 801 F. 2d 396.

No. 86–1155. INTERNATIONAL PRIMATE PROTECTION LEAGUE ET AL. *v.* INSTITUTE FOR BEHAVIORAL RESEARCH, INC., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 799 F. 2d 934.

No. 86–1158. SCHELLONG *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 7th Cir. Certiorari denied. Reported below: 805 F. 2d 655.

No. 86–1316. HARRIS, AS TRUSTEE UNDER THE TRUST AGREEMENT DATED MARCH 1, 1973, ET AL. *v.* SENTRY CORP. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 802 F. 2d 229.

No. 86–1331. YURI FASHIONS CO., LTD. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 804 F. 2d 1246.

No. 86–1332. MCCARTY *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 356 Pa. Super. 618, 512 A. 2d 1290.

No. 86–1411. MILLER *v.* FEDERAL DEPOSIT INSURANCE CORPORATION. C. A. 5th Cir. Certiorari denied. Reported below: 805 F. 2d 1031.

No. 86–1422. RATCLIFF *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 806 F. 2d 1253.

No. 86–1441. SOLTIES ET UX. *v.* MASSEY-FERGUSON, INC. C. A. 3d Cir. Certiorari denied. Reported below: 804 F. 2d 1249.

No. 86–1444. BIGLEY ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 809 F. 2d 291.

No. 86–1465. DESHA *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 23 M. J. 66.

No. 86–5888. DALE *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 715 S. W. 2d 227.

No. 86–5999. TURNER *v.* PANSOPHIC SYSTEMS, INC. C. A. 7th Cir. Certiorari denied.

No. 86–6001. WILMER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 799 F. 2d 495.

No. 86–6031. RODRIGUEZ *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 133 Wis. 2d 475, 394 N. W. 2d 920.

No. 86–6054. WILLIAMS *v.* RONE ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 805 F. 2d 1037.

No. 86–6130. LOCKETT *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied.

No. 86–6148. REED *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 68 Md. App. 320, 511 A. 2d 567.

No. 86–6159. WANZER *v.* TEXAS. Ct. App. Tex., 2d Dist. Certiorari denied.

No. 86–6191. HOFFMAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 806 F. 2d 703.

No. 86–6202. CLARK *v.* LYNAUGH, INTERIM DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 86–6213. DOUBLEDAY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 804 F. 2d 1091.

No. 86–6220. ADAMS *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied.

No. 86–6269. TALBOTT *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 808 F. 2d 1518.

No. 86–6275. KIMBROUGH *v.* AMERICAN TELEPHONE & TELEGRAPH CO. ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 808 F. 2d 839.

No. 86–6337. CLEMENTE *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 809 F. 2d 792.

No. 86–6356. PEHRINGER, AKA WHITTLESEY *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 803 F. 2d 1184.

No. 86–6357. PRICE ET AL. *v.* BALTIMORE POLICE DEPARTMENT ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 804 F. 2d 1251.

No. 86–6358. FRAPPIER *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 807 F. 2d 257.

No. 86–6359. LEAL *v.* WRQN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 805 F. 2d 1035.

No. 86–6363. TAYLOR *v.* DAVIS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 811 F. 2d 608.

No. 86–6366. JACKSON *v.* COUNTY OF ARMSTRONG CHILDREN AND YOUTH SERVICE ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 808 F. 2d 1516.

No. 86–6395. HUMPHREY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 808 F. 2d 561.

No. 86–6396. GRANT *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 180 Ga. App. 746, 350 S. E. 2d 582.

No. 86–6407. DIGGS *v.* ZIMMERMAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AND CORRECTIONAL DIAGNOSTIC AND CLASSIFICATION CENTER AT GRATERFORD, ET AL. C. A. 3d Cir. Certiorari denied.

No. 86–6430. COOK ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 811 F. 2d 608.

No. 86–6440. REYNOSO-BARRIOS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 808 F. 2d 57.

No. 86–6455. RIDGE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 810 F. 2d 1167.

No. 86–6456. CRUZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 805 F. 2d 1464.

No. 86–6463. WHITE *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 86–6465. GATES *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 257 U. S. App. D. C. 160, 807 F. 2d 1075.

No. 86–6467. COLEMAN *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 515 A. 2d 439.

No. 86–6477. BONNER ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 808 F. 2d 864.

No. 86-6480. HAMPTON *v.* ALASKA. Sup. Ct. Alaska. Certiorari denied.

No. 86-6499. HOGAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 812 F. 2d 713.

No. 85-958. ILLINOIS *v.* EYLER. App. Ct. Ill., 2d Dist. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 132 Ill. App. 3d 792, 477 N. E. 2d 774.

No. 86-291. SUMNER, DIRECTOR, NEVADA DEPARTMENT OF PRISONS *v.* PHELPS. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 792 F. 2d 144.

No. 86-1311. A. L. LABORATORIES, INC., ET AL. *v.* NORTH AMERICAN PHILIPS CORP. C. A. 8th Cir. Certiorari denied. JUSTICE WHITE took no part in the consideration or decision of this petition. Reported below: 803 F. 2d 378.

No. 86-1338. DEYA *v.* BOARD OF SUPERVISORS OF LOUISIANA STATE UNIVERSITY ET AL. C. A. 5th Cir. Certiorari denied. JUSTICE SCALIA took no part in the consideration or decision of this petition. Reported below: 801 F. 2d 397.

No. 86-6197. GIPSON *v.* ROSENBERG ET AL. C. A. 5th Cir. Motion of respondents for damages denied. Certiorari denied. Reported below: 797 F. 2d 224.

No. 86-6208. FREY *v.* PENNSYLVANIA. Sup. Ct. Pa.;
No. 86-6334. MANN *v.* TEXAS. Ct. Crim. App. Tex.;
No. 86-6355. KUBAT *v.* ILLINOIS. Sup. Ct. Ill.;
No. 86-6372. ZETTLEMOYER *v.* PENNSYLVANIA. Super. Ct. Pa.; and
No. 86-6470. MORRISON *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: No. 86-6208, 512 Pa. 557, 517 A. 2d 1265; No. 86-6334, 718 S. W. 2d 741; No. 86-6355, 114 Ill. 2d 424, 501 N. E. 2d 111; No. 86-6372, 359 Pa. Super. 631, 515 A. 2d 620; No. 86-6470, 500 So. 2d 57.

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. 86–6600 (A–697). WILLIAMS *v.* LYNAUGH, INTERIM DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE WHITE, and by him referred to the Court, denied. Certiorari denied. Reported below: 809 F. 2d 1063.

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 the application for stay of execution and the petition for writ of certiorari and would vacate the death sentence in this case.

Rehearing Denied

No. 86–1025. IN RE POLYAK, 479 U. S. 1082;

No. 86–6006. LYDA ET AL. *v.* JOHN K. ET AL., 479 U. S. 1095; and

No. 86–6077. KUCHER *v.* MADERIOS ET AL., 479 U. S. 1097. Petitions for rehearing denied.

No. 85–703. SCHOENBORN ET AL. *v.* BOEING CO., 474 U. S. 1082. Motion for leave to file petition for rehearing denied.

APRIL 7, 1987

Miscellaneous Order

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.] The parties are directed to file supplemental briefs addressing the merits of the second question presented in appellants' jurisdictional statement, as well as the question whether the Court of Appeals' decision is sufficiently final to permit this Court to take jurisdiction over the case under 28 U. S. C. § 1254(2) to review both questions presented. Rule 35 of the Rules of this Court prescribes the time for filing these supplemental briefs.

APRIL 20, 1987

Appeals Dismissed

No. 86–1350. 423 SOUTH SALINA STREET, INC. *v.* CITY OF SYRACUSE ET AL. Appeal from Ct. App. N. Y. dismissed for

want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 68 N. Y. 2d 474, 503 N. E. 2d 63.

No. 86–1363. WANGRUD *v.* OREGON. Appeal from Ct. App. Ore. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 81 Ore. App. 105, 723 P. 2d 387.

No. 86–1403. KONIG *v.* PICKING. Appeal from Ct. App. Cal., 2d App. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 86–6427. STEVENSON *v.* DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS. Appeal from Int. Ct. App. Haw. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 86–1370. AUTOMATIC MUSIC & VENDING CORP. ET AL. *v.* MICHIGAN LIQUOR CONTROL COMMISSION. Appeal from Sup. Ct. Mich. dismissed for want of substantial federal question. Reported below: 426 Mich. 452, 396 N. W. 2d 204.

No. 86–1396. BATY *v.* OREGON. Appeal from Ct. App. Ore. dismissed for want of substantial federal question. Reported below: 80 Ore. App. 153, 720 P. 2d 415.

No. 86–6008. JAMES *v.* IOWA. Appeal from Sup. Ct. Iowa dismissed for want of properly presented federal question. Reported below: 393 N. W. 2d 465.

Certiorari Granted—Vacated and Remanded

No. 85–1839. GALLON *v.* LEVIN METALS CORP. ET AL. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *West* v. *Conrail*, *ante*, p. 35. Reported below: 779 F. 2d 1439.

No. 86–1207. IMMIGRATION AND NATURALIZATION SERVICE ET AL. *v.* NATIONAL CENTER FOR IMMIGRANTS' RIGHTS ET AL. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of the Immigration Re-

form and Control Act of 1986, Pub. L. 99–603. Reported below: 791 F. 2d 1351.

Miscellaneous Orders

No. — — ——. JAMES *v.* CITY OF TROY ET AL. Motion to direct the Clerk to file a petition for writ of certiorari out of time denied.

No. — — ——. HANSEN *v.* CITY OF SAN BUENAVENTURA. Motion of appellant to dispense with printing portions of the appendix to the jurisdictional statement denied.

No. A–615 (86–6562). MCDONALD *v.* METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE. Chan. Ct. Tenn., Davidson County. Application for temporary injunction and other relief, addressed to JUSTICE O'CONNOR and referred to the Court, denied.

No. A–732. LINNAS *v.* IMMIGRATION AND NATURALIZATION SERVICE. Application for stay of deportation, presented to JUSTICE MARSHALL, and by him referred to the Court, denied. The order heretofore entered by JUSTICE MARSHALL on April 6, 1987, is vacated. JUSTICE BRENNAN, JUSTICE BLACKMUN, and JUSTICE O'CONNOR would grant the application for stay.

No. D–588. IN RE DISBARMENT OF SPEERT. Disbarment entered. [For earlier order herein, see 479 U. S. 958.]

No. D–599. IN RE DISBARMENT OF HENRY. Disbarment entered. [For earlier order herein, see 479 U. S. 1026.]

No. D–601. IN RE DISBARMENT OF INTINI. Disbarment entered. [For earlier order herein, see 479 U. S. 1026.]

No. D–607. IN RE DISBARMENT OF EIMERS. Disbarment entered. [For earlier order herein, see 479 U. S. 1078.]

No. D–610. IN RE DISBARMENT OF LOPEZ. Vincent Cabrera Lopez, 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 March 2, 1987 [480 U. S. 902], is hereby discharged.

No. D–628. IN RE DISBARMENT OF BRUMFIELD. It is ordered that H. Alva Brumfield III, of Baton Rouge, La., be sus-

pended 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–629. IN RE DISBARMENT OF MIRTO. It is ordered that Peter G. Mirto, of Brooklyn, 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. 9, Orig. UNITED STATES *v.* LOUISIANA ET AL. Supplemental Report of the Special Master on the Alabama and Mississippi boundary cases is received and ordered filed. Exceptions to the Report, with supporting briefs, may be filed by the parties within 45 days. Replies thereto, if any, with supporting briefs, may be filed within 30 days. JUSTICE MARSHALL took no part in the consideration or decision of this order. [For earlier decision herein, see, *e. g.*, 470 U. S. 93.]

No. 108, Orig. NEBRASKA *v.* WYOMING ET AL. Motion of Wyoming for leave to file a counterclaim granted. Answers to the counterclaim may be filed within 60 days. [For earlier order herein, see 479 U. S. 1051.]

No. 85–1409. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* YUCKERT. C. A. 9th Cir. [Certiorari granted, 476 U. S. 1114.] Motion of respondent for leave to file a supplemental brief after argument granted. Motion of the Solicitor General for leave to file a supplemental brief after argument granted.

No. 86–337. BURLINGTON NORTHERN RAILROAD CO. *v.* OKLAHOMA TAX COMMISSION ET AL. C. A. 10th Cir. [Certiorari granted, 479 U. S. 913.] Motion of respondents for leave to file a supplemental brief after argument granted.

No. 86–594. NATIONAL LABOR RELATIONS BOARD ET AL. *v.* UNITED FOOD & COMMERCIAL WORKERS UNION, LOCAL 23, AFL–CIO. C. A. 3d Cir. [Certiorari granted, 479 U. S. 1029.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 86–836. HAZELWOOD SCHOOL DISTRICT ET AL. *v.* KUHLMEIER ET AL. C. A. 8th Cir. [Certiorari granted, 479 U. S.

1053.] Motions of National School Boards Association et al. and School Board of Dade County, Florida, for leave to file briefs as *amici curiae* granted.

No. 86-863. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* KIZER, DIRECTOR OF CALIFORNIA DEPARTMENT OF HEALTH SERVICES, ET AL. C. A. 9th Cir. [Certiorari granted, 479 U. S. 1083.] Motion of respondents for divided argument denied.

No. 86-1108. VERMONT *v.* COX. Sup. Ct. Vt. [Certiorari granted, 479 U. S. 1083.] Motion of respondent for leave to proceed further herein *in forma pauperis* denied. Henry Hinton, Esquire, of Montpelier, Vt., a member of the Bar of this Court, is invited to brief and argue this case in support of the judgment below as *amicus curiae*.

No. 86-6060. YATES *v.* AIKEN, WARDEN, ET AL. Sup. Ct. S. C. [Certiorari granted, 480 U. S. 945.] Motion for appointment of counsel granted, and it is ordered that David I. Bruck, Esquire, of Columbia, S. C., be appointed to serve as counsel for petitioner in this case.

No. 86-6139. WATSON *v.* FORT WORTH BANK & TRUST. C. A. 5th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States limited to Question 1 presented by the petition.

No. 86-1545. IN RE KOWALIK;
No. 86-6559. IN RE TROCHE; and
No. 86-6607. IN RE FIXEL. Petitions for writs of habeas corpus denied.

Certiorari Granted

No. 86-805. PINTER ET AL. *v.* DAHL ET AL. C. A. 5th Cir. Certiorari granted. Reported below: 787 F. 2d 985.

No. 86-1217. RUSSONIELLO ET AL. *v.* OLAGUES ET AL. C. A. 9th Cir. Certiorari granted. In addition to the questions presented by the petition for writ of certiorari, the parties are invited to brief and argue the question of possible mootness. Reported below: 797 F. 2d 1511.

Certiorari Denied. (See also Nos. 86–1350, 86–1363, 86–1403, and 86–6427, *supra.*)

No. 85–1400. CONTINENTAL BAKING CO. *v.* MACON. C. A. 6th Cir. Certiorari denied. Reported below: 779 F. 2d 1166.

No. 86–340. LOCAL 710, INTERNATIONAL BROTHERHOOD OF TEAMSTERS *v.* THOMSEN. C. A. 8th Cir. Certiorari denied. Reported below: 792 F. 2d 115.

No. 86–672. TRANS WORLD AIRLINES, INC. *v.* ELISALDE. C. A. 8th Cir. Certiorari denied. Reported below: 792 F. 2d 114.

No. 86–715. SUBCLASS IV (UNITHOLDERS) *v.* FOX & CO. ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 794 F. 2d 318.

No. 86–765. MISSOURI PACIFIC RAILROAD CO. ET AL. *v.* EVANS. C. A. 8th Cir. Certiorari denied. Reported below: 795 F. 2d 57.

No. 86–1022. GOVERNMENT DEVELOPMENT BANK FOR PUERTO RICO ET AL. *v.* LYDIA DE CHOUDENS. C. A. 1st Cir. Certiorari denied. Reported below: 801 F. 2d 5.

No. 86–1024. CONFERENCE OF STATE BANK SUPERVISORS ET AL. *v.* BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 800 F. 2d 1534.

No. 86–1080. WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY *v.* BROCK, SECRETARY OF LABOR. C. A. D. C. Cir. Certiorari denied. Reported below: 254 U. S. App. D. C. 190, 796 F. 2d 481.

No. 86–1118. CINNANTE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 799 F. 2d 842.

No. 86–1127. WRIGHT ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 797 F. 2d 245.

No. 86–1143. ORTEGA ET AL. *v.* ROWE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 796 F. 2d 765.

No. 86–1163. JONES ET AL. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 801 F. 2d 1334.

No. 86–1187. CANISIUS COLLEGE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 799 F. 2d 18.

No. 86–1188. BURFORD *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. Reported below: 813 F. 2d 400.

No. 86–1199. KINGTON ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 801 F. 2d 733.

No. 86–1200. ROTH STEEL TUBE CO. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. Reported below: 800 F. 2d 625.

No. 86–1213. JIMENEZ-FUENTES ET AL. *v.* TORRES GAZTAMBIDE, SECRETARY OF HOUSING OF PUERTO RICO, ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 807 F. 2d 236.

No. 86–1219. LARY *v.* REPUBLIC OF CHINA. C. A. 11th Cir. Certiorari denied. Reported below: 800 F. 2d 265.

No. 86–1226. JOHN MORRELL & CO. *v.* LOCAL UNION 304A OF THE UNITED FOOD & COMMERCIAL WORKERS, AFL–CIO, CLC, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 804 F. 2d 457.

No. 86–1229. GARCIA *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 500 N. E. 2d 158.

No. 86–1232. NEWTON *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 797 F. 2d 1370.

No. 86–1236. BALLAM *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 806 F. 2d 1017.

No. 86–1238. DEMPSEY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 806 F. 2d 766.

No. 86–1239. COUNTY OF MARIPOSA ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 798 F. 2d 364.

No. 86–1248. CURTIS *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 113 Ill. 2d 136, 497 N. E. 2d 1004.

No. 86–1298. WRIGHT ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 800 F. 2d 1146.

No. 86–1333. NATIONAL ELEVATOR INDUSTRY, INC. *v.* INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS. C. A. 5th Cir. Certiorari denied. Reported below: 806 F. 2d 259.

No. 86–1344. SROUR *v.* UNITED ARAB EMIRATES. C. A. 2d Cir. Certiorari denied. Reported below: 833 F. 2d 1003.

No. 86–1348. CHINAKOOL *v.* TRUSTEES OF THE CALIFORNIA STATE UNIVERSITIES AND COLLEGES ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 86–1355. CHIRPICH *v.* MINNESOTA. Ct. App. Minn. Certiorari denied. Reported below: 392 N. W. 2d 34.

No. 86–1360. CONSTELLATION LINES, S. A., ET AL. *v.* KARVELIS. C. A. 2d Cir. Certiorari denied. Reported below: 806 F. 2d 49.

No. 86–1361. REYNOLDS *v.* VON BULOW, BY HER NEXT FRIENDS, AUERSPERG ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 811 F. 2d 136.

No. 86–1365. SHAW *v.* WINTER, SHERIFF. C. A. 9th Cir. Certiorari denied. Reported below: 796 F. 2d 1124.

No. 86–1367. ADAM ET AL. *v.* BROTHERHOOD RAILWAY CARMEN OF THE UNITED STATES AND CANADA ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 833 F. 2d 1002.

No. 86–1369. MATTINGLY *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 722 S. W. 2d 288.

No. 86–1372. SOBERATS *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 500 So. 2d 157.

No. 86–1375. HARVEY *v.* HOLT OIL & GAS CORP. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 801 F. 2d 773.

No. 86–1378. HANIL BANK *v.* MICHELMAN, TRUSTEE. C. A. 9th Cir. Certiorari denied. Reported below: 799 F. 2d 532.

No. 86–1379. MOYER *v.* PETTY, SHERIFF. C. A. 6th Cir. Certiorari denied. Reported below: 811 F. 2d 606.

No. 86–1385. AL-FASSI *v.* AL-FASSI. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 86–1388. COMPTON COMMUNITY COLLEGE DISTRICT ET AL. *v.* NORTHWESTERN NATIONAL CASUALTY CO. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 803 F. 2d 724.

No. 86–1390. OHIO CITIZENS FOR RESPONSIBLE ENERGY, INC. *v.* NUCLEAR REGULATORY COMMISSION ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 803 F. 2d 258.

No. 86–1391. RUSSELL ET AL. *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES (FRASER, REAL PARTY IN INTEREST). Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 86–1392. PHILADELPHIA FAST FOOD PARTNERSHIP ET AL. *v.* A. COPELAND ENTERPRISES ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 806 F. 2d 254.

No. 86–1393. GISSENDANER MORTGAGE CO. ET AL. *v.* CENTRAL BANK OF THE SOUTH. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 495 So. 2d 751.

No. 86–1397. PHILLIPS ET AL. *v.* AMOCO OIL CO. ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 799 F. 2d 1464.

No. 86–1398. DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS *v.* JOHNSON. Sup. Ct. Fla. Certiorari denied. Reported below: 498 So. 2d 938.

No. 86–1401. BEAZLEY *v.* STATE BAR OF GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 256 Ga. 561, 350 S. E. 2d 422.

No. 86–1402. CAMERON *v.* FOGARTY ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 806 F. 2d 380.

No. 86–1404. MISSOURI PACIFIC RAILROAD CO. *v.* BESSE. Sup. Ct. Mo. Certiorari denied. Reported below: 721 S. W. 2d 740.

No. 86–1405. BOSE CORP. *v.* CONSUMERS UNION OF UNITED STATES, INC. C. A. 1st Cir. Certiorari denied. Reported below: 806 F. 2d 304.

No. 86–1407. WOODRING ET AL. *v.* MCQUADE. Super. Ct. Pa. Certiorari denied. Reported below: 353 Pa. Super. 650, 506 A. 2d 1341.

No. 86–1412. ROSENBLOOM ET AL. *v.* ROTHBERG. C. A. 3d Cir. Certiorari denied. Reported below: 808 F. 2d 252.

No. 86–1413. STOREY ET AL. *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 181 Ga. App. 161, 351 S. E. 2d 502.

No. 86–1418. MCDONALD *v.* BOARD OF EQUALIZATION ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 86–1420. MASSACHUSETTS *v.* LAHTI. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 398 Mass. 829, 501 N. E. 2d 511.

No. 86–1423. TINLEY PARK COMMUNITY CONSOLIDATED SCHOOL DISTRICT NO. 146 ET AL. *v.* JENNINGS. C. A. 7th Cir. Certiorari denied. Reported below: 796 F. 2d 962.

No. 86–1426. TUCKER *v.* BENNETT ET AL. C. A. 10th Cir. Certiorari denied.

No. 86–1437. BRUMFIELD *v.* MISSISSIPPI STATE BAR ASSN. Sup. Ct. Miss. Certiorari denied. Reported below: 497 So. 2d 800.

No. 86–1445. FIRST TEAM AUCTION, INC. *v.* FIRST STATE BANK OF CLAY COUNTY. C. A. 11th Cir. Certiorari denied. Reported below: 808 F. 2d 60.

No. 86–1459. LAW ENFORCEMENT INSURANCE CO., LTD. *v.* CORCORAN, SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK, AS LIQUIDATOR OF IDEAL MUTUAL INSURANCE CO. C. A. 2d Cir. Certiorari denied. Reported below: 807 F. 2d 38.

No. 86–1460. ESPENSCHIED *v.* MERIT SYSTEMS PROTECTION BOARD. C. A. Fed. Cir. Certiorari denied. Reported below: 804 F. 2d 1233.

No. 86–1463. CORONA ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 804 F. 2d 1568.

No. 86–1467. STEMER *v.* WAYNE COUNTY DEPARTMENT OF HEALTH ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 798 F. 2d 471.

No. 86–1479. RATCLIFF *v.* MCKEEVER ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 807 F. 2d 994.

No. 86–1481. HOLLOWAY ET UX. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 798 F. 2d 175.

No. 86–1486. TIMMERMANN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 806 F. 2d 258.

No. 86–1489. MELLETT *v.* FEDERAL DEPOSIT INSURANCE CORPORATION ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 808 F. 2d 840.

No. 86–1494. SORISE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 811 F. 2d 605.

No. 86–1500. MOBLEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 804 F. 2d 1253.

No. 86–1504. TRANOWSKI *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 804 F. 2d 144.

No. 86–1525. RESTREPO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 804 F. 2d 1253.

No. 86–5959. LOVETT *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 516 A. 2d 455.

No. 86–5960. ANDREWS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 790 F. 2d 803.

No. 86–5967. VINCENT *v.* BLACKBURN, WARDEN. 30th Jud. Dist. Ct. La., Vernon Parish. Certiorari denied.

No. 86–6042. HOWELL *v.* DALLAS COUNTY CHILD WELFARE UNIT. Ct. App. Tex., 5th Dist. Certiorari denied. Reported below: 710 S. W. 2d 729.

No. 86–6085. BROOKS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 805 F. 2d 1036.

No. 86–6114. PRICE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 805 F. 2d 1041.

No. 86–6163. GRAYSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 795 F. 2d 278.

No. 86–6170. STOCKHEIMER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 807 F. 2d 610.

No. 86–6233. RODRIGUEZ *v.* SCHWEIGER ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 796 F. 2d 930.

No. 86-6279. EDWARDS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 795 F. 2d 958.

No. 86-6295. ENGLER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 806 F. 2d 425.

No. 86-6312. HYMEN *v.* MERIT SYSTEMS PROTECTION BOARD. C. A. 9th Cir. Certiorari denied. Reported below: 799 F. 2d 1421.

No. 86-6361. SHAW *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 807 F. 2d 178.

No. 86-6362. RUEDA-GOMEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 798 F. 2d 1419.

No. 86-6369. COX *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 810 F. 2d 196.

No. 86-6373. WALLACE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 800 F. 2d 1509.

No. 86-6376. ALMANZA *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 724 S. W. 2d 805.

No. 86-6378. WILLIAMS *v.* BLACKBURN, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 808 F. 2d 1521.

No. 86-6382. WORTHAN *v.* ARMONTROUT, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 805 F. 2d 303.

No. 86-6383. SULLIVAN *v.* BLACKBURN, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 804 F. 2d 885.

No. 86-6390. CALDWELL *v.* TEXAS. Ct. App. Tex., 9th Dist. Certiorari denied. Reported below: 696 S. W. 2d 606.

No. 86-6391. BRENNAN *v.* GRIFFETH ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 803 F. 2d 718.

No. 86-6394. BROWN *v.* RICE, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 803 F. 2d 713.

No. 86-6398. BURNETT *v.* COX ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: 494 So. 2d 1149.

No. 86-6401. SKURDAL *v.* CITY OF BILLINGS, MONTANA. Sup. Ct. Mont. Certiorari denied. Reported below: 224 Mont. 84, 730 P. 2d 371.

No. 86-6406. BERRY *v.* MOORE, DIRECTOR, MISSOURI DEPARTMENT OF CORRECTIONS. C. A. 8th Cir. Certiorari denied. Reported below: 808 F. 2d 841.

No. 86-6408. HOLLEY *v.* SMITH, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 792 F. 2d 1046.

No. 86-6410. REARDON ET AL. *v.* LOPES, COMMISSIONER, CONNECTICUT DEPARTMENT OF CORRECTIONS, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 806 F. 2d 39.

No. 86-6416. GONZALEZ *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 125 App. Div. 2d 330, 508 N. Y. S. 2d 606.

No. 86-6417. LAY *v.* HORAN, COMMONWEALTH ATTORNEY. C. A. 4th Cir. Certiorari denied. Reported below: 806 F. 2d 257.

No. 86-6420. CONWAY *v.* MUNCY, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 808 F. 2d 834.

No. 86-6423. BONDS *v.* WILLIS, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 86-6424. REED *v.* MORTON ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 808 F. 2d 837.

No. 86-6426. ROCHON *v.* CONSOLIDATED CONSTRUCTION CO. ET AL. Ct. App. La., 3d Cir. Certiorari denied. Reported below: 497 So. 2d 746.

No. 86-6428. MRAOVIC *v.* LYNAUGH, INTERIM DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 86-6429. MCCONE *v.* DISTRICT COURT OF ALBANY COUNTY ET AL. C. A. 10th Cir. Certiorari denied.

No. 86-6434. FRANKLIN *v.* WHITE, SUPERINTENDENT, ALGOA CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied. Reported below: 803 F. 2d 416.

No. 86-6437. MURVIN *v.* KAYE. C. A. 4th Cir. Certiorari denied. Reported below: 802 F. 2d 451.

No. 86-6438. MARTIN *v.* PEREZOUS ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 810 F. 2d 1163.

No. 86-6439. SAID *v.* SOUTHERN CALIFORNIA RAPID TRANSIT DISTRICT. C. A. 9th Cir. Certiorari denied. Reported below: 800 F. 2d 1145.

No. 86-6441. WINGOS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 141 Ill. App. 3d 1174, 503 N. E. 2d 1214.

No. 86-6444. COX *v.* LEEKE, COMMISSIONER, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 807 F. 2d 175.

No. 86-6446. CROGHAN *v.* FARRIER, DIRECTOR, IOWA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 8th Cir. Certiorari denied.

No. 86-6448. RANDOLPH *v.* MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 808 F. 2d 835.

No. 86-6450. MARSHALL *v.* BAUER. C. A. 4th Cir. Certiorari denied. Reported below: 803 F. 2d 1181.

No. 86-6454. ESTUPINAN PAREDES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 798 F. 2d 1418.

No. 86-6457. MCGHAR *v.* KOEHLER, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 811 F. 2d 606.

No. 86-6458. ZERMAN *v.* WOLOFSKY ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 794 F. 2d 686.

No. 86-6459. BELK *v.* CHRANS, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied.

No. 86-6460. CARDELLE *v.* DELTA AIR LINES, INC. C. A. 11th Cir. Certiorari denied.

No. 86-6461. MOSS *v.* MORRIS, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 805 F. 2d 1035.

No. 86–6462. TEAGUE *v.* NEW MEXICO. Ct. App. N. M. Certiorari denied.

No. 86–6464. REFILE *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 356 Pa. Super. 590, 512 A. 2d 53.

No. 86–6468. LYNCH *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 800 F. 2d 765.

No. 86–6475. LAVERGNE *v.* HOLY NAME HOSPITAL. Super. Ct. N. J., App. Div. Certiorari denied.

No. 86–6478. REEVES *v.* LYNAUGH, INTERIM DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 86–6496. COMSTOCK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 805 F. 2d 1194.

No. 86–6498. DONOGHUE *v.* MASSACHUSETTS. App. Ct. Mass. Certiorari denied. Reported below: 23 Mass. App. 103, 499 N. E. 2d 832.

No. 86–6504. HAMLOR *v.* MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 809 F. 2d 785.

No. 86–6508. RICHTER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 813 F. 2d 399.

No. 86–6511. VILLAUME *v.* UNITED STATES DEPARTMENT OF JUSTICE. C. A. 8th Cir. Certiorari denied. Reported below: 804 F. 2d 498.

No. 86–6512. WESTBROOK *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 806 F. 2d 255.

No. 86–6527. FAY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 86–6529. BASSFORD *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 812 F. 2d 16.

No. 86–6535. VEGA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 812 F. 2d 713.

No. 86-6538. BREWER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 807 F. 2d 895.

No. 86-6539. WALITWARANGKUL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 808 F. 2d 1352.

No. 86-6542. AL-KURNA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 808 F. 2d 1072.

No. 86-6548. THOMAS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 86-49. AMERICAN ELECTRIC POWER CO., INC., ET AL. *v.* KENTUCKY PUBLIC SERVICE COMMISSION ET AL. C. A. 6th Cir. Motions of Edison Electric Institute and Eastern Utilities Associates et al. for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 787 F. 2d 588.

No. 86-546. NEW ORLEANS PUBLIC SERVICE, INC. *v.* CITY OF NEW ORLEANS ET AL. C. A. 5th Cir. Motions of System Energy Resources, Inc., Edison Electric Institute, National Association of Regulatory Utility Commissioners, and Eastern Utilities Associates et al. for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 798 F. 2d 858.

No. 86-806. PATTERSON ET AL. *v.* JOSEPH ET AL. C. A. 6th Cir. Motion of Prosecuting Attorneys Association of Michigan for leave to file a brief as *amicus curiae* granted. Certiorari denied. JUSTICE WHITE and JUSTICE O'CONNOR would grant certiorari. Reported below: 795 F. 2d 549.

No. 86-1082. CHURCH OF SCIENTOLOGY OF CALIFORNIA *v.* WOLLERSHEIM. Ct. App. Cal., 2d App. Dist. Motions of National Association for the Advancement of Colored People and National Council of Churches of Christ in the U. S. A. for leave to file briefs as *amici curiae* granted. Certiorari denied. JUSTICE BRENNAN took no part in the consideration or decision of these motions and this petition.

No. 86-1116. LEWIS, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. *v.* CHANEY. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 801 F. 2d 1191.

No. 86–1191. WARREN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 800 F. 2d 1316.

No. 86–1283. KAMEAN ET AL. *v.* LOCAL 363, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 833 F. 2d 1002.

No. 86–1495. GONZALES ET AL. *v.* SEALY ET AL. C. A. 10th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari.

No. 86–1346. MATCHA ET UX. *v.* MATTOX, ATTORNEY GENERAL OF TEXAS. Ct. App. Tex., 3d Dist. Motion of Legal Foundation of America for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 711 S. W. 2d 95.

No. 86–6377. LUSK *v.* FLORIDA. Sup. Ct. Fla.;

No. 86–6384. ROMINE *v.* GEORGIA. Sup. Ct. Ga.;

No. 86–6471. PROVENZANO *v.* FLORIDA. Sup. Ct. Fla.; and

No. 86–6510. LASHLEY *v.* MISSOURI. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: No. 86–6377, 498 So. 2d 902; No. 86–6384, 256 Ga. 521, 350 S. E. 2d 446; No. 86–6471, 497 So. 2d 1177; No. 86–6510, 721 S. W. 2d 31.

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. 85–998. UNITED STATES *v.* DUNN, 480 U. S. 294;

No. 85–1277. SCHOOL BOARD OF NASSAU COUNTY, FLORIDA, ET AL. *v.* ARLINE, 480 U. S. 273;

No. 85–6461. MARTIN *v.* OHIO, 480 U. S. 228;

No. 85–6783. WRIGHT *v.* ILLINOIS, 479 U. S. 1101;

No. 85–7232. CARGILL *v.* GEORGIA, 479 U. S. 1101;

No. 86–969. KANAREK *v.* WAMBAUGH ET AL., 479 U. S. 1089; and

No. 86–1113. BERGMAN ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE, 479 U. S. 1092. Petitions for rehearing denied.

No. 86–5207. MORGAN *v.* ILLINOIS, 479 U. S. 1101;
No. 86–5434. OLINGER *v.* ILLINOIS, 479 U. S. 1101;
No. 86–5906. SZABO *v.* ILLINOIS, 479 U. S. 1101;
No. 86–5991. MULLIGAN *v.* KEMP, WARDEN, 480 U. S. 911;
No. 86–5994. BROOKS *v.* OHIO, 479 U. S. 1101;
No. 86–6022. BARRITT *v.* BORDENKIRCHER, WARDEN, 479 U. S. 1095;
No. 86–6030. WILKIE *v.* FOLTZ, REGIONAL ADMINISTRATOR, MICHIGAN DEPARTMENT OF CORRECTIONS, 479 U. S. 1095;
No. 86–6072. DUNLAP *v.* BESHEAR, ATTORNEY GENERAL OF KENTUCKY, ET AL., 479 U. S. 1097;
No. 86–6098. GREEN *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, 479 U. S. 1098;
No. 86–6123. IN RE JOHL, 479 U. S. 1082;
No. 86–6168. DAVID *v.* AMERICAN TELEPHONE & TELEGRAPH CO. ET AL., 480 U. S. 909;
No. 86–6200. STRANGE *v.* BROWN, WARDEN, ET AL., 480 U. S. 921;
No. 86–6210. OLIVER *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, 480 U. S. 921;
No. 86–6218. JONES *v.* ZIMMERMAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AND CORRECTIONAL DIAGNOSTIC CLASSIFICATION CENTER AT GRATERFORD, 480 U. S. 909; and
No. 86–6246. HANNER *v.* MISSISSIPPI ET AL., 480 U. S. 921. Petitions for rehearing denied.

No. 86–5210. LIGHTFOOT *v.* WHITE, WARDEN, ET AL., 479 U. S. 964. Motion for leave to file petition for rehearing denied.

APRIL 27, 1987

Appeals Dismissed

No. 86–1295. ASHLAND OIL, INC. *v.* ROSE, STATE TAX COMMISSIONER OF WEST VIRGINIA. Appeal from Sup. Ct. App. W. Va. Motion of Committee on State Taxation of the Council of State Chambers of Commerce for leave to file a brief as *amicus curiae* granted. Appeal dismissed for want of a final judgment. Reported below: —— W. Va. ——, 350 S. E. 2d 531.

No. 86–1452. STICH *v.* COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT, ET AL. Appeal from C. A. 9th Cir.

dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 805 F. 2d 1039.

No. 86–6474. ROBINSON, BY HIS MOTHER AND NEXT FRIEND, ROBINSON *v.* UNITED STATES. Appeal from C. A. D. C. Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 86–1456. PYZER, EXECUTRIX OF THE ESTATE OF PYZER *v.* PERRY ET AL. Appeal from Ct. App. Cal., 1st App. Dist., dismissed for want of substantial federal question. JUSTICE BLACKMUN would note probable jurisdiction and set case for oral argument.

No. 86–1478. WHITE PLAINS AUTOMOTIVE SUPPLY CO., INC., ET AL. *v.* CITY OF PEEKSKILL. Appeal from Ct. App. N. Y. dismissed for want of substantial federal question. Reported below: 68 N. Y. 2d 933, 502 N. E. 2d 1006.

No. 86–1586. BOMHARDT *v.* MARYLAND. Appeal from Ct. Sp. App. Md. dismissed for want of jurisdiction. Reported below: 68 Md. App. 723.

Vacated and Remanded on Appeal

No. 86–344. OHIO ET AL. *v.* FLEET AEROSPACE CORP. ET AL. Appeal from C. A. 6th Cir. Motion of North American Securities Administrators Association, Inc., for leave to file a brief as *amicus curiae* granted. Judgment vacated and case remanded for further consideration in light of *CTS Corp.* v. *Dynamics Corporation of America*, *ante*, p. 69. Reported below: 796 F. 2d 135.

Certiorari Granted—Reversed and Remanded. (See No. 86–1381, *ante*, p. 400.)

Certiorari Granted—Vacated and Remanded

No. 85–6430. SANDERS *v.* LANE, DIRECTOR, ILLINOIS DEPARTMENT OF CORRECTIONS, ET AL. C. A. 7th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Cruz* v. *New York*, *ante*, p. 186. Reported below: 779 F. 2d 54.

No. 85–6925. PICKETT ET AL. *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Motion of petitioners for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Cruz* v. *New York*, *ante*, p. 186. Reported below: 137 Ill. App. 3d 1155, 499 N. E. 2d 176.

No. 86–6105. PUIATTI *v.* FLORIDA. Sup. Ct. Fla. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Cruz* v. *New York*, *ante*, p. 186. Reported below: 495 So. 2d 128.

Miscellaneous Orders

No. A–770. ROBERTS *v.* UNITED STATES. Application to continue stay and for other relief, presented to JUSTICE POWELL, and by him referred to the Court, denied. The order heretofore entered by JUSTICE POWELL on April 21, 1987, is vacated. JUSTICE STEVENS, JUSTICE O'CONNOR, and JUSTICE SCALIA would grant the application.

No. D–614. IN RE DISBARMENT OF BRIGGS. Due to mistaken identity, the order entered March 9, 1987 [480 U. S. 914], suspending William Leon Briggs, of Fort Wayne, Ind., from the practice of law in this Court is vacated and the rule to show cause issued on that date is discharged.

No. D–630. IN RE DISBARMENT OF ALLEN. It is ordered that William Slater Allen, Jr., of Providence, R. I., 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–631. IN RE DISBARMENT OF BURKE. It is ordered that Thomas John Burke, of Naperville, 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. 85–1589. IOWA MUTUAL INSURANCE CO. *v.* LAPLANTE ET AL., 480 U. S. 9. Motion of respondents to retax costs granted.

No. 86–228. KUNGYS *v.* UNITED STATES. C. A. 3d Cir. [Certiorari granted, 479 U. S. 947.] Motion of petitioner for leave to file a reply brief to the briefs of the *amici curiae* denied.

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 the Solicitor General for divided argument granted.

No. 86–1406. PUERTO RICO DEPARTMENT OF CONSUMER AFFAIRS ET AL *v.* ISLA PETROLEUM CORP. ET AL. Temp. Emerg. Ct. App. Motions of New York et al. and Asociacion de Detallistas de Gasoline de Puerto Rico for leave to file briefs as *amici curiae* granted. The Solicitor General is invited to file a brief in this case expressing the views of the United States. JUSTICE O'CONNOR took no part in the consideration or decision of these motions and this order.

Certiorari Denied. (See also Nos. 86–1452 and 86–6474, *supra.*)

No. 85–1840. ARCHER-DANIELS-MIDLAND CO. ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 785 F. 2d 206.

No. 86–884. GRAMENOS *v.* JEWEL COS., INC., ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 797 F. 2d 432.

No. 86–1085. PAGEL *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., Orange County. Certiorari denied. Reported below: 186 Cal. App. 3d Supp. 1, 232 Cal. Rptr. 104.

No. 86–1134. VGS CORP., DBA SOUTHLAND OIL CO., ET AL. *v.* UNITED STATES DEPARTMENT OF ENERGY ET AL. Temp. Emerg. Ct. App. Certiorari denied. Reported below: 808 F. 2d 842.

No. 86–1174. HOLMBERG *v.* MORRISETTE ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 800 F. 2d 205.

No. 86–1211. REID *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 803 F. 2d 714.

No. 86–1288. KRUTZ *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 28 Ohio St. 3d 36, 502 N. E. 2d 210.

No. 86–1312. ABSHER ET AL. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 805 F. 2d 1025.

No. 86–1334. SKEVIN *v.* SUPREME COURT OF NEW JERSEY. Sup. Ct. N. J. Certiorari denied. Reported below: 104 N. J. 476, 517 A. 2d 852.

No. 86–1421. OCTOPI, INC., ET AL. *v.* COURTNEY. C. A. 7th Cir. Certiorari denied. Reported below: 807 F. 2d 594.

No. 86–1428. PHOENIX NEWSPAPERS, INC., ET AL. *v.* BOSWELL ET AL. Sup. Ct. Ariz. Certiorari denied. Reported below: 152 Ariz. 9, 730 P. 2d 186.

No. 86–1434. CHEVRON U. S. A. INC. *v.* JHJ LIMITED I. C. A. 5th Cir. Certiorari denied. Reported below: 806 F. 2d 82.

No. 86–1446. PUNTON *v.* CITY OF SEATTLE. C. A. 9th Cir. Certiorari denied. Reported below: 805 F. 2d 1378.

No. 86–1448. CHANCEY *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 256 Ga. 415, 349 S. E. 2d 717.

No. 86–1453. ZENITH RADIO CORP. ET AL. *v.* MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 807 F. 2d 44.

No. 86–1455. MARCOCCIO ET AL. *v.* CROSSMAN ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 806 F. 2d 329.

No. 86–1458. VADEN *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 86–1462. POTENZE ET AL. *v.* NEW YORK SHIPPING ASSN., INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 804 F. 2d 235.

No. 86–1477. CREDIT MANAGERS ASSOCIATION OF SOUTHERN CALIFORNIA *v.* KENNESAW LIFE & ACCIDENT INSURANCE CO. C. A. 11th Cir. Certiorari denied. Reported below: 800 F. 2d 1542.

No. 86–1482. KIER *v.* COMMERCIAL UNION INSURANCE COS. C. A. 7th Cir. Certiorari denied. Reported below: 808 F. 2d 1254.

No. 86–1484. TIP TOP FARMS, INC., ET AL. *v.* DAIRYLEA COOPERATIVE, INC. Ct. App. N. Y. Certiorari denied. Reported below: 69 N. Y. 2d 625, 503 N. E. 2d 692.

No. 86–1485. TOWNSHIP OF EDISON, NEW JERSEY *v.* SKEVOFILAX ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 810 F. 2d 378.

No. 86–1491. POINTON *v.* OKLAHOMA ET AL. Ct. App. Okla. Certiorari denied.

No. 86–1515. HING ET UX. *v.* MCELHANON ET UX. Sup. Ct. Ariz. Certiorari denied. Reported below: 151 Ariz. 403, 728 P. 2d 273.

No. 86–1535. CARTER *v.* PURYEAR ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 790 F. 2d 83.

No. 86–1550. POSNER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 806 F. 2d 264.

No. 86–1558. GANT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 808 F. 2d 55.

No. 86–1580. GONZALEZ-CALLES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 808 F. 2d 55.

No. 86–1582. GUZZINO ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 810 F. 2d 687.

No. 86–5361. WASHINGTON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 470 A. 2d 729.

No. 86–5744. KING *v.* UNITED STATES;
No. 86–5745. MARTIN *v.* UNITED STATES; and
No. 86–5746. TAYLOR, AKA ROBERTS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 792 F. 2d 1019.

No. 86–6248. KABAT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 797 F. 2d 580.

No. 86–6319. MOONEY *v.* QUINLAN ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 802 F. 2d 447.

No. 86–6387. BURNS *v.* EDWARDS. C. A. 6th Cir. Certiorari denied. Reported below: 810 F. 2d 200.

No. 86–6397. LOPEZ *v.* UNITED STATES; and
No. 86–6589. NADIR ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 803 F. 2d 969.

No. 86–6469. WARD *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied.

No. 86–6476. BLANDIN *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 809 F. 2d 75.

No. 86-6483. McHARRIS *v.* SPEARS, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 86-6484. STALLWORTH *v.* DETROIT BOARD OF EDUCATION ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 810 F. 2d 203.

No. 86-6486. SMITH *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 142 Ill. App. 3d 1171, 504 N. E. 2d 548.

No. 86-6488. CONTRERAS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 805 F. 2d 1108.

No. 86-6489. MARS *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 500 So. 2d 153.

No. 86-6492. HOLT *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 481 N. E. 2d 1324.

No. 86-6493. SCHLOMANN *v.* McSTEEN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 805 F. 2d 1036.

No. 86-6494. BEWLEY *v.* COLEMAN. Sup. Ct. Okla. Certiorari denied.

No. 86-6495. KIMBLE *v.* BUNNELL. C. A. 9th Cir. Certiorari denied.

No. 86-6518. AMARO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 816 F. 2d 284.

No. 86-6533. MADSON *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 10th Cir. Certiorari denied.

No. 86-6534. McCOY *v.* ZIMMERMAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AND CORRECTIONAL DIAGNOSTIC AND CLASSIFICATION CENTER AT GRATERFORD, ET AL. C. A. 3d Cir. Certiorari denied.

No. 86-6536. DeMARCO *v.* BLACKSHEAR ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 810 F. 2d 1160.

No. 86-6540. CLARKSON *v.* INTERNAL REVENUE SERVICE ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 811 F. 2d 1396.

No. 86-6553. HESS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 805 F. 2d 1039.

No. 86-6555. BROWN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 812 F. 2d 713.

No. 86-6556. ACOSTA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 807 F. 2d 178.

No. 86-6558. MARTINEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 808 F. 2d 1050.

No. 86-6560. SCHIEK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 806 F. 2d 943.

No. 86-6564. MAY *v.* PRO-GUARD, INC. C. A. 6th Cir. Certiorari denied. Reported below: 810 F. 2d 202.

No. 86-6571. SILAS *v.* KERBY, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 86-6574. POMPEY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 86-6575. BROWN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 808 F. 2d 841.

No. 86-6584. REDMOND *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 803 F. 2d 438 and 804 F. 2d 146.

No. 86-6590. PRICE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 86-6595. HAYS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 810 F. 2d 1163.

No. 86-6614. JORDAN *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 258 U. S. App. D. C. 143, 810 F. 2d 262.

No. 86-267. RAVEN'S HOLLOW, LTD., ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 783 F. 2d 450.

No. 86-1257. SMITH *v.* UNITED STATES; and STEVENSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. JUSTICE

BRENNAN and JUSTICE MARSHALL would grant the petition for writ of certiorari and reverse the judgments of conviction. Reported below: 795 F. 2d 841 (first case); 807 F. 2d 178 (second case).

No. 86–1302. THIGPEN, COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS, ET AL. *v.* PRUETT. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 805 F. 2d 1032.

No. 86–1409. INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA, ET AL. *v.* A. T. MASSEY COAL CO., INC., ET AL. C. A. 4th Cir. Certiorari denied. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 799 F. 2d 142.

No. 86–6303. PIERRE, AKA SELBY *v.* SHULSEN, WARDEN, ET AL. C. A. 10th Cir.;

No. 86–6472. SPRANGER *v.* INDIANA. Sup. Ct. Ind.;

No. 86–6604. MARTIN *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla.; and

No. 86–6653. COCHRAN *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: No. 86–6303, 802 F. 2d 1282; No. 86–6472, 498 N. E. 2d 931; No. 86–6604, 497 So. 2d 872; No. 86–6653, 500 So. 2d 1064.

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. 85–1094. HOPFMANN ET AL. *v.* CONNOLLY ET AL., 479 U. S. 1023;

No. 85–1217. CITY OF SPRINGFIELD, MASSACHUSETTS *v.* KIBBE, ADMINISTRATRIX OF THE ESTATE OF THURSTON, 480 U. S. 257;

No. 85–1485. WALKER *v.* OHIO, 480 U. S. 916; and

No. 86–5307. WILLIAMS *v.* OHIO, 480 U. S. 923. Petitions for rehearing denied.

No. 86–5701. GRIFFIN *v.* MARTIN, WARDEN, ET AL., 480 U. S. 919;

No. 86–5953. SCOTT *v.* OHIO, 480 U. S. 923;

No. 86–6147. RUSSELL *v.* GARRAGHTY, WARDEN, ET AL., 479 U. S. 1100;

No. 86–6206. MAHDAVI *v.* SHIRANI, 480 U. S. 921;

No. 86–6256. HENRY *v.* MERIT SYSTEMS PROTECTION BOARD, 480 U. S. 922;

No. 86–6268. STARKES *v.* LYNAUGH, INTERIM DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, 480 U. S. 937;

No. 86–6341. HILL *v.* LYNAUGH, INTERIM DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, 480 U. S. 939; and

No. 86–6345. MONTGOMERY *v.* INTERNAL REVENUE SERVICE, 480 U. S. 939. Petitions for rehearing denied.

MAY 4, 1987

Appeals Dismissed

No. 86–1297. BACKLUND *v.* BOARD OF COMMISSIONERS OF KING COUNTY HOSPITAL DISTRICT NO. 2. Appeal from Sup. Ct. Wash. dismissed for want of substantial federal question. Reported below: 106 Wash. 2d 632, 724 P. 2d 981.

No. 86–1342. LAVALLE ET AL. *v.* CANARY ET AL.; and LACK ET AL. *v.* CANARY ET AL. Appeals from App. Div., Sup. Ct. N. Y., 2d Jud. Dept., dismissed for want of substantial federal question. Reported below: 123 App. Div. 2d 730, 507 N. Y. S. 2d 412 (first case); 123 App. Div. 2d 729, 507 N. Y. S. 2d 606 (second case).

No. 86–1457. BANKERS TRUST NEW YORK CORP. ET AL. *v.* DEPARTMENT OF FINANCE OF THE CITY OF NEW YORK ET AL. Appeal from App. Div., Sup. Ct. N. Y., 1st Jud. Dept., dismissed for want of properly presented federal question. Reported below: 120 App. Div. 2d 992, 502 N. Y. S. 2d 567.

Certiorari Granted—Vacated and Remanded

No. 85–1292. M. C. C. OF FLORIDA, INC., ET AL. *v.* UNITED STATES ET AL. C. A. 11th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Tull* v. *United States*, *ante*, p. 412. Reported below: 772 F. 2d 1501.

No. 86–6263. PETTY *v.* UNITED STATES. C. A. 8th Cir. Certiorari granted limited to Question i presented by the petition,

judgment vacated, and case remanded for further consideration in light of the position presently asserted by the Solicitor General in his brief filed April 13, 1987. In all other respects the petition for writ of certiorari is denied. Reported below: 798 F. 2d 1157.

Miscellaneous Orders

No. A–727. BLACK *v.* UNITED STATES. Application for bail pending appeal, addressed to JUSTICE BLACKMUN and referred to the Court, denied.

No. A–786. RECTOR *v.* TEXAS. Application to continue stay of mandate of the Court of Criminal Appeals of Texas, presented to JUSTICE WHITE, and by him referred to the Court, granted pending the filing of a petition for writ of certiorari on or before June 3, 1987. In the event the petition for writ of certiorari is filed by that date, this order is to continue pending final disposition by this Court of the petition for writ of certiorari.

No. D–606. IN RE DISBARMENT OF KNOWLES. Disbarment entered. [For earlier order herein, see 479 U. S. 1078.]

No. D–615. IN RE DISBARMENT OF ABRAHAMS. Disbarment entered. [For earlier order herein, see 480 U. S. 914.]

No. D–632. IN RE DISBARMENT OF WHITTED. It is ordered that Earl Whitted, Jr., of Goldsboro, 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. 86–6124. BENNETT *v.* ARKANSAS. Sup. Ct. Ark. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 86–6442. LIEGL *v.* WEBB, ACTING COMMISSIONER, NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES, ET AL. C. A. 2d Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until May 26, 1987, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari

without reaching the merits of the motion to proceed *in forma pauperis*.

Probable Jurisdiction Noted

No. 86–1471. LYNG, SECRETARY OF AGRICULTURE *v.* INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, ET AL. Appeal from D. C. D. C. Probable jurisdiction noted. Reported below: 648 F. Supp. 1234.

Certiorari Granted

No. 86–1146. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* GALBREATH. C. A. 8th Cir. Certiorari granted. Reported below: 799 F. 2d 370.

No. 86–1419. OREGON DEPARTMENT OF HUMAN RESOURCES ET AL. *v.* COOS BAY CARE CENTER ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 803 F. 2d 1060.

No. 86–1013. LYNG, SECRETARY OF AGRICULTURE, ET AL. *v.* NORTHWEST INDIAN CEMETERY PROTECTIVE ASSN. ET AL. C. A. 9th Cir. Motion of Howenquet Community Association et al. for leave to file a brief as *amici curiae* granted. Certiorari granted. Reported below: 795 F. 2d 688.

Certiorari Denied. (See also No. 86–6263, *supra*.)

No. 86–61. COMMONWEALTH ELECTRIC CO. *v.* DEPARTMENT OF PUBLIC UTILITIES OF THE COMMONWEALTH OF MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 397 Mass. 361, 491 N. E. 2d 1035.

No. 86–175. NORFOLK & WESTERN RAILWAY CO. *v.* BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 795 F. 2d 1169.

No. 86–353. CONSOLIDATED RAIL CORPORATION *v.* BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 792 F. 2d 303.

No. 86–503. RICHMOND, FREDERICKSBURG & POTOMAC RAILROAD CO. *v.* BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES. C. A. 4th Cir. Certiorari denied. Reported below: 795 F. 2d 1161.

No. 86–849. WOODRICK *v.* HUNGERFORD ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 800 F. 2d 1413.

No. 86–1119. DRAYTON ET AL., AS ESCROW AGENTS OF THE DELAWARE & BOUND BROOK RAILROAD CO. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 801 F. 2d 117.

No. 86–1149. CUNNINGHAM ET UX. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 804 F. 2d 58.

No. 86–1220. DELAWARE & HUDSON RAILWAY CO. *v.* BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES. C. A. 1st Cir. Certiorari denied. Reported below: 803 F. 2d 1228.

No. 86–1224. PION *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied.

No. 86–1281. QUME CORP. *v.* UNITED STATES INTERNATIONAL TRADE COMMISSION ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 809 F. 2d 787.

No. 86–1327. MEDALLION KITCHENS, INC. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 806 F. 2d 185.

No. 86–1364. FERRE *v.* FLORIDA EX REL. RENO, STATE ATTORNEY FOR THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 494 So. 2d 214.

No. 86–1433. ESTATE OF LARKINS, BY HIS ADMINISTRATRIX, LARKINS *v.* FARRELL LINES, INC. C. A. 4th Cir. Certiorari denied. Reported below: 806 F. 2d 510.

No. 86–1438. DENNIS *v.* UNITED STATES;
No. 86–6209. COHEN *v.* UNITED STATES;
No. 86–6336. HURLEY *v.* UNITED STATES; and
No. 86–6544. JENNINGS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 786 F. 2d 1029 and 804 F. 2d 1208.

No. 86–1450. PALANDJIAN *v.* PAHLAVI. C. A. 1st Cir. Certiorari denied. Reported below: 808 F. 2d 1513.

No. 86–1469. ALABAMA *v.* GEESLIN. Ct. Crim. App. Ala. Certiorari denied. Reported below: 505 So. 2d 1248.

No. 86–1473. WILSON, INDIVIDUALLY, AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF WILSON, AND AS GUARD-

IAN OF WILSON ET AL. *v.* BURLINGTON NORTHERN RAILROAD CO. C. A. 10th Cir. Certiorari denied. Reported below: 804 F. 2d 607.

No. 86–1483. REETZ *v.* KINSMAN MARINE TRANSIT CO. Ct. App. Mich. Certiorari denied.

No. 86–1487. SAYLOR *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. Reported below: 223 Neb. 694, 392 N. W. 2d 789.

No. 86–1492. HOSPITAL CORPORATION OF AMERICA *v.* FEDERAL TRADE COMMISSION. C. A. 7th Cir. Certiorari denied. Reported below: 807 F. 2d 1381.

No. 86–1499. EMBERTON ET AL., DBA EMBERTON MACHINE & TOOL, INC. *v.* COUNTY OF SAN DIEGO. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 186 Cal. App. 3d 268, 230 Cal. Rptr. 572.

No. 86–1506. DYKES *v.* NATIONAL GYPSUM CO. C. A. 6th Cir. Certiorari denied. Reported below: 801 F. 2d 810.

No. 86–1509. BOWENS ET AL. *v.* BOARD OF LAW EXAMINERS OF THE STATE OF NORTH CAROLINA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 804 F. 2d 1250.

No. 86–1530. AETNA CASUALTY & SURETY CO. ET AL. *v.* SECURITY FORCES, INC., ET AL. Ct. App. S. C. Certiorari denied. Reported below: 290 S. C. 20, 347 S. E. 2d 903.

No. 86–1565. BAUER *v.* BOSLEY, CLERK OF THE CIRCUIT COURT, CITY OF ST. LOUIS, MISSOURI, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 802 F. 2d 1058.

No. 86–1596. BAZAN ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 807 F. 2d 1200.

No. 86–1611. NICHOLS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 808 F. 2d 660.

No. 86–5282. DIAMOND ET AL. *v.* BLINZINGER ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 789 F. 2d 474.

No. 86–6205. THOMPKINS *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 180 Ga. App. 473, 349 S. E. 2d 768.

No. 86–6223. FREDERICK *v.* WARWZESZACK ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 792 F. 2d 144.

No. 86–6235. SASSOUNIAN *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 182 Cal. App. 3d 361, 226 Cal. Rptr. 880.

No. 86–6241. LONG *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 497 So. 2d 1222.

No. 86–6253. BRIMBERRY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 803 F. 2d 908.

No. 86–6270. ABDULLAH *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied.

No. 86–6272. HARRIS *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla. Certiorari denied. Reported below: 501 So. 2d 1282.

No. 86–6346. WILLIAMS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 805 F. 2d 1301.

No. 86–6481. HILL *v.* WATTS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 803 F. 2d 713.

No. 86–6485. WILSON *v.* LYLES, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 803 F. 2d 1182.

No. 86–6487. JOHNSON *v.* ARMONTROUT, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 815 F. 2d 711.

No. 86–6497. VALENTINO *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 808 F. 2d 59.

No. 86–6502. GALLEGOS *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied.

No. 86–6503. WEBER *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 86–6507. ROBINSON *v.* TANNER ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 798 F. 2d 1378.

No. 86–6513. NAZAIRE *v.* TRANS WORLD AIRLINES ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 807 F. 2d 1372.

No. 86-6516. LIETZKE *v.* MONTGOMERY POLICE DEPARTMENT. Sup. Ct. Ala. Certiorari denied. Reported below: 514 So. 2d 344.

No. 86-6517. VITA *v.* KELLY, SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 802 F. 2d 444.

No. 86-6521. SHEARS *v.* HEDRICK, WARDEN. Sup. Ct. App. W. Va. Certiorari denied.

No. 86-6525. BLEVINS *v.* NORRIS, WARDEN. Sup. Ct. Ark. Certiorari denied. Reported below: 291 Ark. 70, 722 S. W. 2d 573.

No. 86-6531. MATTHEWS *v.* MCCLUNG. Ct. App. Ga. Certiorari denied. Reported below: 181 Ga. App. XXVIII.

No. 86-6541. MOORE *v.* TENNESSEE. C. A. 6th Cir. Certiorari denied. Reported below: 798 F. 2d 1415.

No. 86-6546. ROSS *v.* FOLTZ, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 86-6551. BURTON *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied. Reported below: 815 F. 2d 710.

No. 86-6552. HAMMONDS *v.* FERA ET AL. C. A. 3d Cir. Certiorari denied.

No. 86-6561. MUNFORD *v.* HAWAII. Sup. Ct. Haw. Certiorari denied.

No. 86-6601. DEROCHER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 805 F. 2d 391.

No. 86-6606. BAKER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 808 F. 2d 836.

No. 86-6609. CARPENTER *v.* HEETER, JUDGE, MUNICIPAL COURT OF LIMA, OHIO, ET AL. Sup. Ct. Ohio. Certiorari denied.

No. 86-6616. WAJDA *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 810 F. 2d 754.

No. 86–6622. HILLSBERG *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 812 F. 2d 328.

No. 86–6659. MARTENS *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 398 Mass. 674, 500 N. E. 2d 282.

No. 86–6680. PRIHODA *v.* WISCONSIN. Ct. App. Wis. Certiorari denied.

No. 85–567. DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS *v.* SONGER. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 769 F. 2d 1488.

No. 86–758. FLORIDA *v.* NEASE, AKA COLWELL. Dist. Ct. App. Fla., 4th Dist. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 484 So. 2d 67.

No. 86–1339. O'LEARY, WARDEN *v.* DUNCAN. C. A. 7th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 806 F. 2d 1307.

No. 86–1476. KEMP, WARDEN *v.* THOMAS. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 800 F. 2d 1024.

No. 86–1336. MCCOY ET AL. *v.* HEARST CORP. ET AL. Sup. Ct. Cal. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 42 Cal. 3d 835, 727 P. 2d 711.

No. 86–1443. KRAFT, INC. *v.* AMBRIT, INC. C. A. 11th Cir. Certiorari denied. JUSTICE WHITE took no part in the consideration or decision of this petition. Reported below: 805 F. 2d 974.

No. 86–1466. MCNEIL *v.* ECONOMICS LABORATORY, INC. C. A. 7th Cir. Motion of petitioner to strike respondent's brief denied. Certiorari denied. Reported below: 800 F. 2d 111.

No. 86–1472. RABIDUE *v.* OSCEOLA REFINING CO., A DIVISION OF TEXAS-AMERICAN PETROCHEMICALS, INC. C. A. 6th Cir. Motion of Michigan Trial Lawyers Association for leave to file

a brief as *amicus curiae* granted. Certiorari denied. Reported below: 805 F. 2d 611.

No. 86–1546. CENTRAL MACHINERY CO. *v.* ARIZONA. Sup. Ct. Ariz. Motion of Ak-Chin Indian Community et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this motion and this petition. Reported below: 152 Ariz. 134, 730 P. 2d 843.

No. 86–5026. WINGO *v.* BLACKBURN, WARDEN. C. A. 5th Cir.;

No. 86–5292. LOYD *v.* LOUISIANA. Sup. Ct. La.;

No. 86–5379. WATSON *v.* BLACKBURN, WARDEN. C. A. 5th Cir.;

No. 86–5426. BROGDON *v.* BLACKBURN, WARDEN. C. A. 5th Cir.;

No. 86–5436. GLASS *v.* BLACKBURN, WARDEN. C. A. 5th Cir.;

No. 86–5544. WELCOME *v.* BLACKBURN, WARDEN. C. A. 5th Cir.;

No. 86–5769. THOMPSON *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir.;

No. 86–5800. BERRY *v.* PHELPS, SECRETARY, LOUISIANA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 5th Cir.;

No. 86–5884. IRVING *v.* MISSISSIPPI. Sup. Ct. Miss.;

No. 86–5984. BATES *v.* LOUISIANA. Sup. Ct. La.;

No. 86–6027. RUST *v.* NEBRASKA. Sup. Ct. Neb.;

No. 86–6043. RAULT *v.* BLACKBURN, WARDEN. C. A. 5th Cir.;

No. 86–6103. HARDWICK *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. Sup. Ct. Fla.;

No. 86–6188. MOORE *v.* BLACKBURN, WARDEN. C. A. 5th Cir.; and

No. 86–6300. JOHNSON *v.* LYNAUGH, INTERIM DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: No. 86–5026, 783 F. 2d 1046 and 786 F. 2d 654; No. 86–5292, 489 So. 2d 898; No. 86–5379, 798 F. 2d 872; No. 86–5426, 790 F. 2d 1164; No. 86–5436, 791 F. 2d 1165; No. 86–5544, 793 F. 2d 672; No. 86–5769, 787 F. 2d 1447; No. 86–5800, 795 F. 2d 504; No. 86–5884, 498 So. 2d 305; No. 86–5984, 495 So. 2d 1262; No. 86–6027, 223 Neb. 150, 388 N. W. 2d 483;

No. 86–6043, 799 F. 2d 1071; No. 86–6103, 496 So. 2d 796; No. 86–6188, 806 F. 2d 560; No. 86–6300, 804 F. 2d 300.

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. 86–913. HEINEMANN *v.* UNITED STATES, 480 U. S. 930;

No. 86–1293. MALICK *v.* SANDIA CORP., 480 U. S. 935;

No. 86–6013. BURDINE *v.* TEXAS, 480 U. S. 940;

No. 86–6318. THOMPSON *v.* SOUTHEASTERN TOYOTA ET AL., 480 U. S. 939; and

No. 86–6405. MATUSAVAGE *v.* UNITED STATES, 480 U. S. 950. Petitions for rehearing denied.

No. 85–1837. BLOCK ET AL. *v.* MEESE, ATTORNEY GENERAL OF THE UNITED STATES, ET AL., 478 U. S. 1021. Petition for rehearing denied. JUSTICE SCALIA took no part in the consideration or decision of this petition.

No. 86–848. HAYES *v.* UNITED STATES, 479 U. S. 1086. Motion for leave to file petition for rehearing denied.

MAY 15, 1987

Dismissal Under Rule 53

No. 86–1193. MCDONNELL DOUGLAS CORP. *v.* DANIELS ET AL. Ct. App. Cal., 2d App. Dist. Certiorari dismissed under this Court's Rule 53.

Certiorari Denied

No. 86–6896 (A–824). MULLIGAN *v.* KEMP, WARDEN. C. A. 11th Cir. Application for stay of execution of sentence of death, presented to JUSTICE POWELL, and by him referred to the Court, denied. Certiorari denied. Reported below: 818 F. 2d 746.

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 the application for stay of execution and the petition for writ of certiorari and would vacate the death sentence in this case.

MAY 18, 1987

Appeals Dismissed

No. 86–781. KANSAS GAS & ELECTRIC CO. *v.* STATE CORPORATION COMMISSION OF KANSAS ET AL. Sup. Ct. Kan. [Probable jurisdiction noted, 479 U. S. 1082.] Because there is no longer a live controversy concerning Question 1 presented by the jurisdictional statement, and because Question 2 does not present a substantial federal question, the appeal is dismissed. The portions of this Court's orders of February 23, 1987, consolidating Nos. 86–781 and 86–793 for argument are vacated. JUSTICE POWELL took no part in the consideration or decision of this case.

No. 86–1366. DUQUESNE LIGHT CO. ET AL. *v.* STATE TAX DEPARTMENT OF WEST VIRGINIA ET AL. Appeal from Sup. Ct. App. W. Va. dismissed for want of substantial federal question. JUSTICE POWELL took no part in the consideration or decision of this case. Reported below: —— W. Va. ——, 350 S. E. 2d 754.

No. 86–1510. TYRAKOWSKI *v.* TYRAKOWSKI. Appeal from Ct. App. Cal., 2d App. Dist., dismissed for want of jurisdiction.

No. 86–1518. STANDARD MANUFACTURING CO., INC. *v.* TAX COMMISSION OF THE STATE OF NEW YORK ET AL. Appeal from Ct. App. N. Y. dismissed for want of substantial federal question. Reported below: 69 N. Y. 2d 635, 503 N. E. 2d 694.

No. 86–1524. MCGOVERN *v.* NEW JERSEY. Appeal from Super. Ct. N. J., App. Div., dismissed for want of substantial federal question.

No. 86–1522. TEMPLEMAN *v.* PRESBYTERY OF NORTHERN NEW ENGLAND. Appeal from Sup. Ct. N. H. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 86–1669. BRANSON *v.* NORTHINGTON ET AL. Appeal from C. A. 9th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 810 F. 2d 205.

No. 86–6568. SANDS *v.* ARIZONA DEPARTMENT OF ECONOMIC SECURITY ET AL. Appeal from Sup. Ct. Ariz. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 86–6612. LEWINGDON ET AL. *v.* CELESTE ET AL. Appeal from C. A. 6th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 810 F. 2d 201.

Miscellaneous Orders

No. A–768. RUNNELLS *v.* LEVY ET AL. Application for bail and other relief, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. A–796. MIGUEL T. *v.* COMMISSIONER, NEW YORK CITY DEPARTMENT OF SOCIAL SERVICES, ET AL. Family Ct., Kings County, N. Y. Application for stay, addressed to JUSTICE WHITE and referred to the Court, denied.

No. D–602. IN RE DISBARMENT OF HOLMES. Disbarment entered. [For earlier order herein, see 479 U. S. 1051.]

No. D–613. IN RE DISBARMENT OF SASSOWER. Disbarment entered. [For earlier order herein, see 480 U. S. 914.]

No. D–617. IN RE DISBARMENT OF CASLER. Disbarment entered. [For earlier order herein, see 480 U. S. 928.]

No. D–633. IN RE DISBARMENT OF MONAGHAN. It is ordered that Peter Joseph Monaghan, of Bergenfield, N. J., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 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 National Coordinating Committee for Multiemployer Plans for leave to file a brief as *amicus 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 petitioners for leave to file

a supplemental brief after argument and to supplement the record granted.

No. 86–279. BASIC INC. ET AL. *v.* LEVINSON ET AL. C. A. 6th Cir. [Certiorari granted, 479 U. S. 1083.] Motion of American Corporate Counsel Association for leave to file a brief as *amicus curiae* granted. THE CHIEF JUSTICE took no part in the consideration or decision of this motion.

No. 86–728. HONIG, CALIFORNIA SUPERINTENDENT OF PUBLIC INSTRUCTION *v.* DOE ET AL. C. A. 9th Cir. [Certiorari granted, 479 U. S. 1084.] Motion of San Francisco Unified School District for leave to file a brief as *amicus curiae* granted.

No. 86–740. OMNI CAPITAL INTERNATIONAL, LTD., ET AL. *v.* RUDOLF WOLFF & CO., LTD., ET AL. C. A. 5th Cir. [Certiorari granted, 479 U. S. 1063.] Motion of respondents for divided argument denied.

No. 86–761. FORRESTER *v.* WHITE. C. A. 7th Cir. [Certiorari granted, 479 U. S. 1083.] Motion of petitioner to dispense with printing the joint appendix granted.

No. 86–1033. JAFFE ET AL. *v.* GRANT, TRUSTEE IN BANKRUPTCY FOR CONTINENTAL SOUTHEAST LAND CORP. AND AS RECEIVER, 480 U. S. 931. Motion of respondent for award of fees and damages denied.

No. 86–1128. IMMIGRATION AND NATURALIZATION SERVICE *v.* ABUDU. C. A. 9th Cir. [Certiorari granted, 480 U. S. 930.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 86–1661. BATTLES FARM CO. ET AL. *v.* PIERCE, SECRETARY OF HOUSING AND URBAN DEVELOPMENT. C. A. D. C. Cir. Motion of petitioners to expedite consideration of the petition for writ of certiorari denied.

No. 86–6109. MATHEWS *v.* UNITED STATES. C. A. 7th Cir. [Certiorari granted, 480 U. S. 945.] Motion for appointment of counsel granted, and it is ordered that Franklyn M. Gimbel, Esquire, of Milwaukee, Wis., be appointed to serve as counsel for petitioner in this case.

No. 86–6393. GRUETTER *v.* OHIO. Ct. App. Ohio, Wood County. Motion of petitioner for leave to proceed *in forma pau-*

peris denied. Petitioner is allowed until June 8, 1987, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 86–6629. WRENN *v.* WEINBERGER, SECRETARY OF DEFENSE, ET AL. C. A. D. C. Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until June 8, 1987, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

Probable Jurisdiction Noted

No. 86–1521. UNITED STATES *v.* CROCKER NATIONAL BANK ET AL. Appeal from D. C. C. D. Cal. Motion of appellees to substitute Wells Fargo Bank et al. in place of Crocker National Bank et al. granted. Probable jurisdiction noted.

Certiorari Granted

No. 86–1415. MARINO ET AL. *v.* ORTIZ ET AL.; and COSTELLO ET AL. *v.* NEW YORK CITY POLICE DEPARTMENT ET AL. C. A. 2d Cir. Certiorari granted.* Reported below: 806 F. 2d 1144 (first case); 806 F. 2d 1147 (second case).

No. 86–1512. PIERCE, SECRETARY OF HOUSING AND URBAN DEVELOPMENT *v.* UNDERWOOD ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 761 F. 2d 1342 and 802 F. 2d 1107.

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*[REPORTER'S NOTE: For amendment of this order, see 482 U. S. 912.]

Certiorari Denied. (See also Nos. 86–1522, 86–1669, 86–6568, and 86–6612, *supra.*)

No. 86–1048. COOPER *v.* DIAMOND M CO. C. A. 5th Cir. Certiorari denied. Reported below: 799 F. 2d 176.

No. 86–1136. PACYNA *v.* MARSH, SECRETARY OF THE ARMY. C. A. Fed. Cir. Certiorari denied. Reported below: 809 F. 2d 792.

No. 86–1210. JONES *v.* SHANKLAND ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 800 F. 2d 77.

No. 86–1284. LOPES, COMMISSIONER OF CONNECTICUT DEPARTMENT OF CORRECTION *v.* MELE. C. A. 2d Cir. Certiorari denied. Reported below: 833 F. 2d 1003.

No. 86–1322. AAACON AUTO TRANSPORT, INC. *v.* INTERSTATE COMMERCE COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 253 U. S. App. D. C. 202, 792 F. 2d 1156.

No. 86–1358. CRUZ *v.* MARINE TRANSPORT LINES, INC. C. A. 3d Cir. Certiorari denied. Reported below: 806 F. 2d 252.

No. 86–1359. PORTER *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 807 F. 2d 21.

No. 86–1383. NEW YORK LAND CO. ET AL. *v.* REPUBLIC OF THE PHILIPPINES. C. A. 2d Cir. Certiorari denied. Reported below: 806 F. 2d 344.

No. 86–1435. DEMOULAS SUPER MARKETS, INC. *v.* HARRIMAN ET AL. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 518 A. 2d 1035.

No. 86–1449. FEDERAL INSURANCE CO. ET AL. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 805 F. 2d 1012.

No. 86–1496. MARTIN ET AL. *v.* MONTELONGO ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 803 F. 2d 1341.

No. 86–1497. HOWER ET AL. *v.* PICINICH & RIGOLOSI, P. A., ET AL. Super. Ct. N. J., App. Div. Certiorari denied.

No. 86–1498. HERON *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 357 Pa. Super. 635, 513 A. 2d 1076.

No. 86–1501. CITY OF MCKEESPORT ET AL. *v.* CUNNINGHAM. C. A. 3d Cir. Certiorari denied. Reported below: 807 F. 2d 49.

No. 86–1511. BROWN *v.* MISSOURI PACIFIC RAILROAD CO. Sup. Ct. Mo. Certiorari denied. Reported below: 720 S. W. 2d 357.

No. 86–1513. PALMER ET AL. *v.* CITY OF CHICAGO ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 806 F. 2d 1316.

No. 86–1516. REKLAU *v.* MERCHANTS NATIONAL CORP. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 808 F. 2d 628.

No. 86–1517. SCHOOLER *v.* HARDER, SECRETARY OF SOCIAL AND REHABILITATION SERVICES, ET AL. Ct. App. Kan. Certiorari denied. Reported below: 11 Kan. App. 2d xxxix, 761 P. 2d 327.

No. 86–1523. CHANDLER *v.* CHANDLER. C. A. 5th Cir. Certiorari denied. Reported below: 805 F. 2d 555.

No. 86–1531. EDWARDS *v.* UNITED STATES OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied.

No. 86–1532. FLORIDA *v.* STRONG. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 495 So. 2d 191.

No. 86–1534. APPLEGATE *v.* DEBROVIR, OAKES & GEBHARDT. C. A. D. C. Cir. Certiorari denied. Reported below: 258 U. S. App. D. C. 89, 809 F. 2d 930.

No. 86–1539. STATE LINE DELIVERY SERVICE, INC. *v.* RIVERA ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 69 N. Y. 2d 679, 504 N. E. 2d 381.

No. 86–1540. CATHEY *v.* LOUISIANA. Ct. App. La., 5th Cir. Certiorari denied. Reported below: 493 So. 2d 842.

No. 86–1541. TOWNSHIP OF BRICK *v.* BLOCK 48–7 ET AL. Super. Ct. N. J., App. Div. Certiorari denied. Reported below: 210 N. J. Super. 481, 510 A. 2d 101.

No. 86–1544. NU-CAR CARRIERS, INC. *v.* VARNUM. C. A. 11th Cir. Certiorari denied. Reported below: 804 F. 2d 638.

No. 86–1547. PARKS *v.* MICHIGAN EMPLOYMENT SECURITY COMMISSION ET AL. Sup. Ct. Mich. Certiorari denied. Reported below: 427 Mich. 224, 398 N. W. 2d 275.

No. 86–1549. CONSUL, LTD. *v.* TRANSCO ENERGY CO., FKA TRANSCO COS., INC., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 805 F. 2d 490.

No. 86–1551. PEREZ DE LA CRUZ ET AL. *v.* CROWLEY TOWING & TRANSPORTATION CO. C. A. 1st Cir. Certiorari denied. Reported below: 807 F. 2d 1084.

No. 86–1554. SMITH *v.* TEXAS. Ct. App. Tex., 1st Dist. Certiorari denied. Reported below: 708 S. W. 2d 518.

No. 86–1556. UNITED AMERICAN TELECASTERS, INC. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL.; and

No. 86–1561. BETHEL BROADCASTING, INC. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 255 U. S. App. D. C. 397, 801 F. 2d 1436.

No. 86–1557. DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS *v.* COOPER. C. A. 11th Cir. Certiorari denied. Reported below: 807 F. 2d 881.

No. 86–1560. SHERIDAN ROAD BAPTIST CHURCH ET AL. *v.* MICHIGAN DEPARTMENT OF EDUCATION ET AL. Sup. Ct. Mich. Certiorari denied. Reported below: 426 Mich. 462, 396 N. W. 2d 373.

No. 86–1563. GNIOTEK ET AL. *v.* CITY OF PHILADELPHIA ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 808 F. 2d 241.

No. 86–1564. SPENCER COUNTY CLERK ET AL. *v.* B & M COAL CORP. ET AL. Sup. Ct. Ind. Certiorari denied. Reported below: 501 N. E. 2d 401.

No. 86–1568. ROMAIN *v.* SHEAR, ADMINISTRATOR OF THE DEPARTMENT OF TRANSPORTATION, MARITIME ADMINISTRATION. C. A. 9th Cir. Certiorari denied. Reported below: 799 F. 2d 1416.

No. 86–1571. RALPHS ET UX. *v.* PARA ET AL. Ct. App. Wash. Certiorari denied. Reported below: 44 Wash. App. 1008.

No. 86–1574. CHEMEHUEVI INDIAN TRIBE *v.* CALIFORNIA STATE BOARD OF EQUALIZATION ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 800 F. 2d 1446.

No. 86–1581. NEUMANN *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 148 Ill. App. 3d 362, 499 N. E. 2d 487.

No. 86–1583. WILSON *v.* MCDANIEL, SECRETARY OF STATE OF TEXAS. C. A. 5th Cir. Certiorari denied.

No. 86–1584. PLAS ET AL. *v.* AUSTIN, SECRETARY OF STATE OF MICHIGAN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 811 F. 2d 607.

No. 86–1585. DAROFF ET AL. *v.* DUNKIN' DONUTS OF PENNSYLVANIA, INC. Super. Ct. Pa. Certiorari denied. Reported below: 356 Pa. Super. 621, 512 A. 2d 1293.

No. 86–1592. MADDOX *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 502 So. 2d 790.

No. 86–1595. WOMBLE *v.* SEABOARD SYSTEM RAILROAD. C. A. 11th Cir. Certiorari denied. Reported below: 804 F. 2d 635.

No. 86–1605. ROGERS *v.* CONNECTICUT. App. Ct. Conn. Certiorari denied. Reported below: 9 Conn. App. 208, 518 A. 2d 399.

No. 86–1609. GRABNER *v.* CONTI ET AL. Super. Ct. Pa. Certiorari denied. Reported below: 353 Pa. Super. 649, 506 A. 2d 1340.

No. 86–1610. JOHNSON *v.* NEW MEXICO. Ct. App. N. M. Certiorari denied. Reported below: 105 N. M. 63, 728 P. 2d 473.

No. 86–1624. WITHWORTH, SUPERINTENDENT, COMMUNITY CORRECTIONAL INSTITUTE, ET AL. *v.* WANG. C. A. 6th Cir. Certiorari denied. Reported below: 811 F. 2d 952.

No. 86–1637. WALDMANN *v.* GRANT, TRUSTEE IN BANKRUPTCY FOR CONTINENTAL SOUTHEAST LAND CORP. C. A. 11th Cir. Certiorari denied.

No. 86–1641. LOCKSLEY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 811 F. 2d 1104.

No. 86–1658. ORIENT LEASING CO., LTD., AS OWNER OF M/V MONTMARTRE *v.* CACTUS PIPE & SUPPLY CO., INC. C. A. 5th Cir. Certiorari denied. Reported below: 808 F. 2d 54.

No. 86–1662. CLARK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 806 F. 2d 260.

No. 86–1667. MUINA ET AL. *v.* ARCHER ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 788 F. 2d 1568.

No. 86–1675. DELACRUZ *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 23 M. J. 356.

No. 86–1699. VIDAL *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 23 M. J. 319.

No. 86–1700. DENNISON MANUFACTURING CO. *v.* PANDUIT CORP. C. A. Fed. Cir. Certiorari denied. Reported below: 810 F. 2d 1561.

No. 86–1701. SOUDAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 812 F. 2d 920.

No. 86–6107. NIELSEN *v.* GUNTER ET AL. C. A. 8th Cir. Certiorari denied.

No. 86–6182. MCCORMACK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 86–6217. BURKS *v.* PERINI, SUPERINTENDENT, MARION CORRECTIONAL INSTITUTION, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 810 F. 2d 199.

No. 86–6234. TOWNSEND *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 512 A. 2d 994.

No. 86–6273. JONES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 806 F. 2d 264.

No. 86–6314. STEVENSON *v.* PHELPS, SECRETARY, LOUISIANA DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 86–6322. ROSS *v.* ZIMMERMAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AND DIAGNOSTIC AND CLASSIFICATION CENTER AT GRATERFORD, ET AL. C. A. 3d Cir. Certiorari denied.

No. 86–6326. BROOKS *v.* ZENT ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 810 F. 2d 199.

No. 86–6350. HULL *v.* CUPP, SUPERINTENDENT, OREGON STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied. Reported below: 804 F. 2d 1252.

No. 86–6364. STICKLES *v.* VETERANS ADMINISTRATION. C. A. Fed. Cir. Certiorari denied. Reported below: 809 F. 2d 790.

No. 86–6375. HARRIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 807 F. 2d 178.

No. 86–6381. PITTS *v.* RICHARDS, SUPERINTENDENT, ROCKVILLE TRAINING CENTER. C. A. 7th Cir. Certiorari denied.

No. 86–6421. BERRY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 808 F. 2d 836.

No. 86–6473. RAMIREZ *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 114 Ill. 2d 125, 500 N. E. 2d 14.

No. 86–6537. MINER *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied. Reported below: 802 F. 2d 464.

No. 86–6545. WORKMAN *v.* PERINI, SUPERINTENDENT, MARION CORRECTIONAL INSTITUTION. C. A. 6th Cir. Certiorari denied. Reported below: 812 F. 2d 1409.

No. 86–6549. JAMES *v.* MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 808 F. 2d 835.

No. 86–6562. MCDONALD *v.* METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE. Chan. Ct. Tenn., Davidson County. Certiorari denied.

No. 86–6563. PENDER *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 808 F. 2d 59.

No. 86–6567. MAY *v.* WARNER AMEX CABLE COMMUNICATIONS, INC. C. A. 6th Cir. Certiorari denied. Reported below: 805 F. 2d 1035.

No. 86-6569. COULIAS *v.* CITY OF CHICAGO DEPARTMENT OF WATER. C. A. 7th Cir. Certiorari denied.

No. 86-6570. WILLIAMS *v.* INDIANA. Ct. App. Ind. Certiorari denied. Reported below: 494 N. E. 2d 1001.

No. 86-6572. WORKMAN *v.* PERINI, SUPERINTENDENT, MARION CORRECTION INSTITUTION. C. A. 6th Cir. Certiorari denied. Reported below: 805 F. 2d 1037.

No. 86-6573. VEREEN *v.* NEWSOME, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 811 F. 2d 610.

No. 86-6577. CASTRO *v.* HAWAII. Int. Ct. App. Haw. Certiorari denied.

No. 86-6578. ABDULLAH *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied. Reported below: 808 F. 2d 841.

No. 86-6579. HAGEMEIER ET AL. *v.* BLOCK ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 806 F. 2d 197.

No. 86-6580. GREEN *v.* DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE. C. A. Fed. Cir. Certiorari denied. Reported below: 818 F. 2d 877.

No. 86-6581. MOORE *v.* KEMP, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 809 F. 2d 702.

No. 86-6582. WOOD *v.* MUNCY, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 806 F. 2d 258.

No. 86-6583. ROMAN *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 86-6585. MILLER *v.* SOLEM, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 807 F. 2d 747.

No. 86-6586. WARD *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 516 A. 2d 929.

No. 86-6588. FAULK *v.* MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 807 F. 2d 175.

No. 86-6592. ABDULLAH *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 808 F. 2d 840.

No. 86–6594. CALLAHAN *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 145 Ill. App. 3d 1160, 511 N. E. 2d 278.

No. 86–6596. BENEDICT *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 124 App. Div. 2d 890, 508 N. Y. S. 2d 656.

No. 86–6597. AL-KARIM *v.* STRAWHORN ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 811 F. 2d 1504.

No. 86–6602. JONES *v.* WHITE, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 811 F. 2d 610.

No. 86–6608. BIRD *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 240 Kan. 288, 729 P. 2d 1136.

No. 86–6610. WILKINS *v.* LYLES, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 838 F. 2d 469.

No. 86–6611. DAVENPORT *v.* NEWSOME, WARDEN. Sup. Ct. Ga. Certiorari denied.

No. 86–6613. HENNESSEY *v.* ZIMMERMAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AND DIAGNOSTIC AND CLASSIFICATION CENTER AT GRATERFORD, ET AL. C. A. 3d Cir. Certiorari denied.

No. 86–6615. LONBERGER *v.* MORRIS, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY. C. A. 6th Cir. Certiorari denied. Reported below: 808 F. 2d 1169.

No. 86–6617. RORRER *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied.

No. 86–6620. PEARSON *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 86–6621. GIVENS *v.* MISSOURI COMMISSION ON HUMAN RIGHTS. C. A. 8th Cir. Certiorari denied. Reported below: 808 F. 2d 841.

No. 86–6623. GAMBRELL *v.* AMERADA HESS CORP. C. A. 3d Cir. Certiorari denied. Reported below: 813 F. 2d 397.

No. 86–6624. HARRISON *v.* HATFIELD ET AL. C. A. 8th Cir. Certiorari denied.

No. 86-6627. MAGEE *v.* BORG, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 86-6628. PILON *v.* RAY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 805 F. 2d 1040.

No. 86-6632. FIGUEROA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 810 F. 2d 1163.

No. 86-6635. SPIVEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 811 F. 2d 609.

No. 86-6636. WATSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 808 F. 2d 58.

No. 86-6639. FLOWERS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 818 F. 2d 464.

No. 86-6640. HARRISON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 256 U. S. App. D. C. 295, 804 F. 2d 1324.

No. 86-6643. HOWARD ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 811 F. 2d 1505.

No. 86-6644. MARTINEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 806 F. 2d 945.

No. 86-6649. ZOGHEIB *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 811 F. 2d 1509.

No. 86-6650. JOHNSON *v.* LYNAUGH, INTERIM DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 86-6656. FLIPPINS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 808 F. 2d 16.

No. 86-6657. BRANSFORD *v.* BROWN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 806 F. 2d 83.

No. 86-6658. GISPERT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 810 F. 2d 207.

No. 86-6660. PHIPPS *v.* KEOHANE ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 811 F. 2d 607.

No. 86–6670. BRUNO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 809 F. 2d 1097.

No. 86–6674. DAVIS *v.* TEXAS. Ct. App. Tex., 13th Dist. Certiorari denied. Reported below: 709 S. W. 2d 288.

No. 86–6675. JONES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 86–6684. WOOTEN-BEY *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 308 Md. 534, 520 A. 2d 1090.

No. 86–6686. LOVINGOOD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 810 F. 2d 195.

No. 86–6687. HOLLAND *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 258 U. S. App. D. C. 236, 810 F. 2d 1215.

No. 86–6688. DAVIDSON *v.* FERRUCCI ET AL. App. Ct. Conn. Certiorari denied.

No. 86–6692. RYLAND *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 806 F. 2d 941.

No. 86–6695. ADKINS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 815 F. 2d 80.

No. 86–6708. AYERS *v.* LYLES, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 812 F. 2d 1400.

No. 86–6718. NEAL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 810 F. 2d 195.

No. 86–6741. CUTLER *v.* ALASKA. Sup. Ct. Alaska. Certiorari denied.

No. 86–895. HALL *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant the petition for writ of certiorari and reverse the judgment of conviction. Reported below: 143 Ill. App. 3d 766, 491 N. E. 2d 757.

No. 86–1261. SEQUOIA BOOKS, INC. *v.* ILLINOIS (two cases). Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant the petition for writ of certiorari and reverse the

judgment of conviction. Reported below: 145 Ill. App. 3d 1054, 495 N. E. 2d 1292 (first case); 146 Ill. App. 3d 1, 496 N. E. 2d 740 (second case).

No. 86–1289. CALIFORNIA *v.* SABO ET AL. Ct. App. Cal., 4th App. Dist. Motions of respondents Ronald Lee Sabo and Angela Marie Zizzo for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 185 Cal. App. 3d 845, 230 Cal. Rptr. 170.

JUSTICE WHITE, with whom THE CHIEF JUSTICE joins, dissenting.

During a routine helicopter patrol a deputy sheriff observed what he believed to be marijuana plants growing inside a 15- by 20-foot greenhouse located in respondents' backyard. The helicopter hovered at 400 to 500 feet and circled the greenhouse in order to give the deputy a better look at the marijuana. Based on this observation a search warrant issued and deputies seized the marijuana. A trial court held the marijuana inadmissible as evidence and the California Court of Appeal affirmed, holding that the deputy's observation of the greenhouse from the hovering helicopter violated the Fourth Amendment. 185 Cal. App. 3d 845, 230 Cal. Rptr. 170 (1986). The Court of Appeal distinguished *California* v. *Ciraolo*, 476 U. S. 207 (1986), on the ground that there the observation of marijuana was made from a fixed-wing aircraft flying in navigable airspace at an altitude over 1,000 feet. The court concluded that here the helicopter was not in navigable airspace as that term is defined at 49 U. S. C. App. § 1301(29), but recognized that the helicopter was lawfully positioned because federal regulations allow operation of helicopters at altitudes less than the minimum permitted to fixed-wing aircraft, provided that the helicopter operates without hazard to persons or property, see 14 CFR § 91.79(d) (1987).* The court expressed concern about the capabilities of helicopters to furnish "a platform for aerial

*Title 49 U. S. C. App. § 1301(29) defines navigable airspace as "airspace above the minimum altitudes of flight prescribed by regulations issued under this chapter, . . . includ[ing] airspace needed to insure safety in take-off and landing of aircraft." The Court of Appeal reasoned that a helicopter flying below 1,000 feet is not above a specified minimum flight altitude and hence not in navigable airspace.

surveillance," 185 Cal. App. 3d, at 854, 230 Cal. Rptr., at 175, and held that the search in this case infringed on a reasonable expectation of privacy.

The Court of Appeal's holding that the helicopter was not in navigable airspace is questionable, and even if this is technically correct it remains true, as the court conceded, that the helicopter was lawfully positioned when the deputy observed the marijuana in respondents' greenhouse. While it is certainly possible that helicopter surveillance could be unreasonably intrusive on account of interminable hovering, raising clouds of dust, creating unreasonable noise, and so forth, nothing in the record indicates that any such factor was present in this case. The decision below is a highly questionable interpretation of our decision in *California* v. *Ciraolo*. I would grant certiorari.

No. 86–1330. MAXTONE-GRAHAM *v.* BURTCHAELL ET AL. C. A. 2d Cir. Motion of American Society of Journalists and Authors, Inc., for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 803 F. 2d 1253.

No. 86–1536. POWELL ET AL. *v.* FLORIDA ET AL. Sup. Ct. Fla. Motion of Rabbinical Association of Greater Miami et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 497 So. 2d 1188.

No. 86–1537. ARMONTROUT, WARDEN *v.* THOMPSON. C. A. 8th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 808 F. 2d 28.

No. 86–1567. RYAN *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Motion of respondent to defer consideration of the petition for writ of certiorari denied. Certiorari denied. Reported below: 121 App. Div. 2d 34, 509 N. Y. S. 2d 545.

No. 86–6193. CLARK *v.* TEXAS. Ct. Crim. App. Tex.;

No. 86–6374. CHRISTY *v.* PENNSYLVANIA. Sup. Ct. Pa.;

No. 86–6599. CARD *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla.;

No. 86–6603. DOBBS *v.* KEMP, WARDEN. C. A. 11th Cir.;

No. 86–6618. MCQUEEN *v.* KENTUCKY. Sup. Ct. Ky.; and

No. 86–6648. STANO *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: No. 86–6193, 717 S. W. 2d 910; No. 86–

6374, 511 Pa. 490, 515 A. 2d 832; No. 86–6599, 497 So. 2d 1169; No. 86–6603, 790 F. 2d 1499 and 809 F. 2d 750; No. 86–6618, 721 S. W. 2d 694; No. 86–6648, 497 So. 2d 1185.

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. 85–1864. RANDALL BOOK CORP. *v.* MARYLAND, 480 U. S. 940;

No. 86–5530. TRUESDALE *v.* AIKEN, WARDEN, ET AL., 480 U. S. 527;

No. 86–5656. BAIRNSFATHER *v.* LOUISIANA, *ante*, p. 1001;

No. 86–6059. PATTERSON *v.* AIKEN, WARDEN, ET AL., 480 U. S. 943;

No. 86–6071. KOON *v.* AIKEN, WARDEN, 480 U. S. 943;

No. 86–6145. CARPENTER *v.* LEONARD, 480 U. S. 936;

No. 86–6191. HOFFMAN *v.* UNITED STATES, *ante*, p. 1005;

No. 86–6232. WHITE *v.* OHIO, 480 U. S. 937;

No. 86–6242. GRAVES *v.* OHIO, 480 U. S. 937;

No. 86–6293. HALL *v.* ILLINOIS, 480 U. S. 951;

No. 86–6294. JOHNSON *v.* ILLINOIS, 480 U. S. 951;

No. 86–6315. SELLNER *v.* FEDERAL BUREAU OF INVESTIGATION ET AL., 480 U. S. 939;

No. 86–6328. BEEZLEY *v.* FREMONT INDEMNITY CO. ET AL., 480 U. S. 949;

No. 86–6337. CLEMENTE *v.* OFFICE OF PERSONNEL MANAGEMENT, *ante*, p. 1005;

No. 86–6359. LEAL *v.* WRQN ET AL., *ante*, p. 1006;

No. 86–6371. SHAHID *v.* TEXAS, 480 U. S. 941;

No. 86–6380. PARKER *v.* GEORGIA, 480 U. S. 940;

No. 86–6398. BURNETT *v.* COX ET AL., *ante*, p. 1019; and

No. 86–6479. JOHNSON *v.* THIGPEN, COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS, 480 U. S. 951. Petitions for rehearing denied.

No. 86-5388. TYSON *v.* MCKELLAR, WARDEN, ET AL., 479 U. S. 1037. Motion for leave to file petition for rehearing denied.

MAY 19, 1987

Certiorari Denied

No. 86-6919 (A-842). JOHNSON *v.* CABANA, ACTING COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE WHITE, and by him referred to the Court, denied. Certiorari denied. Reported below: 818 F. 2d 333.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, 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 the application for stay of execution and the petition for certiorari, and would vacate the death sentence in this case.

Even if I did not take this view, I would still grant the application for a stay and the petition for certiorari. Petitioner raises a substantial claim that, since trial, he has become incompetent and therefore may not be executed. In *Ford* v. *Wainwright*, 477 U. S. 399 (1986), the Court held that the Eighth Amendment bars execution of convicted prisoners found to be incompetent. The Court rested its holding on the lack of "retributive value [in] executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life." *Id.*, at 409. The Court also relied on "the natural abhorrence civilized societies feel at killing one who has no capacity to come to grips with his own conscience or deity." *Ibid.* In a concurring opinion, JUSTICE POWELL stated:

> "If the defendant perceives the connection between his crime and his punishment, the retributive goal of the criminal law is satisfied. And only if the defendant is aware that his death is approaching can he prepare himself for his passing. Accordingly, I would hold that the Eighth Amendment forbids the execution only of those who are unaware of the pun-

ishment they are about to suffer and why they are to suffer it." *Id.*, at 422.

Petitioner's claim is founded on an affidavit by a licensed clinical psychologist stating his findings as to petitioner's sanity. Following a 5-hour evaluation of petitioner, and after a review of petitioner's medical records and of statements by others acquainted with petitioner, the affiant concluded:

> "Edward Johnson is unable to relate any punishment through execution to his own conduct, or the conduct alleged against him. He does not understand why he is being singled out, and does not have the proper mental framework to come to grips with his own conscience. It is quite clear that this is the product of mental disease or defect." App. to Pet. for Cert. D 2.

The plausibility of this conclusion is buttressed by the affidavit of a psychiatrist, who evaluated petitioner prior to his trial. That evaluation "revealed substantial mental defects," and the affiant diagnosed that petitioner had "suffered from brain dysfunction" from birth, and "suffered from [an] organic brain syndrome" that intermittently caused personality and behavioral changes. He concluded "that [petitioner's] mental problems were severe." *Id.*, at E 1–2.

Petitioner first presented this evidence to the Mississippi Supreme Court pursuant to the State's postconviction procedures set forth in Miss. Stat. Ann. § 99–19–57(2)(b) (Supp. 1987). In response, the State submitted affidavits that disputed petitioner's claims. The Mississippi Supreme Court did not hold a hearing in this matter, nor did it even consider the affidavits presented by the State. Instead, the court simply concluded, without explanation, that it did "not find it necessary to consider [the State's affidavits] because [petitioner] failed to make out a prima facie case of present insanity by his affidavits." *Johnson* v. *State*, 508 So. 2d 1126, 1127 (1987). The court summarily held that petitioner's evidence was insufficient standing alone to raise "a reasonable probability" that petitioner is presently "insane." *Ibid.*

The Constitution does not require an indigent prisoner to produce more than what petitioner has in order to meet the burden of coming forward. There is nothing amiss, at least facially, in petitioner's affidavits. The affidavits were prepared by licensed professionals, not by family members or friends. Cf. *Evans* v.

McCotter, 805 F. 2d 1210, 1212–1213 (CA5 1986) (affidavit of insanity by prisoner's sister does not raise legitimate question of sanity). They are based on comprehensive evaluations of petitioner. If true, they reveal an individual who, because of mental defect, is "unaware of the punishment [he is] about to suffer and why [he is] to suffer it." *Ford*, 477 U. S., at 422 (concurring opinion). Yet this individual, according to the Mississippi Supreme Court, has not raised even a prima facie *Ford* claim sufficient to warrant *consideration* of the State's response. If unchallenged affidavits by licensed professionals, concluding that a condemned man "is unable to relate any punishment through execution to his own conduct," are insufficient to raise a *prima facie* case that he is incompetent under *Ford*, then it is hard to imagine what would.*

As applied by the Mississippi Supreme Court, the State's procedures for evaluating the competency of those on death row are inconsistent with *Ford*, and with the minimum requirements of due process when the constitutionality of an execution is at stake. It is true that, in *Ford*, we "left to the State the task of developing appropriate ways" to ensure that the incompetent would never be executed. We also acknowledged that "it may be that some high threshold showing on behalf of the prisoner will be found a necessary means to control the number of nonmeritorious or repetitive claims of insanity." *Id.*, at 417. But we left no doubt that the "overriding dual imperative" in devising procedures to comply with *Ford* was to ensure "redress for those with substantial claims and [to] encourag[e] accuracy in the factfinding determination." *Ibid.* Mississippi's procedures appear utterly inconsistent with this imperative.

Because the precedent set below threatens to undermine the practical effectiveness of our holding in *Ford*, I would grant the stay and the petition to consider the constitutionality of Mississippi's procedures for ensuring that its death sentencing system comports with the constitutional obligations identified in *Ford*.

MAY 22, 1987

Certiorari Denied

No. 86-6925 (A-844). TUCKER *v.* KEMP, WARDEN. C. A. 11th Cir. Application for stay of execution of sentence of death,

*I am at a loss to guess what extensive showing the State might require of an indigent defendant before it would grant a hearing.

presented to JUSTICE POWELL, and by him referred to the Court, denied. Certiorari denied. Reported below: 818 F. 2d 749.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, 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 the application for stay of execution and the petition for certiorari, and would vacate the death sentence in this case.

Even if I did not take this view, however, I would still grant the application for a stay. Tucker's petition for certiorari raises the question whether inflammatory and prejudicial photographs of the victim's body introduced at trial violated his constitutional right to "fundamental fairness and a reliable sentencing determination." Pet. for Cert. i. This question is sufficiently similar to a question that will be decided by the Court in *Thompson* v. *Oklahoma*, certiorari granted, 479 U. S. 1084 (1987),[1] that the petition should be held by the Court pending our disposition of the question in *Thompson*.[2]

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[1] Among the questions presented in *Thompson* is:

"May admission of inflammatory evidence [*i. e.*, two photos of murder victim] in capital case against 16 year old defendant be deemed harmless error merely because of strong evidence of guilt, when such evidence also prejudices defendant's right to fair, full jury consideration of all mitigating circumstances—including age—during death penalty deliberations?" Pet. for Cert. in No. 86-6169, p. 2.

[2] It is true that in *Thompson* the court below found that admission of the photographs at issue was error, but harmless, while here the court found no error in the admission of the photographs. 724 P. 2d 780 (Okla. Crim. App. 1986). This difference is not significant. In *Thompson*, in order to overturn the state court's determination of harmless error, we would have to find both that the admission of the photographs at issue violated the defendant's due process rights under the Federal Constitution, and that the error was not harmless. In order to overturn the state court's determination that no error occurred in *Tucker*, we would have to find only the first of these, namely that the admission of the photographs at issue violated these same federal constitutional rights. Plainly, any standard we might develop in deciding whether sufficient prejudice existed to render an error harmful would be applicable in a decision whether sufficient possibility of prejudice existed to render admission of evidence error. The possibility that the analysis in *Thompson* will shed light on *Tucker* is therefore sufficient to justify a hold.

I find particularly disturbing the Court of Appeals' treatment of this question. In deciding that the grant of certiorari in *Thompson* did not "sufficiently suggest that 'new law' relevant to the present case [was] near at hand," the court stated:

> "The petition for certiorari . . . raised two issues of which only one may be marginally relevant to the present case. This court has no way of knowing which issue prompted the Court to grant *certiorari*. Thus the ends of justice would not be served by revisiting the issue." 818 F. 2d 749, 751 (CA11 1987).

Plainly, any doubt that the Court of Appeals had about which issue prompted the Court to grant certiorari should have been resolved in favor of the defendant facing the death penalty. Moreover, given that this Court may restrict its grant of certiorari to those questions it wishes to hear, it seems to me most inappropriate for the court to have engaged in speculation about the *possible* insignificance of our grant on one of the questions in Tucker's petition.

The relationship between the questions presented by Tucker and Thompson justifies delaying consideration of the former on the ground that it will be illuminated by the disposition of the latter. I dissent.

MAY 26, 1987

Dismissal Under Rule 53

No. 86–440. BECHTEL, INC. *v.* WEBSTER ET AL. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 796 F. 2d 252.

Appeals Dismissed

No. 86–1649. OHIO ET AL. *v.* ALLINDER ET AL. Appeal from C. A. 6th Cir. dismissed for want of jurisdiction. *Thornburgh* v. *American College of Obstetricians & Gynecologists*, 476 U. S. 747 (1986). Reported below: 808 F. 2d 1180.

No. 86–6291. BECKNELL *v.* TEXAS. Appeal from Ct. Crim. App. Tex. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 720 S. W. 2d 526.

No. 86–6642. HELLER *v.* EMPLOYMENT DIVISION ET AL. Appeal from Ct. App. Ore. dismissed for want of jurisdiction.

Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 80 Ore. App. 153, 721 P. 2d 482.

No. 86-6667. MEDER *v.* MEDER. Appeal from C. A. 9th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 793 F. 2d 302.

No. 86-6702. COSNER *v.* OREGON. Appeal from Sup. Ct. Ore. dismissed for want of substantial federal question. Reported below: 302 Ore. 159, 727 P. 2d 129.

Miscellaneous Orders

No. D-592. IN RE DISBARMENT OF GIOMETTI. Disbarment entered. [For earlier order herein, see 479 U. S. 1003.]

No. D-609. IN RE DISBARMENT OF CONNOLLY. Disbarment entered. [For earlier order herein, see 480 U. S. 902.]

No. D-616. IN RE DISBARMENT OF DECIOUS. Disbarment entered. [For earlier order herein, see 480 U. S. 914.]

No. D-618. IN RE DISBARMENT OF WHITTEN. Disbarment entered. [For earlier order herein, see 480 U. S. 928.]

No. D-619. IN RE DISBARMENT OF STOKES. Disbarment entered. [For earlier order herein, see 480 U. S. 928.]

No. D-634. IN RE DISBARMENT OF BRYAN. It is ordered that Paul Jackson Bryan, of Palatka, 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. 86-108. HILTON, SUPERINTENDENT, NEW JERSEY STATE PRISON, ET AL. *v.* BRAUNSKILL. C. A. 3d Cir. [Certiorari granted, 479 U. S. 881.] Motion of petitioners for leave to file a supplemental brief after argument granted.

No. 86-120. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. *v.* ELLENDER ET AL., 479 U. S. 914. Motion of respondents for award of attorney's fees and costs denied.

No. 86-179. CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS ET AL. *v.* AMOS ET AL.; and

No. 86-401. UNITED STATES *v.* AMOS ET AL. D. C. Utah. [Probable jurisdiction postponed, 479 U. S. 929.] Motion of

appellees for leave to file a supplemental brief after argument denied.

No. 86–728. HONIG, CALIFORNIA SUPERINTENDENT OF PUBLIC INSTRUCTION *v.* DOE ET AL. C. A. 9th Cir. [Certiorari granted, 479 U. S. 1084.] Motion of Davis Joint Unified School District et al. for leave to participate in oral argument as *amici curiae*, for divided argument, and for additional time for oral argument denied. Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument 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, 480 U. S. 915.] Motion of Women's Legal Defense Fund et al. for leave to file a brief as *amici curiae* granted.

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 Edison Electric Institute for leave to file a brief as *amicus curiae* granted. JUSTICE POWELL took no part in the consideration or decision of this motion.

No. 86–870. PHILLIPS PETROLEUM CO. ET AL. *v.* MISSISSIPPI ET AL. Sup. Ct. Miss. [Certiorari granted, 479 U. S. 1084.] Motion of Robert E. Longino, Jr., for leave to file a brief as *amicus curiae* granted.

No. 86–1503. SAMAYOA ET AL. *v.* CHICAGO BOARD OF EDUCATION ET AL. C. A. 7th Cir. Motion of petitioners to strike brief of respondents denied.

No. 86–6781. IN RE WILLIAMS. Petition for writ of habeas corpus denied.

Probable Jurisdiction Noted

No. 86–1430. PERALTA *v.* HEIGHTS MEDICAL CENTER, INC., DBA HEIGHTS HOSPITAL, ET AL. Appeal from Ct. App. Tex., 1st Dist. Probable jurisdiction noted. Reported below: 715 S. W. 2d 721.

Certiorari Granted

No. 86–1329. GULFSTREAM AEROSPACE CORP. *v.* MAYACAMAS CORP. C. A. 9th Cir. Certiorari granted. Reported below: 806 F. 2d 928.

No. 86–1552. DEPARTMENT OF THE NAVY *v.* EGAN. C. A. Fed. Cir. Certiorari granted. Reported below: 802 F. 2d 1563.

No. 86–1602. UNITED SAVINGS ASSOCIATION OF TEXAS *v.* TIMBERS OF INWOOD FOREST ASSOCIATES, LTD. C. A. 5th Cir. Certiorari granted. Reported below: 808 F. 2d 363.

Certiorari Denied. (See also Nos. 86–6291, 86–6642, and 86–6667, *supra.*)

No. 86–1002. NEWELL ET UX. *v.* MARITIME ADMINISTRATION ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 802 F. 2d 448.

No. 86–1099. GALANOS *v.* HOWARD, JUDGE, UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA. C. A. 11th Cir. Certiorari denied.

No. 86–1201. VAHLSING CHRISTINA CORP. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 1st Cir. Certiorari denied. Reported below: 802 F. 2d 440.

No. 86–1206. WILLIAMS *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 290 Ark. 286, 718 S. W. 2d 935.

No. 86–1234. CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD CO. ET AL. *v.* UNITED STATES ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 799 F. 2d 317.

No. 86–1247. SHENKER *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 8th Cir. Certiorari denied. Reported below: 804 F. 2d 109.

No. 86–1277. EASTERN CONNECTICUT CITIZENS ACTION GROUP, INC., ET AL. *v.* DOLE, SECRETARY OF TRANSPORTATION, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 804 F. 2d 804.

No. 86–1349. NATIONAL TREASURY EMPLOYEES UNION ET AL. *v.* REAGAN, PRESIDENT OF THE UNITED STATES, ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 806 F. 2d 1034.

No. 86–1368. LEE *v.* WEBB, SECRETARY OF THE NAVY. C. A. 9th Cir. Certiorari denied. Reported below: 804 F. 2d 146.

No. 86–1410. HUNTER DOUGLAS, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 3d Cir. Certiorari denied. Reported below: 804 F. 2d 808.

No. 86–1414. OREGON *v.* SETTLER ET AL. Ct. App. Ore. Certiorari denied. Reported below: 81 Ore. App. 518, 726 P. 2d 410.

No. 86–1425. YAKIMA TRIBAL COURT OF THE YAKIMA INDIAN NATION ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 806 F. 2d 853.

No. 86–1427. COLE *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 807 F. 2d 262.

No. 86–1439. LEVER BROTHERS CO. *v.* UNITED STATES ET AL. C. A. D. C. Cir. Certiorari before judgment denied.

No. 86–1555. ORECK CORP. *v.* U. S. FLOOR SYSTEMS, INC. C. A. 5th Cir. Certiorari denied. Reported below: 803 F. 2d 166.

No. 86–1566. COLCLASURE ET AL. *v.* KANSAS CITY LIFE INSURANCE CO. ET AL. Sup. Ct. Ark. Certiorari denied. Reported below: 290 Ark. 585, 720 S. W. 2d 916.

No. 86–1587. TOUSSAINT ET AL. *v.* MCCARTHY ET AL.; and
No. 86–1588. MCCARTHY ET AL. *v.* TOUSSAINT ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 801 F. 2d 1080.

No. 86–1590. NOVINGER ET UX. *v.* KRAMER ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 809 F. 2d 212.

No. 86–1597. CHETISTER *v.* DOUGLAS, JUSTICE, SUPREME COURT OF OHIO, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 812 F. 2d 1406.

No. 86–1604. MICHIGAN *v.* WILLIAMS. Ct. App. Mich. Certiorari denied.

No. 86–1606. SLOAN ET AL. *v.* LEE, BANKRUPTCY JUDGE, UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY. C. A. 6th Cir. Certiorari denied.

No. 86–1612. CONSOLIDATED RAIL CORPORATION *v.* ERIE LACKAWANNA INC. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 803 F. 2d 881.

No. 86–1654. ROBINSON ET AL. *v.* NEW JERSEY ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 806 F. 2d 442.

No. 86–1655. TURGISS *v.* FASSETT ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 807 F. 2d 1150.

No. 86–1664. HERZFELD ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 86–1683. SAMPSON *v.* COHN ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 808 F. 2d 838.

No. 86–1692. COWIN *v.* CHILDERS ET AL. Cir. Ct. Montgomery County, Md. Certiorari denied.

No. 86–1705. MORRELL ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 799 F. 2d 665.

No. 86–6251. NEWTON *v.* SUPERIOR COURT OF CALIFORNIA, IN AND FOR THE COUNTY OF ALAMEDA. C. A. 9th Cir. Certiorari denied. Reported below: 803 F. 2d 1051.

No. 86–6351. JONES *v.* SCROGGY, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 812 F. 2d 1407.

No. 86–6402. CAMDEN *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 115 Ill. 2d 369, 504 N. E. 2d 96.

No. 86–6449. ROSENBERG ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 806 F. 2d 1169.

No. 86–6543. LYNESS *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 115 App. Div. 2d 333, 495 N. Y. S. 2d 848.

No. 86–6625. DEBAUFER *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 147 Ill. App. 3d 1161, 512 N. E. 2d 138.

No. 86–6626. KNIGHT *v.* TEXAS. C. A. 5th Cir. Certiorari denied.

No. 86–6630. MCDONALD *v.* BLACKBURN, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 806 F. 2d 613.

No. 86–6634. BROWN *v.* MINNEAPOLIS ELECTRIC STEEL CASTINGS ET AL. Sup. Ct. Minn. Certiorari denied. Reported below: 398 N. W. 2d 568.

No. 86–6646. MCMILLAN *v.* SCULLY ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 814 F. 2d 653.

No. 86–6651. JACKSON *v.* ARMONTROUT, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 86–6652. JOHNSON *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 240 Kan. 326, 729 P. 2d 1169.

No. 86–6662. OWEN ET AL. *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 806 F. 2d 1519.

No. 86–6663. WILKERSON *v.* WYRICK, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 806 F. 2d 161.

No. 86–6664. NICHOLAS *v.* BUCHANAN. C. A. 1st Cir. Certiorari denied. Reported below: 806 F. 2d 305.

No. 86–6665. MORRIS *v.* OREGON. Ct. App. Ore. Certiorari denied. Reported below: 82 Ore. App. 422, 727 P. 2d 632.

No. 86–6666. MCDONALD *v.* PATE ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 815 F. 2d 711.

No. 86–6668. PARKER *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 86–6671. ANDERSON *v.* NEWSOME, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 813 F. 2d 409.

No. 86–6673. DAVIS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 86–6681. MILLER *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 124 App. Div. 2d 830, 508 N. Y. S. 2d 549.

No. 86–6696. ELAGAMY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 808 F. 2d 1521.

No. 86–6697. ASANTE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 86–6704. GOLDBERG *v.* MERIT SYSTEMS PROTECTION BOARD. C. A. Fed. Cir. Certiorari denied. Reported below: 818 F. 2d 877.

No. 86–6726. HEMPHILL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 810 F. 2d 197.

No. 86–6733. STANDRIDGE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 810 F. 2d 1034.

No. 86–6734. SANDINI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 810 F. 2d 1165.

No. 86–6743. ALEGRIA-VALENCIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 810 F. 2d 1338.

No. 86–6749. TATE *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 809 F. 2d 75.

No. 86–6752. JAQUEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 814 F. 2d 654.

No. 85–1877. AZL RESOURCES, INC. *v.* MARGARET HALL FOUNDATION, INC., ET AL. C. A. 1st Cir. Certiorari denied. JUSTICE WHITE and JUSTICE POWELL would grant certiorari. Reported below: 784 F. 2d 29.

No. 86–1468. BSP INVESTMENT & DEVELOPMENT, LTD. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 804 F. 2d 1085.

No. 86–6451. WEST *v.* TEXAS. Ct. Crim. App. Tex; and

No. 86–6723. COOKS *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: No. 86–6451, 720 S. W. 2d 511.

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. 86–1422. RATCLIFF *v.* UNITED STATES, *ante*, p. 1004;

No. 86–6197. GIPSON *v.* ROSENBERG ET AL., *ante*, p. 1007;

No. 86–6355. KUBAT *v.* ILLINOIS, *ante*, p. 1007;

No. 86–6367. IN RE GRAY, *ante*, p. 1003;

No. 86–6428. MRAOVIC *v.* LYNAUGH, INTERIM DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, *ante*, p. 1020; and

No. 86–6438. MARTIN *v.* PEREZOUS ET AL., *ante*, p. 1021. Petitions for rehearing denied.

MAY 27, 1987

Miscellaneous Order

No. A–861. WILLIAMS *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. Application for stay of execution of sentence of death, presented to JUSTICE WHITE, and by him referred to the Court, denied.

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 the application for stay of execution in order to give the applicant time to file a petition for writ of certiorari and would grant the petition and vacate the death sentence in this case.

MAY 29, 1987

Dismissal Under Rule 53

No. 86–1688. DAYTON-HUDSON CORP. *v.* ALTUS. Ct. App. Tex., 1st Dist. Certiorari dismissed under this Court's Rule 53. Reported below: 715 S. W. 2d 670.

Certiorari Denied

No. 86–6955 (A–860). TUCKER *v.* KEMP, WARDEN. C. A. 11th Cir. Application for stay of execution of sentence of death, presented to JUSTICE POWELL, and by him referred to the Court, denied. Certiorari denied. The order heretofore entered staying the execution of sentence of death until 7 p.m., May 29, 1987, will not be extended. Reported below: 819 F. 2d 978.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, and with whom JUSTICE BLACKMUN joins as to Part II, dissenting.

I

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) (BRENNAN, J., dissenting), I would grant the stay application and the petition for certiorari and would vacate the death sentence in this case.

II

Even if I did not hold this view, I would still grant the application for a stay and the petition for certiorari. Petitioner raises a substantial claim that the trial court's instruction to the jury unconstitutionally shifted the burden of proof to petitioner in violation of *Francis* v. *Franklin*, 471 U. S. 307 (1985).

Petitioner William Tucker was tried for murder, kidnaping with bodily injury, armed robbery, and aggravated sodomy. Intent was a crucial issue at trial. Trial testimony indicated that, on the day of the crime, Tucker was under the influence of drugs and alcohol, which he had been using heavily since his father's death less than three months earlier. Both the prosecutor and the defense attorney focused their closing remarks on Tucker's state of mind and his ability *vel non* to form the requisite criminal intent.

The trial court's instruction to the jury included the following charge on the burden of proof with respect to the defendant's criminal intent:

> "Ladies and Gentlemen, a crime is the violation of the Statute of this State in which there shall be a union or joint operation of act and intention, or criminal negligence.
>
> "*Now, I'm going to give you certain presumptions. A person is presumed to be of sound mind and discretion, but the presumption may be rebutted. The acts of a person of sound mind and discretion are presumed to be the product of the person's will. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his act. But, these presumptions may be rebutted. The person will not be presumed to act with criminal intention, but the trier of facts, and that's you the jury, may find such intention upon consideration of the words, conduct, demeanor and other circumstances connected with the act for which the accused is prosecuted.*" Tr. 822–823 (emphasis added).

After deliberations, the jury returned a verdict of murder, kidnaping with bodily injury, and robbery by intimidation. After a sentencing hearing, Tucker was sentenced to death.

In *Francis* v. *Franklin*, *supra*, the trial court gave a similar instruction to the jury:

> "A crime is a violation of a statute of this State in which there shall be a union of joint operation of act or omission to act, and intention or criminal negligence. A person shall not be found guilty of any crime committed by misfortune or accident where it satisfactorily appears there was no criminal scheme or undertaking or intention or criminal negligence. *The acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts but the presumption may be rebutted. A person will not be presumed to act with criminal intention but the trier of facts, that is, the Jury, may find criminal intention upon a consideration of the words, conduct, demeanor, motive and all other circumstances connected with the act for which the accused is prosecuted.*" 471 U. S., at 311–312 (emphasis added).

In *Franklin*, the Court held that this instruction created a mandatory presumption that shifted to the defendant the burden of proof on the element of intent, thereby depriving him of due process under the Fourteenth Amendment. The charge given in Tucker's case is virtually identical to the jury instruction in *Franklin*.

Tucker petitioned the District Court for a writ of habeas corpus, raising the *Franklin* claim for the first time in a federal court. The District Court denied an evidentiary hearing on this claim solely on its conclusion that the petition constituted an abuse of the writ, because Tucker had filed a previous petition for federal habeas corpus in District Court on January 28, 1982, that did not raise the *Franklin* claim. The Court of Appeals agreed. It concluded that since, in its view, "*Franklin* did not constitute 'new law[,'] petitioner's *Franklin* claim should have been raised in his first petition," and that therefore it was an abuse of the writ under Habeas Corpus Rule 9(b), 28 U. S. C. § 2254. 819 F. 2d 978, 980 (CA11 1987). Rule 9(b) allows a federal court to dismiss a second federal petition when "new and different grounds are alleged," if "the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ."

In my view, Tucker's failure to raise the *Franklin* claim in his first petition for federal habeas relief does not constitute abuse of the writ under Rule 9(b). In *Sanders* v. *United States*, 373 U. S. 1 (1963), the Court established guidelines for cases involving potential abuse of the writ:

> "Thus, for example, if a prisoner *deliberately* withholds one of two grounds for federal collateral relief at the time of filing his first application, in the hope of being granted two hearings rather than one or for some other such reason, he may be deemed to have waived his right to a hearing on a second application presenting the withheld ground. The same may be true if, as in *Wong Doo* [v. *United States*, 265 U. S. 239 (1924)], the prisoner *deliberately abandons* one of his grounds at the first hearing. Nothing in the traditions of habeas corpus requires the federal courts to tolerate needless piecemeal litigation, or to entertain collateral proceedings whose *only purpose* is to vex, harass, or delay." *Id.*, at 18 (emphasis added).

The Court of Appeals for the Eleventh Circuit requires a habeas petitioner to demonstrate that "the failure to present the ground in the prior proceeding was neither the result of an intentional abandonment or withholding nor the product of inexcusable neglect" to avoid dismissal of a subsequent petition. *Witt* v. *Wainwright*, 755 F. 2d 1396, 1397, rev'd on other grounds, 469 U. S. 412 (1985), quoted in *Fleming* v. *Kemp*, 794 F. 2d 1478, 1482 (CA11 1986).

In considering the present petition by a man facing execution, the District Court refused to conduct an evidentiary hearing, but made no finding of intentional abandonment, deliberate withholding, or inexcusable neglect.[1] In my view, this represents an unexplained departure from the standards set forth in *Sanders*, *supra*. Tucker's petition establishes that under *Sanders* his petition does not constitute abuse of the writ.

This Court did not decide *Franklin* until April 29, 1985. The Georgia Supreme Court had earlier dismissed Franklin's appeal raising the burden of proof issue in 1980, eight months before

[1] Both the District Court and the Court of Appeals found that, because *Franklin* did not represent a substantial break in precedent with *Sandstrom* v. *Montana*, 442 U. S. 510 (1979), Tucker had no excuse for failing to raise the claim in his first petition.

Tucker's appeal to that same court. *Franklin* v. *State*, 245 Ga. 141, 153–154, 263 S. E. 2d 666, 674 (1980). Tucker did not raise the *Franklin* claim at that time. Thus, Tucker had a perfectly valid reason for his failure to raise the *Franklin* claim in his first federal habeas petition—it would obviously have been frivolous to do so. The Georgia Supreme Court repeatedly rejected *Franklin* claims during the two years in which Tucker had the opportunity to present the claim in state courts, prior to filing his first federal habeas petition in January 1982. See, *e. g.*, *Rose* v. *State*, 249 Ga. 628, 631, 292 S. E. 2d 678, 681 (1982); *Zant* v. *Gaddis*, 247 Ga. 717, 718, 279 S. E. 2d 219, 220–221, cert. denied, 454 U. S. 1037 (1981); *Lackey* v. *State*, 246 Ga. 331, 338, 271 S. E. 2d 478, 484–485 (1980); *Robinson* v. *State*, 246 Ga. 469, 470–471, 271 S. E. 2d 786, 788 (1980); *Adams* v. *State*, 246 Ga. 119, 122, 271 S. E. 2d 11, 12–13 (1980); *Bridges* v. *State*, 246 Ga. 323, 324, 271 S. E. 2d 471, 472–473 (1980). It is unreasonable, therefore, to dismiss this second federal habeas petition on the ground that petitioner's failure to raise in his first petition what was a frivolous claim barred him forever from asserting that claim once *Francis* made clear that it was viable.

The record in this case contains no evidence that the *Franklin* claim was intentionally abandoned or deliberately withheld. The affidavit of petitioner's counsel states:

> "At the time we filed the original petition for writ of habeas corpus I had no basis for believing that the portion of the charge concerning intent and state of mind was in any way constitutionally infirm. The language of the charge was taken nearly verbatim from Georgia statutes which had repeatedly been upheld by the Georgia Supreme Court. I was aware of no case that would indicate that this portion of the jury charge was unconstitutional and I had no reason to believe that that charge was improper.
>
> "We included in the petition for writ of habeas corpus all claims which appeared to be viable based on our reasoned and professional judgment of the facts and law. It was our intent to include all nonfrivolous claims. We did not deliberately withhold this claim or intentionally abandon it. This claim was not included in the petition because in the exercise of our reasoned professional judgment we were not aware that it ex-

isted." Affidavits of Robert B. Remar and Eric G. Kocher, 819 F. 2d, at 980.[2]

In *Franklin* we held that a charge identical in all pertinent respects to the one given here violated the Fourteenth Amendment's requirement that the State prove every element of a criminal offense beyond a reasonable doubt. Here, the Court permits a man to be executed despite the likelihood that his conviction was obtained in violation of this fundamental tenet of our criminal law. It does so on the untenable ground that petitioner has abused the writ by failing to anticipate that a claim repeatedly held without merit by the State Supreme Court would ultimately be vindicated here. I dissent.

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[2] Petitioner himself submitted an affidavit that states:

"At no time did I instruct Mr. Remar or Mr. Kocher to withhold that [*Franklin* claim]. In fact, we agreed that all claims that my attorneys believed had any merit should be asserted in my habeas corpus petition. . . .

"At no time have I deliberately withheld any claims or intentionally abandoned any claims. I wanted every claim that my attorneys were aware of to be filed in my original habeas corpus petition." Affidavit of William Boyd Tucker (Exhibit F to Pet. for Cert.).

Reporter's Note

The next page is purposely numbered 1301. The numbers between 1078 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

UNITED STATES POSTAL SERVICE *v.* NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL–CIO

ON APPLICATION FOR STAY

No. A–820. Decided May 21, 1987

The United States Postal Service's application to stay the Court of Appeals' mandate enforcing an arbitrator's decision requiring the reinstatement of Edward Hyde as a postal worker is granted pending the filing and disposition of a petition for certiorari. Although the District Court set aside the arbitrator's reinstatement order following Hyde's discharge for dereliction of duty upon his conviction for unlawful delay of the mail, the Court of Appeals reversed, holding that a court may set aside an arbitrator's award as contrary to public policy only when the award itself violates established law or compels unlawful conduct. There is a reasonable probability that four Justices will eventually grant certiorari in this case, since the Court has already granted certiorari in *Misco, Inc.* v. *United Paperworkers International Union*, 768 F. 2d 739 (CA5), cert. granted 479 U. S. 1029, which raises the identical public policy issue. Moreover, the stay equities favor the applicant, whose ability to impress the seriousness of its mission upon its workers would be seriously impaired by even the temporary reinstatement of a convicted criminal, whereas continuation of the status quo will not work an irreparable harm on Hyde, who has not worked for the applicant for almost three years.

CHIEF JUSTICE REHNQUIST, Circuit Justice.

Applicant United States Postal Service asks that I stay the mandate of the Court of Appeals for the District of Columbia Circuit enforcing an arbitrator's decision that applicant reinstate Edward Hyde as a postal worker. In 1984, Hyde was convicted of unlawful delay of the mail by a postal employee after postal inspectors found more than 3,500 pieces of undelivered mail in his possession. The Postal Service dis-

charged Hyde for dereliction of duty. Respondent filed a grievance against applicant on Hyde's behalf, seeking arbitration. The arbitrator ordered that applicant reinstate Hyde after a 60-day medical leave of absence. Applicant filed suit, seeking to set aside the award as contrary to public policy. The District Court set aside the arbitrator's decision, finding that the Postal Service must retain the power to remove employees who breach the public trust and hamper the strong public interest in ensuring prompt delivery of the mails. 631 F. Supp. 599 (DC 1986). The Court of Appeals reversed, holding that a court may set aside an arbitrator's award as contrary to public policy only when the award itself violates established law or compels unlawful conduct. 258 U. S. App. D. C. 260, 810 F. 2d 1239 (1987).

The standards for granting a stay pending a petition for certiorari are well settled: a Circuit Justice is required "'to determine whether four Justices would vote to grant certiorari, to balance the so-called "stay equities," and to give some consideration as to predicting the final outcome of the case in this Court.'" *Heckler* v. *Redbud Hospital District*, 473 U. S. 1308, 1311 (1985) (REHNQUIST, Circuit Justice), quoting *Gregory-Portland Independent School District* v. *United States*, 448 U. S. 1342 (1980).

In my view, the applicant has satisfied these requirements. There is a reasonable probability that four Justices will eventually grant certiorari in this case. The Court has already granted certiorari in *Misco, Inc.* v. *United Paperworkers International Union*, 768 F. 2d 739 (CA5 1985), cert. granted, 479 U. S. 1029 (1987), which raises the identical issue: the scope of the public policy exception to enforcement of arbitration awards. Although that case presents the issue in the context of a private employer, the applicant presents a stronger case for setting aside the arbitrator's award because it operates under a statutory mandate to ensure prompt delivery of the mails. See 39 U. S. C. §101(a). Moreover, I find that the stay equities favor the applicant. Even the

temporary reinstatement of Hyde, a convicted criminal, will seriously impair the applicant's ability to impress the seriousness of the Postal Service's mission upon its workers. While Hyde does have some interest in returning to his position, he has not worked for the applicant for almost three years. Continuation of the status quo will not work an irreparable harm on Hyde, but it will preserve the applicant's ability to carry out its legal obligations.

The application for a stay of the Court of Appeals' mandate pending the filing and disposition of a petition for certiorari is granted.

INDEX

ABSTENTION. See **Jurisdiction.**

ACCESS TO COURTS. See **Constitutional Law,** IV, 2; VI, 1.

ACCRUAL-BASIS TAXPAYERS. See **Internal Revenue Code.**

ADULT BOOKSTORES. See **Constitutional Law,** X, 1; **Criminal Law,** 2.

ADVISORY JURIES IN CAPITAL SENTENCING PROCEEDINGS. See **Constitutional Law,** II, 2.

AID TO FAMILIES WITH DEPENDENT CHILDREN PROGRAM. See **Social Security Act.**

ALIENS. See **Constitutional Law,** IV, 1.

"ALL EVENTS" TEST OF TREASURY REGULATIONS. See **Internal Revenue Code.**

ALL-MALE ORGANIZATIONS. See **Constitutional Law,** VIII; **Judicial Review.**

ALLOTMENT OF INDIAN LANDS. See **Constitutional Law,** V; **Standing to Sue,** 3.

ANTI-SEMITISM. See **Civil Rights Act of 1866.**

ANTITRUST DIVISION OF DEPARTMENT OF JUSTICE. See **Grand Juries.**

APPEAL BONDS. See **Jurisdiction.**

APPOINTMENT OF COUNSEL FOR INDIGENT DEFENDANTS. See **Constitutional Law,** IV, 2; VI, 1.

APPOINTMENT OF SPECIAL PROSECUTORS IN CRIMINAL CONTEMPT ACTIONS. See **Criminal Contempt.**

ARABIAN ANCESTRY AS PROTECTING PERSON FROM RACIAL DISCRIMINATION. See **Civil Rights Act of 1870; Statutes of Limitations,** 1.

ARBITRATORS' AWARDS. See **Stays.**

ARKANSAS. See **Constitutional Law,** X, 2; **Standing to Sue,** 1.

ARMED FORCES. See **Federal Tort Claims Act.**

ARRESTEES. See **Constitutional Law,** IV, 3; VII.

ARTICLE III OF CONSTITUTION. See **Standing to Sue,** 3.

ASSAULT TO COMMIT MURDER. See **Constitutional Law,** XIII, 1.

ASSESSMENT OF CIVIL PENALTIES UNDER CLEAN WATER ACT. See **Constitutional Law,** XI.

ASSOCIATIONAL RIGHTS. See **Constitutional Law,** VIII.

ATTORNEYS. See **Constitutional Law,** IV, 2; VI, 1.

BAIL REFORM ACT OF 1984. See **Constitutional Law,** IV, 3; VII.

BONDS. See **Jurisdiction.**

BREACH OF CONTRACT. See **Jurisdiction.**

BUSINESS EXPENSES AS TAX DEDUCTIONS. See **Internal Revenue Code.**

CALIFORNIA. See **Constitutional Law,** VIII; **Judicial Review.**

CAPITAL MURDER. See **Constitutional Law,** XIII, 3.

CAPITAL SENTENCES. See **Constitutional Law,** II, 1; VI, 2.

CASE OR CONTROVERSY. See **Standing to Sue,** 3.

CHALLENGES TO DEPORTATION ORDERS. See **Constitutional Law,** IV, 1.

CHILD SUPPORT BY DISABLED VETERANS. See **Constitutional Law,** XIV.

CIVIL DIVISION OF DEPARTMENT OF JUSTICE. See **Grand Juries.**

CIVIL PENALTIES UNDER CLEAN WATER ACT. See **Constitutional Law,** XI.

CIVIL RIGHTS. See **Civil Rights Act of 1866; Civil Rights Act of 1870; Constitutional Law,** VIII; **Judicial Review; Statutes of Limitations,** 1.

CIVIL RIGHTS ACT OF 1866.

Racial discrimination—Jews.—Since Jews were among peoples considered to be distinct races within protection of 42 U. S. C. § 1982 when it was passed, petitioners, a Jewish synagogue congregation and some of its members, could state a § 1982 claim of racial discrimination based on respondents' alleged desecration of synagogue by painting anti-Semitic slogans, phrases, and symbols on outside walls, and were not foreclosed from stating a cause of action simply because respondents were also part of what today is considered Caucasian race. Shaare-Tefila Congregation v. Cobb, p. 615.

CIVIL RIGHTS ACT OF 1870. See also **Statutes of Limitations,** 1.

Racial discrimination—Person of Arabian ancestry.—Title 42 U. S. C. § 1981 may protect persons of Arabian ancestry from racial discrimination, and therefore if respondent professor in his action under § 1981 can prove that when petitioners denied him tenure he was subjected to intentional discrimination based on fact that he was born an Arab rather than solely on place or nation of his origin or religion, he will have made out a case under § 1981; Congress intended § 1981 to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics, and fact that respondent might today be considered a Caucasian did not preclude him from maintaining suit against another Caucasian. Saint Francis College v. Al-Khazraji, p. 604.

CLEAN WATER ACT. See **Constitutional Law,** XI.

COAST GUARD HELICOPTER PILOTS. See **Federal Tort Claims Act.**

CODEFENDANT'S CONFESSIONS. See **Constitutional Law,** XIII, 1, 2.

COLLATERAL CHALLENGES TO DEPORTATION ORDERS. See **Constitutional Law,** IV, 1.

COLLATERAL POSTCONVICTION PROCEEDINGS. See **Constitutional Law,** IV, 2; VI, 1.

COLLECTIVE-BARGAINING AGREEMENTS. See **Labor Management Relations Act, 1947; Norris-LaGuardia Act; Statutes of Limitations,** 2.

COMMERCE CLAUSE. See **Constitutional Law,** I.

COMMON-LAW CAUSES OF ACTION. See **Employee Retirement Income Security Act of 1974.**

COMMUNITY STANDARDS IN DETERMINING OBSCENITY. See **Constitutional Law,** X, 1; **Criminal Law,** 2.

CONCURRENT SENTENCE DOCTRINE. See **Criminal Law,** 1.

CONFESSIONS. See **Constitutional Law,** XIII, 1, 2.

CONFRONTATION CLAUSE. See **Constitutional Law,** XIII, 1, 2.

CONSTITUTIONAL LAW. See also **Judicial Review; Jurisdiction; Standing to Sue,** 2, 3.

I. Commerce Clause.

State statute governing control shares in corporation.—Indiana statute protecting independent shareholders from coercive aspects of tender offers

CONSTITUTIONAL LAW—Continued.
by allowing them to vote as a group does not violate Commerce Clause, since statute's limited effect on interstate commerce is justified by State's interests in defining attributes of its corporations' shares and in protecting shareholders. CTS Corp. v. Dynamics Corporation of America, p. 69.

II. Cruel and Unusual Punishment.

1. *Death sentence—Disproportionality—Statistical study.*—A statistical study indicating a risk that racial considerations entered into capital sentencing determinations in Georgia did not demonstrate that black petitioner's death sentence for killing a white police officer during a store robbery violated Eighth Amendment; petitioner could not base a constitutional claim on an argument that his case differed from other cases in which defendants *did* receive death penalty nor, absent a showing that Georgia capital punishment system operated in an arbitrary and capricious manner, could he prove a constitutional violation by demonstrating that other defendants who might be similarly situated did *not* receive death penalty. McCleskey v. Kemp, p. 279.

2. *Death sentence—Mitigating circumstances.*—Where in a postconviction proceeding in which petitioner, who had been convicted of first-degree murder, was sentenced to death, trial judge instructed advisory jury not to consider, and himself refused to consider, evidence of mitigating circumstances not specifically enumerated in Florida death penalty statute, such proceeding did not comport with requirement that sentencer may neither refuse to consider nor be precluded from considering any relevant mitigating evidence, and therefore petitioner's death sentence could not stand. Hitchcock v. Dugger, p. 393.

3. *Felony murder—Reckless disregard for human life.*—Although petitioners, who participated in events leading up to and following murder of four members of a family by petitioners' father and another convict whom petitioners had helped escape from prison, neither intended to kill victims nor inflicted fatal wounds, record might support a finding that they had a culpable mental state of reckless indifference to human life warranting death sentences; Eighth Amendment does not prohibit death penalty as disproportionate in case of defendant whose participation in a felony that results in murder is major and whose mental state is one of reckless indifference. Tison v. Arizona, p. 137.

III. Double Jeopardy.

Incest—Sexual assault.—Double Jeopardy Clause did not prevent respondent's trial on charge of sexually assaulting his ex-wife's 12-year-old daughter where his prior conviction for incest based on same assault was not reversed on grounds related to guilt or innocence but on grounds that at time of assault incest statute did not apply to assaults against stepchildren and that amended statute under which respondent was tried had not

become effective until after assault, there was no suggestion that evidence at trial was insufficient to convict him, and State originally sought to try him for sexual assault but, at his behest, tried him instead for incest; moreover, Double Jeopardy Clause did not forbid retrial because respondent was convicted of nonexistent crime but, in fact, permits retrial after a conviction is reversed because of a defect in charging instrument. Montana v. Hall, p. 400.

IV. Due Process.

1. *Aliens—Deportation orders—Contestability in prosecution for illegal reentry.*—Since 8 U. S. C. § 1326, which makes it a felony for any deported alien to reenter United States, was not intended to make validity of deportation order contestable in a § 1326 prosecution and thus effectively eliminated alien's right to obtain judicial review of deportation order, due process requires that a collateral challenge to use of deportation proceeding as an element of a criminal offense be permitted; hence, deportation hearing of respondents, who were subsequently charged with violating § 1326, was fundamentally unfair and violated due process where Immigration Judge deprived respondents of their right to judicial review of deportation orders by permitting waivers of right to appeal that were not result of respondents' considered or intelligent judgment. United States v. Mendoza-Lopez, p. 828.

2. *Convicted indigent defendant—Right to counsel in postconviction proceedings.*—Where indigent defendant, following affirmance of her second-degree murder conviction, brought postconviction proceedings in which trial court, as required by state law, appointed counsel to assist her and counsel, upon concluding that there were no arguable bases for collateral review, was granted permission to withdraw by court, which then dismissed proceedings, procedures followed by trial counsel fully comported with fundamental fairness mandated by Due Process Clause of Fourteenth Amendment and he was not required to follow additional procedures that are required on direct appeal under *Anders* v. *California*, 386 U. S. 738. Pennsylvania v. Finley, p. 551.

3. *Fifth Amendment—Bail Reform Act of 1984—Facial unconstitutionality—Pretrial detention.*—Given legitimate and compelling regulatory purpose and procedural protections of Bail Reform Act of 1984, § 3142(e) of Act, which authorizes pretrial detention of arrestees charged with certain felonies on ground of future dangerousness, is not facially invalid under Due Process Clause as against facial attack by respondents who were charged with racketeering activity and whose pretrial detention District Court had ordered under Act. United States v. Salerno, p. 739.

4. *Reinstatement of discharged employee—Failure to provide employer with evidence—Lack of evidentiary hearing.*—In appellee trucking compa-

CONSTITUTIONAL LAW—Continued.
ny's action seeking injunctive relief against reinstatement of a discharged employee and a declaratory judgment that § 405 of Surface Transportation Assistance Act of 1982—which forbids discharge of trucking industry employees in retaliation for refusing to operate a vehicle that does not comply with safety standards or for filing complaints alleging such noncompliance—to extent it empowered Secretary of Labor to order temporary reinstatement without first conducting an evidentiary hearing deprived appellee of procedural due process under Fifth Amendment, District Court's judgment is affirmed insofar as it held that Secretary's preliminary reinstatement order was unconstitutionally imposed because appellee was not informed of evidence supporting employee's complaint that he was discharged in retaliation for complaining of safety violations and that therefore appellee was deprived of an opportunity to prepare a meaningful response, but is reversed insofar as it held § 405 unconstitutional to extent it did not provide appellee an evidentiary hearing before employee's temporary reinstatement could be ordered. Brock v. Roadway Express, Inc., p. 252.

V. Eminent Domain.

Fifth Amendment—Taking of Indians' decedents' land.—Original version of § 207 of Indian Land Consolidation Act of 1983, which provided that no fractional interests in Indian lands shall descend by intestacy or devise but, instead, shall escheat to tribe "if such interest represents 2 per centum or less of total acreage in such tract and has earned to its owner less than $100 in the proceeding year before it is due to escheat," and made no provision for compensation to owner of interests, effected a "taking" of appellees' decedents' property without just compensation. Hodel v. Irving, p. 704.

VI. Equal Protection of the Laws.

1. *Convicted indigent defendant—Right to counsel in postconviction proceedings.*—Where indigent defendant, following affirmance of her second-degree murder conviction, brought postconviction proceedings in which trial court, as required by state law, appointed counsel to assist her and counsel, upon concluding that there were no arguable bases for collateral review, was granted permission to withdraw by court, which then dismissed proceedings, there was no violation of equal protection guarantee of "meaningful access" since by time defendant applied for postconviction relief she had been represented at trial and on direct appeal. Pennsylvania v. Finley, p. 551.

2. *Death sentence—Racial considerations—Statistical study.*—A statistical study indicating a risk that racial considerations entered into capital sentencing determinations in Georgia did not establish that black petitioner's death sentence for killing a white police officer during a store robbery

CONSTITUTIONAL LAW—Continued.

violated Equal Protection Clause of Fourteenth Amendment; petitioner offered no evidence specific to his own case to support an inference that racial considerations played a part in his sentence, and statistical study was insufficient to support an inference that decisionmakers in his case acted with discriminatory purpose. McCleskey v. Kemp, p. 279.

VII. Excessive Bail.

Eighth Amendment—Bail Reform Act of 1984—Facial unconstitutionality—Pretrial detention.—Section 3142(e) of Bail Reform Act of 1984, which authorizes pretrial detention of arrestees charged with certain felonies on ground of future dangerousness, is not facially unconstitutional as violative of Excessive Bail Clause of Eighth Amendment, as against facial attack by respondents who were charged with racketeering activity and whose pretrial detention District Court had ordered under Act. United States v. Salerno, p. 739.

VIII. Freedom of Association.

Membership in organization—Sex discrimination.—California statute that entitles all persons, regardless of sex, to full and equal accommodations, advantages, facilities, privileges, and services in all business establishments in State did not violate First Amendment by requiring California Rotary Clubs to admit women members, and statute's application to local Rotary Clubs did not unduly interfere with Club members' freedom of private association nor violate First Amendment right of expressive association. Board of Directors of Rotary International v. Rotary Club of Duarte, p. 537.

IX. Freedom of Speech.

Foreign Agents Registration Act of 1938—"Political propaganda."—Foreign Agents Registration Act's use of term "political propaganda" to identify materials subject to Act's registration, reporting, and disclosure requirements does not violate First Amendment, and therefore appellee California State Senator was not entitled to enjoin on constitutional grounds application of such term to Canadian films that he wanted to show. Meese v. Keene, p. 465.

X. Freedom of the Press.

1. *Magazines—Obscenity—Jury instruction.*—In Illinois state-court prosecutions of petitioners for selling allegedly obscene magazines, a jury instruction that directed jury to apply community standards in deciding whether magazines, taken as a whole, lacked serious literary, artistic, political, or scientific value violated First Amendment; proper inquiry is not whether an ordinary member of any given community would find serious value in allegedly obscene material but whether a reasonable person would find such value in material taken as a whole. Pope v. Illinois, p. 497.

CONSTITUTIONAL LAW—Continued.

2. *State tax on magazine sales—Discriminatory scheme.*—Arkansas sales tax scheme that taxes general interest magazines, such as appellant's, but exempts newspapers and religious, professional, trade, and sports journals, violates First Amendment's freedom of press guarantee by discriminating against a small group of magazines, which are only magazines that pay tax. Arkansas Writers' Project, Inc. v. Ragland, p. 221.

XI. Right to Jury Trial.

Action for civil penalties and injunction under Clean Water Act.—Seventh Amendment guaranteed petitioner real estate developer a jury trial to determine his liability in Government's actions seeking civil penalties and injunctive relief for alleged violations of Clean Water Act, since such an action and remedies sought are more analogous to "[s]uits at common law" within meaning of Seventh Amendment than they are to cases traditionally tried in courts of equity; but Seventh Amendment did not guarantee petitioner jury assessment of civil penalties, and fact that trial judge assessed penalties did not violate Amendment since assessment does not involve substance of common-law right to, nor a fundamental element of, a jury trial as is necessary to implicate Amendment. Tull v. United States, p. 412.

XII. Self-incrimination.

Miranda rights—Police "interrogation."—Where, after respondent, while in custody for killing his son, refused to be questioned without a lawyer upon being advised of his *Miranda* rights, police allowed respondent's wife to speak with him on condition an officer be present and had that officer tape-record ensuing conversation between respondent and his wife, police's actions did not constitute an interrogation or its functional equivalent in violation of Fifth and Fourteenth Amendments, and, therefore, use of respondent's statements to his wife at trial to rebut his insanity defense was constitutionally permissible. Arizona v. Mauro, p. 520.

XIII. Sixth Amendment.

1. *Confrontation Clause—Codefendant's confession.*—Confrontation Clause is not violated by admission of a nontestifying codefendant's confession with a proper limiting instruction when, as in this case, confession was redacted to eliminate not only defendant's name but any reference to her existence and became incriminating only when linked with evidence later introduced at joint murder trial. Richardson v. Marsh, p. 200.

2. *Confrontation Clause—Codefendant's confession.*—Where nontestifying codefendant's confession facially incriminating defendant was not directly admissible against defendant, Confrontation Clause barred its admission at their joint trial for felony murder, even if jury was instructed

CONSTITUTIONAL LAW—Continued.
not to consider it against defendant and defendant's own confession was admitted against him; although codefendant's interlocking confession was inadmissible, defendant's own confession could be considered in assessing whether codefendant's statements were supported by sufficient "indicia of reliability" to be directly admissible against him (assuming codefendant's "unavailability") despite lack of an opportunity for cross-examination and on appeal in assessing whether Confrontation Clause violation was harmless. Cruz v. New York, p. 186.

3. *Right to impartial jury—Capital murder—Death penalty—Erroneous exclusion of juror.*—In prosecution of petitioner for capital murder, venire member, who stated that she could reach guilty verdict and vote to impose death penalty, was clearly qualified to be seated as a juror under *Witherspoon* v. *Illinois*, 391 U. S. 510, and its progeny, and, thus, trial court was not authorized to exclude her for cause on prosecutor's motion; *Witherspoon* violations constitute reversible constitutional error and cannot be subjected to harmless-error review. Gray v. Mississippi, p. 648.

XIV. Supremacy Clause.

State-court jurisdiction—Disabled veteran—Child support—Contempt.—Tennessee state court had jurisdiction to hold appellant disabled veteran in contempt for failing to pay child support, even if his only means of satisfying this obligation was to utilize veteran's disability benefits received from Veterans' Administration; Tennessee statute, as construed by state courts to authorize an award of such benefits as child support, was not pre-empted under Supremacy Clause, since it did not conflict with federal law. Rose v. Rose, p. 619.

CONTEMPT. See **Constitutional Law,** XIV; **Criminal Contempt.**

CONTRACTS. See **Jurisdiction.**

COURTS OF APPEALS. See **Criminal Law,** 1; **Habeas Corpus,** 2.

CRIMINAL CONTEMPT.

Special prosecutor.—Although district courts have authority to appoint private attorneys to prosecute criminal contempt actions, counsel for a party that is beneficiary of a court order may not be appointed to undertake criminal contempt prosecutions for alleged violations of that order; thus, District Court, after finding probable cause to believe petitioners were violating injunction prohibiting them from infringing respondent's trademark, erred in appointing respondent's attorneys as special counsel to represent Government in prosecution of criminal contempt action against petitioners. Young v. United States *ex rel.* Vuitton, p. 787.

CRIMINAL LAW. See also **Constitutional Law,** II; III; IV, 1–3; VI; VII; XII; XIII; **Habeas Corpus,** 2.

1. *Court of Appeals—Review of sentences—Sentences as concurrent.*—Where petitioner, upon being found guilty of one count of conspiracy to possess cocaine with intent to distribute and two counts of possession with intent to distribute, was sentenced to concurrent prison terms on all three counts and to concurrent parole terms on two possession counts, and District Court, pursuant to 18 U. S. C. § 3013, also imposed $50 assessment on each count, petitioner was not in fact serving concurrent sentences since his liability to pay assessments depended on validity of each conviction; therefore, Court of Appeals should not have applied "concurrent sentence doctrine" in declining to review second possession conviction on ground that sentences on two possession counts were concurrent. Ray v. United States, p. 736.

2. *Obscenity convictions—Effect of erroneous jury instruction.*—Petitioners' convictions in Illinois state court for selling obscene magazines should stand despite erroneous instruction to jury to apply community standards in deciding whether magazines, taken as a whole, lacked serious literary, artistic, political, or scientific value, if Illinois Appellate Court on remand concludes that no rational juror, if properly instructed, could find "value" in magazines. Pope v. Illinois, p. 497.

CRUEL AND UNUSUAL PUNISHMENT. See **Constitutional Law,** II; VI, 2.

DANGER TO PUBLIC OF RELEASED PRISONERS. See **Habeas Corpus,** 2.

DEATH PENALTY. See **Constitutional Law,** XIII, 3.

DEATH SENTENCES. See **Constitutional Law,** II; VI, 2.

DEDUCTION OF TAXPAYERS' BUSINESS EXPENSES. See **Internal Revenue Code.**

DEPARTMENT OF JUSTICE. See **Grand Juries.**

DEPORTATION OF ALIENS. See **Constitutional Law,** IV, 1.

DESCENT AND DISTRIBUTION. See **Constitutional Law,** V; **Standing to Sue,** 3.

DESECRATION OF SYNAGOGUES. See **Civil Rights Act of 1866.**

DETENTION HEARINGS. See **Constitutional Law,** IV, 3; VII.

DISABILITY BENEFITS. See **Employee Retirement Income Security Act of 1974.**

DISABLED VETERANS' BENEFITS. See **Constitutional Law,** XIV.

DISCHARGE OF EMPLOYEES. See **Stays.**

DISCHARGE OF TRUCKING INDUSTRY EMPLOYEES FOR REFUSING TO OPERATE UNSAFE VEHICLE. See **Constitutional Law,** IV, 4.

DISCLOSURE OF GRAND JURY MATERIALS IN CIVIL SUIT. See **Grand Juries.**

DISCRIMINATION AGAINST JEWS. See **Civil Rights Act of 1866.**

DISCRIMINATION AGAINST PERSONS OF ARABIAN ANCESTRY. See **Civil Rights Act of 1870; Statutes of Limitations,** 1.

DISCRIMINATORY STATE TAXATION OF RAILROAD PROPERTY. See **Railroad Revitalization and Regulatory Reform Act of 1976.**

DISTRICT COURTS. See **Constitutional Law,** IV, 4; **Criminal Contempt; Jurisdiction; Norris-LaGuardia Act.**

DOUBLE JEOPARDY. See **Constitutional Law,** III.

DUE PROCESS. See **Constitutional Law,** IV; VI; VII.

EIGHTH AMENDMENT. See **Constitutional Law,** II, 1, 3; IV, 3; VI, 2; VII.

EMINENT DOMAIN. See **Constitutional Law,** V; **Standing to Sue,** 3.

EMPLOYEE BENEFIT PLANS. See **Employee Retirement Income Security Act of 1974.**

EMPLOYEE MEDICAL CARE PLANS. See **Internal Revenue Code.**

EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974.

1. *State common-law action to recover benefits—Pre-emption.*—ERISA pre-empted employee's state common-law suit against his employer's insurer for alleged improper processing of his claim for disability benefits under ERISA-regulated benefit plan, since asserted common-law causes of action "relate to" an employee benefit plan and therefore fall under ERISA's pre-emption clause providing that ERISA supersedes all state laws insofar as they "relate to any employee benefit plan." Pilot Life Ins. Co. v. Dedeaux, p. 41.

2. *State common-law action to recover benefits—Pre-emption—Removal to federal court.*—ERISA pre-empted employee's state common-law suit against his employer and its insurer for alleged improper processing of his claim for disability benefits under ERISA-regulated plan, since suit "relate[s] to [an] employee benefit plan" under ERISA's pre-emption clause and since, moreover, as a suit by a beneficiary to recover benefits from a covered plan, it fell directly under § 502(a)(1)(B) of ERISA, which provides exclusive federal cause of action for resolution of such disputes; suit was

EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974—Continued.

removable to federal court under 28 U. S. C. § 1441(b). Metropolitan Life Ins. Co. v. Taylor, p. 58.

EMPLOYER AND EMPLOYEES. See **Constitutional Law**, IV, 4; **Employee Retirement Income Security Act of 1974; Federal Tort Claims Act; Statutes of Limitations**, 2; **Stays.**

EMPLOYER'S DUTY TO PROVIDE SAFE WORKPLACE. See **Labor Management Relations Act, 1947.**

EQUAL PROTECTION OF THE LAWS. See **Constitutional Law**, II, 1; IV, 2; VI.

EVIDENCE. See **Constitutional Law**, IV, 4; XIII, 1, 2.

EVIDENTIARY HEARINGS. See **Constitutional Law**, IV, 4.

EXCESSIVE BAIL CLAUSE. See **Constitutional Law**, IV, 3; VII.

EXCLUSION OF JURORS IN CAPITAL CASES. See **Constitutional Law**, XIII, 3.

EXCLUSION OF WOMEN FROM ORGANIZATION MEMBERSHIP. See **Constitutional Law**, VIII; **Judicial Review.**

EXHAUSTION OF STATE REMEDIES. See **Habeas Corpus**, 1.

FACIAL UNCONSTITUTIONALITY. See **Constitutional Law**, IV, 3; VII.

FAIR REPRESENTATION OF EMPLOYEES BY UNIONS. See **Statutes of Limitations**, 2.

FEDERAL DISTRICT COURTS. See **Constitutional Law**, IV, 4; **Norris-LaGuardia Act.**

FEDERAL INCOME TAXES. See **Internal Revenue Code.**

FEDERAL RULES OF APPELLATE PROCEDURE. See **Habeas Corpus**, 2.

FEDERAL RULES OF CIVIL PROCEDURE. See **Statutes of Limitations**, 2.

FEDERAL RULES OF CRIMINAL PROCEDURE. See **Grand Juries.**

FEDERAL-STATE RELATIONS. See **Constitutional Law**, I; XIV; **Employee Retirement Income Security Act of 1974; Habeas Corpus; Jurisdiction; Labor Management Relations Act, 1947; Williams Act.**

FEDERAL TORT CLAIMS ACT.

Military service member's death—Civilian employees' negligence—Bar of action.—Doctrine under which Government has no liability under Act

FEDERAL TORT CLAIMS ACT—Continued.
for injuries to military service personnel arising out of, or in course of, activity incident to service barred an action under Act on behalf of Coast Guard helicopter pilot who was killed when helicopter crashed during rescue mission, even if alleged negligence was by air traffic controllers, who were civilian Government employees. United States v. Johnson, p. 681.

FELONY MURDER. See **Constitutional Law,** II, 3; XIII, 1, 2.

FIFTH AMENDMENT. See **Constitutional Law,** III; IV, 3; V; VII; XII.

FIRST AMENDMENT. See **Constitutional Law,** VIII; IX; X; **Standing to Sue,** 1, 2.

FIRST-DEGREE MURDER. See **Constitutional Law,** II, 2.

FLIGHT OF RELEASED PRISONERS. See **Habeas Corpus,** 2.

FLORIDA. See **Constitutional Law,** II, 2.

FOREIGN AGENTS REGISTRATION ACT OF 1938. See **Constitutional Law,** IX; **Standing to Sue,** 2.

FOURTEENTH AMENDMENT. See **Constitutional Law,** II, 1; IV, 2; VI; XII; XIII, 3; **Standing to Sue,** 1.

FRACTIONATION OF INDIAN LANDS. See **Constitutional Law,** V; **Standing to Sue,** 3.

FREEDOM OF ASSOCIATION. See **Constitutional Law,** VIII.

FREEDOM OF SPEECH. See **Constitutional Law,** IX; **Standing to Sue,** 2.

FREEDOM OF THE PRESS. See **Constitutional Law,** X; **Standing to Sue,** 1.

GENDER DISCRIMINATION. See **Constitutional Law,** VIII; **Judicial Review.**

GEORGIA. See **Constitutional Law,** II, 1; VI, 2.

GOVERNMENT ATTORNEYS. See **Grand Juries.**

GOVERNMENT'S LIABILITY FOR INJURIES TO MILITARY PERSONNEL. See **Federal Tort Claims Act.**

GRAND JURIES.

Grand jury materials—Use in civil phase of dispute.—There was a "particularized need" under Federal Rule of Criminal Procedure 6(e) for disclosure of grand jury materials to attorneys for Civil Division of Department of Justice and United States Attorney for use in a civil action against corporations with respect to whom grand jury convened by attorneys for

GRAND JURIES—Continued.
DOJ's Antitrust Division had concluded that, although corporations had engaged in price fixing, criminal prosecution was not warranted; attorney who conducted criminal prosecution may make continued use of grand jury materials in civil phase of dispute without obtaining a court order to do so under Rule 6(e), which merely prohibits those who already have a legitimate access to grand jury material from revealing it to *others* not authorized to receive it. United States v. John Doe, Inc. I, p. 102.

HABEAS CORPUS.

1. *Exhaustion of state remedies—Waiver of nonexhaustion defense.*—Where, in state prisoner's appeal from Federal District Court's dismissal of his habeas corpus petition on merits, State for first time interposed defense that prisoner had not exhausted his state remedies, Court of Appeals, rather than rejecting prisoner's argument that nonexhaustion defense had been waived and simply holding that a nonexhaustion defense could not be waived, should have attempted to determine whether interests of justice would be better served by addressing merits of petition or by requiring additional state proceedings before doing so. Granberry v. Greer, p. 129.

2. *Federal Rules of Appellate Procedure 23(c) and (d)—Release of state prisoner pending appeal.*—Under Federal Rule of Appellate Procedure 23(c)—which provides that, when a State appeals a federal district court decision granting a writ of habeas corpus to a state prisoner, he shall be released from custody unless district court or court of appeals orders otherwise—and Rule 23(d)—which states that initial orders issued pursuant to Rule 23(c) shall govern review in court of appeals unless for special reasons order is modified or an independent order is made—Court of Appeals was not restricted to considering only risk of respondent state prisoner's flight in determining whether to release him pending appeal of District Court's order granting him habeas corpus relief but could also consider such factors as prisoner's danger to community if released, State's interest in continuing custody and rehabilitation pending appeal, and prisoner's substantial interest in release pending appeal. Hilton v. Braunskill, p. 770.

HOSTILE STOCK TENDER OFFERS. See **Constitutional Law**, I; **Williams Act.**

"HYBRID" SUITS BY EMPLOYEE AGAINST EMPLOYER AND UNION. See **Statutes of Limitations**, 2.

IMMIGRATION AND NATIONALITY ACT. See **Constitutional Law**, IV, 1.

IMPARTIAL JURIES. See **Constitutional Law**, XIII, 3.

INCEST. See **Constitutional Law**, III.

INCOME TAXES. See **Internal Revenue Code.**

INCOME UNDER AID TO FAMILIES WITH DEPENDENT CHILDREN PROGRAM. See **Social Security Act.**

INCRIMINATING STATEMENTS. See **Constitutional Law,** XII.

INDIANA. See **Constitutional Law,** I; **Williams Act.**

INDIAN LAND CONSOLIDATION ACT OF 1983. See **Constitutional Law,** V; **Standing to Sue,** 3.

INDIANS. See **Constitutional Law,** V; **Standing to Sue,** 3.

INDIGENT DEFENDANTS' RIGHT TO COUNSEL. See **Constitutional Law,** IV, 2; VI, 1.

INFRINGEMENT OF TRADEMARKS. See **Criminal Contempt.**

INJUNCTIONS. See **Constitutional Law,** IV, 4; **Norris-LaGuardia Act.**

INJUNCTIONS BY FEDERAL COURTS AGAINST STATE-COURT ACTIONS. See **Jurisdiction.**

INSANITY DEFENSE. See **Constitutional Law,** XII.

INSTRUCTIONS TO JURY IN OBSCENITY CASES. See **Constitutional Law,** X, 1; **Criminal Law,** 2.

INSURED EMPLOYEE BENEFIT PLANS. See **Employee Retirement Income Security Act of 1974.**

INTENT TO KILL. See **Constitutional Law,** II, 3.

INTERLOCKING CONFESSIONS. See **Constitutional Law,** XIII, 2.

INTERNAL REVENUE CODE.

Estimate of obligation to pay for employees' medical care—Deductibility.—Where filing of claims was a condition precedent for respondent employer's liability to pay for employees' medical care, employer, as accrual-basis taxpayer, could not deduct at close of taxable year an estimate of its obligation to pay for medical care during final quarter of year, claims for which had not been reported to employer; proposed deduction failed Treasury Regulations' "all events" test because it depended on a mere estimate of employer's liability based on events that had not occurred before close of taxable year. United States v. General Dynamics Corp., p. 239.

INTERROGATIONS BY POLICE. See **Constitutional Law,** XII.

JEWS AS SUBJECT TO RACIAL DISCRIMINATION. See **Civil Rights Act of 1866.**

JOINT TRIALS. See **Constitutional Law,** XIII, 1, 2.

JUDICIAL REVIEW. See also **Constitutional Law,** IV, 1; **Criminal Law,** 1; **Habeas Corpus,** 2.

Contentions not properly presented in courts below.—Supreme Court would not review contentions that California statute requiring California Rotary Clubs to admit women members is unconstitutionally vague and overbroad where contentions were not properly presented to state courts. Board of Directors of Rotary International v. Rotary Club of Duarte, p. 537.

JURISDICTION. See also **Constitutional Law,** XIV; **Norris-LaGuardia Act; Railroad Revitalization and Regulatory Reform Act of 1976.**

District Court—Injunction against state-court proceeding—Abstention.—Where (1) appellant oil company obtained a $10.53 billion jury verdict in its Texas state-court suit alleging that appellee oil company tortiously induced third oil company to breach its contract to sell its stock shares to appellant, (2) because appellee would be unable to comply with Texas law requiring that a judgment debtor post a supersedeas bond in at least amount of judgment, interest, and costs in order to prevent judgment creditor from obtaining a lien on debtor's property, appellee filed suit in Federal District Court alleging that Texas proceeding violated its rights under Federal Constitution and statutes, and (3) appellee did not present such claims in state court, District Court should have abstained from exercising jurisdiction instead of enjoining any action to enforce state-court judgment. Pennzoil Co. v. Texaco Inc., p. 1.

JURY INSTRUCTIONS IN OBSCENITY CASES. See **Constitutional Law,** X, 1; **Criminal Law,** 2.

JURY SELECTION. See **Constitutional Law,** XIII, 3.

JURY TRIALS IN ACTIONS FOR CIVIL PENALTIES AND INJUNCTION UNDER CLEAN WATER ACT. See **Constitutional Law,** XI.

JUSTICE DEPARTMENT. See **Grand Juries.**

LABOR DISPUTES. See **Norris-LaGuardia Act.**

LABOR MANAGEMENT RELATIONS ACT, 1947.

Unsafe workplace—Employee's claim against unions—Pre-emption by Act—Statute of limitations.—State-law tort claim of respondent apprentice employee, who was injured while assigned to a job that required tasks allegedly beyond scope of her training and experience, that petitioner unions had breached their duty to furnish safe workplace was not sufficiently independent of collective-bargaining agreement between unions and employer to withstand pre-emptive force of § 301 of Act; if respondent's suit is treated as a § 301 claim, it must be determined whether claim is time

LABOR MANAGEMENT RELATIONS ACT, 1947—Continued.
barred by applicable statute of limitations under federal law. Electrical Workers v. Hechler, p. 851.

LABOR UNION'S DISCIPLINE OF SUPERVISOR-MEMBERS. See **National Labor Relations Act.**

LABOR UNION'S DUTY OF FAIR REPRESENTATION. See **Statutes of Limitations,** 2.

LABOR UNION'S DUTY TO PROVIDE SAFE WORKPLACE. See **Labor Management Relations Act.**

LABOR UNION'S SECONDARY PICKETING RIGHTS. See **Norris-LaGuardia Act.**

LIENS. See **Jurisdiction.**

LIMITATION OF ACTIONS. See **Labor Management Relations Act, 1947; Statutes of Limitations.**

MAGAZINES AS OBSCENE. See **Constitutional Law,** X, 1; **Criminal Law,** 2.

MAGAZINES AS SUBJECT TO STATE SALES TAXES. See **Constitutional Law,** X, 2; **Standing to Sue,** 1.

MALE ORGANIZATIONS. See **Constitutional Law,** VIII; **Judicial Review.**

MEMBERSHIP IN ORGANIZATIONS. See **Constitutional Law,** VIII; **Judicial Review.**

***MIRANDA* RIGHTS.** See **Constitutional Law,** XII.

MITIGATING CIRCUMSTANCES IN CONSIDERING DEATH PENALTY. See **Constitutional Law,** II, 2.

MOTOR TRANSPORTATION INDUSTRY. See **Constitutional Law,** IV, 4.

MURDER. See **Constitutional Law,** II, 2, 3; XIII, 1, 2.

NATIONAL LABOR RELATIONS ACT. See also **Statutes of Limitations,** 2.

Unfair labor practice—Union's discipline of supervisor-members.—Respondent union did not violate § 8(b)(1)(B) of Act when it fined, for violation of its constitution, supervisor-members who did not participate in collective bargaining and whose employers had no collective-bargaining agreement with union. NLRB v. Electrical Workers, p. 573.

NEGLIGENCE. See **Federal Tort Claims Act.**

NONEXHAUSTION OF STATE REMEDIES DEFENSE. See **Habeas Corpus,** 1.

NONTESTIFYING CODEFENDANT'S CONFESSIONS. See **Constitutional Law**, XIII, 1, 2.

NORRIS-LAGUARDIA ACT.

Railway labor dispute—Secondary picketing—Injunction—District Court's jurisdiction.—Where respondent railroad employees' union in a dispute over renewal of a collective-bargaining agreement with its employer railroad, after instituting a lawful strike, extended its picketing to other railroads, including petitioners, Federal District Court had no jurisdiction under Act to enjoin secondary picketing; under plain meaning of § 13(c) of Act—which defines "labor dispute" as including "any controversy concerning terms or conditions of employment . . . regardless of whether or not the disputants stand in the proximate relation of employer and employee"—and § 13(a)—which provides that a case shall be held to "grow out of a labor dispute when the case involves persons who are engaged in the same industry"—respondent union's dispute with primary employer was unquestionably a labor dispute and secondary activity against petitioners grew out of that dispute. Burlington Northern R. Co. v. Maintenance of Way Employes, p. 429.

OBSCENITY. See **Constitutional Law**, X, 1; **Criminal Law**, 2.

OKLAHOMA. See **Railroad Revitalization and Regulatory Reform Act of 1976.**

OVERBREADTH OF STATUTES. See **Judicial Review.**

OVERVALUATION OF RAILROAD PROPERTY FOR STATE TAXATION PURPOSES. See **Railroad Revitalization and Regulatory Reform Act of 1976.**

PEREMPTORY CHALLENGES. See **Constitutional Law**, XIII, 3.

PERSONAL INJURY AWARDS AS INCOME OR RESOURCES UNDER AID TO FAMILIES WITH DEPENDENT CHILDREN PROGRAM. See **Social Security Act.**

POLICE INTERROGATIONS. See **Constitutional Law**, XII.

POLITICAL PROPAGANDA. See **Constitutional Law**, IX; **Standing to Sue**, 2.

PORNOGRAPHY. See **Constitutional Law**, X, 1; **Criminal Law**, 2.

POSTAL WORKERS. See **Stays.**

POSTCONVICTION PROCEEDINGS. See **Constitutional Law**, IV, 2; VI, 1.

PRECLUSION FROM CONSIDERING MITIGATING CIRCUMSTANCES IN CONSIDERING DEATH PENALTY. See **Constitutional Law**, II, 2.

PRE-EMPTION OF STATE LAW BY FEDERAL LAW. See **Constitutional Law**, XIV; **Employee Retirement Income Security Act of 1974; Labor Management Relations Act, 1947; Williams Act.**

PRETRIAL DETENTION HEARINGS. See **Constitutional Law**, IV, 3; VII.

PRICE FIXING. See **Grand Juries.**

PRISONERS. See **Habeas Corpus.**

PRIVATE ATTORNEYS AS PROSECUTORS OF CRIMINAL CONTEMPT ACTIONS. See **Criminal Contempt.**

PRIVILEGE AGAINST SELF-INCRIMINATION. See **Constitutional Law**, XII.

PRUDENTIAL STANDING DOCTRINE. See **Standing to Sue**, 3.

PUBLIC EMPLOYEES. See **Federal Tort Claims Act; Stays.**

RACIAL DISCRIMINATION AGAINST JEWS. See **Civil Rights Act of 1866.**

RACIAL DISCRIMINATION AGAINST PERSONS OF ARABIAN ANCESTRY. See **Civil Rights Act of 1870; Statutes of Limitations**, 1.

RACIAL DISCRIMINATION IN CAPITAL SENTENCING DETERMINATIONS. See **Constitutional Law**, II, 1; VI, 2.

RAILROAD REVITALIZATION AND REGULATORY REFORM ACT OF 1976.

State taxation of railroad property—Federal-court review of alleged overvaluation.—Section 306(b)(1) of Act—which provides that a State may not assess railroad property at a value that has a higher ratio to true market value than a ratio that assessed value of other commercial and industry property in same assessment jurisdiction has to true market value of other commercial and industrial property—permitted Federal District Court to review petitioner railroad's claim that respondent Oklahoma taxation authorities overvalued its property; § 306(b)(1)'s language makes it clear that in order to compare actual assessment ratios applicable to railroad property and to other commercial and industrial property, it is necessary to determine what "true market values" are. Burlington Northern R. Co. v. Oklahoma Tax Comm'n, p. 454.

RAILWAY LABOR ACT. See **Statutes of Limitations**, 2.

RAILWAY LABOR DISPUTES. See **Norris-LaGuardia Act.**

RECKLESS DISREGARD FOR HUMAN LIFE. See **Constitutional Law**, II, 3.

REDACTED CONFESSIONS. See **Constitutional Law**, XIII, 1.

REFUSAL TO CONSIDER MITIGATING CIRCUMSTANCES IN CONSIDERING DEATH PENALTY. See **Constitutional Law**, II, 2.

REINSTATEMENT OF DISCHARGED EMPLOYEES. See **Constitutional Law**, IV, 4; **Stays.**

REINSTATEMENT OF TRUCKING INDUSTRY EMPLOYEES DISCHARGED FOR REFUSING TO OPERATE UNSAFE VEHICLE. See **Constitutional Law**, IV, 4.

RELEASE OF PRISONERS PENDING APPEAL OF RELEASE ORDERS. See **Habeas Corpus**, 2.

RESERVE ACCOUNT FOR EMPLOYEES' ESTIMATED MEDICAL CARE EXPENSES AS TAX DEDUCTION. See **Internal Revenue Code.**

RESOURCES UNDER AID TO FAMILIES WITH DEPENDENT CHILDREN PROGRAM. See **Social Security Act.**

RETALIATORY DISCHARGES OF TRUCKING INDUSTRY EMPLOYEES FOR REFUSING TO OPERATE UNSAFE VEHICLE. See **Constitutional Law**, IV, 4.

RETROACTIVITY. See **Statutes of Limitations**, 1.

RIGHT OF ASSOCIATION. See **Constitutional Law**, VIII.

RIGHT TO COUNSEL IN POSTCONVICTION PROCEEDINGS. See **Constitutional Law**, IV, 2; VI, 1.

RIGHT TO IMPARTIAL JURY. See **Constitutional Law**, XIII, 3.

RIGHT TO JURY TRIAL IN ACTIONS FOR CIVIL PENALTIES AND INJUNCTION UNDER CLEAN WATER ACT. See **Constitutional Law**, XI.

RISKS POSED BY RELEASED PRISONER. See **Habeas Corpus**, 2.

ROTARY CLUBS. See **Constitutional Law**, VIII; **Judicial Review.**

SALE OF OBSCENE MATERIALS. See **Constitutional Law**, X, 1; **Criminal Law**, 2.

SALES TAXES. See **Constitutional Law**, X, 2; **Standing to Sue**, 1.

SECONDARY PICKETING. See **Norris-LaGuardia Act.**

SECURITIES REGULATION. See **Constitutional Law**, I; **Williams Act.**

SELF-INCRIMINATION. See **Constitutional Law**, XII.

SENTENCES. See **Criminal Law**, 1.

SEVENTH AMENDMENT. See **Constitutional Law**, XI.

SEX DISCRIMINATION. See **Constitutional Law, VIII; Judicial Review.**

SEXUAL ASSAULTS. See **Constitutional Law, III.**

SHAREHOLDERS. See **Constitutional Law, I; Williams Act.**

SIXTH AMENDMENT. See **Constitutional Law, XIII.**

SOCIAL SECURITY ACT.

Aid to Families with Dependent Children program—Personal injury awards as income.—In class action brought by personal injury award recipients who were rendered ineligible for AFDC benefits under Virginia regulations that treated personal injury awards but not property damage awards as income rather than resources, Court of Appeals' judgment affirming District Court's summary judgment for class on grounds that common meaning of "income" precluded application of term to personal injury awards and that it was irrational to treat such awards as income while treating property damage awards as resources, is reversed. Lukhard v. Reed, p. 368.

SPECIAL PROSECUTORS IN CRIMINAL CONTEMPT ACTIONS. See **Criminal Contempt.**

STANDING TO SUE.

1. *Challenge to state sales tax—Personal stake in outcome.*—Appellant publisher of general interest magazine had standing to challenge Arkansas sales tax scheme that taxes general interest magazines but exempts newspapers and religious, professional, trade, and sports journals where appellant alleged a sufficient personal stake in litigation's outcome in that State Supreme Court's holding that even if exemption for other publications fell as discriminatory, appellant would still be subject to tax stood as a total bar to appellant's relief so that its constitutional attack under First and Fourteenth Amendments held only promise of escape from burden imposed by challenged tax scheme. Arkansas Writers' Project, Inc. v. Ragland, p. 221.

2. *Foreign Agents Registration Act of 1938—Political propaganda—First Amendment.*—Appellee California State Senator, in his action to enjoin application to Canadian films that he wanted to show of term "political propaganda" used by Foreign Agents Registration Act to identify materials subject to Act's registration, reporting, and disclosure requirements, had standing to challenge such use as a violation of First Amendment where identification of films as "political propaganda" threatened to cause appellee cognizable injury in that his exhibition of films would substantially harm his chances for reelection and adversely affect his reputation in community. Meese v. Keene, p. 465.

STANDING TO SUE—Continued.

3. *Indian tribe members—Challenge to statute depriving them of land interest.*—Appellee members of Indian Tribe had standing to challenge original version of § 207 of Indian Land Consolidation Act of 1983, which deprived them of fractional interests in lands that they otherwise would have inherited; this was sufficient injury-in-fact to satisfy case-or-controversy requirement of Article III of Constitution, and, moreover, concerns of prudential standing doctrine were also satisfied even though appellees did not assert that their own property rights had been taken unconstitutionally but rather that their decedents' right to pass property at death had been taken. Hodel v. Irving, p. 704.

STATE COMMON-LAW ACTIONS. See **Employee Retirement Income Security Act of 1974.**

STATE PRISONERS. See **Habeas Corpus.**

STATE REGULATIONS UNDER AID TO FAMILIES WITH DEPENDENT CHILDREN PROGRAM. See **Social Security Act.**

STATE SALES TAXES. See **Constitutional Law,** X, 2; **Standing to Sue,** 1.

STATE TAXATION OF RAILROAD PROPERTY. See **Railroad Revitalization and Regulatory Reform Act of 1976.**

STATISTICAL STUDIES OF DEATH SENTENCES. See **Constitutional Law,** II, 1; VI, 2.

STATUTES OF LIMITATIONS. See also **Labor Management Relations Act, 1947.**

1. *Action under 42 U. S. C. § 1981.*—Respondent professor's action against petitioners, his former employer college and its tenure committee, alleging that by denying him tenure nearly three years before they had discriminated against him on basis of his Arabian race in violation of 42 U. S. C. § 1981, was not time barred where, when respondent filed suit, it was clearly established in Third Circuit that a § 1981 plaintiff under Pennsylvania statute of limitations had six years to bring an action so that it would be inequitable to apply retroactively Third Circuit decision overruling earlier decisions and applying Pennsylvania 2-year personal-injury statute of limitations rather than 6-year statute of limitations. Saint Francis College v. Al-Khazraji, p. 604.

2. *Employee's "hybrid" action—Breach of collective-bargaining agreement and duty of fair representation—Filing of complaint—Borrowed statute of limitations.*—Where, in employee's "hybrid" action under Railway Labor Act against his employer for alleged breach of collective-bargaining agreement and against his union and his union representative for alleged breach of their duty of fair representation, District Court borrowed 6-month statute of limitations of § 10(b) of National Labor Relations Act, ac-

STATUTES OF LIMITATIONS—Continued.
tion was timely commenced since complaint was filed within six months of alleged breach of fair representation in accordance with Federal Rule of Civil Procedure 3, even though summonses and complaints were not mailed nor service acknowedgments made within 6-month period as required by § 10(b). West v. Conrail, p. 35.

STAYS.

Arbitrator's award—Reinstatement of postal worker.—Application to stay Court of Appeals' mandate enforcing an arbitrator's award requiring reinstatement of postal worker who was discharged after being convicted of unlawful delay of mail, is granted. United States Postal Service v. Letter Carriers (REHNQUIST, C. J., in chambers), p. 1301.

STOCK TENDER OFFERS. See **Constitutional Law, I; Williams Act.**

"SUITS AT COMMON LAW" UNDER SEVENTH AMENDMENT. See **Constitutional Law, XI.**

SUPERSEDEAS BONDS. See **Jurisdiction.**

SUPERVISOR-MEMBERS OF UNION AS SUBJECT TO UNION DISCIPLINE. See **National Labor Relations Act.**

SUPREMACY CLAUSE. See **Constitutional Law, XIV.**

SURFACE TRANSPORTATION ASSISTANCE ACT OF 1982. See **Constitutional Law, IV, 4.**

SYNAGOGUES. See **Civil Rights Act of 1866.**

TAKING OF PROPERTY WITHOUT JUST COMPENSATION. See **Constitutional Law, V.**

TAXATION OF RAILROAD PROPERTY. See **Railroad Revitalization and Regulatory Reform Act of 1976.**

TAX DEDUCTIONS OF BUSINESS EXPENSES. See **Internal Revenue Code.**

TAXES. See **Constitutional Law, X, 2; Internal Revenue Code; Standing to Sue, 1.**

TENDER OFFERS. See **Constitutional Law, I; Williams Act.**

TENNESSEE. See **Constitutional Law, XIV.**

TEXAS. See **Jurisdiction.**

TORTIOUS INDUCEMENT TO BREACH CONTRACT. See **Jurisdiction.**

TRADEMARKS. See **Criminal Contempt.**

TREASURY REGULATIONS. See **Internal Revenue Code.**

TRUCKING INDUSTRY. See **Constitutional Law, IV, 4.**

UNFAIR LABOR PRACTICES. See **National Labor Relations Act.**

UNION'S DISCIPLINE OF SUPERVISOR-MEMBERS. See **National Labor Relations Act.**

UNION'S DUTY OF FAIR REPRESENTATION. See **Statutes of Limitations,** 2.

UNION'S DUTY TO PROVIDE SAFE WORKPLACE. See **Labor Management Relations Act, 1947.**

UNION'S SECONDARY PICKETING RIGHTS. See **Norris-LaGuardia Act.**

UNITED STATES ATTORNEYS. See **Grand Juries.**

VAGUENESS OF STATUTES. See **Judicial Review.**

VALUE IN DETERMINING OBSCENITY. See **Constitutional Law,** X, 1; **Criminal Law,** 2.

VETERANS' ADMINISTRATION. See **Constitutional Law,** XIV.

VETERANS' BENEFITS. See **Constitutional Law,** XIV.

VIRGINIA. See **Social Security Act.**

WAIVER OF NONEXHAUSTION OF STATE REMEDIES DEFENSE. See **Habeas Corpus,** 1.

WILLIAMS ACT.

State statute governing control shares in corporation—Pre-emption by Williams Act.—Indiana statute protecting independent shareholders from coercive aspects of tender offers by allowing them to vote as a group is consistent with provisions and purposes of Williams Act and is not pre-empted thereby. CTS Corp. v. Dynamics Corporation of America, p. 69.

WOMEN'S RIGHTS TO ORGANIZATION MEMBERSHIP. See **Constitutional Law,** VIII; **Judicial Review.**

WORDS AND PHRASES.

1. "*Labor dispute.*" § 13(c), Norris-LaGuardia Act, 29 U. S. C. § 113(c). Burlington Northern R. Co. v. Maintenance of Way Employes, p. 429.

2. "*Relate to any employee benefit plan.*" § 514(a), Employee Retirement Income Security Act of 1974, 29 U. S. C. § 1144(a). Pilot Life Ins. Co. v. Dedeaux, p. 41; Metropolitan Life Ins. Co. v. Taylor, p. 58.

3. "*Suits at common law.*" Seventh Amendment. Tull v. United States, p. 412.

WRONGFUL DEATH. See **Federal Tort Claims Act.**