



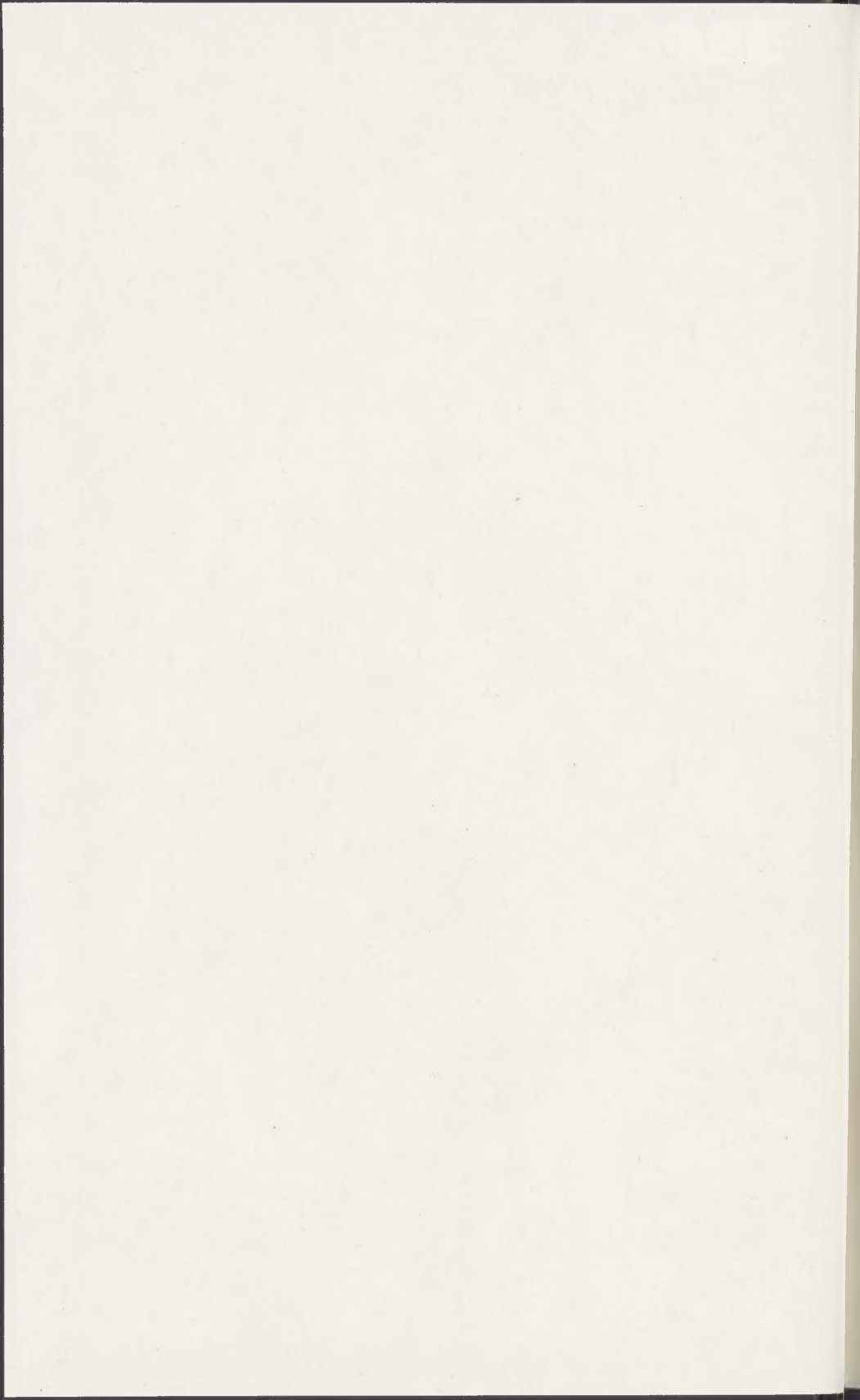
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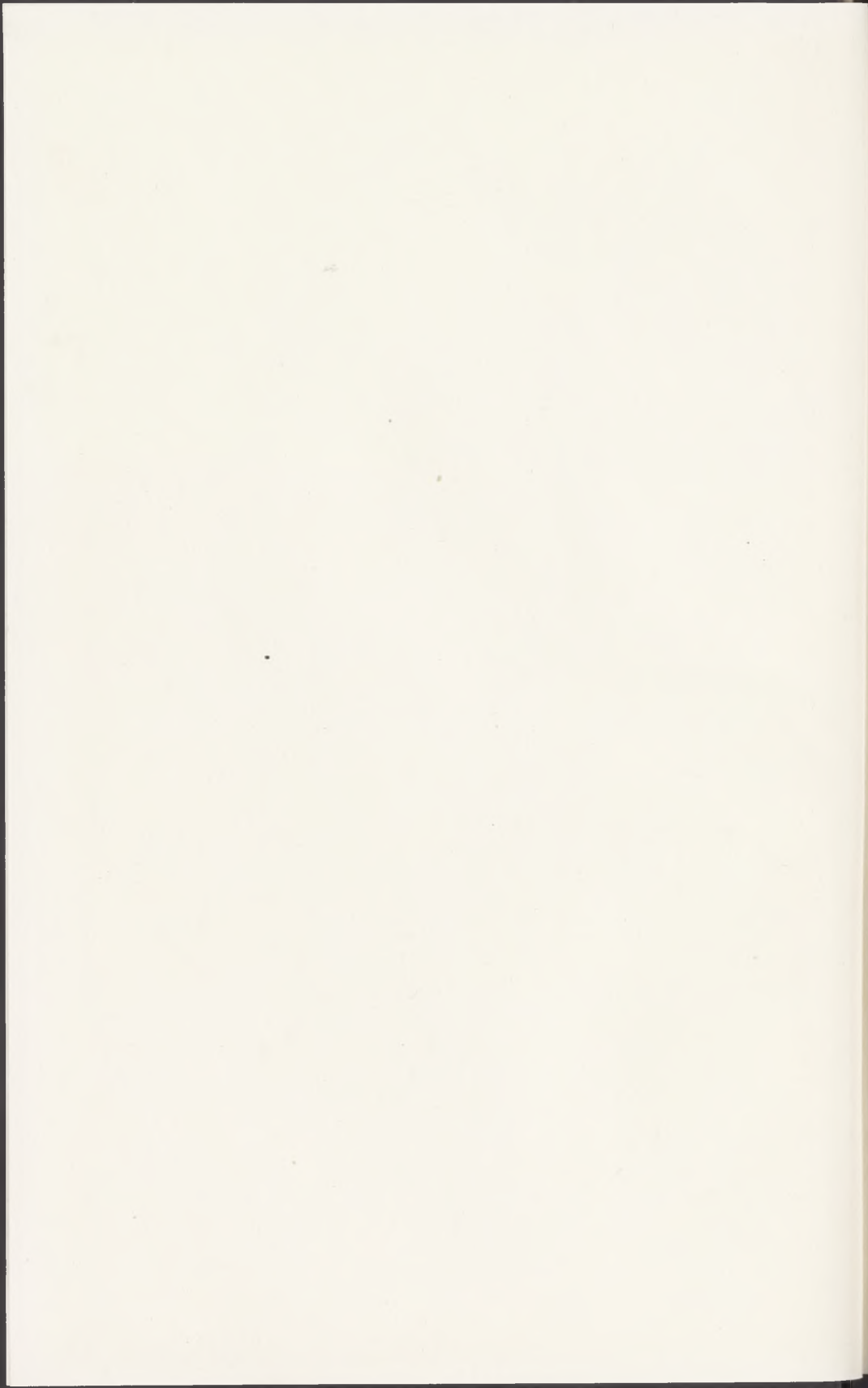
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UNITED STATES REPORTS

VOLUME 485

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1987

FEBRUARY 24 THROUGH MAY 13, 1988

FRANK D. WAGNER

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ERRATA

467 U. S. 844, line 7: "provison" should be "provision".

484 U. S. 51, note, line 5: "*Scott M. DuBoff*," should be added before "*McNeill Watkins II*".

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.
JOHN PAUL STEVENS, ASSOCIATE JUSTICE.
SANDRA DAY O'CONNOR, ASSOCIATE JUSTICE.
ANTONIN SCALIA, ASSOCIATE JUSTICE.
ANTHONY M. KENNEDY, ASSOCIATE JUSTICE.

RETIRED

WARREN E. BURGER, CHIEF JUSTICE.
LEWIS F. POWELL, JR., ASSOCIATE JUSTICE.

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SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, effective February 18, 1988, *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, ANTHONY M. KENNEDY, Associate Justice.

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

February 18, 1988.

(For next previous allotment, and modifications, see 479 U. S., p. v, 483 U. S., pp. v, vi, and 484 U. S., pp. v, vi.)

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CASES ADJUDGED
IN THE
SUPREME COURT OF THE UNITED STATES

AT
OCTOBER TERM, 1987

PENNELL ET AL. *v.* CITY OF SAN JOSE ET AL.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA

No. 86-753. Argued November 10, 1987—Decided February 24, 1988

Under a San Jose, Cal., rent control ordinance (Ordinance), a landlord may automatically raise the annual rent of a tenant in possession by as much as eight percent, but if a tenant objects to a higher increase, a hearing is required to determine whether the landlord's proposed increase is "reasonable under the circumstances," and the hearing officer is directed to consider specified factors, including "the hardship to a tenant." Appellants, an individual landlord and Tri-County Apartment House Owners Association (Association), which represents owners and lessors of real property located in San Jose, filed a state-court action seeking a declaration that the Ordinance, particularly the "tenant hardship" provision, is facially invalid under the Federal Constitution. The court entered judgment on the pleadings in appellants' favor, and the California Court of Appeal affirmed. However, the California Supreme Court reversed, rejecting appellants' arguments under the Takings Clause of the Fifth Amendment and the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

Held:

1. Appellants have standing to challenge the Ordinance's constitutionality, even though they did not allege that either the individual appellant or appellant Association's members have "hardship tenants" who might trigger the Ordinance's hearing process, or that they have been or will be aggrieved by a hearing officer's determination that a certain proposed rent increase is unreasonable on the ground of tenant hardship. When standing is challenged on the basis of the pleadings, all material allegations of the complaint must be taken as true, and the complaint must be

construed in favor of the complaining party. Appellants alleged that their properties are subject to the Ordinance, and stated at oral argument that the Association represents "most of the residential unit owners in the city and [has] many hardship tenants." Thus, the likelihood of enforcement of the Ordinance, with the concomitant probability that a rent will be reduced below what the landlord would otherwise be able to obtain, is a sufficient threat of actual injury to satisfy Art. III's requirement that a plaintiff who challenges a law must demonstrate a realistic danger of sustaining a direct injury as a result of the law's operation or enforcement. Pp. 6-8.

2. Appellants' contention that application of the Ordinance's tenant hardship provision violates the Takings Clause—since reducing, because of tenant hardship, what would otherwise be a "reasonable" rent under the other, objective factors specified in the Ordinance relating to the landlord's costs or the rental market's condition, accomplishes a taking and transfer of the landlord's property to individual hardship tenants—is premature. There is no evidence that the tenant hardship provision has in fact ever been relied upon by a hearing officer to reduce a rent below the figure it would have been set at on the basis of the other specified factors. In addition, the Ordinance does not require that a hearing officer in fact reduce a proposed rent increase on grounds of tenant hardship, but only makes it mandatory that tenant hardship be considered. In takings cases, the constitutionality of laws should not be decided except in an actual factual setting that makes such a decision necessary. Pp. 8-11.

3. The mere provision in the Ordinance that a hearing officer may consider the tenant's hardship in finally fixing a reasonable rent does not render the Ordinance facially invalid under the Due Process Clause. The Ordinance's purpose of preventing unreasonable rent increases caused by the city's housing shortage is a legitimate exercise of appellees' police powers. Moreover, there is no merit to appellants' argument that it is arbitrary, discriminatory, or demonstrably irrelevant for appellees to attempt to accomplish the additional goal of reducing the burden of housing costs on low-income tenants by requiring that "hardship to a tenant" be considered in determining the amount of excess rent increase that is "reasonable under the circumstances." The protection of consumer welfare is a legitimate and rational goal of price or rate regulation. The Ordinance's scheme represents a rational attempt to accommodate the conflicting interests of protecting tenants from burdensome rent increases while at the same time ensuring that landlords are guaranteed a fair return on their investment. Pp. 11-14.

4. The Ordinance, on its face, does not violate the Equal Protection Clause. Its classification scheme is rationally related to the legitimate

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Syllabus

purpose of protecting tenants. It is not irrational for the Ordinance to treat landlords differently on the basis of whether or not they have hardship tenants. Pp. 14-15.

42 Cal. 3d 365, 721 P. 2d 1111, affirmed.

REHNQUIST, C. J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. SCALIA, J., filed an opinion concurring in part and dissenting in part, in which O'CONNOR, J., joined, *post*, p. 15. KENNEDY, J., took no part in the consideration or decision of the case.

Harry D. Miller argued the cause for appellants. With him on the briefs were *Burch Fitzpatrick* and *Gary E. Rosenberg*.

Joan R. Gallo argued the cause for appellees. With her on the brief was *George Rios*.*

*Briefs of *amici curiae* urging reversal were filed for the California Association of Realtors by *William M. Pfeiffer*; for the National Apartment Association et al. by *Jon D. Smock*, *Wilbur H. Haines III*, and *Jeffrey J. Gale*; for the National Association of Realtors by *William D. North*; for the National Multi Housing Council by *Lawrence B. Simons* and *Michael E. Fine*; for the Rent Stabilization Association of New York City, Inc., et al. by *Erwin N. Griswold*; and for the Washington Legal Foundation by *Daniel J. Popeo*, *Paul D. Kamenar*, and *Todd Natkin*.

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *John A. Powell*, *Steven R. Shapiro*, *Helen Hershkoff*, *Paul L. Hoffman*, and *Mark Rosenbaum*; for the American Federation of Labor and Congress of Industrial Organizations by *Robert M. Weinberg* and *Laurence Gold*; for the Asian Law Alliance et al. by *Brenton Rogozen*; for the Center for Constitutional Rights by *Frank E. Deale*; for the National Housing Law Project by *David B. Bryson*; for the National Institute of Municipal Law Officers by *William I. Thornton, Jr.*, *Roger F. Cutler*, *Roy D. Bates*, and *William H. Taube*; and for the U. S. Conference of Mayors et al. by *Benna Ruth Solomon* and *H. Bartow Farr III*.

Briefs of *amici curiae* were filed for the city of Santa Monica et al. by *Joseph Lawrence*, *Karl M. Manheim*, *Joel M. Levy*, *Hadassa K. Gilbert*, *Manuela Albuquerque*, *Raymond E. Ott*, *Mary Jo Levinger*, *Marc G. Hynes*, *Jayne W. Williams*, *K. Duane Lyders*, *Louise H. Renne*, *Roger T. Picquet*, *Steven A. Amerikaner*, *Mark G. Sellers*, and *John M. Powers*; for the Competitive Enterprise Institute by *Sam Kazman*; and for the National Association of Home Builders et al. by *Gus Bauman*.

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

This case involves a challenge to a rent control ordinance enacted by the city of San Jose, California, that allows a hearing officer to consider, among other factors, the "hardship to a tenant" when determining whether to approve a rent increase proposed by a landlord. Appellants Richard Pennell and the Tri-County Apartment House Owners Association sued in the Superior Court of Santa Clara County seeking a declaration that the ordinance, in particular the "tenant hardship" provisions, are "facially unconstitutional and therefore . . . illegal and void." The Superior Court entered judgment on the pleadings in favor of appellants, sustaining their claim that the tenant hardship provisions violated the Takings Clause of the Fifth Amendment, as made applicable to the States by the Fourteenth Amendment. The California Court of Appeal affirmed this judgment, 154 Cal. App. 3d 1019, 201 Cal. Rptr. 728 (1984), but the Supreme Court of California reversed, 42 Cal. 3d 365, 721 P. 2d 1111 (1986), each by a divided vote. The majority of the Supreme Court rejected appellants' arguments under the Takings Clause and the Equal Protection and Due Process Clauses of the Fourteenth Amendment; the dissenters in that court thought that the tenant hardship provisions were a "forced subsidy imposed on the landlord" in violation of the Takings Clause. *Id.*, at 377, 721 P. 2d, at 1119. On appellants' appeal to this Court we postponed consideration of the question of jurisdiction, 480 U. S. 905 (1987), and now having heard oral argument we affirm the judgment of the Supreme Court of California.

The city of San Jose enacted its rent control ordinance (Ordinance) in 1979 with the stated purpose of

"alleviat[ing] some of the more immediate needs created by San Jose's housing situation. These needs include but are not limited to the prevention of excessive and unreasonable rent increases, the alleviation of undue hard-

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ships upon individual tenants, and the assurance to landlords of a fair and reasonable return on the value of their property." San Jose Municipal Ordinance 19696, § 5701.2.¹

At the heart of the Ordinance is a mechanism for determining the amount by which landlords subject to its provisions may increase the annual rent which they charge their tenants. A landlord is automatically entitled to raise the rent of a tenant in possession² by as much as eight percent; if a tenant objects to an increase greater than eight percent, a hearing is required before a "Mediation Hearing Officer" to determine whether the landlord's proposed increase is "reasonable under the circumstances." The Ordinance sets forth a number of factors to be considered by the hearing officer in making this determination, including "the hardship to a tenant." § 5703.28(c)(7). Because appellants concentrate their attack on the consideration of this factor, we set forth the relevant provision of the Ordinance in full:

"5703.29. Hardship to Tenants. In the case of a rent increase or any portion thereof which exceeds the standard set in Section 5703.28(a) or (b), then with respect to such excess and whether or not to allow same to be part of the increase allowed under this Chapter, the Hearing Officer shall consider the economic and financial hardship imposed on the present tenant or tenants of the unit or units to which such increases apply. If, on balance, the Hearing Officer determines that the proposed increase

¹ In order to be consistent with the decisions below, we refer throughout this opinion to the sections of the Ordinance as originally designated. We note, however, that the San Jose Municipal Code has recently been recodified and the Ordinance now appears at Chapter 17.23 of the new Code.

² Under § 5703.3, the Ordinance does not apply to rent or rent increases for new rental units first rented after the Ordinance takes effect, § 5703.3(a), to the rental of a unit that has been voluntarily vacated, § 5703.3(b)(1), or to the rental of a unit that is vacant as a result of eviction for certain specified acts, § 5703.3(b)(2).

constitutes an unreasonably severe financial or economic hardship on a particular tenant, he may order that the excess of the increase which is subject to consideration under subparagraph (c) of Section 5703.28, or any portion thereof, be disallowed. Any tenant whose household income and monthly housing expense meets [certain income requirements] shall be deemed to be suffering under financial and economic hardship which must be weighed in the Hearing Officer's determination. The burden of proof in establishing any other economic hardship shall be on the tenant."

If either a tenant or a landlord is dissatisfied with the decision of the hearing officer, the Ordinance provides for binding arbitration. A landlord who attempts to charge or who receives rent in excess of the maximum rent established as provided in the Ordinance is subject to criminal and civil penalties.

Before we turn to the merits of appellants' contentions we consider the claim of appellees that appellants lack standing to challenge the constitutionality of the Ordinance. The original complaint in this action states that appellant Richard Pennell "is an owner and lessor of 109 rental units in the City of San Jose." Appellant Tri-County Apartment House Owners Association (Association) is said to be "an unincorporated association organized for the purpose of representing the interests of the owners and lessors of real property located in the City of San Jose." App. 2-3. The complaint also states that the real property owned by appellants is "subject to the terms of" the Ordinance. But, appellees point out, at no time did appellants allege that either Pennell or any member of the Association has "hardship tenants" who might trigger the Ordinance's hearing process, nor did they specifically allege that they have been or will be aggrieved by the determination of a hearing officer that a certain proposed rent increase is unreasonable on the ground of tenant hardship. As appellees put it, "[a]t this point in time, it is speculative"

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whether any of the Association's members will be injured in fact by the Ordinance's tenant hardship provisions. Thus, appellees contend, appellants lack standing under either the test for individual standing, see, *e. g.*, *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U. S. 464, 472 (1982) (individual standing requires an "actual injury redressable by the court"), or the test for associational standing, see *Hunt v. Washington Apple Advertising Comm'n*, 432 U. S. 333, 343 (1977) (an association has standing on behalf of its members only when "its members would otherwise have standing to sue in their own right").³

We must keep in mind, however, that "application of the constitutional standing requirement [is not] a mechanical exercise," *Allen v. Wright*, 468 U. S. 737, 751 (1984), and that when standing is challenged on the basis of the pleadings, we "accept as true all material allegations of the complaint, and . . . construe the complaint in favor of the complaining party," *Warth v. Seldin*, 422 U. S. 490, 501 (1975); see also *Gladstone, Realtors v. Village of Bellwood*, 441 U. S. 91, 109 (1979). Here, appellants specifically alleged in their complaint that appellants' properties are "subject to the terms of" the Ordinance, and they stated at oral argument that the Association represents "most of the residential unit owners in the city and [has] many hardship tenants," Tr. of Oral Arg. 42; see also *id.*, at 7; Reply Brief for Appellants 2.

³Our cases also impose two additional requirements for associational or representational standing: the interests the organization seeks to protect must be "germane to the organization's purpose," *Hunt*, 432 U. S., at 343, and "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit," *ibid.* See also *Automobile Workers v. Brock*, 477 U. S. 274, 281-282 (1986). Both of these requirements are satisfied here. The Association was "organized for the purpose of representing the interests of the owners and lessors of real property" in San Jose in this lawsuit, App. 3, and the facial challenge that the Association makes to the Ordinance does not require the participation of individual landlords.

Accepting the truth of these statements, which appellees do not contest, it is not "unadorned speculation," *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U. S. 26, 44 (1976), to conclude that the Ordinance will be enforced against members of the Association. The likelihood of enforcement, with the concomitant probability that a landlord's rent will be reduced below what he or she would otherwise be able to obtain in the absence of the Ordinance, is a sufficient threat of actual injury to satisfy Art. III's requirement that "[a] plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." *Babbitt v. Farm Workers*, 442 U. S. 289, 298 (1979).⁴

This said, we recognize that the record in this case leaves much to be desired in terms of specificity for purposes of determining the standing of appellants to challenge this Ordinance. Undoubtedly this is at least in part a reflection of the fact that the case originated in a state court where Art. III's proscription against advisory opinions may not apply. We strongly suggest that in future cases parties litigating in this Court under circumstances similar to those here take pains to supplement the record in any manner necessary to enable us to address with as much precision as possible any question of standing that may be raised.

Turning now to the merits, we first address appellants' contention that application of the Ordinance's tenant hardship provisions violates the Fifth and Fourteenth Amend-

⁴ Appellees also argue that Pennell lacks standing individually because in early 1987 he sold the properties he owned at the time the complaint in this action was filed. See Brief for Appellees 8. In a declaration submitted to the Court, Pennell admits that he sold these properties, but states that he recently repurchased and now owns one of the apartment buildings in San Jose that he formerly owned. Declaration of Richard Pennell ¶7. That property was and still is "subject to the Ordinance." *Id.*, ¶8. Because we conclude that the Association has standing and that therefore we have jurisdiction over this appeal, we find it unnecessary to decide whether Pennell's sale and repurchase of the property affects his standing here.

ments' prohibition against taking of private property for public use without just compensation. In essence, appellants' claim is as follows: § 5703.28 of the Ordinance establishes the seven factors that a hearing officer is to take into account in determining the reasonable rent increase. The first six of these factors are all objective, and are related either to the landlord's costs of providing an adequate rental unit, or to the condition of the rental market. Application of these six standards results in a rent that is "reasonable" by reference to what appellants contend is the only legitimate purpose of rent control: the elimination of "excessive" rents caused by San Jose's housing shortage. When the hearing officer then takes into account "hardship to a tenant" pursuant to § 5703.28(c)(7) and reduces the rent below the objectively "reasonable" amount established by the first six factors, this additional reduction in the rent increase constitutes a "taking." This taking is impermissible because it does not serve the purpose of eliminating excessive rents—that objective has already been accomplished by considering the first six factors—instead, it serves only the purpose of providing assistance to "hardship tenants." In short, appellants contend, the additional reduction of rent on grounds of hardship accomplishes a transfer of the landlord's property to individual hardship tenants; the Ordinance forces private individuals to shoulder the "public" burden of subsidizing their poor tenants' housing. As appellants point out, "[i]t is axiomatic that the Fifth Amendment's just compensation provision is 'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U. S. 304, 318–319 (1987) (quoting *Armstrong v. United States*, 364 U. S. 40, 49 (1960)).

We think it would be premature to consider this contention on the present record. As things stand, there simply is no evidence that the "tenant hardship clause" has in fact ever

been relied upon by a hearing officer to reduce a rent below the figure it would have been set at on the basis of the other factors set forth in the Ordinance. In addition, there is nothing in the Ordinance requiring that a hearing officer in fact reduce a proposed rent increase on grounds of tenant hardship. Section 5703.29 does make it mandatory that hardship be considered—it states that “the Hearing Officer *shall* consider the economic hardship imposed on the present tenant”—but it then goes on to state that if “the proposed increase constitutes an unreasonably severe financial or economic hardship . . . he *may* order that the excess of the increase” be disallowed. §5703.29 (emphasis added). Given the “essentially ad hoc, factual inquir[y]” involved in the takings analysis, *Kaiser Aetna v. United States*, 444 U. S. 164, 175 (1979), we have found it particularly important in takings cases to adhere to our admonition that “the constitutionality of statutes ought not be decided except in an actual factual setting that makes such a decision necessary.” *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U. S. 264, 294–295 (1981). In *Virginia Surface Mining*, for example, we found that a challenge to the Surface Mining Control and Reclamation Act of 1977, 91 Stat. 447, 30 U. S. C. §1201 *et seq.*, was “premature,” 452 U. S., at 296, n. 37, and “not ripe for judicial resolution,” *id.*, at 297, because the property owners in that case had not identified any property that had allegedly been taken by the Act, nor had they sought administrative relief from the Act’s restrictions on surface mining. Similarly, in this case we find that the mere fact that a hearing officer is enjoined to consider hardship to the tenant in fixing a landlord’s rent, without any showing in a particular case as to the consequences of that injunction in the ultimate determination of the rent, does not present a sufficiently concrete factual setting for the adjudication of the takings claim appellants raise here. Cf. *CIO v. McAdory*, 325 U. S. 472, 475–476 (1945) (declining to consider the validity of a state statute when the record did not

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show that the statute would ever be applied to any of the petitioner's members).⁵

Appellants also urge that the mere provision in the Ordinance that a hearing officer may *consider* the hardship of the tenant in finally fixing a reasonable rent renders the Ordinance "facially invalid" under the Due Process and Equal Protection Clauses, even though no landlord ever has its rent diminished by as much as one dollar because of the application of this provision. The standard for determining whether a state price-control regulation is constitutional under the Due Process Clause is well established: "Price control is 'unconstitutional . . . if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt . . .'" *Permian Basin Area Rate Cases*, 390 U. S. 747, 769-770 (1968) (quoting *Nebbia v. New York*, 291 U. S. 502, 539 (1934)). In other contexts we have recognized that the government may intervene in the marketplace to regulate rates or prices that are artificially inflated as a result of the existence of a monopoly or near monopoly, see, e. g., *FCC v. Florida Power Corp.*, 480 U. S. 245, 250-254 (1987) (approving limits on rates charged to cable companies for access to telephone poles); *FPC v. Texaco Inc.*, 417 U. S. 380, 397-398 (1974) (recognizing that federal regulation of the nat-

⁵For this reason we also decline to address appellants' contention that application of § 5703.28(c)(7) to reduce an otherwise reasonable rent increase on the basis of tenant hardship violates the Fourteenth Amendment's due process and equal protection requirements. See *Hodel v. Indiana*, 452 U. S. 314, 335-336 (1981) (dismissing as "premature" a due process challenge to the civil penalty provision of the Surface Mining Act because "appellees have made no showing that they were ever assessed civil penalties under the Act, much less that the statutory prepayment requirement was ever applied to them or caused them any injury").

Appellants and several *amici* also argue that the Ordinance's combination of lower rents for hardship tenants and restrictions on a landlord's power to evict a tenant amounts to a physical taking of the landlord's property. We decline to address this contention not only because it was raised for the first time in this Court, but also because it, too, is premised on a hearing officer's actually granting a lower rent to a hardship tenant.

ural gas market was in response to the threat of monopoly pricing), or a discrepancy between supply and demand in the market for a certain product, see, e. g., *Nebbia v. New York*, *supra*, at 530, 538 (allowing a minimum price for milk to offset a "flood of surplus milk"). Accordingly, appellants do not dispute that the Ordinance's asserted purpose of "prevent[ing] excessive and unreasonable rent increases" caused by the "growing shortage of and increasing demand for housing in the City of San Jose," § 5701.2, is a legitimate exercise of appellees' police powers.⁶ Cf. *Block v. Hirsh*, 256 U. S. 135, 156 (1921) (approving rent control in Washington, D. C., on the basis of Congress' finding that housing in the city was "monopolized"). They do argue, however, that it is "arbitrary, discriminatory, or demonstrably irrelevant," *Permian Basin Area Rate Cases*, *supra*, at 769-770, for appellees to attempt to accomplish the additional goal of reducing the burden of housing costs on low-income tenants by requiring that "hardship to a tenant" be considered in determining the amount of excess rent increase that is "reasonable under the circumstances" pursuant to § 5703.28.⁷ As appellants put it, "[t]he objective of alleviating individual tenant hardship is . . . not a 'policy the legislature is free to adopt' in a rent control ordinance." Reply Brief for Appellants 16.

⁶ Appellants do not claim, as do some *amici*, that rent control is *per se* a taking. We stated in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U. S. 419 (1982), that we have "consistently affirmed that States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails." *Id.*, at 440 (citing, *inter alia*, *Bowles v. Willingham*, 321 U. S. 503, 517-518 (1944)). And in *FCC v. Florida Power Corp.*, 480 U. S. 245 (1987), we stated that "statutes regulating the economic relations of landlords and tenants are not *per se* takings." *Id.*, at 252. Despite *amici*'s urgings, we see no need to reconsider the constitutionality of rent control *per se*.

⁷ As we noted above, see n. 5, *supra*, to the extent that appellants' due process argument is based on the claim that the Ordinance forces landlords to subsidize individual tenants, that claim is premature and not presented by the facts before us.

We reject this contention, however, because we have long recognized that a legitimate and rational goal of price or rate regulation is the protection of consumer welfare. See, *e. g.*, *Permian Basin Area Rate Cases*, *supra*, at 770; *FPC v. Hope Natural Gas Co.*, 320 U. S. 591, 610–612 (1944) (“The primary aim of [the Natural Gas Act] was to protect consumers against exploitation at the hands of natural gas companies”). Indeed, a primary purpose of rent control is the protection of tenants. See, *e. g.*, *Bowles v. Willingham*, 321 U. S. 503, 513, n. 9 (1944) (one purpose of rent control is “to protect persons with relatively fixed and limited incomes, consumers, wage earners . . . from undue impairment of their standard of living”). Here, the Ordinance establishes a scheme in which a hearing officer considers a number of factors in determining the reasonableness of a proposed rent increase which exceeds eight percent *and* which exceeds the amount deemed reasonable under either § 5703.28(a) or § 5703.28(b). The first six factors of § 5703.28(c) focus on the individual landlord—the hearing officer examines the history of the premises, the landlord’s costs, and the market for comparable housing. Section 5703.28(c)(5) also allows the landlord to bring forth any other financial evidence—including presumably evidence regarding his own financial status—to be taken into account by the hearing officer. It is in only this context that the Ordinance allows tenant hardship to be considered and, under § 5703.29, “balance[d]” with the other factors set out in § 5703.28(c). Within this scheme, § 5703.28(c) represents a rational attempt to accommodate the conflicting interests of protecting tenants from burdensome rent increases while at the same time ensuring that landlords are guaranteed a fair return on their investment. Cf. *Bowles v. Willingham*, *supra*, at 517 (considering, but rejecting, the contention that rent control must be established “landlord by landlord, as in the fashion of utility rates”). We accordingly find that the Ordinance, which so carefully considers both the individual circumstances of the landlord and

the tenant before determining whether to allow an *additional* increase in rent over and above certain amounts that are deemed reasonable, does not on its face violate the Fourteenth Amendment's Due Process Clause.⁸

We also find that the Ordinance does not violate the Amendment's Equal Protection Clause. Here again, the standard is deferential; appellees need only show that the classification scheme embodied in the Ordinance is "rationally related to a legitimate state interest." *New Orleans v. Dukes*, 427 U. S. 297, 303 (1976). As we stated in *Vance v. Bradley*, 440 U. S. 93 (1979), "we will not overturn [a statute that does not burden a suspect class or a fundamental interest] unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational." *Id.*, at 97. In light of our conclusion above that the Ordinance's tenant hardship provisions are designed to serve the legitimate purpose of protecting tenants, we can hardly conclude that it is irrational for the Ordinance to treat certain landlords differently on the basis of whether or not they have hardship tenants. The Ordinance distinguishes between landlords because doing so furthers the purpose of ensuring that individual tenants do not suffer "unreasonable" hardship; it would be inconsistent to state that hardship is a legitimate factor to be considered but then hold that appellees could not tailor the Ordinance so that only legitimate hardship cases are redressed. Cf. *Woods v. Cloyd W. Miller Co.*, 333 U. S. 138, 145 (1948)

⁸The consideration of tenant hardship also serves the additional purpose, not stated on the face of the Ordinance, of reducing the costs of dislocation that might otherwise result if landlords were to charge rents to tenants that they could not afford. Particularly during a housing shortage, the social costs of the dislocation of low-income tenants can be severe. By allowing tenant hardship to be considered under § 5703.28(c), the Ordinance enables appellees to "fine tune" their rent control to take into account the risk that a particular tenant will be forced to relocate as a result of a proposed rent increase.

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(Congress “need not control all rents or none. It can select those areas or those classes of property where the need seems the greatest”). We recognize, as appellants point out, that in general it is difficult to say that the landlord “causes” the tenant’s hardship. But this is beside the point—if a landlord does have a hardship tenant, regardless of the reason why, it is rational for appellees to take that fact into consideration under § 5703.28 of the Ordinance when establishing a rent that is “reasonable under the circumstances.”

For the foregoing reasons, we hold that it is premature to consider appellants’ claim under the Takings Clause and we reject their facial challenge to the Ordinance under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The judgment of the Supreme Court of California is accordingly

Affirmed.

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

JUSTICE SCALIA, with whom JUSTICE O’CONNOR joins, concurring in part and dissenting in part.

I agree that the tenant hardship provision of the Ordinance does not, on its face, violate either the Due Process Clause or the Equal Protection Clause of the Fourteenth Amendment. I disagree, however, with the Court’s conclusion that appellants’ takings claim is premature. I would decide that claim on the merits, and would hold that the tenant hardship provision of the Ordinance effects a taking of private property without just compensation in violation of the Fifth and Fourteenth Amendments.

I

Appellants contend that any application of the tenant hardship provision of the San Jose Ordinance would effect an uncompensated taking of private property because that provision does not substantially advance legitimate state interests and because it improperly imposes a public burden on individ-

ual landlords. I can understand how such a claim—that a law applicable to the plaintiffs is, root and branch, invalid—can be readily rejected on the merits, by merely noting that at least some of its applications may be lawful. But I do not understand how such a claim can possibly be avoided by considering it “premature.” Suppose, for example, that the feature of the rental ordinance under attack was a provision allowing a hearing officer to consider the race of the apartment owner in deciding whether to allow a rent increase. It is inconceivable that we would say judicial challenge must await demonstration that this provision has actually been applied to the detriment of one of the plaintiffs. There is no difference, it seems to me, when the facial, root-and-branch challenge rests upon the Takings Clause rather than the Equal Protection Clause.

The Court confuses the issue by relying on cases, and portions of cases, in which the Takings Clause challenge was not (as here) that the law in all its applications took property without just compensation, but was rather that the law’s application in regulating the use of particular property so severely reduced the value of that property as to constitute a taking. It is in *that* context, and not (as the Court suggests) generally, that takings analysis involves an “essentially ad hoc, factual inquir[y],” *Kaiser Aetna v. United States*, 444 U. S. 164, 175 (1979). We said as much less than a year ago, and it is surprising that we have so soon forgotten:

“In addressing petitioners’ claim we must not disregard the posture in which this case comes before us. The District Court granted summary judgment to respondents only on the facial challenge to the Subsidence Act. The court explained that ‘. . . *the only question before this court is whether the mere enactment of the statutes and regulations constitutes a taking.*’ . . .

“The posture of the case is critical because we have recognized an important distinction between a claim that the mere enactment of a statute constitutes a taking and

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a claim that the particular impact of government action on a specific piece of property requires the payment of just compensation. This point is illustrated by our decision in *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U. S. 264 (1981), in which we rejected a preenforcement challenge to the constitutionality of the Surface Mining Control and Reclamation Act of 1977. . . . The Court [there] explained:

““Because appellees” taking claim arose in the context of a facial challenge, it presented no concrete controversy concerning either application of the Act to particular surface mining operations or its effect on specific parcels of land. Thus, the only issue properly before the District Court and, in turn, this Court, is whether the “mere enactment” of the Surface Mining Act constitutes a taking. . . . The test to be applied in considering this facial challenge is straightforward. A statute regulating the uses that can be made of property effects a taking if it “denies an owner economically viable use of his land.” . . . ’

“Petitioners thus face an uphill battle in making a facial attack on the Act as a taking.” *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U. S. 470, 493–495 (1987).

While the battle was “uphill” in *Keystone*, we allowed it to be fought, and did not declare it “premature.”

The same was true of the facial takings challenge in *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, *supra*. It is remarkable that the Court should point to that case in support of its position, describing the holding as follows:

“In *Virginia Surface Mining*, for example, we found that a challenge to the Surface Mining Control and Reclamation Act . . . was ‘premature,’ . . . and ‘not ripe for judi-

cial resolution,' . . . because the property owners in that case had not identified any property that had allegedly been taken by the Act, nor had they sought administrative relief from the Act's restrictions on surface mining." *Ante*, at 10.

But this holding in *Virginia Surface Mining* applied only to "the taking issue decided by the District Court," 452 U. S., at 297, which was the issue of the statute's validity *as applied*. Having rejected that challenge as premature, the Court then continued (in the language we quoted in *Keystone*):

"Thus, the only issue properly before the District Court and, in turn, this Court, is whether the 'mere enactment' of the Surface Mining Act constitutes a taking." 452 U. S., at 295.

That issue was *not* rejected as premature, but was decided on its merits, *id.*, at 295–297, just as it was in *Keystone*, and as it was before that in *Agins v. Tiburon*, 447 U. S. 255, 260–263 (1980).

In sum, it is entirely clear from our cases that a facial takings challenge is not premature even if it rests upon the ground that the ordinance deprives property owners of all economically viable use of their land—a ground that is, as we have said, easier to establish in an "as-applied" attack. It is, if possible, even more clear that the present facial challenge is not premature, because it does not rest upon a ground that would even profit from consideration in the context of particular application. As we said in *Agins*, a zoning law "effects a taking if the ordinance does not substantially advance legitimate state interests, . . . or denies an owner economically viable use of his land." *Id.*, at 260. The present challenge is of the former sort. Appellants contend that providing financial assistance to impecunious renters is not a state interest that can legitimately be furthered by regulating the use of property. Knowing the nature and character of the

particular property in question, or the degree of its economic impairment, will in no way assist this inquiry. Such factors are as irrelevant to the present claim as we have said they are to the claim that a law effects a taking by authorizing a permanent physical invasion of property. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U. S. 419 (1982). So even if we were explicitly to overrule cases such as *Agins*, *Virginia Surface Mining*, and *Keystone*, and to hold that a facial challenge will not lie where the issue can be more forcefully presented in an “as-applied” attack, there would still be no reason why the present challenge should not proceed.

Today’s holding has no more basis in equity than it does in precedent. Since the San Jose Ordinance does not require any specification of how much reduction in rent is attributable to each of the various factors that the hearing officer is allowed to take into account, it is quite possible that none of the many landlords affected by the Ordinance will ever be able to meet the Court’s requirement of a “showing in a particular case as to the consequences of [the hardship factor] in the ultimate determination of the rent.” *Ante*, at 10. There is no reason thus to shield alleged constitutional injustice from judicial scrutiny. I would therefore consider appellants’ takings claim on the merits.

II

The Fifth Amendment of the United States Constitution, made applicable to the States through the Fourteenth Amendment, *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 239 (1897), provides that “private property [shall not] be taken for public use, without just compensation.” We have repeatedly observed that the purpose of this provision is “to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” *Armstrong v. United States*, 364 U. S. 40, 49 (1960); see also *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U. S.

304, 318–319 (1987); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U. S. 155, 163 (1980); *Agins v. Tiburon*, *supra*, at 260; *Penn Central Transportation Co. v. New York City*, 438 U. S. 104, 123 (1978); *Monongahela Navigation Co. v. United States*, 148 U. S. 312, 325 (1893).

Traditional land-use regulation (short of that which totally destroys the economic value of property) does not violate this principle because there is a cause-and-effect relationship between the property use restricted by the regulation and the social evil that the regulation seeks to remedy. Since the owner's use of the property is (or, but for the regulation, would be) the source of the social problem, it cannot be said that he has been singled out unfairly. Thus, the common zoning regulations requiring subdividers to observe lot-size and set-back restrictions, and to dedicate certain areas to public streets, are in accord with our constitutional traditions because the proposed property use would otherwise be the cause of excessive congestion. The same cause-and-effect relationship is popularly thought to justify emergency price regulation: When commodities have been priced at a level that produces exorbitant returns, the owners of those commodities can be viewed as responsible for the economic hardship that occurs. Whether or not that is an accurate perception of the way a free-market economy operates, it is at least true that the owners reap unique benefits from the situation that produces the economic hardship, and in that respect singling them out to relieve it may not be regarded as "unfair." That justification might apply to the rent regulation in the present case, apart from the single feature under attack here.

Appellants do not contest the validity of rent regulation in general. They acknowledge that the city may constitutionally set a "reasonable rent" according to the statutory minimum and the six other factors that must be considered by the hearing officer (cost of debt servicing, rental history of the unit, physical condition of the unit, changes in housing serv-

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ices, other financial information provided by the landlord, and market value rents for similar units). San Jose Municipal Ordinance 19696, § 5703.28(c) (1979). Appellants' only claim is that a reduction of a rent increase below what would otherwise be a "reasonable rent" under this scheme may not, consistently with the Constitution, be based on consideration of the seventh factor—the hardship to the tenant as defined in § 5703.29. I think they are right.

Once the other six factors of the Ordinance have been applied to a landlord's property, so that he is receiving only a reasonable return, he can no longer be regarded as a "cause" of exorbitantly priced housing; nor is he any longer reaping distinctively high profits from the housing shortage. The seventh factor, the "hardship" provision, is invoked to meet a quite different social problem: the existence of some renters who are too poor to afford even reasonably priced housing. But *that* problem is no more caused or exploited by landlords than it is by the grocers who sell needy renters their food, or the department stores that sell them their clothes, or the employers who pay them their wages, or the citizens of San Jose holding the higher paying jobs from which they are excluded. And even if the neediness of renters could be regarded as a problem distinctively attributable to landlords in general, it is not remotely attributable to the *particular* landlords that the Ordinance singles out—namely, those who happen to have a "hardship" tenant at the present time, or who may happen to rent to a "hardship" tenant in the future, or whose current or future affluent tenants may happen to decline into the "hardship" category.

The traditional manner in which American government has met the problem of those who cannot pay reasonable prices for privately sold necessities—a problem caused by the society at large—has been the distribution to such persons of funds raised from the public at large through taxes, either in cash (welfare payments) or in goods (public housing, publicly subsidized housing, and food stamps). Unless we are to

abandon the guiding principle of the Takings Clause that "public burdens . . . should be borne by the public as a whole," *Armstrong*, 364 U. S., at 49, this is the only manner that our Constitution permits. The fact that government acts through the landlord-tenant relationship does not magically transform general public welfare, which must be supported by all the public, into mere "economic regulation," which can disproportionately burden particular individuals. Here the city is not "regulating" rents in the relevant sense of preventing rents that are excessive; rather, it is using the occasion of rent regulation (accomplished by the rest of the Ordinance) to establish a welfare program privately funded by those landlords who happen to have "hardship" tenants.

Of course all economic regulation effects wealth transfer. When excessive rents are forbidden, for example, landlords as a class become poorer and tenants as a class (or at least incumbent tenants as a class) become richer. Singling out landlords to be the transferors may be within our traditional constitutional notions of fairness, because they can plausibly be regarded as the source or the beneficiary of the high-rent problem. Once such a connection is no longer required, however, there is no end to the social transformations that can be accomplished by so-called "regulation," at great expense to the democratic process.

The politically attractive feature of regulation is not that it permits wealth transfers to be achieved that could not be achieved otherwise; but rather that it permits them to be achieved "off budget," with relative invisibility and thus relative immunity from normal democratic processes. San Jose might, for example, have accomplished something like the result here by simply raising the real estate tax upon rental properties and using the additional revenues thus acquired to pay part of the rents of "hardship" tenants. It seems to me doubtful, however, whether the citizens of San Jose would allow funds in the municipal treasury, from wherever derived, to be distributed to a family of four with income as

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high as \$32,400 a year—the generous maximum necessary to qualify automatically as a “hardship” tenant under the rental Ordinance.* The voters might well see other, more pressing, social priorities. And of course what \$32,400-a-year renters can acquire through spurious “regulation,” other groups can acquire as well. Once the door is opened it is not unreasonable to expect price regulations requiring private businesses to give special discounts to senior citizens (no matter how affluent), or to students, the handicapped, or war veterans. Subsidies for these groups may well be a good idea, but because of the operation of the Takings Clause our governmental system has required them to be applied, in general, through the process of taxing and spending, where both economic effects and competing priorities are more evident.

That fostering of an intelligent democratic process is one of the happy effects of the constitutional prescription—perhaps accidental, perhaps not. Its essence, however, is simply the unfairness of making one citizen pay, in some fashion other than taxes, to remedy a social problem that is none of his creation. As the Supreme Court of New Jersey said in finding unconstitutional a scheme displaying, among other defects, the same vice I find dispositive here:

“A legislative category of economically needy senior citizens is sound, proper and sustainable as a rational classification. But compelled subsidization by landlords

*Under the San Jose Ordinance, “hardship” tenants include (though are not limited to) those whose “household income and monthly housing expense meets [*sic*] the criteria” for assistance under the existing housing provisions of § 8 of the Housing and Community Development Act of 1974, 42 U. S. C. § 1437f (1982 ed. and Supp. III). The United States Department of Housing and Urban Development currently limits assistance under these provisions for families of four in the San Jose area to those who earn \$32,400 or less per year. Memorandum from U. S. Dept. of Housing and Urban Development, Assistant Secretary for Housing-Federal Housing Comm’r, Income Limits for Lower Income and Very Low-Income Families Under the Housing Act of 1937 (Jan. 15, 1988).

or by tenants who happen to live in an apartment building with senior citizens is an improper and unconstitutional method of solving the problem." *Property Owners Assn. v. North Bergen*, 74 N. J. 327, 339, 378 A. 2d 25, 31 (1977).

I would hold that the seventh factor in § 5703.28(c) of the San Jose Ordinance effects a taking of property without just compensation.

Syllabus

UNITED STATES *v.* ROBINSONCERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT

No. 86-937. Argued November 3, 1987—Decided February 24, 1988

At respondent's federal-court jury trial, which resulted in his conviction of counts of mail fraud involving arson-related insurance claims, defense counsel urged several times in his closing argument that the Government had not allowed respondent (who did not testify) to explain his side of the story and had unfairly denied him the opportunity to explain his actions. Out of the jury's presence, the prosecutor objected to defense counsel's remarks and contended that the defense had "opened the door" to commenting upon respondent's failure to testify. The judge agreed and respondent did not object. The prosecutor then, in his rebuttal summation, remarked that respondent "could have taken the stand and explained it to you." Defense counsel did not object and did not request a cautionary instruction, but the judge admonished the jury that no inference could be drawn from a defendant's election not to testify. The Court of Appeals reversed respondent's convictions, holding, *inter alia*, that the prosecutor's comment had deprived respondent of a fair trial under the Fifth Amendment.

Held: The prosecutor's comment did not violate respondent's Fifth Amendment privilege to be free from compulsory self-incrimination. The trial court reasonably interpreted defense counsel's closing-argument remarks to mean that the Government had not allowed respondent to explain his side of the story either before or *during* trial. The prosecutor's statement that respondent could have explained his story to the jury did not, in the light of defense counsel's comments, infringe upon respondent's Fifth Amendment rights. Where the prosecutor on his own initiative asks the jury to draw an adverse inference from a defendant's silence, or to treat the defendant's silence as substantive evidence of guilt, *Griffin v. California*, 380 U. S. 609, holds that the privilege against compulsory self-incrimination is violated. But where, as in this case, the prosecutor's reference to the defendant's opportunity to testify is a fair response to a claim made by the defendant or his counsel, there is no violation of the privilege. Pp. 30-34.

794 F. 2d 1132, reversed.

REHNQUIST, C. J., delivered the opinion of the Court, in which WHITE, STEVENS, O'CONNOR, and SCALIA, JJ., joined. BLACKMUN, J., filed an

opinion concurring in part and dissenting in part, *post*, p. 34. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 37. KENNEDY, J., took no part in the consideration or decision of the case.

Lawrence S. Robbins 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*.

Carolou P. Durham argued the cause for respondent. With her on the brief was *Bart C. Durham III*.

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

During the course of respondent Robinson's mail fraud trial in the Middle District of Tennessee, his counsel urged in closing argument that the Government had not allowed respondent to explain his side of the story. The prosecutor during his summation informed the jury that respondent "could have taken the stand and explained it to you. . . ." App. 27. We hold that the comment by the prosecutor did not violate respondent's privilege to be free from compulsory self-incrimination guaranteed by the Fifth Amendment to the United States Constitution.

Following a jury trial in the United States District Court for the Middle District of Tennessee, respondent was convicted of two counts of mail fraud, 18 U. S. C. § 1341;¹ both counts involved arson-related insurance claims. The evidence at trial showed that respondent leased a truck stop in Guthrie, Kentucky, in 1979. The business deteriorated over the next several months. Two days after respondent increased the insurance coverage on the truckstop an explosion and fire destroyed the premises. A number of unusual

¹ Respondent was acquitted on two counts of making false statements to a bank for purposes of obtaining a loan, 18 U. S. C. § 1014, and the District Court dismissed at the close of the evidence two counts of making and possessing a destructive device, 26 U. S. C. § 5861.

circumstances suggested arson. Respondent subsequently submitted an insurance claim of \$80,000.

Approximately one year later, respondent's home in Clarksville, Tennessee, was badly damaged by arson an hour after respondent had departed for California in a large truck filled with household furnishings. When interviewed by investigators, respondent denied setting fire to his house and explained that he had removed the household furnishings to take them to his daughter in California. Respondent filed with his insurance company a proof of loss claim of \$200,000, including a \$106,500 personal property claim. Certain property included in this claim was later discovered by authorities in respondent's California home.

Respondent did not testify at trial. In his closing argument to the jury, the theme of respondent's counsel was that the Government had breached its "duty to be fair." Several different times, counsel charged that the Government had unfairly denied respondent the opportunity to explain his actions.² Counsel concluded by informing the jury that respondent was not required to testify, and that although it would be natural to draw an adverse inference from respondent-

²"By the way, all of those statements, I don't know how many statements we heard of Mr. Robinson, they were all about the arson. Did they ever give him a chance to explain about those sorts of things, about mail fraud?"

"Did they ever give this man an opportunity in their many, many statements they took at the time to say, 'Well, I had two bedroom sets.'" App. 18.

"The furniture and clothing, all that clothing out on the lawn, . . . 'What about your clothing?' They never gave him a chance to explain." *Id.*, at 19.

"Now, would you like to get indicted for that, without the Government being fair, and being able to explain, have him explain before you, members of your own community, rather than before the agents?" *Ibid.*

"Now, here is what the Government, to be fair with the jury, should have done. They should have taken those items in the Kentucky inventory and just proved them. Why let the defendant disprove them, give him an opportunity to explain?" *Id.*, at 21.

ent's failure to take the stand, the jury could not and should not do so.

Following this closing and out of the presence of the jury, the prosecution objected to the remarks of defense counsel and contended that the defense had "opened the door." The court agreed, stating:

"... I will tell you what, the Fifth Amendment ties the Government's hands in terms of commenting upon the defendant's failure to testify. But that tying of hands is not putting you into a boxing match with your hands tied behind your back and allowing him to punch you in the face.

"That is not what it was intended for and not fair. I will let you say that the defendants had every opportunity, if they wanted to, to explain this to the ladies and gentlemen of the jury." App. 25.

Respondent did not object.

Following a short recess, the prosecutor gave his rebuttal summation. He began by stating that the Government had an obligation to "play fair" and had complied with that obligation in this case. Specifically, he stated:

"[Defense counsel] has made comments to the extent the Government has not allowed the defendants an opportunity to explain. It is totally unacceptable.

"He explained himself away on tape right into an indictment. He explained himself to the insurance investigator, to the extent that he wanted to.

"He could have taken the stand and explained it to you, anything he wanted to. The United States of America has given him, throughout, the opportunity to explain." *Id.*, at 27.

Defense counsel did not object to this closing and did not request a cautionary instruction. Nonetheless, the court included in the jury instruction the admonition that "no infer-

ence whatever may be drawn from the election of a defendant not to testify." Tr. 694.

The United States Court of Appeals for the Sixth Circuit reversed respondent's convictions, finding that the prosecutor's comment had "deprived the defendant . . . of a fair trial under the Fifth Amendment and 18 U. S. C. § 3481."³ 716 F. 2d 1095, 1096, 1097 (1983) (citing *Griffin v. California*, 380 U. S. 609 (1965), and *Wilson v. United States*, 149 U. S. 60 (1893)). The court held that because the prosecution's reference to respondent's failure to testify had been "direct," it did not matter that it was made in response to remarks by defense counsel. This Court granted certiorari, vacated that judgment of the Court of Appeals, and remanded for reconsideration in light of *United States v. Young*, 470 U. S. 1 (1985). 470 U. S. 1025 (1985). There we held that improper remarks by the prosecutor—in which he expressed his personal belief that the defendant was guilty—did not constitute reversible error under the standard properly applicable. On remand, a divided panel of the Court of Appeals reinstated its prior judgment. 794 F. 2d 1132 (1986). We granted certiorari, 479 U. S. 1083 (1987), to consider whether the remarks violated the Fifth Amendment,⁴ and if so,

³ "In trial of all persons charged with the commission of offense against the United States . . . the person charged shall, at his own request, be a competent witness. His failure to make such a request shall not create any presumption against him." 18 U. S. C. § 3481.

⁴ Concomitant with the protections of the Fifth Amendment are those afforded by § 3481. See n. 3, *supra*. For many years, the prohibition on adverse comment concerning a defendant's failure to testify was grounded solely in § 3481. See *Wilson v. United States*, 149 U. S. 60 (1893). Since that time, however, the scope of the Fifth Amendment has been expanded to encompass in large part the terrain previously occupied solely by § 3481. See *Griffin v. California*, 380 U. S. 609 (1965). In circumstances such as these, the two provisions are generally construed in a parallel fashion. *Id.*, at 613–614 (quoting a passage from *Wilson* and concluding: "If the words 'Fifth Amendment' are substituted for 'act' and for 'statute,' the spirit of the Self-Incrimination Clause is reflected"); see also *United States v. Hasting*, 461 U. S. 499, 504–508 (1983).

whether the violation constituted plain error. Because we conclude that there was no constitutional error at all, we do not reach the plain-error issue.

In *Griffin v. California*, *supra*, the defendant, who had not testified, was found guilty by a jury of first-degree murder. The prosecution had emphasized to the jury in closing argument that the defendant, who had been with the victim just prior to her demise, was the only person who could provide information as to certain details related to the murder, and yet, he had “not seen fit to take the stand and deny or explain.” *Id.*, at 611. In accordance with the California Constitution, the trial court had instructed the jury that although the defendant had a constitutional right not to testify, the jury could draw an inference unfavorable to the defendant as to facts within his knowledge about which he chose not to testify. *Id.*, at 610. This Court reversed the conviction ruling that the prosecutor’s comments and the jury instruction impermissibly infringed upon the defendant’s Fifth Amendment right to remain silent:

“[Comment on the refusal to testify] is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly. It is said, however, that the inference of guilt for failure to testify as to facts peculiarly within the accused’s knowledge is in any event natural and irresistible, and that comment on the failure does not magnify that inference into a penalty for asserting a constitutional privilege. What the jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another.” *Id.*, at 614 (citations omitted).

The Court said that the Fifth Amendment “forbids either comment by the prosecution on the accused’s silence or instructions by the court that such silence is evidence of guilt.” *Id.*, at 615.

We think that the Court of Appeals' holding in this case rests both upon too broad a reading of *Griffin* and upon too restrictive a reading of the closing comments of respondent's counsel. Taking up the second of these points first, we think the reasoning of the opinion of the Court of Appeals necessarily rests on the assumption that the references by respondent's counsel to the Government's failure to provide respondent an opportunity to "explain" were directed only to the period during which the offenses were being investigated, and not the trial itself. Respondent understandably mirrors this position in his brief here. While we agree that defense counsel's remarks *could* have been interpreted in this manner, we do not think that an appellate court may substitute its reading of ambiguous language for that of the trial court and counsel. The colloquy quoted earlier shows that the trial court, immediately after hearing counsel's comment, understood them to mean that the Government had not allowed respondent to explain his side of the story either before or *during* trial. While respondent now contends that this interpretation is incorrect, he did not offer, while the matter was being considered by the trial judge, the explanation which he now supports. If counsel's remarks were, as respondent now argues, so clearly limited to the pretrial period, we think it unusual, to say the least, that counsel would have stood silently by when the trial court made clear its contrary interpretation. We accept what we regard as a reasonable interpretation of the remarks adopted by the trial court.

We hold that the prosecutor's statement that respondent could have explained to the jury his story did not in the light of the comments by defense counsel infringe upon respondent's Fifth Amendment rights. The Court of Appeals and respondent apparently take the view that any "direct" reference by the prosecutor to the failure of the defendant to testify violates the Fifth Amendment as construed in *Griffin*. We decline to give *Griffin* such a broad reading, because we think such a reading would be quite inconsistent with the

Fifth Amendment, which protects against compulsory self-incrimination. The *Griffin* court addressed prosecutorial comment which baldly stated to the jury that the defendant must have known what the disputed facts were, but that he had refused to take the stand to deny or explain them. We think there is considerable difference for purposes of the privilege against compulsory self-incrimination between the sort of comments involved in *Griffin* and the comments involved in this case.

In *Baxter v. Palmigiano*, 425 U. S. 308, 319 (1976), we stated that "*Griffin* prohibits the judge and prosecutor from suggesting to the jury that it may treat the defendant's silence as substantive evidence of guilt." See also *Lakeside v. Oregon*, 435 U. S. 333, 338 (1978). In the present case it is evident that the prosecutorial comment did not treat the defendant's silence as substantive evidence of guilt, but instead referred to the possibility of testifying as one of several opportunities which the defendant was afforded, contrary to the statement of his counsel, to explain his side of the case. Where the prosecutor on his own initiative asks the jury to draw an adverse inference from a defendant's silence, *Griffin* holds that the privilege against compulsory self-incrimination is violated. But where as in this case the prosecutor's reference to the defendant's opportunity to testify is a fair response to a claim made by defendant or his counsel, we think there is no violation of the privilege.

"Under *Griffin* . . . it is improper for either the court or the prosecutor to ask the jury to draw an adverse inference from a defendant's silence. But I do not believe the protective shield of the Fifth Amendment should be converted into a sword that cuts back on the area of legitimate comment by the prosecutor on the weaknesses in the defense case." *United States v. Hasting*, 461 U. S. 499, 515 (1983) (STEVENS, J., concurring) (citation omitted).

The principle that prosecutorial comment must be examined in context is illustrated by our treatment of a Fifth Amendment claim in *Lockett v. Ohio*, 438 U. S. 586 (1978). We quickly dismissed the argument that the prosecutor had violated the defendant's right to remain silent when he repeatedly remarked that the evidence was uncontradicted. We did not need to decide whether such comment was generally improper, because in that case "Lockett's own counsel had clearly focused the jury's attention on her silence, first, by outlining her contemplated defense in his opening statement and, second, by stating to the court and jury near the close of the case, that Lockett would be the 'next witness.'" *Id.*, at 595. We concluded: "When viewed against this background, it seems clear that the prosecutor's closing remarks added nothing to the impression that had already been created by Lockett's refusal to testify after the jury had been promised a defense by her lawyer and told that Lockett would take the stand." *Ibid.*; cf. *United States v. Young*, 470 U. S. 1 (1985); *Darden v. Wainwright*, 477 U. S. 168 (1986).⁵

"[The] central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, *United States v. Nobles*, 422 U. S. 225 (1975)" *Delaware v. Van Arsdall*, 475 U. S. 673, 681 (1986). To this end it is important that both the defendant and the prosecutor have the opportunity to meet fairly the evidence and arguments of one another. The broad dicta in *Griffin* to the effect that the Fifth Amendment "forbids . . . comment by the prosecution on the accused's silence," 380 U. S., at 615, must be taken in

⁵ In *United States v. Young* and *Darden v. Wainwright*, we concluded that statements by the prosecutor which inflamed the jury, vouched for the credibility of witnesses, or offered the prosecutor's personal opinion as to the defendant's guilt were improper, but we held that, in context, those statements did not necessitate reversal. In contrast, a reference to the defendant's failure to take the witness stand may, in context, be perfectly proper.

the light of the facts of that case. It is one thing to hold, as we did in *Griffin*, that the prosecutor may not treat a defendant's exercise of his right to remain silent at trial as substantive evidence of guilt; it is quite another to urge, as defendant does here, that the same reasoning would prohibit the prosecutor from fairly responding to an argument of the defendant by advertent to that silence. There may be some "cost" to the defendant in having remained silent in each situation, but we decline to expand *Griffin* to preclude a fair response by the prosecutor in situations such as the present one.

The judgment of the Court of Appeals is

Reversed.

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

JUSTICE BLACKMUN, concurring in part and dissenting in part.

I agree with JUSTICE MARSHALL when he concludes that the prosecutor's comments constituted error under *Griffin v. California*, 380 U. S. 609 (1965). I also share his conclusion that the considerations taken into account by the Court in determining that no error occurred should have been weighed, instead, in assessing whether the prosecutor's error qualified as plain error, requiring reversal despite the absence of a contemporaneous objection. See *post*, at 42. I write separately, however, because I think the Court of Appeals' determination that the prosecutor's error constituted plain error may well be wrong. I fear that the flaws in that court's plain-error analysis, as I read it, may be attributable to confusion generated by this Court's recent opinion in *United States v. Young*, 470 U. S. 1 (1985), and its direction to reconsider the present case in the light of *Young*. 470 U. S. 1025 (1985).

"Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Fed. Rule Crim. Proc. 52(b). "[C]onsiderations

of fairness to the court and to the parties and of the public interest in bringing litigation to an end" have led this Court to except from the contemporaneous-objection requirement only errors that are "obvious" or "otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings." *United States v. Atkinson*, 297 U. S. 157, 159-160 (1936). See also *United States v. Frady*, 456 U. S. 152, 163, n. 14 (1982) (plain error "to be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result"). While this Court has emphasized that the doctrine is to be invoked only rarely, it generally has avoided articulating a strict formula for other courts to follow in applying the doctrine. Cf. *Engle v. Isaac*, 456 U. S. 107, 135 (1982) (plain-error analysis characterized as "vague inquiry").

In *United States v. Young*, however, the Court was presented with a lower court's decision finding plain error which the Court determined had been reached without considering whether the defendant had been prejudiced by the error. In pinpointing where it thought the lower court had gone wrong, this Court broke down the plain-error inquiry into two parts: whether the error "seriously affected 'substantial rights,'" and whether the error "had an unfair prejudicial impact on the jury's deliberations." 470 U. S., at 17, n. 14. While any application of the plain-error doctrine necessarily includes some form of prejudice inquiry, the Court's attempt to isolate that inquiry without giving it any substantive definition may have produced more mischief than clarity. See *id.*, at 36 (STEVENS, J., dissenting). The present decision below, I believe, is an example of this mischief.

In analyzing whether the prosecutor's improper remarks at trial constituted plain error, the Court of Appeals tracked *Young's* two-pronged analysis: the Court found, first, that the remarks affected a substantial right, and, second, that the effect of the error was not proved, beyond a reasonable doubt, to be harmless. 794 F. 2d 1132, 1137 (1986). In so

dividing the inquiry into these two parts, however, the Court of Appeals appears to have taken the constitutional nature of the error into consideration twice—both in finding the right at issue substantial and in following the lenient standard for prejudice used to determine whether properly preserved constitutional errors are harmless. See *Chapman v. California*, 386 U. S. 18, 24 (1967) (where court or prosecutor commits constitutional error, reviewing court “must be able to declare a belief that [the error] was harmless beyond a reasonable doubt”). Accounting for the constitutional magnitude of the error is, of course, appropriate. See *Weems v. United States*, 217 U. S. 349, 362 (1910) (court less reluctant to find plain error “when rights are asserted which are of such high character as to find expression and sanction in the Constitution or bill of rights”). I am troubled, however, by the Court of Appeals’ apparent double counting of the constitutional nature of the error, for it threatens to render meaningless the contemporaneous-objection requirement in the context of constitutional error. Under the Court of Appeals’ analysis, constitutional error, whether or not objected to at trial, always would be subject to the more sensitive prejudice standard set out in *Chapman*.

To clear the confusion reflected in the Court of Appeals’ application of the plain-error standard “in light of *Young*,” this Court should either continue on the path it started down in *Young* and formulate a test for plain error that articulates the prejudice standard to be applied,* or, in the alternative,

*In formulating that prejudice standard, the Court might look to the standard applied by some Courts of Appeals in assessing whether non-constitutional errors are harmless, see, e. g., *United States v. Davis*, 657 F. 2d 637, 640 (CA4 1981) (citing *Kotteakos v. United States*, 328 U. S. 750, 765 (1946), for the proposition that “[t]he test for harmlessness for nonconstitutional error is whether it is probable that the error could have affected the verdict reached by the particular jury in the particular circumstances of the trial”), or to the standard alluded to in JUSTICE STEVENS’ dissent in *United States v. Young*, 470 U. S. 1, 35, 37 (1985) (plain error

it should make clear, by reasserting the plain-error doctrine's lack of rigid definition, that its language in *Young* is not to be interpreted as a test. This latter course may be more true to the doctrine's purpose of allowing courts to single out the rare case in which allowing a conviction to stand would severely undermine "the fairness, integrity or public reputation of judicial proceedings." *United States v. Atkinson*, 297 U. S., at 160. Either course, however, would clarify for other courts their role in determining what errors, unnoticed at trial, warrant reversal. Because "the proper course" to follow "[w]hen we detect legal error in a lower court's application of the plain-error or harmless-error rules . . . is to set forth the appropriate standards and then remand for further proceedings," *United States v. Young*, 470 U. S., at 30-31 (opinion concurring in part and dissenting in part), I would vacate the Court of Appeals' judgment and remand the case after clarifying how the plain-error doctrine is to be applied.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

In practical terms, the erosion of the *Griffin* rule that the Court today sanctions is modest: the Court's holding is tailored to address only prosecutorial comments that are "a fair response to a claim made by defendant or his counsel," *ante*, at 32. Presumably, defendants and their counsel need only refrain from claiming that the Government denied them an opportunity to testify in order to insulate themselves from prosecutorial comment on the failure to testify. Only such claims are capable of provoking the prosecution to "fairly respond to an argument of the defendant by advert[ing] to that silence." *Ante*, at 34. But however slight the impact of today's decision, the Court's faithlessness to the bright-line rules of *Griffin v. California*, 380 U. S. 609 (1965), and *Wil-*

where error "obviously prejudicial," and prejudice of sufficient degree to warrant reversal).

son v. *United States*, 149 U. S. 60 (1893), is unsettling and unwarranted. I therefore dissent.

The Court styles its decision as a refusal to expand the rule of *Griffin*. It rejects as unduly broad respondent's reading of *Griffin* to prohibit any direct reference by the prosecutor to the defendant's failure to testify. But *Griffin* lays down exactly this prohibition, and it does so in no uncertain terms. The final words of the opinion in *Griffin* read: "We . . . hold that the Fifth Amendment . . . forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." 380 U. S., at 615. See also *id.*, at 614, n. 5 ("Our decision today [is] that the Fifth Amendment prohibits comment on the defendant's silence"). We repeatedly have recognized the categorical nature of the *Griffin* rule in subsequent decisions.¹ Respondent's position thus represents a straightforward and orthodox reading of the controlling law.

Moreover, because this case involves a federal prosecution, the prosecutor's comments must also satisfy the statutory requirements of 18 U. S. C. §3481, which we construed in *Wilson v. United States*, *supra*. *Wilson's* longstanding prohibition on prosecutorial comment is, if anything, more plainly categorical than the rule set down in *Griffin*: "To pre-

¹ See, e. g., *United States v. Hasting*, 461 U. S. 499, 507 (1983) (*Griffin* "interpreted the Fifth Amendment guarantee against self-incrimination to mean that comment on the failure to testify was an unconstitutional burden on the basic right"); *Jenkins v. Anderson*, 447 U. S. 231, 235 (1980) (*Griffin* "prevents the prosecution from commenting on the silence of a defendant who asserts the right" not to testify); *Mackey v. United States*, 401 U. S. 667, 673 (1971) ("*Griffin* . . . construed the Fifth Amendment to forbid comment on defendants' failure to testify, thereby removing a burden from the exercise of the privilege against compulsory self-incrimination and further implementing its purpose"); *United States v. Jackson*, 390 U. S. 570, 583, n. 25 (1968) (In *Griffin*, "the Court held that comment on a defendant's failure to testify imposes an impermissible penalty on the exercise of the right to remain silent at trial"); *Stovall v. Denno*, 388 U. S. 293, 300 (1967) (referring to the "no comment rule of *Griffin*").

vent [any adverse presumption from the defendant's failure to testify,] *comment, especially hostile comment*, upon such failure must necessarily be excluded from the jury. The minds of the jurors can only remain unaffected from this circumstance *by excluding all reference to it.*" 149 U. S., at 65 (emphasis added). The statement by the prosecutor in this case that respondent "could have taken the stand and explained it to you" is undeniably a comment on respondent's exercise of his constitutional right not to testify. The statement thus violated the statutory rule of *Wilson* as well as the constitutional standard of *Griffin*.

The underpinnings of today's decision are difficult to discern. The Court freely offers its conclusion that "[w]e think there is considerable difference . . . between the sort of comments involved in *Griffin* and the comments involved in this case," *ante*, at 32, but it is far less forthcoming with its reasoning. At times, the Court's opinion appears to flirt with a constitutional distinction under *Griffin* between prosecutorial comment that invites the jury to treat the defendant's silence as substantive evidence of guilt and other prosecutorial comment on the failure to testify. No such distinction can be found in the text or the animating principle of *Griffin*. The passages from *Griffin* that the Court cites addressed California's practice of permitting *the trial court* to instruct the jury that it could draw an unfavorable inference from the accused's failure to testify. We recognized that "[w]hat the jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another." *Griffin*, 380 U. S., at 614. The *Griffin* opinion suggests no similar distinction with regard to comments by the prosecution. Indeed, its holding explicitly rejects such a distinction: "[T]he Fifth Amendment . . . forbids *either* comment by the prosecution on the accused's silence *or* instructions by the court that such silence is evidence of guilt." *Id.*, at 615 (emphasis added).

At other points in the opinion, the crux of the Court's holding appears to be its assumption that the prosecution's comments were made in response to improper argument from defense counsel. First, the Court's premise is problematic. Respondent's counsel could "fairly" have provoked the prosecutorial comment in this case only if he had suggested that the Government had prevented respondent from taking the stand at trial. Respondent maintains, however, that his counsel argued only that the Government had prevented him from explaining his position during its pretrial investigation, not during the trial itself. This interpretation appears from the record to be the most, if not the only, reasonable one.² More fundamentally, the Court's suggestion that whether a comment violates *Griffin* depends on whether it is a response to the defense is muddled. A comment may well be a response to the defense and nevertheless be precisely the kind of statement that our holdings in *Griffin* and *Wilson* were designed to eliminate. If, for example, a defendant's counsel argues at trial that the defendant failed to take the stand in order to protect another person, and the prosecution responds that the true explanation is that the defendant is guilty as sin, the prosecution's comment responds to the defense, but it nevertheless invites the jury to infer guilt from the defendant's decision not to testify.³ Such a comment

² Most of defense counsel's controversial statements refer outright to the Government's failure to allow respondent to explain his actions during the preindictment investigation. The balance, although admittedly more ambiguous, are also best seen in that light. Respondent's argument is nevertheless troublesome, because, as the majority points out, it does not take account of the apparent understanding of the prosecution and trial court. But rather than address this tension in any cogent way, the Court simply "accept[s] what we regard as a reasonable interpretation of the remarks adopted by the trial court." *Ante*, at 31. It does so even though the trial court never expressly made this interpretation and the Court of Appeals' understanding is the more reasonable.

³ Indeed, this hypothetical chain of events bears more than a passing resemblance to this case. In response to counsel's claim that the Govern-

violates *Griffin* under any reasonable interpretation of that case.

The breadth of the categorical bright-line rule of *Griffin* and *Wilson* is not a simple matter of convenience or administrability. Rather, it rests on a theory that today's decision threatens to erode. As the Court explained in *Griffin*, "comment on the refusal to testify . . . cuts down on the privilege by making its assertion costly." *Griffin, supra*, at 614. The commonsensical premise of *Griffin* and *Wilson* is that the practice of prosecutorial comment on the failure to testify tends inherently to penalize a defendant for exercising his constitutional right not to take the stand. It is no doubt possible to conceive of a particular comment that would impose no penalty on a particular defendant in the eyes of a particular jury, but, as I argue below, that undertaking properly goes to the harmfulness, rather than the existence, of *Griffin* error. More importantly, the truly benign comment on the failure to testify is far less frequent than the offhand reference or subtle innuendo that imposes an unmistakable, if not always obvious, cost on the assertion of the Fifth Amendment privilege. *Griffin*, and *Wilson* before it, responded to this pervasive threat with a general prophylactic rule. As the author of *Griffin* explained: "In *Griffin* . . . we held that

ment had not given respondent a chance to explain, the prosecution paraded respondent's failure to testify before the jury: "He could have taken the stand and explained it to you, anything he wanted to." 716 F. 2d 1095, 1096 (1983). That statement varies only subtly, if at all, from the bald references condemned in *Griffin v. California*, 380 U. S., at 611, "[t]hese things he has not seen fit to take the stand and deny or explain"—and *Wilson v. United States*, 149 U. S., at 62, "if I am ever charged with a crime, . . . I will go upon the stand . . . and testify before Heaven to my innocence." The character of the statement at issue here thus is quite similar to that condemned in *Griffin* and *Wilson*. The focus on whether a comment is responsive therefore could sanction a blatant violation of *Griffin*. This is so because whether a prosecutorial comment imposes a cost on a defendant's assertion of his Fifth Amendment privilege is not necessarily related to whether the comment is a response to the defense.

the Fifth Amendment guarantee against self-incrimination prohibits a prosecutor from commenting to the jury upon the defendant's failure to testify at his trial. Such a practice would place a price on the defendant's invocation of his constitutional privilege—a price that would seriously undermine the value of that privilege.” *Burt v. New Jersey*, 414 U. S. 938, 938 (1973) (Douglas, J., dissenting from denial of certiorari). *Wilson* similarly rejects a case-by-case analysis in favor of a general prophylactic ban: “To prevent such presumption being created, comment, especially hostile comment, upon such practice must necessarily be excluded from the jury.” 149 U. S., at 65. See also *Lakeside v. Oregon*, 435 U. S. 333, 344 (1978) (STEVENS, J., dissenting) (Although the probability that the jury will draw an unfavorable inference from the defendant's failure to testify “can never be eliminated, *Griffin* stands for the proposition that the government may not add unnecessarily to the risk taken by a defendant who stands mute”) (footnote omitted).

That is not to say that every comment by the prosecution on the defendant's failure to testify occasions a reversal of an ensuing conviction. This Court recognized as much in *Chapman v. California*, 386 U. S. 18, 21–24 (1967) (*Griffin* violation may be harmless error if the court believes beyond a reasonable doubt that the violation did not contribute to the jury's verdict). My fundamental objection with the Court's analysis is that it confuses the issue whether a constitutional error has occurred with the analytically distinct issue whether the constitutional error is harmless, or, as in a case like this one where no contemporaneous objection was made, whether the error is plain. The considerations that guide the Court's opinion may help identify whether *Griffin* error is reversible, but they should not enter into the analysis whether *Griffin* error has occurred.

Nor do I necessarily dispute the Court's statement that “prosecutorial comment must be examined in context.” *Ante*, at 33. I agree that under our precedents the com-

ments in this case may be evaluated against the trial court's and prosecution's apparent perception that respondent's counsel had offered an inaccurate suggestion that the Government had barred his client from testifying at trial. But this Court set out the framework for that evaluation in *United States v. Young*, 470 U. S. 1 (1985), and we previously indicated that it applied to this case. The prosecutor in *Young*, in response to unethical argument from defense counsel, interjected personal impressions into his argument to the jury. The Court recognized that the argument was improper but found that it was not plain error meriting reversal: "Viewed in context, the prosecutor's statements, although inappropriate and amounting to error, were not such as to undermine the fundamental fairness of the trial and contribute to a miscarriage of justice." *Id.*, at 16. The teaching of *Young* is that improper argument that viewed in context only "rights the scales" after improper argument from the other side sometimes will not rise to the level of plain error. *Id.*, at 14. In this case, we vacated the Court of Appeals' first reversal of respondent's conviction and remanded for reconsideration in light of our intervening opinion in *Young*. See 716 F. 2d 1095 (1983), vacated and remanded, 470 U. S. 1025 (1985). The obvious premise of that order was that the prosecutor's comments in this case were error under *Griffin*, but the Court of Appeals was to determine whether the error was plain in the context of defense counsel's argument. Thus, we already have recognized that the "context" of an argument is relevant for determining whether it is reversible error, not for determining whether it in fact violates the bright-line standard of *Griffin*. The Court today muddies *Griffin* analysis by straying from that distinction.

The Court ultimately attempts to justify its decision by an appeal to the truth-finding function of the criminal trial. The Court cites this function as the central purpose of the trial and writes that "it is important that both the defendant and the prosecutor have the opportunity to fairly meet the

evidence and arguments of one another." *Ante*, at 33. This rationale could mean one of two things, neither of which legitimately can support the Court's holding. First, the Court could mean that the prosecutor's statements in this case were not error because they aided the jury in its central purpose of determining whether respondent was guilty of mail fraud. This, however, is only another way of admitting that the prosecutor's comments invited the jury to infer guilt from respondent's silence, in clear violation of *Griffin*. If this is the kind of "truth-finding" the Court has in mind, the quick answer to the Court's concern is that our constitutional scheme presupposes that the exercise of Fifth Amendment rights may make it more difficult to discover whether the defendant is guilty as charged; the impediment to the jury's truth-finding function that the Court finds irksome is a matter of precious design. See *Mackey v. United States*, 401 U. S. 667, 673 (1971) (Fifth Amendment "privilege 'is not an adjunct to the ascertainment of truth,' but is aimed at serving the complex of values on which it has historically rested") (citing *Tehan v. United States ex rel. Shott*, 382 U. S. 406, 416 (1966)). *Griffin*'s ban on prosecutorial comment on the failure to testify may impose a social cost, but the acceptance of this cost is a prized achievement which separates our system from an "inquisitorial system of criminal justice." *Griffin*, 380 U. S., at 614.

The other meaning that the Court's appeal to the criminal trial's truth-finding function could have is that the prosecutor's comments were not meant to bear on respondent's guilt but merely made the jury aware that the Government had not barred respondent from taking the stand. Perhaps such a vindication of the Government's honor and the principles of fair play has its place in the criminal justice system and may be taken into account in evaluating whether a particular constitutional violation is reversible error. In my estimation, however, this interest would rarely be significant enough to

subordinate the defendant's right to an unfettered exercise of his privilege not to testify. Moreover, this interest can be vindicated by less burdensome alternatives, such as sustaining an objection from the prosecution or perhaps undertaking a separate disciplinary proceeding against a dissembling attorney. But in any event, the Court's appeal to the truth-finding function is no justification for its determination that the prosecution's comments were "perfectly proper." *Ante*, at 33, n. 5. That conclusion, in fact, is unjustifiable; the prosecution's comments were not perfectly proper under either *Griffin* or *Wilson*. Perhaps they were not reversibly improper, but that, as I have indicated, is a separate question.

The Court's concluding comments reveal a belief that it simply would be unfair not to permit the prosecution to offer a "fair response . . . in situations such as the present one." *Ante*, at 34. This gut feeling may be the final explanation for today's decision. But this Court should be more circumspect before bending constitutional principles in the service of what it takes to be the fairer result in an individual case. Whether or not the Court's adulteration of *Griffin* and *Wilson* produces a fairer result here (and there is good reason to believe it does not), it tends to undermine a defendant's constitutional privilege not to testify. "The Fifth Amendment privilege is 'as broad as the mischief against which it seeks to guard,' and the privilege is fulfilled only when a criminal defendant is guaranteed the right 'to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence.'" *Estelle v. Smith*, 451 U. S. 454, 467-468 (1981) (citations omitted; footnote omitted). As the Court itself recognizes, see *ante*, at 34, the comments in this case imposed a penalty on respondent for his decision not to take the stand. They also ran afoul of the express prohibitions of both *Griffin* and *Wilson*. The fair judicial response, rather than validating such comments, should be to reject them as violative of the Fifth Amendment. I dissent.

HUSTLER MAGAZINE, INC., ET AL. v. FALWELL

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

No. 86-1278. Argued December 2, 1987—Decided February 24, 1988

Respondent, a nationally known minister and commentator on politics and public affairs, filed a diversity action in Federal District Court against petitioners, a nationally circulated magazine and its publisher, to recover damages for, *inter alia*, libel and intentional infliction of emotional distress arising from the publication of an advertisement "parody" which, among other things, portrayed respondent as having engaged in a drunken incestuous rendezvous with his mother in an outhouse. The jury found against respondent on the libel claim, specifically finding that the parody could not "reasonably be understood as describing actual facts . . . or events," but ruled in his favor on the emotional distress claim, stating that he should be awarded compensatory and punitive damages. The Court of Appeals affirmed, rejecting petitioners' contention that the "actual malice" standard of *New York Times Co. v. Sullivan*, 376 U. S. 254, must be met before respondent can recover for emotional distress. Rejecting as irrelevant the contention that, because the jury found that the parody did not describe actual facts, the ad was an opinion protected by the First Amendment to the Federal Constitution, the court ruled that the issue was whether the ad's publication was sufficiently outrageous to constitute intentional infliction of emotional distress.

Held: In order to protect the free flow of ideas and opinions on matters of public interest and concern, the First and Fourteenth Amendments prohibit public figures and public officials from recovering damages for the tort of intentional infliction of emotional distress by reason of the publication of a caricature such as the ad parody at issue without showing in addition that the publication contains a false statement of fact which was made with "actual malice," *i. e.*, with knowledge that the statement was false or with reckless disregard as to whether or not it was true. The State's interest in protecting public figures from emotional distress is not sufficient to deny First Amendment protection to speech that is patently offensive and is intended to inflict emotional injury when that speech could not reasonably have been interpreted as stating actual facts about the public figure involved. Here, respondent is clearly a "public figure" for First Amendment purposes, and the lower courts' finding that the ad parody was not reasonably believable must be accepted. "Outrageous-

ness" in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression, and cannot, consistently with the First Amendment, form a basis for the award of damages for conduct such as that involved here. Pp. 50-57.

797 F. 2d 1270, reversed.

REHNQUIST, C. J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, BLACKMUN, STEVENS, O'CONNOR, and SCALIA, JJ., joined. WHITE, J., filed an opinion concurring in the judgment, *post*, p. 57. KENNEDY, J., took no part in the consideration or decision of the case.

Alan L. Isaacman argued the cause for petitioners. With him on the briefs was *David O. Carson*.

Norman Roy Grutman argued the cause for respondent. With him on the brief were *Jeffrey H. Daichman* and *Thomas V. Marino*.*

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner Hustler Magazine, Inc., is a magazine of nationwide circulation. Respondent Jerry Falwell, a nationally known minister who has been active as a commentator on politics and public affairs, sued petitioner and its publisher, petitioner Larry Flynt, to recover damages for invasion of

*Briefs of *amici curiae* urging reversal were filed for the American Civil Liberties Union Foundation et al. by *Harriette K. Dorsen*, *John A. Powell*, and *Steven R. Shapiro*; for the Association of American Editorial Cartoonists et al. by *Roslyn A. Mazer* and *George Kaufmann*; for the Association of American Publishers, Inc., by *R. Bruce Rich*; for Home Box Office, Inc., by *P. Cameron DeVore* and *Daniel M. Waggoner*; for the Law & Humanities Institute by *Edward de Grazia*; for the Reporters Committee for Freedom of the Press et al. by *Jane E. Kirtley*, *Richard M. Schmidt*, *David Barr*, and *J. Laurent Scharff*; for Richmond Newspapers, Inc., et al. by *Alexander Wellford*, *David C. Kohler*, *Rodney A. Smolla*, *William A. Niese*, *Jeffrey S. Klein*, *W. Terry Maguire*, and *Slade R. Metcalf*; and for Volunteer Lawyers for the Arts, Inc., by *Irwin Karp* and *I. Fred Koenigsberg*.

privacy, libel, and intentional infliction of emotional distress. The District Court directed a verdict against respondent on the privacy claim, and submitted the other two claims to a jury. The jury found for petitioners on the defamation claim, but found for respondent on the claim for intentional infliction of emotional distress and awarded damages. We now consider whether this award is consistent with the First and Fourteenth Amendments of the United States Constitution.

The inside front cover of the November 1983 issue of *Hustler Magazine* featured a "parody" of an advertisement for Campari Liqueur that contained the name and picture of respondent and was entitled "Jerry Falwell talks about his first time." This parody was modeled after actual Campari ads that included interviews with various celebrities about their "first times." Although it was apparent by the end of each interview that this meant the first time they sampled Campari, the ads clearly played on the sexual double entendre of the general subject of "first times." Copying the form and layout of these Campari ads, *Hustler's* editors chose respondent as the featured celebrity and drafted an alleged "interview" with him in which he states that his "first time" was during a drunken incestuous rendezvous with his mother in an outhouse. The *Hustler* parody portrays respondent and his mother as drunk and immoral, and suggests that respondent is a hypocrite who preaches only when he is drunk. In small print at the bottom of the page, the ad contains the disclaimer, "ad parody—not to be taken seriously." The magazine's table of contents also lists the ad as "Fiction; Ad and Personality Parody."

Soon after the November issue of *Hustler* became available to the public, respondent brought this diversity action in the United States District Court for the Western District of Virginia against *Hustler Magazine, Inc.*, Larry C. Flynt, and Flynt Distributing Co., Inc. Respondent stated in his complaint that publication of the ad parody in *Hustler* entitled

him to recover damages for libel, invasion of privacy, and intentional infliction of emotional distress. The case proceeded to trial.¹ At the close of the evidence, the District Court granted a directed verdict for petitioners on the invasion of privacy claim. The jury then found against respondent on the libel claim, specifically finding that the ad parody could not "reasonably be understood as describing actual facts about [respondent] or actual events in which [he] participated." App. to Pet. for Cert. C1. The jury ruled for respondent on the intentional infliction of emotional distress claim, however, and stated that he should be awarded \$100,000 in compensatory damages, as well as \$50,000 each in punitive damages from petitioners.² Petitioners' motion for judgment notwithstanding the verdict was denied.

On appeal, the United States Court of Appeals for the Fourth Circuit affirmed the judgment against petitioners. *Falwell v. Flynt*, 797 F. 2d 1270 (1986). The court rejected petitioners' argument that the "actual malice" standard of *New York Times Co. v. Sullivan*, 376 U. S. 254 (1964), must be met before respondent can recover for emotional distress. The court agreed that because respondent is concededly a public figure, petitioners are "entitled to the same level of first amendment protection in the claim for intentional infliction of emotional distress that they received in [respondent's] claim for libel." 797 F. 2d, at 1274. But this does not mean that a literal application of the actual malice rule is appropriate in the context of an emotional distress claim. In the court's view, the *New York Times* decision emphasized the constitutional importance not of the falsity of the statement or the defendant's disregard for the truth, but of the heightened level of culpability embodied in the requirement of "knowing . . . or reckless" conduct. Here, the *New York*

¹ While the case was pending, the ad parody was published in *Hustler Magazine* a second time.

² The jury found no liability on the part of *Flynt Distributing Co., Inc.* It is consequently not a party to this appeal.

Times standard is satisfied by the state-law requirement, and the jury's finding, that the defendants have acted intentionally or recklessly.³ The Court of Appeals then went on to reject the contention that because the jury found that the ad parody did not describe actual facts about respondent, the ad was an opinion that is protected by the First Amendment. As the court put it, this was "irrelevant," as the issue is "whether [the ad's] publication was sufficiently outrageous to constitute intentional infliction of emotional distress." *Id.*, at 1276.⁴ Petitioners then filed a petition for rehearing en banc, but this was denied by a divided court. Given the importance of the constitutional issues involved, we granted certiorari. 480 U. S. 945 (1987).

This case presents us with a novel question involving First Amendment limitations upon a State's authority to protect its citizens from the intentional infliction of emotional distress. We must decide whether a public figure may recover damages for emotional harm caused by the publication of an ad parody offensive to him, and doubtless gross and repugnant in the eyes of most. Respondent would have us find that a State's interest in protecting public figures from emotional distress is sufficient to deny First Amendment protection to speech that is patently offensive and is intended to inflict emotional injury, even when that speech could not reasonably have been interpreted as stating actual facts about the public figure involved. This we decline to do.

At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern. "[T]he

³ Under Virginia law, in an action for intentional infliction of emotional distress a plaintiff must show that the defendant's conduct (1) is intentional or reckless; (2) offends generally accepted standards of decency or morality; (3) is causally connected with the plaintiff's emotional distress; and (4) caused emotional distress that was severe. 797 F. 2d, at 1275, n. 4 (citing *Womack v. Eldridge*, 215 Va. 338, 210 S. E. 2d 145 (1974)).

⁴ The court below also rejected several other contentions that petitioners do not raise in this appeal.

freedom to speak one's mind is not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common quest for truth and the vitality of society as a whole.” *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U. S. 485, 503–504 (1984). We have therefore been particularly vigilant to ensure that individual expressions of ideas remain free from governmentally imposed sanctions. The First Amendment recognizes no such thing as a “false” idea. *Gertz v. Robert Welch, Inc.*, 418 U. S. 323, 339 (1974). As Justice Holmes wrote, “when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market” *Abrams v. United States*, 250 U. S. 616, 630 (1919) (dissenting opinion).

The sort of robust political debate encouraged by the First Amendment is bound to produce speech that is critical of those who hold public office or those public figures who are “intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large.” *Associated Press v. Walker*, decided with *Curtis Publishing Co. v. Butts*, 388 U. S. 130, 164 (1967) (Warren, C. J., concurring in result). Justice Frankfurter put it succinctly in *Baumgartner v. United States*, 322 U. S. 665, 673–674 (1944), when he said that “[o]ne of the prerogatives of American citizenship is the right to criticize public men and measures.” Such criticism, inevitably, will not always be reasoned or moderate; public figures as well as public officials will be subject to “vehement, caustic, and sometimes unpleasantly sharp attacks,” *New York Times*, *supra*, at 270. “[T]he candidate who vaunts his spotless record and sterling integrity cannot convincingly cry ‘Foul!’ when an opponent or an industrious reporter attempts

to demonstrate the contrary.” *Monitor Patriot Co. v. Roy*, 401 U. S. 265, 274 (1971).

Of course, this does not mean that *any* speech about a public figure is immune from sanction in the form of damages. Since *New York Times Co. v. Sullivan*, 376 U. S. 254 (1964), we have consistently ruled that a public figure may hold a speaker liable for the damage to reputation caused by publication of a defamatory falsehood, but only if the statement was made “with knowledge that it was false or with reckless disregard of whether it was false or not.” *Id.*, at 279–280. False statements of fact are particularly valueless; they interfere with the truth-seeking function of the marketplace of ideas, and they cause damage to an individual’s reputation that cannot easily be repaired by counterspeech, however persuasive or effective. See *Gertz*, 418 U. S., at 340, 344, n. 9. But even though falsehoods have little value in and of themselves, they are “nevertheless inevitable in free debate,” *id.*, at 340, and a rule that would impose strict liability on a publisher for false factual assertions would have an undoubted “chilling” effect on speech relating to public figures that does have constitutional value. “Freedoms of expression require “breathing space.” *Philadelphia Newspapers, Inc. v. Hepps*, 475 U. S. 767, 772 (1986) (quoting *New York Times*, *supra*, at 272). This breathing space is provided by a constitutional rule that allows public figures to recover for libel or defamation only when they can prove *both* that the statement was false and that the statement was made with the requisite level of culpability.

Respondent argues, however, that a different standard should apply in this case because here the State seeks to prevent not reputational damage, but the severe emotional distress suffered by the person who is the subject of an offensive publication. Cf. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U. S. 562 (1977) (ruling that the “actual malice” standard does not apply to the tort of appropriation of a right of publicity). In respondent’s view, and in the view of the

Court of Appeals, so long as the utterance was intended to inflict emotional distress, was outrageous, and did in fact inflict serious emotional distress, it is of no constitutional import whether the statement was a fact or an opinion, or whether it was true or false. It is the intent to cause injury that is the gravamen of the tort, and the State's interest in preventing emotional harm simply outweighs whatever interest a speaker may have in speech of this type.

Generally speaking the law does not regard the intent to inflict emotional distress as one which should receive much solicitude, and it is quite understandable that most if not all jurisdictions have chosen to make it civilly culpable where the conduct in question is sufficiently "outrageous." But in the world of debate about public affairs, many things done with motives that are less than admirable are protected by the First Amendment. In *Garrison v. Louisiana*, 379 U. S. 64 (1964), we held that even when a speaker or writer is motivated by hatred or ill will his expression was protected by the First Amendment:

"Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth." *Id.*, at 73.

Thus while such a bad motive may be deemed controlling for purposes of tort liability in other areas of the law, we think the First Amendment prohibits such a result in the area of public debate about public figures.

Were we to hold otherwise, there can be little doubt that political cartoonists and satirists would be subjected to damages awards without any showing that their work falsely defamed its subject. Webster's defines a caricature as "the deliberately distorted picturing or imitating of a person, literary style, etc. by exaggerating features or mannerisms for satirical effect." Webster's New Unabridged Twentieth

Century Dictionary of the English Language 275 (2d ed. 1979). The appeal of the political cartoon or caricature is often based on exploitation of unfortunate physical traits or politically embarrassing events—an exploitation often calculated to injure the feelings of the subject of the portrayal. The art of the cartoonist is often not reasoned or evenhanded, but slashing and one-sided. One cartoonist expressed the nature of the art in these words:

“The political cartoon is a weapon of attack, of scorn and ridicule and satire; it is least effective when it tries to pat some politician on the back. It is usually as welcome as a bee sting and is always controversial in some quarters.” Long, *The Political Cartoon: Journalism’s Strongest Weapon*, *The Quill* 56, 57 (Nov. 1962).

Several famous examples of this type of intentionally injurious speech were drawn by Thomas Nast, probably the greatest American cartoonist to date, who was associated for many years during the post-Civil War era with *Harper’s Weekly*. In the pages of that publication Nast conducted a graphic vendetta against William M. “Boss” Tweed and his corrupt associates in New York City’s “Tweed Ring.” It has been described by one historian of the subject as “a sustained attack which in its passion and effectiveness stands alone in the history of American graphic art.” M. Keller, *The Art and Politics of Thomas Nast* 177 (1968). Another writer explains that the success of the Nast cartoon was achieved “because of the emotional impact of its presentation. It continuously goes beyond the bounds of good taste and conventional manners.” C. Press, *The Political Cartoon* 251 (1981).

Despite their sometimes caustic nature, from the early cartoon portraying George Washington as an ass down to the present day, graphic depictions and satirical cartoons have played a prominent role in public and political debate. Nast’s castigation of the Tweed Ring, Walt McDougall’s characterization of Presidential candidate James G. Blaine’s banquet with the millionaires at Delmonico’s as “The Royal

Feast of Belshazzar," and numerous other efforts have undoubtedly had an effect on the course and outcome of contemporaneous debate. Lincoln's tall, gangling posture, Teddy Roosevelt's glasses and teeth, and Franklin D. Roosevelt's jutting jaw and cigarette holder have been memorialized by political cartoons with an effect that could not have been obtained by the photographer or the portrait artist. From the viewpoint of history it is clear that our political discourse would have been considerably poorer without them.

Respondent contends, however, that the caricature in question here was so "outrageous" as to distinguish it from more traditional political cartoons. There is no doubt that the caricature of respondent and his mother published in *Hustler* is at best a distant cousin of the political cartoons described above, and a rather poor relation at that. If it were possible by laying down a principled standard to separate the one from the other, public discourse would probably suffer little or no harm. But we doubt that there is any such standard, and we are quite sure that the pejorative description "outrageous" does not supply one. "Outrageousness" in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression. An "outrageousness" standard thus runs afoul of our longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience. See *NAACP v. Claiborne Hardware Co.*, 458 U. S. 886, 910 (1982) ("Speech does not lose its protected character . . . simply because it may embarrass others or coerce them into action"). And, as we stated in *FCC v. Pacific Foundation*, 438 U. S. 726 (1978):

"[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection.

For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas." *Id.*, at 745-746.

See also *Street v. New York*, 394 U. S. 576, 592 (1969) ("It is firmly settled that . . . the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers").

Admittedly, these oft-repeated First Amendment principles, like other principles, are subject to limitations. We recognized in *Pacifica Foundation*, that speech that is "'vulgar,' 'offensive,' and 'shocking'" is "not entitled to absolute constitutional protection under all circumstances." 438 U. S., at 747. In *Chaplinsky v. New Hampshire*, 315 U. S. 568 (1942), we held that a State could lawfully punish an individual for the use of insulting "'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Id.*, at 571-572. These limitations are but recognition of the observation in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U. S. 749, 758 (1985), that this Court has "long recognized that not all speech is of equal First Amendment importance." But the sort of expression involved in this case does not seem to us to be governed by any exception to the general First Amendment principles stated above.

We conclude that public figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications such as the one here at issue without showing in addition that the publication contains a false statement of fact which was made with "actual malice," *i. e.*, with knowledge that the statement was false or with reckless disregard as to whether or not it was true. This is not merely a "blind application" of the *New York Times* standard, see *Time, Inc. v. Hill*, 385 U. S. 374, 390 (1967), it reflects our considered judgment that such a standard is necessary to give adequate "breathing space" to the freedoms protected by the First Amendment.

Here it is clear that respondent Falwell is a "public figure" for purposes of First Amendment law.⁵ The jury found against respondent on his libel claim when it decided that the Hustler ad parody could not "reasonably be understood as describing actual facts about [respondent] or actual events in which [he] participated." App. to Pet. for Cert. C1. The Court of Appeals interpreted the jury's finding to be that the ad parody "was not reasonably believable," 797 F. 2d, at 1278, and in accordance with our custom we accept this finding. Respondent is thus relegated to his claim for damages awarded by the jury for the intentional infliction of emotional distress by "outrageous" conduct. But for reasons heretofore stated this claim cannot, consistently with the First Amendment, form a basis for the award of damages when the conduct in question is the publication of a caricature such as the ad parody involved here. The judgment of the Court of Appeals is accordingly

Reversed.

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

JUSTICE WHITE, concurring in the judgment.

As I see it, the decision in *New York Times Co. v. Sullivan*, 376 U. S. 254 (1964), has little to do with this case, for here the jury found that the ad contained no assertion of fact. But I agree with the Court that the judgment below, which penalized the publication of the parody, cannot be squared with the First Amendment.

⁵ Neither party disputes this conclusion. Respondent is the host of a nationally syndicated television show and was the founder and president of a political organization formerly known as the Moral Majority. He is also the founder of Liberty University in Lynchburg, Virginia, and is the author of several books and publications. *Who's Who in America* 849 (44th ed. 1986-1987).

MATHEWS *v.* UNITED STATESCERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE SEVENTH CIRCUIT

No. 86-6109. Argued December 2, 1987—Decided February 24, 1988

Petitioner, an employee of the Small Business Administration (SBA), was the principal SBA contact for James DeShazer, the president of a company that participated in an SBA program. DeShazer believed that his company was not being provided with certain program benefits because he had rejected petitioner's repeated requests for loans. Assisting the Federal Bureau of Investigation (FBI) in an investigation of the matter, DeShazer, under FBI surveillance, offered petitioner a previously requested loan, which petitioner agreed to accept. Later, DeShazer met petitioner and gave him the money. Petitioner was immediately arrested and charged with the federal offense of accepting a bribe in exchange for an official act. The District Court denied petitioner's pretrial motion seeking to raise an entrapment defense, ruling that entrapment was not available because petitioner would not admit all of the elements (including the requisite mental state) of the offense. Petitioner testified in his own defense that although he had accepted the loan, he believed it was a personal loan unrelated to his SBA duties. The court refused to instruct the jury as to entrapment, the jury found petitioner guilty, and the Court of Appeals affirmed.

Held: Even if the defendant in a federal criminal case denies one or more elements of the crime, he is entitled to an entrapment instruction whenever there is sufficient evidence from which a reasonable jury could find entrapment—a defense that has the two related elements of Government inducement of the crime, and a lack of predisposition on the defendant's part to engage in the criminal conduct. There is no merit to the Government's contention that, because entrapment presupposes the commission of a crime, a defendant should not be allowed both to deny the offense or an element thereof, and to rely on the inconsistent, affirmative defense of entrapment. Although the Federal Rules of Civil Procedure specifically authorize inconsistent pleading, the absence of a cognate provision in the Federal Rules of Criminal Procedure is not because of the Rules' intent to more severely restrict criminal defendants than civil parties, but because of the much less elaborate system of pleadings—particularly with respect to the defendant—in a criminal case. A simple not guilty plea puts the prosecution to its proof as to all elements of the crime charged, and raises the defense of entrapment. Moreover, the Government's arguments that allowing a defendant to rely on inconsistent de-

fenses will encourage perjury, lead to jury confusion, and subvert the trial's truth-finding function are not persuasive. The question whether the evidence at trial was insufficient to support an entrapment instruction was pretermitted by the Court of Appeals, and is open for consideration by that court on remand. Pp. 62-66.

803 F. 2d 325, reversed and remanded.

REHNQUIST, C. J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, STEVENS, and O'CONNOR, JJ., joined. BRENNAN, J., filed a concurring opinion, *post*, p. 66. SCALIA, J., filed an opinion concurring in the judgment, *post*, p. 67. WHITE, J., filed a dissenting opinion, in which BLACKMUN, J., joined, *post*, p. 68. KENNEDY, J., took no part in the consideration or decision of the case.

Franklyn M. Gimbel, by appointment of the Court, 481 U. S. 1046, argued the cause for petitioner. With him on the briefs were *Jeffrey A. Kaufman* and *Marna M. Tess-Mattner*.

Charles A. Rothfeld argued the cause for the United States. With him on the brief were *Solicitor General Fried*, *Assistant Attorney General Weld*, and *Deputy Solicitor General Bryson*.

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

This case requires the Court to decide whether a defendant in a federal criminal prosecution who denies commission of the crime may nonetheless have the jury instructed, where the evidence warrants, on the affirmative defense of entrapment. The United States Court of Appeals for the Seventh Circuit upheld the ruling of the District Court, which had refused to instruct the jury as to entrapment because petitioner would not admit committing all of the elements of the crime of accepting a bribe. 803 F. 2d 325 (1986). This holding conflicts with decisions of other Courts of Appeals, which have taken a variety of approaches to the question.¹ We

¹Two other Circuits have adopted the approach taken by the Seventh Circuit. See *United States v. Hill*, 655 F. 2d 512, 514 (CA3 1981); *United States v. Whitley*, 734 F. 2d 1129, 1139 (CA6 1984). Four Circuits have ruled that a defendant may not affirmatively deny committing the elements of the crime if he desires an entrapment instruction. *United States*

granted certiorari to resolve this conflict, and we now reverse.

Petitioner was employed by the Small Business Administration (SBA) in Milwaukee, Wisconsin, and was responsible for the SBA's "8A Program," which provided aid to certain small businesses. Under the program, the SBA obtained Government contracts and subcontracted them to program participants. The SBA would then assist the participants in performing the contracts. Midwest Knitting Mills, whose president was James DeShazer, was one of the participants in the 8A Program. DeShazer's principal contact at the SBA was petitioner.

In October 1984, DeShazer complained to a Government customer that petitioner had repeatedly asked for loans. DeShazer believed that petitioner was not providing Midwest with certain 8A Program benefits because DeShazer had not made the requested loans. In early 1985, the Federal Bureau of Investigation (FBI) arranged for DeShazer to assist in the investigation resulting from his complaint. Under FBI surveillance, DeShazer offered petitioner a loan that, according to DeShazer, petitioner had previously requested.

v. Annese, 631 F. 2d 1041, 1046-1047 (CA1 1980); *United States v. Mayo*, 705 F. 2d 62, 72-73 (CA2 1983); *United States v. Dorta*, 783 F. 2d 1179, 1181 (CA4), cert. denied, 477 U. S. 905 (1986); *United States v. Mora*, 768 F. 2d 1197, 1198-1199 (CA10 1985), cert. denied, 474 U. S. 1083 (1986). One Circuit has declared that a defendant denying the elements of the crime may rely on entrapment if the issue is raised by the Government's evidence. *United States v. Smith*, 757 F. 2d 1161, 1169 (CA11 1985). Another Circuit has developed a hybrid rule allowing a testifying defendant to contest the intent element of the offense charged, but not the acts, while arguing entrapment. *United States v. Henry*, 749 F. 2d 203 (CA5 1984) (en banc); two Circuits have ruled that a defendant is entitled to an entrapment instruction even if he testifies and denies all elements of the offense. *United States v. Demma*, 523 F. 2d 981 (CA9 1975) (en banc); *Hansford v. United States*, 112 U. S. App. D. C. 359, 303 F. 2d 219 (1962). We note also that even within the Circuits, the decisions have been contradictory and inconsistent.

Petitioner agreed to accept the loan, and two months later, DeShazer met petitioner at a restaurant and gave him the money. Petitioner was immediately arrested and charged with accepting a gratuity in exchange for an official act. 18 U. S. C. § 201(g).

Before trial petitioner filed a motion *in limine* seeking to raise an entrapment defense. The District Court denied the motion, ruling that entrapment was not available to petitioner because he would not admit all of the elements (including the requisite mental state) of the offense charged. The District Court did, however, allow petitioner to argue as his first line of defense that his acts "were procured [*sic*] by the overt acts of the principle [*sic*] witness of the Government, Mr. DeShazer."² App. 131.

At trial, the Government argued that petitioner had accepted the loan in return for cooperation in SBA matters. The Government called DeShazer, who testified both that petitioner had repeatedly asked for loans and that he and petitioner had agreed that the loan at issue would result in SBA-provided benefits for Midwest. The Government also played tape recordings of conversations between DeShazer and petitioner in which they discussed the loan. Petitioner testified in his own defense that although he had accepted the loan, he believed it was a personal loan unrelated to his duties at the SBA. Petitioner stated that he and DeShazer were friends and that he had accepted a personal loan from DeShazer previously. According to petitioner, he was in dire financial straits when DeShazer broached the possibility of providing a loan. Petitioner also testified that DeShazer had stated that he needed quickly to get rid of the money that he was offering to petitioner because he had been hiding the money from his wife and was concerned that she would be upset if she discovered this secret; DeShazer had also stated

² In pursuing this line of defense, petitioner apparently introduced the same evidence that he planned to adduce in support of his entrapment claim.

at one point that if petitioner did not take the money soon, DeShazer would be tempted to spend it.

At the close of the trial, petitioner moved for a "mistrial" because of the District Court's refusal to instruct the jury as to entrapment. The District Court noted that the evidence of entrapment was "shaky at best," *ibid.*, but rather than premise its denial of petitioner's motion on that ground, the court reaffirmed its earlier ruling that, as a matter of law, petitioner was not entitled to an entrapment instruction because he would not admit committing all elements of the crime charged. The jury subsequently found petitioner guilty.

The United States Court of Appeals for the Seventh Circuit affirmed the District Court's refusal to allow petitioner to argue entrapment:

"When a defendant pleads entrapment, he is asserting that, although he had criminal intent, it was 'the Government's deception [that implanted] the criminal design in the mind of the defendant.' *United States v. Russell*, 411 U. S. 423, 436 . . . (1973); *United States v. Rodgers*, 755 F. 2d 533, 550 (7th Cir. 1985). We find this to be inconsistent *per se* with the defense that the defendant never had the requisite criminal intent. We see no reason to allow [petitioner] or any other defendant to plead these defenses simultaneously." 803 F. 2d, at 327.

We granted certiorari, 480 U. S. 945 (1987), to consider under what circumstances a defendant is entitled to an entrapment instruction. We hold that even if the defendant denies one or more elements of the crime, he is entitled to an entrapment instruction whenever there is sufficient evidence from which a reasonable jury could find entrapment.

Because the parties agree as to the basics of the affirmative defense of entrapment as developed by this Court, there is little reason to chronicle its history in detail. Suffice it to say that the Court has consistently adhered to the view, first enunciated in *Sorrells v. United States*, 287 U. S. 435 (1932),

that a valid entrapment defense has two related elements: government inducement of the crime, and a lack of predisposition on the part of the defendant to engage in the criminal conduct. See *Sherman v. United States*, 356 U. S. 369, 376-378 (1958); *United States v. Russell*, 411 U. S. 423, 435-436 (1973); *Hampton v. United States*, 425 U. S. 484, 489 (1976). Predisposition, "the principal element in the defense of entrapment," *Russell, supra*, at 433, focuses upon whether the defendant was an "unwary innocent" or, instead, an "unwary criminal" who readily availed himself of the opportunity to perpetrate the crime. *Sherman, supra*, at 372; *Russell, supra*, at 436. The question of entrapment is generally one for the jury, rather than for the court. *Sherman, supra*, at 377.

The Government insists that a defendant should not be allowed both to deny the offense and to rely on the affirmative defense of entrapment. Because entrapment presupposes the commission of a crime, *Russell, supra*, at 435, a jury could not logically conclude that the defendant had both failed to commit the elements of the offense *and* been entrapped. According to the Government, petitioner is asking to "clai[m] the right to swear that he had no criminal intent and in the same breath to argue that he had one that did not originate with him." *United States v. Henry*, 749 F. 2d 203, 214 (CA5 1984) (en banc) (Gee, J., dissenting).

As a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor. *Stevenson v. United States*, 162 U. S. 313 (1896); 4 C. Torcia, Wharton's Criminal Procedure §538, p. 11 (12th ed. 1976) (hereinafter Wharton). A parallel rule has been applied in the context of a lesser included offense instruction, see Fed. Rule Crim. Proc. 31(c); *Keeble v. United States*, 412 U. S. 205, 208 (1973); *Sansone v. United States*, 380 U. S. 343, 349 (1965). In *Stevenson*, this Court reversed a murder conviction arising out of a gunfight in the Indian Territory. The

principal holding of the Court was that the evidence was sufficient to entitle the defendant to a manslaughter instruction, but the Court also decided that the defendant was entitled as well to have the jury instructed on self-defense. The affirmative defense of self-defense is, of course, inconsistent with the claim that the defendant killed in the heat of passion.

Federal appellate cases also permit the raising of inconsistent defenses. See *Johnson v. United States*, 138 U. S. App. D. C. 174, 179, 426 F. 2d 651, 656 (1970) (the defense in a rape case was permitted to argue that the act did not take place and that the victim consented), cert. dismissed, 401 U. S. 846 (1971); see also *Womack v. United States*, 119 U. S. App. D. C. 40, 336 F. 2d 959 (1964). And state cases support the proposition that a homicide defendant may be entitled to an instruction on both accident and self-defense, two inconsistent affirmative defenses. 4 Wharton § 545, p. 32.

The Government points out that inconsistent pleading is specifically authorized under the Federal Rules of Civil Procedure, but that there is no parallel authorization under the Federal Rules of Criminal Procedure. Rule 8(e)(2) of the Federal Rules of Civil Procedure provides in relevant part:

"A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. . . . A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal, equitable or maritime grounds. All statements shall be made subject to the obligations set forth in Rule 11." (Emphasis added.)

The absence of a cognate provision affecting criminal trials, we think, is not because the Rules intended to more severely restrict criminal defendants than civil parties, but because of the much less elaborate system of pleadings—particularly with respect to the defendant—in a criminal case. The issues of fact in a criminal trial are usually developed by the evidence adduced and the court's instructions to the jury. A

simple plea of not guilty, Fed. Rule Crim. Proc. 11, puts the prosecution to its proof as to all elements of the crime charged, and raises the defense of entrapment. *Sorrells*, 287 U. S., at 452. The only matters required to be specially pleaded by a defendant are notice of alibi, Fed. Rule Crim. Proc. 12.1, or of intent to rely on insanity as a defense, Fed. Rule Crim. Proc. 12.2.

The Government argues that allowing a defendant to rely on inconsistent defenses will encourage perjury, lead to jury confusion, and subvert the truth-finding function of the trial. These same concerns are, however, present in the civil context, yet inconsistency is expressly allowed under the Federal Rules of Civil Procedure. We do not think that allowing inconsistency necessarily sanctions perjury. Here petitioner wished to testify that he had no intent to commit the crime, and have his attorney argue to the jury that if it concluded otherwise, then it should consider whether that intent was the result of Government inducement. The jury would have considered inconsistent defenses, but petitioner would not have necessarily testified untruthfully.

We would not go so far as to say that charges on inconsistent defenses may not on occasion increase the risk of perjury, but particularly in the case of entrapment we think the practical consequences will be less burdensome than the Government fears. The Court of Appeals in *United States v. Demma*, 523 F. 2d 981, 985 (CA9 1975) (en banc), observed:

“Of course, it is very unlikely that the defendant will be able to prove entrapment without testifying and, in the course of testifying, without admitting that he did the acts charged. . . . When he takes the stand, the defendant forfeits his right to remain silent, subjects himself to all the rigors of cross-examination, including impeachment, and exposes himself to prosecution for perjury. Inconsistent testimony by the defendant seriously impairs and potentially destroys his credibility. While we hold that a defendant may both deny the acts

and other elements necessary to constitute the crime charged and at the same time claim entrapment, the high risks to him make it unlikely as a strategic matter that he will choose to do so."

The Government finally contends that since the entrapment defense is not of "constitutional dimension," *Russell*, 411 U. S., at 433, and that since it is "relatively limited," *id.*, at 435, Congress would be free to make the entrapment defense available on whatever conditions and to whatever category of defendants it believed appropriate. Congress, of course, has never spoken on the subject, and so the decision is left to the courts. We are simply not persuaded by the Government's arguments that we should make the availability of an instruction on entrapment where the evidence justifies it subject to a requirement of consistency to which no other such defense is subject.

The Government contends as an alternative basis for affirming the judgment below that the evidence at trial was insufficient to support an instruction on the defense of entrapment. Of course evidence that Government agents merely afforded an opportunity or facilities for the commission of the crime would be insufficient to warrant such an instruction. But this question was pretermitted by the Court of Appeals, and it will be open for consideration by that court on remand.

Reversed and remanded.

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

JUSTICE BRENNAN, concurring.

I join the Court's opinion. I write separately only because I have previously joined or written four opinions dissenting from this Court's holdings that the defendant's predisposition is relevant to the entrapment defense. *Hampton v. United States*, 425 U. S. 484, 495 (1976) (BRENNAN, J., dissenting);

United States v. Russell, 411 U. S. 423, 436 (1973) (Douglas, J., dissenting); *id.*, at 439 (Stewart, J., dissenting); *Sherman v. United States*, 356 U. S. 369, 378 (1958) (Frankfurter, J., concurring in judgment). See also *Sorrells v. United States*, 287 U. S. 435, 453 (1932) (Roberts, J., concurring in judgment). Although some governmental misconduct might be sufficiently egregious to violate due process, *Russell*, *supra*, at 431–432, my differences with the Court have been based on statutory interpretation and federal common law, not on the Constitution. Were I judging on a clean slate, I would still be inclined to adopt the view that the entrapment defense should focus exclusively on the Government's conduct. But I am not writing on a clean slate; the Court has spoken definitively on this point. Therefore I bow to *stare decisis*, and today join the judgment and reasoning of the Court.

JUSTICE SCALIA, concurring in the judgment.

I concur in the judgment of the Court because in my view the defense of entrapment will rarely be genuinely inconsistent with the defense on the merits, and when genuine inconsistency exists its effect in destroying the defendant's credibility will suffice to protect the interests of justice.

The typical case presenting the issue before us here is one in which the defendant introduces evidence to the effect that he did not commit the unlawful acts, or did not commit them with the requisite unlawful intent, and also introduces evidence to show his lack of predisposition and inordinate government inducement. There is nothing inconsistent in these showings. The inconsistency alleged by the government is a purely formal one, which arises only if entrapment is defined to require not only (1) inordinate government inducement to commit a crime, (2) directed at a person not predisposed to commit the crime, but also (3) causing that person to commit the crime. If the third element is added to the definition, counsel's argument to the jury cannot claim entrapment without admitting the crime. But I see no reason why the third

element is essential, unless it is for the very purpose of rendering the defense unavailable without admission of the crime. Surely it does not add anything of substance to the findings the jury must make, since findings of (1) inordinate inducement plus (2) lack of predisposition will almost inevitably produce a conclusion of (3) causality. To be sure, entrapment cannot be available as a defense unless a crime by the object of the entrapment is established, since if there is no crime there is nothing to defend against; but in that sense all affirmative defenses assume commission of the crime.

My point is not that entrapment must be defined to exclude element (3). Whether it is or not, since that element seems to me unnecessary to achieve the social policy fostered by the defense I am not willing to declare the defense unavailable when it produces the formal inconsistency of the defendant's simultaneously denying the crime and asserting entrapment which assumes commission of the crime. I would not necessarily accept such formal inconsistency for other defenses, where the element contradicted is a functionally essential element of the defense.

Of course in the entrapment context, as elsewhere, the defendant's case may involve genuine, *non*formal inconsistency. The defendant might testify, for example, that he was not in the motel room where the illegal drugs changed hands, and that the drugs were pressed upon him in the motel room by agents of the government. But that kind of genuine inconsistency here, as elsewhere, is self-penalizing. There is nothing distinctive about entrapment that justifies a special prophylactic rule.

JUSTICE WHITE, with whom JUSTICE BLACKMUN joins, dissenting.

At his criminal trial, petitioner took the stand and flatly denied accepting a loan "for or because of any official act." App. 128-130; 18 U. S. C. §201(g). Petitioner later moved for a mistrial because the District Court would not permit

him to rely on that testimony while he simultaneously argued that, in fact, he *had* accepted a loan for an official act, but only at the Government's instigation. Today, the Court holds that this rather sensible ruling on the part of the District Court constitutes reversible error. The reasons the Court offers for reaching this conclusion are not at all persuasive, and I respectfully dissent.

I

The Court properly recognizes that its result is not compelled by the Constitution. As the Court acknowledges, petitioner has no Fifth or Sixth Amendment right to conduct the inconsistent entrapment defense that he wished to mount at trial. *Ante*, at 66. And yet, if the Constitution does not compel reversal of the decision below, then what does?

Certainly not any Act of Congress, or the Federal Rules of Criminal Procedure. As the majority candidly admits, "Congress . . . has never spoken on the subject [at issue here], and so the decision is left to the courts." *Ibid.* Moreover, the Court also frankly notes that while the Federal Rules of Civil Procedure contain a provision expressly authorizing inconsistent defenses, Fed. Rule Civ. Proc. 8(e)(2), the Federal Criminal Rules are without any such authorization. *Ante*, at 64. Indeed, the rather scant authority the majority cites in support of its view that inconsistent defenses are generally permitted in criminal trials, *ibid.*, is strongly suggestive of just how extraordinary such pleadings are in the criminal context.¹

¹ While some cases have explicitly permitted inconsistent criminal defenses outside of the entrapment area, *e. g.*, *Whittaker v. United States*, 108 U. S. App. D. C. 268, 269, 281 F. 2d 631, 632 (1960), others have been less receptive to this defense strategy, see, *e. g.*, *United States v. Ervin*, 436 F. 2d 1331, 1334 (CA5 1971); *Blunt v. United States*, 131 U. S. App. D. C. 306, 312, n. 12, 404 F. 2d 1283, 1289, n. 12 (1968). Given the rarity of reported federal cases on this question, drawing any conclusion about the prevailing practice in the federal courts is difficult. See Note, Entrap-

Nor is the result the Court reaches urged by a predominance of authority in the lower courts. As the Court recognizes, only two Circuits have held, as the Court does today, that a criminal defendant may deny committing the elements of a crime, and then contend that the Government entrapped him into the offense. The remaining Circuits are far more restrained in their allowance of such inconsistent defenses, divided along the lines the majority discusses in its opinion. *Ante*, at 59–60, n. 1.

Thus, neither the Constitution, nor a statute, nor the Criminal Rules, nor the bulk of authority compels us to reverse petitioner's conviction. Nor does the Court claim support from any of these sources for its decision. Instead, the majority rests almost exclusively on an application of the "general proposition [that] a defendant is entitled to an instruction as to any legally sufficient defense for which there exists evidence sufficient for a reasonable jury to find in his favor." *Ante*, at 63. There are several reasons, however, why this "general proposition" is inapposite here.

II

First, there is the unique nature of the entrapment defense. There is a valuable purpose served by having civil litigants plead alternative defenses which may be legally inconsistent. Allowing a tort defendant to claim both that he owed no duty of care to the plaintiff, but that if he did, he met that duty, preserves possible alternative defenses under which the defendant is entitled to relief. It prevents formalities of pleadings, or rigid application of legal doctrines, from standing in the way of the equitable resolution of a civil dispute. See generally 2A J. Moore, J. Lucas, & G. Grotheer, *Moore's Federal Practice* ¶8.32, pp. 8–224–8–229 (2d ed. 1987). The same may be true for *some* criminal defenses

ment and Denial of the Crime: A Defense of the Inconsistency Rule, 1986 Duke L. J. 866, 878–879, and n. 127.

(such as "self-defense" or "provocation") where a defendant may truthfully testify as to the facts of the crime, leaving it to his counsel to argue that these facts make out, as a matter of law, several possible defenses.

But the entrapment defense, by contrast, "is a relatively limited defense"; it is only available to "a defendant who has committed all the elements of a proscribed offense." *United States v. Russell*, 411 U. S. 423, 435 (1973). Thus, when a defendant (as petitioner did here) testifies that he did not commit the elements of the offense he is charged with, the defense of entrapment is *not* a plausible alternative legal theory of the case; rather, it is a proper defense *only* if the accused is lying. We have rejected before the notion that a defendant has a right to lie at trial, or a right to solicit his attorney's aid in executing such a defense strategy. See *Nix v. Whiteside*, 475 U. S. 157, 173 (1986). And there is respectable authority for concluding that no legitimate end of the criminal justice system is served by requiring a trial court to entertain such tactics, in the form of an entrapment defense which is at odds with the defendant's own testimony.²

Allowing such inconsistency in defense tactics invites the scourge of an effective criminal justice system: perjury. In the past, we have taken extraordinary steps to combat perjury in criminal trials; these steps have even included permitting the admission of otherwise inadmissible evidence to prevent a defendant from procuring an acquittal via false testimony. See, e. g., *Oregon v. Hass*, 420 U. S. 714, 720-723 (1975); *Harris v. New York*, 401 U. S. 222, 225-226 (1971). Yet today, the Court reaches a result which it concedes "may . . . on occasion" increase the risk of perjury. *Ante*, at 65. This is reason enough to reject the Court's result. Worse still, the majority's prognostication may well

²See, e. g., *United States v. Dorta*, 783 F. 2d 1179, 1181-1182 (CA4 1986); *United States v. Smith*, 757 F. 2d 1161, 1167-1168 (CA11 1985); *United States v. Henry*, 749 F. 2d 203, 214-216 (CA5 1984) (en banc) (Gee, J., dissenting).

be an understatement. Even if—as the Court suggests, *ibid.*—inconsistent defenses do not measurably increase the frequency of perjury in civil trials, the risk of perjury in a criminal trial is always greater than in a civil setting because the stakes are so much higher. See *Britt v. North Carolina*, 404 U. S. 226, 238 (1971) (Douglas, J., dissenting). Absent some constitutional or statutory mandate to conduct criminal trials in a particular way, we should be taking steps to minimize, not increase, the danger of perjured testimony.

After all, a criminal trial is not a game or a sport. “[T]he very nature of a trial [i]s a search for truth.” *Nix v. Whiteside*, *supra*, at 166. This observation is particularly applicable to criminal trials, which are the means by which we affix our most serious judgments of individual guilt or innocence. It is fundamentally inconsistent with this understanding of criminal justice to permit a defendant to win acquittal on a rationale which he states, under oath, to be false. “Permitting a defendant to argue two defenses that cannot both be true is equivalent to sanctioning perjury by the defendant.” See Note, *Entrapment and Denial of the Crime: A Defense of the Inconsistency Rule*, 1986 Duke L. J. 866, 883–884.

Finally, even if the Court’s decision does not result in increased perjury at criminal trials, it will—at the very least—result in increased confusion among criminal juries.³ The lower courts have rightly warned that jury confusion is likely to result from allowing a defendant to say “I did not do it”

³ Again, the fact that the system endures the jury confusion caused by inconsistent civil defenses is no support for the Court’s conclusion here. For one thing, reliability is obviously a more important concern in criminal cases than in civil.

Moreover, in civil cases, the trial court has the option of ordering the jury to complete a special verdict form, thus minimizing any errors in judgment which may result from inconsistent defenses. See Fed. Rule Civ. Proc. 49(a). The Criminal Rules contain no similar provision, cf. Fed. Rule Crim. Proc. 31, and “as a general rule special verdicts are disfavored in criminal cases,” see *United States v. Buishas*, 791 F. 2d 1310, 1317 (CA7 1986).

while his lawyer argues "he did it, but the government tricked him into it." See, e. g., *United States v. Dorta*, 783 F. 2d 1179, 1182 (CA4 1986). Creating such confusion may enable some defendants to win acquittal on the entrapment defense, but only under the peculiar circumstances where a jury rejects the defendant's own stated view of the facts. We have not previously endorsed defense efforts to prevail at trial by playing such "shell games" with the jury; rather, we have written that "[a] defendant has no entitlement to the luck of a lawless decisionmaker." *Strickland v. Washington*, 466 U. S. 668, 695 (1984). Nor, it should be added, is there any entitlement to a baffled decisionmaker.

III

Ultimately, only petitioner knows whether he accepted a loan in exchange for an official act, or whether he obtained it as a personal favor. Today, the Court holds that petitioner has a right to take the stand and claim the latter, while having his attorney argue that he was entrapped into doing the former. Nothing counsels such a result—let alone compels it. Hence this dissent.

BOWEN, SECRETARY OF HEALTH AND HUMAN
SERVICES *v.* GALBREATH

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

No. 86-1146. Argued December 9, 1987—Decided February 24, 1988

After the Secretary of Health and Human Services denied respondent's application for supplemental security income (SSI) benefits under Title XVI of the Social Security Act, respondent appealed to the District Court, which reversed the denial and awarded her past-due benefits. The court also ordered the Secretary to pay attorney's fees to respondent's attorney out of the past-due benefits. The Court of Appeals affirmed.

Held: A district court does not have the authority to order the Secretary to withhold a portion of past-due SSI benefits for the payment of attorney's fees received in judicial proceedings under Title XVI. Pp. 75-79. 799 F. 2d 370, reversed.

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

Richard J. Lazarus argued the cause for petitioner. With him on the briefs were *Solicitor General Fried*, *Assistant Attorney General Willard*, *Deputy Solicitor General Lauber*, *William G. Kanter*, and *Jeffrica Jenkins Lee*.

Anthony W. Bartels argued the cause and filed a brief for respondent.

JUSTICE BRENNAN delivered the opinion of the Court.

The question before us is whether, under Title XVI of the Social Security Act, a district court has the authority to order the Secretary of Health and Human Services to withhold a portion of past-due supplemental security income benefits for the payment of attorney's fees.

After the Secretary of Health and Human Services denied Mary Alice Galbreath's application for supplemental security income (SSI) benefits under Title XVI of the Social Security

Act, she appealed to a Federal District Court. The District Court reversed the denial, and the Secretary accordingly paid Galbreath her full \$7,954 in past-due benefits. Galbreath's attorney, Anthony W. Bartels, then moved for attorney's fees equal to 25% of the past-due benefits. The District Court determined that the amount requested was reasonable and, relying on 42 U. S. C. § 406(b)(1), ordered the Secretary "to compute, certify, and pay" Bartels his requested fee of \$1,988.50 out of the the past-due benefits awarded Galbreath. The Secretary appealed, arguing that § 406(b)(1) applies only to cases under Title II of the Social Security Act and that the relevant statutes and regulations do not permit withholding past-due SSI benefits for payment of attorney's fees in Title XVI cases. The Court of Appeals for the Eighth Circuit affirmed. 799 F. 2d 370 (1986). We granted certiorari to resolve a conflict among the Courts of Appeals,* 481 U. S. 1036 (1987), and now reverse.

Title II is an insurance program. Enacted in 1935, it provides old-age, survivor, and disability benefits to insured individuals irrespective of financial need. See 42 U. S. C. §§ 403, 423 (1982 ed. and Supp. III). Title XVI is a welfare program. Enacted in 1972, it provides SSI benefits to financially needy individuals who are aged, blind, or disabled regardless of their insured status. See 42 U. S. C. § 1382(a) (1982 ed. and Supp. III).

Until 1965, Title II contained no provision expressly authorizing a district court to award fees to a claimant's attorney. In 1965, however, the Court of Appeals for the Fifth Circuit held that 42 U. S. C. § 405(g) implicitly authorized district courts to order the payment of attorney's fees out of

*Compare *Howard v. Bowen*, 823 F. 2d 185 (CA7 1987) (withholding not permitted); *McCarthy v. Secretary of Health and Human Services*, 793 F. 2d 741 (CA6 1986) (same); *Motley v. Heckler*, 800 F. 2d 1253 (CA4 1986) (same), with *Clay v. Secretary of Health and Human Services*, 823 F. 2d 679 (CA1 1987) (withholding is permitted); *Reid v. Heckler*, 735 F. 2d 757 (CA3 1984) (same); and the decision below.

past-due benefits. See *Celebrezze v. Sparks*, 342 F. 2d 286 (1965). Under 42 U. S. C. § 405(g), a court reviewing a decision of the Secretary has the power to enter "a judgment affirming, modifying, or reversing the decision of the Secretary." The court in *Sparks* reasoned that where a statute gives a court jurisdiction, it must be presumed, absent any indication to the contrary, that the court was intended to exercise all the powers of a court, including the power to provide for payment of attorney's fees out of any recovery. 342 F. 2d, at 288-289. Later in 1965, Congress effectively codified *Sparks* by adding a new subsection (b)(1) to 42 U. S. C. § 406 that allows withholding of past-due benefits to pay attorney's fees incurred in judicial proceedings under Title II. Social Security Amendments of 1965, Pub. L. 89-97, § 332, 79 Stat. 403. Subsection (b)(1) provides:

"Whenever a court renders a judgment favorable to a claimant under this subchapter who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment, and the Secretary may, notwithstanding the provisions of section 405(i) of this title, certify the amount of such fee for payment to such attorney out of, and not in addition to, the amount of such past-due benefits."

In 1968, Congress amended 42 U. S. C. § 406(a) by adding two sentences giving the Secretary similar withholding authority to pay attorney's fees incurred in Title II administrative proceedings. Social Security Amendments of 1967, Pub. L. 90-248, § 173, 81 Stat. 877.

Thus, the District Court's order in this case would clearly be valid if this were a Title II case. When Congress enacted Title XVI in 1972, however, it provided no similar authority to withhold past-due benefits for attorney's fees. This omission is particularly telling because Congress incorporated

many other provisions of Title II into Title XVI. In particular, while incorporating almost every other provision of § 406 into Title XVI, Congress left out the provisions in § 406(b)(1) and § 406(a) that authorized judicial withholding and administrative withholding. Social Security Amendments of 1972, Pub. L. 92-603, § 301, 86 Stat. 1476-1477, codified at 42 U. S. C. § 1383(d)(2). This omission does not appear to have been inadvertent. Indeed, with respect to administrative proceedings, the House Report specifically noted and explained the omission of withholding authority by twice stating:

“Where an individual who has requested a hearing is represented before the Secretary by an attorney . . . there would be no withholding of attorney fees from such individual’s benefits. Your committee believes that to withhold such fees would be contrary to the purpose of the program.” H. R. Rep. No. 92-231, pp. 156, 187 (1971).

The Senate Report also indicates the omission of administrative withholding authority was intentional. See S. Rep. No. 92-1230, p. 392 (1972) (“Where an individual who has requested a hearing is represented before the Secretary by an attorney . . . there would be no withholding of attorney fees from the individual’s benefits”). Although the legislative history offered no explanation specifically linked to the omission of judicial withholding authority, it is fair to assume that this omission also reflected Congress’ view that withholding past-due SSI benefits would be inconsistent with the purpose of the program. Given the extreme financial need of SSI beneficiaries, this view is not irrational. Nor would it be odd for Congress to conclude that withholding past-due benefits from financially needy individuals under Title XVI would cause greater hardship than withholding past-due benefits from insured individuals under Title II. We thus conclude that, as originally enacted, Title XVI evidenced a congressional intent not to allow the withholding of past-

due SSI benefits to pay attorney's fees incurred in judicial proceedings.

Respondent and the courts finding judicial withholding authority under Title XVI do not dispute the conclusion that Congress intended to disallow judicial withholding when it enacted Title XVI in 1972. Rather, they contend that courts possess inherent authority to order withholding and that a 1976 amendment to 42 U. S. C. § 1383(c)(3)—the judicial review provision of Title XVI—demonstrates Congress' intent to allow that authority to be exercised. As enacted in 1972, 42 U. S. C. § 1383(c)(3) (1970 ed., Supp. IV) provided:

"The final determination of the Secretary after a hearing under paragraph (1) shall be subject to judicial review as provided in Section 405(g) of this title to the same extent as the Secretary's final determinations under Section 405 of this title; *except that the determination of the Secretary after such hearing as to any fact shall be final and conclusive and not subject to review by any court.*" Pub. L. 92-603, § 301, 86 Stat. 1476 (emphasis added).

The 1976 amendment simply deleted the italicized portion of the statute. Act of Jan. 2, 1976, Pub. L. 94-202, 89 Stat. 1135. The clear and expressed intent was to make the Secretary's factual findings under Title XVI subject to judicial review, just as they were under Title II. Nothing in the legislative history mentions withholding benefits to pay attorney's fees. The Court of Appeals below and other courts have nonetheless reasoned that, because Congress intended to make judicial review under Title XVI the same as judicial review under Title II, courts adjudicating Title XVI cases must have the same inherent authority to order withholding under § 405(g) that, under *Sparks*, courts adjudicating Title II cases had even before § 406(b)(1) was added.

We find this analysis unpersuasive. On its face, the deletion of a provision making factual findings unreviewable

bears no apparent relation to whether withholding of past-due benefits should be allowed. Indeed, the deletion does not even purport to address cases involving legal, rather than factual, disputes, and we can hardly imagine that Congress meant to change the ban on withholding without addressing both kinds of cases. The courts that have concluded that the 1976 amendment authorizes judicial withholding rely on statements in the legislative history indicating Congress' intent to make judicial review under Title II and Title XVI "virtually identical," to "provide the same rights to . . . judicial review" under both Titles, and "to apply the same rules of judicial review to Title XVI cases as apply to Title II cases." S. Rep. No. 94-550, pp. 1, 3-4 (1975). None of these statements suggests that Congress intended to allow withholding of past-due benefits. Rather, they simply state the obvious point that removing the provision barring review under Title XVI of the Secretary's factual determinations makes the scope of issues reviewable under Title XVI and Title II the same. Even assuming courts have inherent authority under *Sparks* to withhold a portion of past-due SSI benefits to pay attorney's fees in Title XVI cases, we see no reason why Congress cannot divest courts of that authority if it so chooses. In originally enacting Title XVI, Congress manifested its intent, by selective incorporation and legislative history, to disallow the withholding of past-due SSI benefits to pay attorney's fees incurred in Title XVI cases. Until Congress sees fit to override its original decision, by amending Title XVI in a way that manifests an intent to allow withholding, that original decision stands.

The judgment of the Court of Appeals is

Reversed.

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

PERALTA v. HEIGHTS MEDICAL CENTER, INC., DBA
HEIGHTS HOSPITAL, ET AL.

APPEAL FROM THE COURT OF APPEALS OF TEXAS,
FIRST DISTRICT

No. 86-1430. Argued November 30, 1987—Decided February 24, 1988

In 1982, a default judgment was entered against appellant in appellee medical center's Texas state-court suit to recover a sum allegedly due under appellant's guarantee of a hospital debt incurred by one of his employees. The judgment was recorded, a writ of attachment was issued, and appellant's real property was sold to satisfy the judgment. In 1984, appellant initiated a bill of review proceeding seeking, *inter alia*, to set aside the default judgment and void the sale, and alleging that, since the original service of process itself showed it was untimely made and, in fact, he had never been personally served, the judgment was void under Texas law. The court entered summary judgment for appellee on the ground that it must be shown in a bill of review proceeding that the complainant had a meritorious defense to the action in which the judgment was entered, which appellant conceded he did not have. In affirming, the State Court of Appeals rejected appellant's contention that the meritorious-defense requirement violated his due process rights under the Fourteenth Amendment to the Federal Constitution, declaring that the requirement was "not onerous." The State Supreme Court denied appellant's application for a writ of error, noting "No Reversible Error."

Held: The holding below contravenes this Court's precedents, under which a judgment entered without notice or service violates the Due Process Clause. See, e. g., *Mullane v. Central Hanover Bank & Trust Co.*, 339 U. S. 306; *Armstrong v. Manzo*, 380 U. S. 545. The argument that appellant suffered no harm from the default judgment since the same judgment would again be entered on retrial absent a meritorious defense is untenable because, had he had notice of the suit, appellant might have impleaded the employee whose debt had been guaranteed, worked out a settlement, paid the debt, or sold the property himself rather than suffer its sale at a constable's auction for allegedly much less than its true value. Nor is there any doubt that the entry of the judgment itself had substantial adverse consequences, since the judgment was entered on county records, became a lien on appellant's property which impaired his ability to mortgage or alienate the property, and was the basis for issuance of the writ of execution under which the property was promptly sold, again without notice. The contention that appellant has other

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Opinion of the Court

remedies to escape the consequences of an invalid judgment and should be left to pursue those avenues will not be considered here, since there is no indication that it was raised below. Pp. 84-87.

Reversed.

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

Bruce Ian Schimmel argued the cause for appellant. With him on the briefs were *Stephen P. Dillon* and *Michael J. Kator*.

Jack E. Urquhart argued the cause for appellees. With him on the brief were *Jack G. Carnegie*, *Paul A. Share*, and *Emil T. Bayko*.*

JUSTICE WHITE delivered the opinion of the Court.

Heights Medical Center, Inc. (hereafter appellee), sued appellant Peralta in February 1982 to recover some \$5,600 allegedly due under appellant's guarantee of a hospital debt incurred by one of his employees. Citation issued, the return showing personal, but untimely, service. Appellant did not appear or answer, and on July 20, 1982, default judgment was entered for the amount claimed, plus attorney's fees and costs.

In June 1984, appellant began a bill of review proceeding in the Texas courts to set aside the default judgment and obtain other relief.¹ In the second amended petition, it was alleged

**Jim Mattox*, Attorney General, *Mary F. Keller*, Executive Assistant Attorney General, and *Javier P. Guajardo*, Assistant Attorney General, filed a brief for the State of Texas as *amicus curiae*.

¹ Texas Rule of Civil Procedure 329b(f) provides:

"On expiration of the time within which the trial court has plenary power, a judgment cannot be set aside by the trial court except by bill of review for sufficient cause, filed within the time allowed by law; provided that the court may at any time correct a clerical error in the record of a judgment and render judgment nunc pro tunc under Rule 316, and may also sign an order declaring a previous judgment or order to be void because signed after the court's plenary power had expired."

that the return of service itself showed a defective service² and that appellant in fact had not been personally served at all. The judgment was therefore void under Texas law. It was also alleged that the judgment was abstracted and recorded in the county real property records, thereby creating a cloud on appellant's title, that a writ of attachment was issued, and that, unbeknownst to him, his real property was sold to satisfy the judgment and for much less than its true value. Appellant prayed that the default judgment be vacated, the abstract of judgment be expunged from the county real property records, the constable's sale be voided, and that judgment for damages be entered against the Medical Center and Mr. and Mrs. Paul-Seng-Ngan Chen, the purchasers at the constable's sale and appellees here.

Appellee filed a motion for summary judgment asserting that in a bill of review proceeding such as appellant filed, it must be shown that petitioner had a meritorious defense to the action in which judgment had been entered, that petitioner was prevented from proving his defense by the fraud, accident, or wrongful act of the opposing party, and that there had been no fault or negligence on petitioner's part. Although it was assumed for the purposes of summary judgment that there had been defective service and that this lapse excused proof of the second and third requirement for obtaining a bill of review, it was assertedly necessary, nevertheless, to show a meritorious defense, which appellant had con-

²The petition alleged that the record contained a return of service of process, showing that service was effected more than 90 days after its issuance, contrary to Texas Rule of Civil Procedure 101 (repealed effective Jan. 1, 1988). Record 41. The parties agree that under Texas law at the time of this suit, the citation lost its official status after 90 days. Texas courts have held that service after the 90th day is a nullity, depriving the court of personal jurisdiction over the defendant. *Lewis v. Lewis*, 667 S. W. 2d 910, 911 (Tex. App. 1984); *Kem v. Krueger*, 626 S. W. 2d 143, 144 (Tex. App. 1981); *Lemothe v. Cimbalista*, 236 S. W. 2d 681, 682 (Tex. Civ. App. 1951).

ceded he did not have. In response to the motion, appellant repeated the allegations in his petition and filed an affidavit denying that he had ever been personally served or had ever been notified of the entry of default judgment³ or of the sale of his property. Appellee's motion for summary judgment was granted. Record 54.

Appellant's motion for rehearing for the first time asserted federal constitutional claims under the Fourteenth Amendment. Appellee answered that under Texas law there were three avenues by which to attack a judgment on the grounds that it was void for want of service: an appeal within 30 days of the judgment; by writ of error within 6 months; and by bill of review. It being too late to seek either of the first two courses, appellee urged that the bill of review was the only route then open to appellant, and that route was not available to him—even assuming he did not receive notice of the action filed against him—since he had no meritorious defense. Appellee denied that the meritorious-defense requirement threatened any federal constitutional rights. Rehearing was denied.

On appeal to the Texas Court of Appeals, appellant repeated his claims that in the absence of valid service of process and notice of the judgment, showing a meritorious defense was not necessary under Texas law and requiring it violated the Fourteenth Amendment. Appellee argued that despite the allegation of no service and no notice of judgment, the meritorious-defense requirement prevented relief and that even though the bill of review was the only avenue of relief, the State could constitutionally insist on the showing of a meritorious defense. The Court of Appeals affirmed, reciting the three elements essential for granting a bill of review and holding that a meritorious defense must be shown

³Texas Rule of Civil Procedure 239(a) requires that notice of default judgment be mailed to the defendant at the address which the party taking the judgment is required to file with the clerk. Appellant argued in the Court of Appeals that neither of these requirements had been fulfilled.

whether there had been proper service and notice or not. 715 S. W. 2d 721 (1986). The court rejected the due process challenge because it viewed the meritorious-defense requirement as "not onerous." *Id.*, at 722. Rehearing was denied, as was the application for a writ of error filed with the Texas Supreme Court, that court noting, "No Reversible Error." App. to Juris. Statement 2a.

Because the holding below appeared problematic in light of our precedents, we noted probable jurisdiction. 481 U. S. 1067 (1987). The case was briefed and argued, and we now reverse.⁴

In opposition to summary judgment, appellant denied that he had been personally served and that he had notice of the judgment. The case proceeded through the Texas courts on that basis,⁵ and it is not denied by appellee that under our cases, a judgment entered without notice or service is constitutionally infirm. "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under the circumstances, to apprise interested parties of the pendency of the action and afford them the opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U. S. 306, 314 (1950). Failure to give notice violates "the most rudimentary demands of due process of law." *Armstrong v. Manzo*, 380 U. S. 545, 550 (1965). See also

⁴Further examination of the record indicates that appellee was correct in challenging our appellate jurisdiction, Motion to Dismiss 3-4, because there was no explicit challenge to the constitutionality of Texas Rule of Civil Procedure 329b(f) and because the Texas courts did not pass on any such issue. *Charleston Federal Savings & Loan Assn. v. Alderson*, 324 U. S. 182, 185 (1945); *Richmond Newspapers, Inc. v. Virginia*, 448 U. S. 555, 562, n. 4 (1980). Treating the filed papers as a petition for certiorari, however, we grant the petition. We nevertheless continue to refer to Peralta and Heights Medical Center as appellant and appellee.

⁵Appellee conceded at oral argument that for purposes of this decision, we must assume the truth of appellant's claims that he was never served with process. Tr. of Oral Arg. 39.

World-Wide Volkswagen Corp. v. Woodson, 444 U. S. 286, 291 (1980); *Mathews v. Eldridge*, 424 U. S. 319, 333 (1976); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U. S. 100, 110 (1969); *Pennoyer v. Neff*, 95 U. S. 714, 733 (1878).

The Texas courts nevertheless held, as appellee urged them to do, that to have the judgment set aside, appellant was required to show that he had a meritorious defense, apparently on the ground that without a defense, the same judgment would again be entered on retrial and hence appellant had suffered no harm from the judgment entered without notice. But this reasoning is untenable. As appellant asserts, had he had notice of the suit, he might have impleaded the employee whose debt had been guaranteed, worked out a settlement, or paid the debt. He would also have preferred to sell his property himself in order to raise funds rather than to suffer it sold at a constable's auction.

Nor is there any doubt that the entry of the judgment itself had serious consequences. It is not denied that the judgment was entered on the county records, became a lien on appellant's property,⁶ and was the basis for issuance of a writ of execution under which appellant's property was promptly sold without notice. Even if no execution sale had yet occurred, the lien encumbered the property and impaired appellant's ability to mortgage or alienate it; and state procedures for creating and enforcing such liens are subject to the strictures of due process. See *Mitchell v. W. T. Grant Co.*, 416 U. S. 600, 604 (1974); *Hodge v. Muscatine County*, 196

⁶ Under Texas law a judgment entitles the judgment creditor to a lien on the debtor's property. As a matter of right and without notice and hearing, a judgment creditor can have the judgment abstracted and recorded. Tex. Prop. Code Ann. §§ 52.002, 52.004(a) (1984 and Supp. 1988). Such a recorded abstract "constitutes a lien on the real property of the defendant located in the county in which the abstract is recorded and indexed, including real property acquired after such recording and indexing," § 52.001, and the holder of a judgment lien will have a superior interest to a later purchaser. *Masterson v. Adams*, 197 S. W. 2d 154, 156 (Tex. Civ. App. 1946).

U. S. 276, 281 (1905). Here, we assume that the judgment against him and the ensuing consequences occurred without notice to appellant, notice at a meaningful time and in a meaningful manner that would have given him an opportunity to be heard. *Armstrong v. Manzo*, *supra*, at 552.

In this Court, appellee insists that appellant has other remedies to escape the consequences of an invalid judgment and should be left to pursue those avenues. This argument, which is made for the first time in this litigation and which appellant disputes, is apparently offered as an alternative ground for affirming the judgment below. We are not required, however, to entertain such submissions, particularly when there is no indication that they were raised below, and we are especially disinclined to become involved in resolving disputes about Texas law that should have been presented to the state courts. We shall deal with the case as it came here and affirm or reverse based on the ground relied on below.

Appellee's position below was that appellant either had a remedy by bill of review or not at all, and that that remedy was unavailable since no meritorious defense had been shown. It appears to us that the Texas courts decided the case on this basis. There was no mention of other remedies, no suggestion that appellant had sought the wrong remedy; and it seems obvious that had a meritorious defense been shown, and the allegations on service and notice found to be true, the offending judgment would have been vacated. The Texas court held that the default judgment must stand absent a showing of a meritorious defense to the action in which judgment was entered without proper notice to appellant, a judgment that had substantial adverse consequences to appellant. By reason of the Due Process Clause of the Fourteenth Amendment, that holding is plainly infirm.

Where a person has been deprived of property in a manner contrary to the most basic tenets of due process, "it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate

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Opinion of the Court

defense upon the merits.” *Coe v. Armour Fertilizer Works*, 237 U. S. 413, 424 (1915). As we observed in *Armstrong v. Manzo*, 380 U. S., at 552, only “wip[ing] the slate clean . . . would have restored the petitioner to the position he would have occupied had due process of law been accorded to him in the first place.” The Due Process Clause demands no less in this case.

The judgment below is

Reversed.

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

UNITED STATES *v.* LOUISIANA ET AL. (ALABAMA
AND MISSISSIPPI BOUNDARY CASE)

ON EXCEPTIONS TO REPORT OF SPECIAL MASTER

No. 9, Orig. Argued January 11, 1988—Decided March 1, 1988

In its 1985 opinion in this litigation, the Court ruled that Alabama and Mississippi, rather than the United States, own their respective portions of the bed under Mississippi Sound, and directed the parties to submit to the Special Master a proposed appropriate decree. 470 U. S. 93. Mississippi and the United States submitted proposed supplemental decrees which reflected their disagreement as to Mississippi's coastline at two points (Alabama's coastline is no longer in dispute). The first point of contention occurs between two islands along the Sound's southern boundary. The second point involves Mississippi's claimed interest in seabed south of Mississippi Sound in the vicinity of Chandeleur Sound. In his Supplemental Report, the Master concluded (a) that the decree proposed by Mississippi should not be entered, and (b) that, while the United States' solution as to the second disputed point would be preferable, it would amount to a modification of the Court's 1985 opinion because it would be beyond the scope of the reference to the Master, which concerned only Mississippi Sound and its boundary. The Master recommended that the Court enter an order directing the parties to submit a decree defining the coastline of Alabama and Mississippi "to the extent agreed upon"; defining Mississippi's coastline as to the first disputed point as proposed by the United States; and defining Mississippi's coastline as to the second point as lying along a described line heading west from an island on Mississippi Sound's southern boundary to the Louisiana border. Mississippi noted exceptions relating only to the second point of contention, and not at all to the first contention. The United States is in opposition.

Held:

1. Since the current phase of this litigation has so far dealt only with Mississippi Sound, and has not focused on Mississippi's interest south of that Sound, this Court will not on the present record determine the extent of Mississippi's rights thereto without the parties' complete agreement and the Special Master's ready acquiescence. However, any party may advance such claims as it might have with respect to the area south of Mississippi Sound and in the vicinity of Chandeleur Sound by filing a timely complaint in these proceedings. Pp. 92-93.

2. Because Mississippi's presently pending objections do not relate to Mississippi Sound nor contest the validity of that Sound's closing lines recommended by the Master, all parties are in agreement as to that Sound and its boundary. P. 92.

Exceptions of Mississippi overruled, and Special Master's Supplemental Report and his recommendations, to the extent they are consistent with this opinion, adopted and confirmed.

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

Jim R. Bruce, Special Assistant Attorney General, argued the cause for defendant State of Mississippi. With him on the brief was *Edwin Lloyd Pittman*, Attorney General.

Jeffrey P. Minear argued the cause for the United States. On the brief were *Solicitor General Fried*, *Acting Assistant Attorney General Marzulla*, *Deputy Solicitor General Wallace*, and *Donald A. Carr*.*

JUSTICE BLACKMUN delivered the opinion of the Court.

In the Court's most recent opinion in this extended litigation, see 470 U. S. 93 (1985), Mississippi Sound was determined to be a historic bay under the Convention on the Territorial Sea and the Contiguous Zone, [1964] 15 U. S. T. (pt. 2) 1607, T. I. A. S. No. 5639. The waters of that Sound, therefore, are inland waters, and Alabama and Mississippi own their respective portions of the bed of Mississippi Sound. The Court, as is customary in cases of this kind, stated:

"The parties are directed promptly to submit to the Special Master a proposed appropriate decree for this Court's consideration; if the parties are unable to agree upon the form of the decree, each shall submit its proposal to the Master for his consideration and recommendation." 470 U. S., at 115.

**Grace Berg Schaible*, Attorney General, *G. Thomas Koester*, Assistant Attorney General, and *John Briscoe* filed a brief for the State of Alaska as *amicus curiae*.

Jurisdiction was retained to entertain such further proceedings as might be determined to be necessary or advisable to effectuate and supplement the decree and to determine the rights of the parties. *Ibid.*

The Supplemental Report dated March 16, 1987, of the Special Master, the Honorable Walter P. Armstrong, Jr., now has been filed and is before us. The Master notes therein, p. 2, that no disagreement remains among the parties with respect to the coastline and seaward boundary of Alabama. That much has been decided and is clear. The Master further notes, however, *id.*, at 3, that Mississippi and the United States are in disagreement as to the "seaward boundary" of Mississippi "at two points." Attached to the Report, as exhibits, are forms of a supplemental decree proposed respectively by the United States and by Mississippi. *Id.*, at 31 and 38. The Special Master ends his Report with conclusions and recommendations. *Id.*, at 26. Mississippi has noted exceptions. The United States is in opposition to those exceptions. Alabama at this point, of course, stands mute. Briefs have been filed and oral argument has been presented.

The Special Master concluded (a) that the decree proposed by Mississippi should *not* be entered, *ibid.*, and (b) that, while "the line proposed by the United States," would be "a preferable solution," it "would amount to a modification of the Court's opinion of February 26, 1985," because it "would be beyond the scope of the reference" to the Master. *Id.*, at 27. He has recommended that the Court "enter an order directing the parties to prepare and submit to the Special Master a decree" defining the seaward boundaries of Alabama and Mississippi "to the extent agreed upon"; defining Mississippi's seaward boundary between Petit Bois Island and Horn Island "as proposed in the decree submitted by the United States"; and, despite his expressed reservation noted above, defining the portion of Mississippi's seaward boundary from West Ship Island westward as a described line inter-

secting at its westernmost point with the already-determined Louisiana border.* *Ibid.*

I

The specific proceeding that culminated in this Court's opinion of February 26, 1985, reported at 470 U. S. 93, concerned, we thought, only Mississippi Sound and its boundary. See *id.*, at 94; Tr. of Oral Arg. 3. The Special Master's Report and his stated reservation as to the scope of the reference to him also appear to reflect that understanding. But in its argument to the Master and in its present exceptions, Mississippi seeks to extend the scope of this litigation to include its interest in seabed south of Mississippi Sound. The State's current arguments bear little relation to earlier proceedings unless one engrafts upon our 1985 opinion, and upon our direction therein for a proposed decree fixing the southern boundary of Mississippi Sound, an implication that Mississippi's rights, if any, *south* of that Sound's boundary are to be definitively determined in this phase of the litigation.

To the south of the western part of Mississippi Sound lies Chandeleur Sound, a body of water east of Louisiana's mainland and west of the offshore Chandeleur Islands that run north and south. Chandeleur Sound and Mississippi Sound generally lie perpendicular to each other. They are separated by Cat Island, West Ship Island, and East Ship Island. The latter two at one time formed a single island but became divided by hurricane action some years ago.

An earlier phase of this litigation led to the entry of a supplemental decree issued June 16, 1975, see *United States v. Louisiana (Louisiana Boundary Case)*, 422 U. S. 13, fixing the coastline (baseline) of Louisiana pursuant to the Court's decision of March 17, 1975, see 420 U. S. 529. Embodied in that decree is a line then stipulated to by the United States and the State of Louisiana delimiting Louisiana's interest in

*We necessarily assume that, by his repeated use of the term "seaward boundary," the Master is referring to Mississippi's coastline and not to its ultimate offshore boundary.

Chandeleur Sound north of the Chandeleur Islands. The Solicitor General advises us that the United States, in this litigation with Mississippi, offered to recognize Mississippi's rights "in the vicinity of Chandeleur Sound on the basis of an extension of the line stipulated" in the litigation between the United States and Louisiana (a line running from the location at that time of the northernmost of the Chandeleur Islands to a point near the middle of West Ship Island), but that Mississippi rejected that offer. Brief for United States 2-3. Mississippi acknowledges the rejection. Tr. of Oral Arg. 6. Thus, that easy solution to the controversy between the United States and Mississippi as to waters south of Mississippi Sound and in the vicinity of Chandeleur Sound proved to be unattainable. What remains in dispute is an area of about 150 square miles. *Id.*, at 16.

II

As has been stated above, the current phase of the litigation up to this point, so far as Mississippi is concerned, has dealt only with Mississippi Sound. It has not focused on Mississippi's interest south of Mississippi Sound. This being so, we sympathize with the Special Master's unease about the scope of the reference to him. With the case in its present somewhat confused posture, we are unwilling on the present record to determine the extent of Mississippi's rights south of Mississippi Sound without the parties' complete agreement and the Special Master's ready acquiescence.

Because Mississippi's exceptions to the Special Master's Supplemental Report do not relate at all to Mississippi Sound, and do not contest the validity of that Sound's closing lines recommended by the Master, we are left with a situation where all parties are in agreement as to that Sound and its boundary. The exceptions of Mississippi, as presented to us at this time, therefore are overruled but without prejudice to the advancement of such claims as any party might have with respect to the area south of Mississippi Sound and in the

vicinity of Chandeleur Sound in an appropriate separate chapter of these proceedings. The Supplemental Report dated March 16, 1987, of the Special Master and his recommendations, to the extent—and only to the extent—they are consistent with this opinion, are adopted and confirmed.

The parties once again are directed promptly to submit to the Special Master a proposed appropriate decree for this Court's consideration defining the claims of Alabama and Mississippi with respect to Mississippi Sound. If the parties are unable to agree upon the form of the decree, each shall submit its proposal to the Special Master for his consideration and recommendation. Each party shall bear its own costs; the actual expenses of the Special Master incurred with respect to this litigation since February 26, 1985, shall be borne half by the United States and half by Mississippi.

The Court retains jurisdiction to entertain such further proceedings, enter such orders, and issue such writs as from time to time may be determined to be necessary or advisable to effectuate and supplement the forthcoming decree and to determine the rights of the respective parties.

In order to facilitate the resolution of any question that might remain as to Chandeleur Sound, leave is granted the State of Mississippi and the United States, respectively, without further motion, to file a complaint with this Court setting forth its claim to any undecided portion of Chandeleur Sound. The complaint may be filed within 60 days of the date this opinion is filed. An opposing party shall have 45 days to respond. It is expected that all concerned will cooperate in expediting this remaining aspect of this phase of the litigation.

It is so ordered.

JUSTICE MARSHALL and JUSTICE KENNEDY took no part in the consideration or decision of this litigation.

IMMIGRATION AND NATURALIZATION
SERVICE *v.* ABUDU

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

No. 86-1128. Argued December 1, 1987—Decided March 1, 1988

Respondent, a native and citizen of Ghana, overstayed his visa. After he pleaded guilty in 1981 to drug charges, deportation proceedings were initiated, at which he expressly declined to seek asylum as a refugee. In 1982, he was ordered deported, and in 1984, the Board of Immigration Appeals (BIA) dismissed his appeal. In 1985, while his petition for review in the Court of Appeals was pending, respondent filed a motion with the BIA requesting a reopening of his deportation proceeding to enable him to apply for asylum and a withholding of deportation. He claimed that he had a well-founded fear that if he was returned to Ghana his life and freedom would be threatened by the government that had seized power in 1981. Moreover, in 1984, he had received a surprise visit from a former acquaintance who had become a Ghana government official and who, respondent believed, was attempting to entice him to return in order to force him to disclose the whereabouts of his brother and other government enemies. The BIA denied respondent's motion both on the ground that he had failed to make out a prima facie case of eligibility for asylum and on the alternative ground that he had failed to explain reasonably his decision not to request asylum in the first instance. The BIA noted that all of the facts set forth in the motion had been available to respondent at the time of the deportation hearing, except for the 1984 visit, which may have been in fact a purely social visit. The Court of Appeals consolidated respondent's petitions for review and affirmed the deportation order, but reversed the order denying the motion to reopen and remanded for further proceedings. Stating that the sole issue was whether respondent had made a prima facie case for reopening, the court ruled that the appropriate standard of judicial review was the strict standard that would be applied when passing on a motion for summary judgment, rather than an abuse-of-discretion standard.

Held:

1. Regardless of what may be the appropriate standard of judicial review when the BIA holds that the movant for reopening deportation proceedings has not established a prima facie case for the underlying relief sought (an issue not decided here), the abuse-of-discretion standard of review is appropriate when the BIA's denial of a motion to reopen

is based on its finding that the movant has not introduced previously unavailable, material evidence or, in an asylum application case, that the movant has not reasonably explained his failure to apply for asylum initially. The reasons why motions to reopen are disfavored in deportation proceedings are comparable to those that apply to petitions for rehearing and to motions for new trials on the basis of newly discovered evidence—particularly the strong public interest in bringing litigation to a close as promptly as is consistent with the interest in giving the adversaries a fair opportunity to develop and present their respective cases. The appropriate analogy is not a motion for summary judgment but, instead, a motion for a new trial in a criminal case on the basis of newly discovered evidence, as to which the moving party bears a heavy burden. Pp. 104–110.

2. If respondent had made a timely application for asylum, supported by the factual allegations and exhibits set forth in his motion to reopen, the Immigration Judge would have been required to grant him an evidentiary hearing. However, an alien who has already been found deportable has a much heavier burden when he first advances his request for asylum in a motion to reopen. The BIA did not abuse its discretion when it held that respondent had not reasonably explained his failure to apply for asylum prior to the completion of the initial deportation proceeding. Pp. 110–111.

802 F. 2d 1096, reversed.

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

Robert H. Klonoff argued the cause for petitioner. With him on the briefs were *Solicitor General Fried*, *Assistant Attorney General Willard*, *Deputy Solicitor General Wallace*, and *Marshall Tamor Golding*.

Dorothy A. Harper argued the cause and filed a brief for respondent.*

*Briefs of *amici curiae* urging affirmance were filed for the American Immigration Lawyers Association by *Robert D. Baizer*; and for Centro Presente, Inc., et al. by *Alan J. Rom* and *Robert Rubin*.

Arthur C. Helton filed a brief for the Lawyers Committee for Human Rights as *amicus curiae*.

JUSTICE STEVENS delivered the opinion of the Court.

Regulations promulgated by the Attorney General authorize deportable aliens to file motions to reopen their deportation proceedings to request asylum on the basis of newly discovered evidence. Denials of such motions are subject to judicial review in the United States courts of appeals. The question in this case is whether those courts should review such Board of Immigration Appeals (BIA) denials under an abuse-of-discretion standard, as petitioner contends, or under the strict standard that would be applied when passing on a motion for summary judgment, as the Court of Appeals held. 802 F. 2d 1096 (CA9 1986). Consistently with our prior cases confirming the BIA's broad discretion in considering motions to reopen, we conclude that the abuse-of-discretion standard applies and therefore reverse the judgment of the Court of Appeals.

I

Respondent, a native and citizen of Ghana, first entered the United States in 1965 as a student. While attending medical school in 1973, he spent his summer vacation in Ghana, and then reentered the United States on a student visa that authorized him to remain until 1976. After becoming a licensed physician, he married an American citizen and overstayed his visa. In 1981, he pleaded guilty to charges of attempting to obtain narcotic drugs (Demerol) by fraud. In due course, deportation proceedings were initiated, and respondent designated England as the country of deportation if necessary and expressly declined to seek asylum as a refugee. On July 1, 1982, the Immigration Judge ordered him deported,¹ and on August 14, 1984, the BIA dismissed his appeal.

¹ Respondent had declined to apply for asylum, but had argued instead that his marriage to a United States citizen made him eligible for an adjustment of status under 8 U. S. C. § 1255(a). The Immigration Judge denied the adjustment-of-status application, App. to Pet. for Cert. 28a, because respondent's drug conviction constituted a nonwaivable ground of exclud-

Respondent filed a petition for review in the Court of Appeals for the Ninth Circuit. While that petition was pending, on February 1, 1985, respondent filed a motion with the BIA requesting a reopening of his deportation proceeding to enable him to apply for asylum and a withholding of deportation. In that motion, which was supported by affidavits and other exhibits, respondent claimed that he had a well-founded fear that if England did not accept him and he was returned to Ghana, his life and freedom would be threatened by the regime in power. His fear was based largely on the facts that after the current government seized power in 1981, it had carried out a systematic campaign of persecution against its political enemies and that respondent's brother and certain close friends were among the targets of that campaign. Moreover, in 1984, respondent had received an unsolicited and surprise visit from a former acquaintance who had become a high official in the Ghana government. The visitor invited respondent to return to Ghana, ostensibly because qualified physicians are in short supply, but respondent concluded that his visitor actually wanted to entice him to return in order to force him to disclose the whereabouts of his brother and other enemies of the government.

The BIA first stated the standard for granting motions to reopen deportation proceedings in cases such as this:

"A motion to reopen deportation proceedings for the purpose of applying for asylum or withholding of deportation will only be granted where prima facie eligibility for such relief has been established and where the alien has reasonably explained his failure to assert the claim prior to completion of the deportation hearing. 8 CFR § 208.11. . . . Nor will reopening be granted unless the evidence sought to be offered is material, was not available, and could not have been discovered or presented at

ability, 8 U. S. C. § 1182(a)(23) (1982 ed., Supp. IV), and the BIA affirmed this determination, App. to Pet. for Cert. 24a.

the time of the original hearing. 8 CFR §§ 3.2, 103.5, 242.22" App. to Pet. for Cert. 15a.

The BIA then denied respondent's motion to reopen on both § 208.11 and *prima facie* case grounds, either of which would have sufficed. First, it held that respondent had not reasonably explained his failure to request asylum prior to the completion of the deportation proceedings, as required by Immigration and Naturalization Service (INS or Agency) regulations.² In support of this holding, the BIA noted that the Immigration Judge had continued the deportation hearing from November 10, 1981, until April 29, 1982, to give respondent an opportunity to apply for asylum, but that respondent had expressly declined to do so, and further, that all of the facts set forth in the motion—except for the surprise visit in 1984—had been available to respondent at the time of the hearing. With respect to the visit, the BIA observed that "the respondent's visitor was admittedly a long-time friend of the respondent's who in fact may have been paying a purely social visit." App. to Pet. for Cert. 17a.

Second, the BIA also held that the facts set forth in the motion to reopen did not show either a clear probability of persecution within the meaning of § 243(h) of the Immigration and Nationality Act (Act), 66 Stat. 214, as amended, 8

²Title 8 CFR § 208.11 (1987) provides in part:

"[A motion to reopen to request asylum] must reasonably explain the failure to request asylum prior to the completion of the exclusion or deportation proceeding. If the alien fails to do so, the asylum claim shall be considered frivolous, absent any evidence to the contrary."

Title 8 CFR § 3.2 (1987) provides in part:

"Motions to reopen in deportation proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing; nor shall any motion to reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted . . . unless the relief is sought on the basis of circumstances which have arisen subsequent to the hearing."

U. S. C. § 1253(h),³ or that respondent was eligible for asylum as a "refugee," see 8 U. S. C. § 1101(a)(42), under § 208 of the Act, 8 U. S. C. § 1158.⁴ In support of this holding, the BIA noted that no affidavit from his brother had been

³See *INS v. Stevic*, 467 U. S. 407 (1984) (mandatory withholding of deportation under § 243(h) only if alien can establish that his "life or freedom would be threatened" on account of race, religion, political opinion, etc.). Although respondent moved for reopening to apply for both asylum and withholding of deportation, Motion to Reopen to Permit Respondent to Apply for Asylum and Request Withholding of Deportation in No. 86-7075 (CA9), p. 1 (pp. 14-19 of Pleadings of the Record), the focus throughout the proceedings has been on the asylum application, and our discussion will maintain the same focus. This focus should not obscure the fact that our holding today applies to BIA reopening decisions regarding both asylum and withholding of deportation requests. First, the standard for granting reopening under 8 CFR § 3.2 (1987) is the same for both asylum and withholding of deportation requests; accordingly, the BIA's determination regarding whether "evidence sought to be offered [on reopening] is material and was not available and could not have been discovered or presented at the former hearing," *ibid.*, is subject to an abuse-of-discretion standard of review regardless of the underlying substantive claim asserted by the alien. Further, since all asylum requests "made after the institution of exclusion or deportation proceedings . . . shall also be considered as requests for withholding exclusion or deportation pursuant to section 243(h) of the Act," 8 CFR § 208.3(b) (1987); since, normally, "the relevant evidence will be identical on both claims," 802 F. 2d 1096, 1102 (CA9 1986) (case below), see *Matter of Mogharrabi*, Interim Dec. No. 3028, p. 12 (BIA June 12, 1987) ("[T]he core of evidence and testimony presented in support of the asylum and withholding applications will in almost every case be virtually the same"); and since it is easier to prove well-founded fear of persecution than clear probability of persecution, the BIA's application of 8 CFR § 208.11 (1987), which on its face applies only to asylum requests on reopening, will also usually be dispositive of its decision whether to reopen to permit a withholding of deportation request. In sum, our holding today is that a court of appeals should review the BIA only for abuse of discretion when the Board denies reopening on § 3.2 or § 208.11 grounds, regardless of the underlying basis of the alien's request. See n. 10, *infra*.

⁴See *INS v. Cardoza-Fonseca*, 480 U. S. 421 (1987) ("well-founded fear of persecution" contains subjective and objective components, but does not require proof that persecution is more likely than not to occur if alien is deported).

offered, and that there was no satisfactory explanation of the details of respondent's relationship with the enemies of the government or the reasons why that relationship might lead to his persecution. The BIA concluded that his conjectures about probable threats were too speculative to constitute a *prima facie* showing of eligibility for either asylum or withholding of deportation.

When respondent petitioned for review of the order denying his motion to reopen, the Court of Appeals consolidated that petition with his pending petition to review the original order of deportation. The court affirmed the deportation order,⁵ but reversed the order denying the motion to reopen and remanded for an evidentiary hearing on the asylum and withholding of deportation claims. In support of the latter holding, the court began by noting that although the BIA has "wide discretion" to deny motions to reopen, and although such denials are normally reviewed only for "abuse of discretion," in this case "the sole issue" was whether respondent had "presented a *prima facie* case for reopening." 802 F. 2d, at 1099-1100. The court stated that "[w]hen the Board restricts its decision [refusing to reopen] to whether the alien has established a *prima facie* case it is only this basis for its decision that we review." *Id.*, at 1100 (internal quotation omitted). The court then reasoned:

"Upon motion to reopen, the Board must draw reasonable inferences from the facts in favor of the petitioner. A motion to reopen is analogous to a motion for summary judgment; each is accompanied by affidavits and other evidentiary material and may be granted if the motion presents 'proof that will support the desired findings [of a *prima facie* case] . . . until it is contradicted or overruled by other evidence.' *Maroufi v. INS*, 772 F. 2d 597, 599 (9th Cir. 1985). In both cases, inferences are to

⁵ Respondent did not cross-petition for a writ of certiorari from this holding.

be drawn in favor of the party whose entitlement to further proceedings is at stake: the non-moving party under Fed. R. Civ. P. 56 and the alien seeking reopening under 8 CFR 3.2. See, e. g., *U. S. v. Diebold, Inc.*, 369 U. S. 654, 655 (1962) ('choice of inferences to be drawn from the subsidiary facts contained in the affidavits . . . submitted [is inappropriate]. On summary judgment the inferences to be drawn from the underlying facts contained in such materials must be viewed in the light most favorable to the party opposing the motion.') . . .

"[F]or purposes of the limited screening function of motions to reopen, the BIA must draw all reasonable inferences in favor of the alien unless the evidence presented is 'inherently unbelievable.' *Hernandez-Ortiz* [v. INS], 777 F. 2d [509,] 514 [CA9 1985].

"While the visit from the Ghanaian official could be viewed as benign, it could also be viewed, as Dr. Abudu suggests, as threatening. Viewing the inferences in favor of the petitioner as we must, we conclude that the affidavits made out a prima facie case of well-founded fear of persecution." *Id.*, at 1101-1102 (citations omitted).

Although the BIA had denied respondent's motion to reopen *both* on the ground that he had failed to make out a prima facie case for asylum *and* on the ground that he had failed to explain reasonably his decision not to request asylum in the first instance, and although the Government had contended in the Court of Appeals that "petitioner *neither* offered a reasonable explanation for the belatedness of his application for asylum and withholding of deportation *nor* made a prima facie showing of entitlement to such relief," Brief for Respondent in Nos. 84-7686 and 86-7075 (CA9), p. 16 (emphasis added), the Court of Appeals did not discuss, as a separate matter, the "failure to explain" ground in the BIA's decision. The Court of Appeals' statement that "the

sole issue [in this case] is whether petitioner presented a *prima facie* case for reopening," 802 F. 2d, at 1100, reveals that the court seems to have blended the two grounds into one.⁶

The petition for certiorari described this case as involving "the extent to which a reviewing court is required to defer to the BIA's ruling on a motion to reopen deportation proceedings." Pet. for Cert. 8. Like the Court of Appeals' opinion, the questions presented, though, did not clearly separate the two grounds upon which the BIA had denied respondent's motion to reopen,⁷ and respondent reported to us, incor-

⁶ Early in its opinion, the Court of Appeals did state, correctly, that the BIA had denied reopening both because of respondent's failure to explain the belated asylum application and because of his failure to make out a *prima facie* showing for asylum relief. 802 F. 2d, at 1099. The Court of Appeals later commented:

"The Board incorrectly found that all the considerations upon which Dr. Abudu relied in making his asylum and prohibition against deportation claims were in existence at the time he made the determination not to apply for such relief." *Id.*, at 1102.

This statement was erroneous. The Board's actual finding was:

"We are satisfied from a careful review of the record that the respondent has not reasonably explained his failure to file his application at the hearing. 8 CFR § 208.11; *Matter of Escobar*, 18 I&N Dec. 412 (BIA 1979). He was aware at the time of the hearing of the problems which his brother and other associates were allegedly facing, yet apparently those considerations did not then prompt him to seek asylum. Now, in seeking reopening, he relies heavily on those same considerations. Given that so much of the evidence upon which the respondent now bases his persecution claim was available at the time of the hearing, we are not persuaded that the visit by a member of the present government was by itself so alarming that it explains the respondent's failure to apply for asylum at the hearing." App. to Pet. for Cert. 17a.

It may be that the Court of Appeals' confusion regarding the BIA's holding led to its addressing the two separate grounds on which the BIA had relied as if they were one.

⁷ "QUESTIONS PRESENTED

"1. Whether a decision by the Board of Immigration Appeals (BIA) denying an alien's motion to reopen deportation proceedings on the ground

rectly, that "the sole question before the Ninth Circuit was whether the Respondent had established a prima facie case of a well founded fear of persecution." Brief in Opposition 20. Petitioner's reply memorandum, though, eliminated any possible doubts about the issue it was asking us to resolve:

"[T]he important question for present purposes [is] whether the BIA correctly found that respondent had not offered significant new evidence and had not adequately explained his previous failure to seek asylum or withholding of deportation (see 8 CFR 3.2, 208.11)." Reply Memorandum for Petitioner 2, n. 2.⁸

that the alien did not make a prima facie showing of entitlement to relief must be affirmed if it is plausible and not arbitrary.

"2. Whether the BIA, in ruling on an alien's motion to reopen deportation proceedings, is required to draw all reasonable inferences in favor of the alien." Pet. for Cert. (I).

⁸Thus, this case comes to us in a different posture than did *INS v. Stevic*, 467 U. S. 407 (1984). There, the BIA had issued an opinion denying reopening to the alien movant on alternative grounds similar to those relied upon by the BIA in today's case. That is, the BIA in *Stevic* had held (1) that Stevic had failed to show that the new evidence was unavailable at the initial deportation hearing, and thus could not overcome the threshold of 8 CFR § 3.2 (1987), and (2) that Stevic had "failed to submit prima facie evidence" of the substantive ground on which he sought relief (that his freedom would be threatened upon return to Yugoslavia on account of his political opinion). *INS v. Stevic*, *supra*, at 411, and n. 3. The Court of Appeals in *Stevic* held that a change in the law between Stevic's initial deportation hearing and his motion to reopen had changed the legal standard for the underlying substantive claim, and thus that Stevic was entitled to a hearing under the new, more lenient standard. We reversed, holding that the standard for gaining mandatory withholding of deportation under § 243(h) had not been altered by the Refugee Act of 1980. See n. 3, *supra*. Thus, although the BIA had relied upon alternative grounds in *Stevic* similar to those it relied upon in respondent's case—and accordingly one could suggest that we should decide the underlying substantive issue here just as we did in *Stevic*—the crucial difference between the two cases is that in *Stevic* the issue whether sufficient new evidence was available to require reopening depended upon a determination whether the underlying substantive standard for withholding of deportation had been altered, while in today's case the issue whether respondent reasonably explained his

Thus, we granted certiorari, 480 U. S. 930 (1987), not to decide the substantive issues of what constitutes a prima facie case for establishing eligibility for asylum on the basis of a well-founded fear of persecution, or of what standard of review applies, either initially or on motion to reopen, when the BIA rests its grant or denial of relief squarely on prima facie case grounds,⁹ but rather to determine the standard a Court of Appeals must apply when reviewing the BIA's conclusion that an alien has not reasonably explained his failure to assert his asylum claim at the outset.

II

There are at least three independent grounds on which the BIA may deny a motion to reopen. First, it may hold that the movant has not established a prima facie case for the underlying substantive relief sought. The standard of review of such a denial is not before us today, as we have explained. Second, the BIA may hold that the movant has not introduced previously unavailable, material evidence, 8 CFR §3.2

failure to apply for asylum initially does not so depend upon how one states the underlying substantive standard, but rather may be resolved as an independent matter. Unlike the petition for writ of certiorari and reply memorandum in today's case, which asked us to resolve an issue regarding agency discretion on reopening and not the underlying substantive standard for determining eligibility for asylum, the petition for writ of certiorari in *Stevic*, as well as the brief in opposition and reply memorandum, discussed only the nature of the underlying substantive standard.

⁹Just last Term we stated that "[t]here is obviously some ambiguity in a term like 'well-founded fear' which can only be given concrete meaning through a process of case-by-case adjudication." *INS v. Cardoza-Fonseca*, 480 U. S., at 448. The BIA has begun this post-*Cardoza-Fonseca* process of giving meaning to "well-founded fear of persecution." *Matter of Mogharrabi*, Interim Dec. No. 3028, at 9 (after canvassing various approaches taken by Courts of Appeals, adopts general standard set forth by Fifth Circuit in *Guevara Flores v. INS*, 786 F. 2d 1242 (1986), cert. denied, 480 U. S. 930 (1987), viz., "that an applicant for asylum has established a well-founded fear if he shows that a reasonable person in his circumstances would fear persecution"). We express no opinion on the BIA's recent formulation.

(1987), or, in an asylum application case, that the movant has not reasonably explained his failure to apply for asylum initially, 8 CFR § 208.11 (1987). (The issues under the two regulations may, of course, both involve the incremental significance of whatever allegedly new evidence is introduced by the movant.) We decide today that the appropriate standard of review of such denials is abuse of discretion. Third, in cases in which the ultimate grant of relief is discretionary (asylum, suspension of deportation, and adjustment of status, but not withholding of deportation), the BIA may leap ahead, as it were, over the two threshold concerns (*prima facie* case and new evidence/reasonable explanation), and simply determine that even if they were met, the movant would not be entitled to the discretionary grant of relief. We have consistently held that denials on this third ground are subject to an abuse-of-discretion standard. *INS v. Rios-Pineda*, 471 U. S. 444 (1985) (suspension of deportation); *INS v. Baganmasbad*, 429 U. S. 24 (1976) (adjustment of status).

We have discussed 8 CFR § 3.2 (1987), which is one of the two regulations before us today, in dicta:

"[Section 3.2] is framed negatively; it directs the Board not to reopen unless certain showings are made. It does not affirmatively require the Board to reopen the proceedings under any particular condition. Thus, the regulations may be construed to provide the Board with discretion in determining under what circumstances proceedings should be reopened." *INS v. Jong Ha Wang*, 450 U. S. 139, 144, n. 5 (1981).

This footnote, and our subsequent citations of it, *INS v. Rios-Pineda*, *supra*, at 449; *INS v. Phinpathya*, 464 U. S. 183, 188, n. 6 (1984),¹⁰ stand for the proposition that the BIA

¹⁰ Respondent attempts to distinguish *Jong Ha Wang*, *Phinpathya*, and *Rios-Pineda*, by arguing that the key standard for determining eligibility for suspension of deportation (whether the deportation would result in extreme hardship to the alien) is itself established at the discretion of the BIA, see 8 U. S. C. §§ 1254(a)(1) and 1103; 8 CFR § 2.1 (1987); *INS*

has discretion to deny a motion to reopen even if the alien has made out a *prima facie* case for relief; that is, our prior glosses on § 3.2 have served as support for an abuse-of-discretion standard of review for the third type of denial, where the BIA simply refuses to grant relief that is itself discretionary in nature, even if the alien has surmounted the requisite thresholds of *prima facie* case and new evidence/reasonable explanation.

But even before reaching the ultimate decision on an alien's application for discretionary relief from deportation, or before reaching the point at which mandatory relief is called for in a withholding of deportation case, the BIA's discretion may be called into play regarding the specific, evidentiary requirements of §§ 3.2 and 208.11. That is, in a given case the BIA may determine, either as a sufficient ground for denying relief or as a necessary step toward granting relief, whether

v. *Jong Ha Wang*, 450 U. S. 139, 144–146 (1981), whereas the standard for determining eligibility for asylum is determined by statute, see 8 U. S. C. §§ 1158 and 1101(a)(42)(A). Thus, respondent continues, *Jong Ha Wang* and its successor cases are of limited value because they all arose in the suspension of deportation setting, where the BIA's discretion to determine eligibility is greater than it is in the asylum setting. Without commenting on the validity of respondent's conclusion regarding the varying degrees of discretion the BIA may exercise in suspension of deportation and asylum settings, we note that even if respondent's point were correct, it would be irrelevant for purposes of this case. The BIA's regulation that provides for reopening of deportation proceedings, 8 CFR § 3.2 (1987), applies to all motions to reopen, regardless of the underlying substantive basis of the alien's claim. Further, the separate regulation relied on by the BIA in denying respondent's motion to reopen, 8 CFR § 208.11 (1987), addresses not the underlying substantive standard for an asylum claim, but rather the additional threshold an alien must overcome on a motion to reopen to make such a claim. As we are simply defining the standard a court of appeals must apply in reviewing the BIA's denial of reopening on §§ 3.2 and 208.11 grounds—and not the standard for establishing eligibility for asylum, whether initially or on motion to reopen—whatever distinction may exist regarding the BIA's discretion in determining eligibility for suspension of deportation and for asylum does not affect the question we address today. See n. 3, *supra*.

the alien has produced previously unavailable, material evidence (§ 3.2), and, in asylum cases, whether the alien has reasonably explained his or her failure to request asylum initially (§ 208.11). We hold today that such decisions are subject to an abuse-of-discretion standard of review.

The reasons why motions to reopen are disfavored in deportation proceedings are comparable to those that apply to petitions for rehearing,¹¹ and to motions for new trials on the basis of newly discovered evidence.¹² There is a strong public interest in bringing litigation to a close as promptly as is consistent with the interest in giving the adversaries a fair opportunity to develop and present their respective cases. The relevance of this interest to deportation proceedings was pointedly explained in an opinion that we recently quoted with approval:

¹¹ See, e. g., *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U. S. 281, 294–296 (1974) (reopening of Interstate Commerce Commission licensing hearing only “in the most extraordinary circumstances”); *Cities of Campbell v. FERC*, 248 U. S. App. D. C. 267, 278, 770 F. 2d 1180, 1191 (1985) (reopening of Federal Energy Regulatory Commission evidentiary hearing “a matter of agency discretion, . . . reserved for extraordinary circumstances”); *Duval Corp. v. Donovan*, 650 F. 2d 1051, 1054 (CA9 1981) (reconsideration of Federal Mine Safety and Health Review Commission order “addressed to that body’s discretion” and “[d]enial of such a petition should be overturned only upon a showing of the clearest abuse of discretion”); *Nance v. EPA*, 645 F. 2d 701, 717 (CA9) (“The administrative process cannot provide for the constant reopening of the record to consider new facts, . . . and it is for the agency, not this court to determine when such reopening is appropriate, unless the failure to reconsider can be characterized an abuse of discretion”), cert. denied *sub nom. Crow Tribe of Indians, Montana v. EPA*, 454 U. S. 1081 (1981).

¹² See, e. g., *United States v. Tucker*, 836 F. 2d 334, 336 (CA7 1988) (new trial only if newly discovered evidence “would probably lead to an acquittal in the event of a trial”); *United States v. Vergara*, 714 F. 2d 21, 22 (CA5 1983) (“[S]tandard for review of the denial of a motion for new trial on [grounds of newly discovered evidence] rests in the sound discretion of the trial court”); 3 C. Wright, *Federal Practice and Procedure* § 557, p. 315 (1982) (motions for new trial on grounds of newly discovered evidence “are not favored by the courts and are viewed with great caution”).

“If INS discretion is to mean anything, it must be that the INS has some latitude in deciding when to reopen a case. The INS should have the right to be restrictive. Granting such motions too freely will permit endless delay of deportation by aliens creative and fertile enough to continuously produce new and material facts sufficient to establish a *prima facie* case. It will also waste the time and efforts of immigration judges called upon to preside at hearings automatically required by the *prima facie* allegations[, a requirement not disputed in this case].” *INS v. Jong Ha Wang*, 450 U. S., at 144, n. 5 (quoting from Judge Wallace’s dissenting opinion in *Villena v. INS*, 622 F. 2d 1352, 1362 (CA9 1980) (en banc) (CA9 companion case to *Jong Ha Wang*).

As we have detailed above, the Court of Appeals in this case purported to decide “whether [respondent] presented a *prima facie* case for reopening.” 802 F. 2d, at 1100. In so doing, the Court of Appeals set out a standard for BIA motions to reopen deportation proceedings, see *supra*, at 100–101, that appears to have conflated the quite separate issues whether the alien has presented a *prima facie* case for asylum with whether the alien has reasonably explained his failure to apply for asylum initially and has indeed offered previously unavailable, material evidence.¹³ To the extent that

¹³ See, e. g., *Aviles-Torres v. INS*, 790 F. 2d 1433, 1436 (CA9 1986) (*prima facie* showing of entitlement to relief and explanation of failure to present evidence earlier are separate elements of reopening motion); *Bahramnia v. INS*, 782 F. 2d 1243, 1245 (CA5) (requirements of §§ 3.2 and 208.11 “additional . . . to the establishment of a *prima facie* case of eligibility”), cert. denied, 479 U. S. 930 (1986); *Ananeh-Firempong v. INS*, 766 F. 2d 621, 627 (CA1 1985) (§ 3.2 requirement separate from *prima facie* case requirement); *Duran v. INS*, 756 F. 2d 1338, 1340, n. 1 (CA9 1985) (two requirements for reopening to request asylum: *prima facie* case of eligibility for relief and reasonable explanation for failure to apply initially, under § 208.11); *Samimi v. INS*, 714 F. 2d 992, 994 (CA9 1983) (“To justify reopening on the basis of an asylum claim, a petitioner must make a *prima facie* showing that he is eligible for the relief sought, . . . and explain

the reasoning of the Court of Appeals addresses the issue of reopening rather than the issue of prima facie case for asylum,¹⁴ it is not supported by our cases, and has been consistently rejected by other Circuits and by other panels in the Ninth Circuit.¹⁵ We have never suggested that all ambigu-

his failure to raise the asylum claim in the previous proceeding. 8 CFR §§ 3.2, 208.11 (1983). Somewhat related to this second requirement is the requirement that the petitioner offer new, material evidence that could not have been discovered and presented at the former hearing. 8 CFR §§ 3.2, 103.5, 242.22 (1983)).

¹⁴ As we have stated throughout the opinion, to the extent that the Court of Appeals' reasoning addresses the issue of prima facie case for asylum, we offer no view of its validity, save our observation, *infra*, at 111, that the untimeliness of an asylum claim may be relevant to the BIA's decision as to the prima facie case issue on reopening.

¹⁵ See, e. g., *Torres-Hernandez v. INS*, 812 F. 2d 1262, 1264 (CA9 1987) (abuse-of-discretion standard applied to denial of motion to reopen on § 3.2 grounds); *Sakhavat v. INS*, 796 F. 2d 1201, 1203 (CA9 1986) (abuse-of-discretion standard applied to denial of reopening on § 208.11 grounds); *Conti v. INS*, 780 F. 2d 698, 701 (CA7 1985) (abuse-of-discretion standard applied to denial of reopening on § 3.2 grounds); *Ananeh-Firempong v. INS*, *supra*, at 626 (abuse-of-discretion standard applied to denial of motion to reopen in which alien complied with § 3.2 by alleging new facts); *Riasati v. INS*, 738 F. 2d 1115, 1119 (CA10 1984) (abuse-of-discretion standard applied to denial of motion to reopen on § 3.2 materiality grounds); *Motamedi v. INS*, 713 F. 2d 575, 576 (CA10 1983) (BIA abused its discretion in denying motion to reopen when alien had complied with § 208.11 by reasonably explaining his failure to request asylum initially); *LeBlanc v. INS*, 715 F. 2d 685, 689 (CA1 1983) (suggesting that our holding in *INS v. Jong Ha Wang*, 450 U. S. 139 (1981), permits the BIA, pursuant to § 3.2, to "decide that it will not reopen in cases such as the one at bar, where the movant may have made out a prima facie case, but the Board is persuaded that for other assertedly legitimate reasons it would not, as a matter of discretion, allow suspension"); *Samimi v. INS*, *supra*, at 994-995 (abuse-of-discretion standard applied to denial of reopening on §§ 3.2 and 208.11 grounds); *Chae Kim Ro v. INS*, 670 F. 2d 114 (CA9 1982) (abuse-of-discretion standard applied to denial of reopening on § 3.2 grounds); *Au Yi Lau v. INS*, 181 U. S. App. D. C. 99, 107, 555 F. 2d 1036, 1044 (1977) ("At most, [§ 3.2] dictates that the Board consider any new circumstances advanced in support of a motion to reopen, and that the Board not abuse its discretion in determining whether the circumstances are sufficient to justify granting of

ities in the factual averments must be resolved in the movant's favor, and we have never analogized such a motion to a motion for summary judgment. The appropriate analogy is a motion for a new trial in a criminal case on the basis of newly discovered evidence, as to which courts have uniformly held that the moving party bears a heavy burden. See, e. g., *Taylor v. Illinois*, 484 U. S. 400, 414, n. 18 (1988) (citing cases). Moreover, this is the tenor of the Attorney General's regulations, which plainly disfavor motions to reopen. See n. 2, *supra*. In sum, although all adjudications by administrative agencies are to some degree judicial and to some degree political¹⁶—and therefore an abuse-of-discretion standard will often apply to agency adjudications not governed by specific statutory commands—INS officials must exercise especially sensitive political functions that implicate questions of foreign relations,¹⁷ and therefore the reasons for giving deference to agency decisions on petitions for reopening or reconsideration in other administrative contexts apply with even greater force in the INS context.

III

We have no doubt that if respondent had made a timely application for asylum, supported by the factual allegations and exhibits set forth in his motion to reopen, the Immigration Judge would have been required to grant him an eviden-

the motion"); see also, e. g., *Brown v. INS*, 249 U. S. App. D. C. 333, 337, 775 F. 2d 383, 387 (1985) (abuse-of-discretion standard applied to denial of motion to reopen on § 3.8 grounds due to lack of evidentiary support).

¹⁶ See, e. g., *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U. S. 50, 67–70 (1982) (plurality opinion) (Constitution authorizes Congress to delegate adjudication of "public rights" to non-Article III judges); see also *id.*, at 91 (REHNQUIST, J., concurring in judgment) ("public rights" doctrine might sustain other powers granted non-Article III judges under the Bankruptcy Act of 1978, but not the adjudication of appellant's contract suit).

¹⁷ Cf., e. g., *Hampton v. Mow Sun Wong*, 426 U. S. 88, 101–102, n. 21 (1976) ("[T]he power over aliens is of a political character and therefore subject only to narrow judicial review").

tiary hearing. See 8 CFR §§ 208.6 (1987) (requiring appearance before immigration officer for asylum application) and 208.10(c) (permitting presentation of evidence in deportation proceedings). We are equally convinced, however, that an alien who has already been found deportable has a much heavier burden when he first advances his request for asylum in a motion to reopen. In passing on the sufficiency of such a motion, the BIA is entitled to attach significance to its untimeliness, both for the purpose of evaluating the probability that the movant can prove his allegations and for the purpose of determining whether the movant has complied with the regulation requiring a reasonable explanation for the failure to request asylum during the deportation proceeding.

In this case we have no hesitation in concluding that the BIA did not abuse its discretion when it held that respondent had not reasonably explained his failure to apply for asylum prior to the completion of the initial deportation proceeding. The surprise visit in 1984 was admittedly an event with uncertain meaning, but it was neither arbitrary nor unreasonable for the BIA to regard it as not providing any significant additional support for a claim that respondent had not previously considered strong enough to prompt him to assert that he had a well-founded fear of persecution.

The portion of the Court of Appeals' judgment that reversed the BIA order denying the motion to reopen is reversed.

It is so ordered.

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

CITY OF ST. LOUIS *v.* PRAPROTNIKCERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT

No. 86-772. Argued October 7, 1987—Decided March 2, 1988

Two years after respondent, a management-level employee in one of petitioner city's agencies, successfully appealed a temporary suspension to petitioner's Civil Service Commission (Commission), he was transferred to a clerical position in another city agency, from which he was laid off the next year. In respondent's suit under 42 U. S. C. § 1983, the jury found petitioner liable on the theory that respondent's First Amendment rights had been violated through retaliatory actions taken in response to his suspension appeal. The Court of Appeals affirmed the judgment entered on this verdict, finding that the jury had implicitly determined that respondent's layoff was brought about by an unconstitutional city policy. Applying a test under which a "policymaker" is one whose employment decisions are "final" in the sense that they are not subjected to *de novo* review by higher ranking officials, the court concluded that petitioner could be held liable for adverse personnel decisions made by respondent's supervisors.

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

798 F. 2d 1168, reversed and remanded.

JUSTICE O'CONNOR, joined by THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE SCALIA, concluded that:

1. Petitioner's failure to timely object under Federal Rule of Civil Procedure 51 to a jury instruction on municipalities' § 1983 liability for their employees' unconstitutional acts does not deprive this Court of jurisdiction to determine the proper legal standard for imposing such liability. The same legal issue was raised by petitioner's motions for summary judgment and a directed verdict, was considered and decided by the Court of Appeals, and is likely to recur in § 1983 litigation against municipalities. Review in this Court will not undermine the policy of judicial efficiency that underlies Rule 51. Pp. 118-121.

2. The Court of Appeals applied an incorrect legal standard for determining when isolated decisions by municipal officials or employees may expose the municipality to § 1983 liability. The identification of officials having "final policymaking authority" is a question of state (including local) law, rather than a question of fact for the jury. Here, it appears that petitioner's City Charter gives the authority to set employment policy to the Mayor and Aldermen, who are empowered to enact ordinances,

and to the Commission, whose function is to hear employees' appeals. Petitioner cannot be held liable unless respondent proved the existence of an unconstitutional policy promulgated by officials having such authority. The Mayor and Aldermen did not enact an ordinance permitting retaliatory transfers or layoffs. Nor has the Commission indicated that such actions were permissible; it has, on the contrary, granted respondent at least partial relief in a series of appeals from adverse personnel decisions. The Court of Appeals' findings that the decisions of respondent's supervisors were not individually reviewed for "substantive propriety" by higher supervisory officials, and were accorded substantial deference by the Commission on appeal, are insufficient to support the conclusion that the supervisors had been delegated the authority to establish transfer and layoff policy. When a subordinate's discretionary decisions are constrained or subjected to review by authorized policymakers, they, and not the subordinate, have *final* policymaking authority. Positing a delegation based on their mere acquiescence in, or failure to investigate the basis of, the subordinate's decisions does not serve § 1983's purposes where (as here) the wrongfulness of those decisions arises from a retaliatory motive or other unstated rationale. Pp. 121-131.

JUSTICE BRENNAN, joined by JUSTICE MARSHALL and JUSTICE BLACKMUN, agreed that respondent's supervisor at his first agency did not possess delegated authority to establish final employment policy such that petitioner could be held liable under § 1983 for the allegedly unlawful decision to transfer respondent to a dead-end job, but concluded that in any case in which the policymaking authority of a municipal tortfeasor is in doubt, although state law will naturally be the appropriate starting point, ultimately the factfinder must determine where such policymaking authority actually resides, and not simply where the applicable state law purports to put it. JUSTICE BRENNAN also concluded that the "custom or usage" doctrine cannot compensate for the inherent inflexibility of an approach that relies exclusively on state law, for that doctrine simply does not apply to isolated unconstitutional acts by subordinates having *de facto*, but not statutory, final policymaking authority; that a subordinate's decisions are not rendered nonfinal simply because they are subject to some form of review, however limited; and that the question is open whether a municipality can be subjected to liability for a policy that, while not unconstitutional in and of itself, may give rise to constitutional deprivations. Pp. 132-147.

O'CONNOR, J., announced the judgment of the Court and delivered an opinion, in which REHNQUIST, C. J., and WHITE and SCALIA, JJ., joined. BRENNAN, J., filed an opinion concurring in the judgment, in which MARSHALL and BLACKMUN, JJ., joined, *post*, p. 132. STEVENS, J., filed a dis-

senting opinion, *post*, p. 147. KENNEDY, J., took no part in the consideration or decision of the case.

James J. Wilson argued the cause for petitioner. With him on the briefs was *Julian L. Bush*.

Charles R. Oldham argued the cause for respondent. With him on the brief were *Julius LeVonne Chambers* and *Eric Schnapper*.*

JUSTICE O'CONNOR announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE SCALIA join.

This case calls upon us to define the proper legal standard for determining when isolated decisions by municipal officials or employees may expose the municipality itself to liability under 42 U. S. C. § 1983.

I

The principal facts are not in dispute. Respondent James H. Praprotnik is an architect who began working for petitioner city of St. Louis in 1968. For several years, respondent consistently received favorable evaluations of his job performance, uncommonly quick promotions, and significant increases in salary. By 1980, he was serving in a management-level city planning position at petitioner's Community Development Agency (CDA).

The Director of CDA, Donald Spaid, had instituted a requirement that the agency's professional employees, including architects, obtain advance approval before taking on private clients. Respondent and other CDA employees ob-

**Benna Ruth Solomon*, *Joyce Holmes Benjamin*, *Beate Bloch*, and *Carter G. Phillips* filed a brief for the International City Management Association et al. as *amici curiae* urging reversal.

Michael H. Gottesman, *David M. Silberman*, and *Laurence Gold* filed a brief for the American Federation of Labor and Congress of Industrial Organizations et al. as *amici curiae* urging affirmance.

Mark Stodola and *Thomas M. Carpenter* filed a brief for the city of Little Rock et al. as *amicus curiae*.

jected to the requirement. In April 1980, respondent was suspended for 15 days by CDA's Director of Urban Design, Charles Kindleberger, for having accepted outside employment without prior approval. Respondent appealed to the city's Civil Service Commission, a body charged with reviewing employee grievances. Finding the penalty too harsh, the Commission reversed the suspension, awarded respondent backpay, and directed that he be reprimanded for having failed to secure a clear understanding of the rule.

The Commission's decision was not well received by respondent's supervisors at CDA. Kindleberger later testified that he believed respondent had lied to the Commission, and that Spaid was angry with respondent.

Respondent's next two annual job performance evaluations were markedly less favorable than those in previous years. In discussing one of these evaluations with respondent, Kindleberger apparently mentioned his displeasure with respondent's 1980 appeal to the Civil Service Commission. Respondent appealed both evaluations to the Department of Personnel. In each case, the Department ordered partial relief and was upheld by the city's Director of Personnel or the Civil Service Commission.

In April 1981, a new Mayor came into office, and Donald Spaid was replaced as Director of CDA by Frank Hamsher. As a result of budget cuts, a number of layoffs and transfers significantly reduced the size of CDA and of the planning section in which respondent worked. Respondent, however, was retained.

In the spring of 1982, a second round of layoffs and transfers occurred at CDA. At that time, the city's Heritage and Urban Design Commission (Heritage) was seeking approval to hire someone who was qualified in architecture and urban planning. Hamsher arranged with the Director of Heritage, Henry Jackson, for certain functions to be transferred from CDA to Heritage. This arrangement, which made it possible for Heritage to employ a relatively high-level "city planning

manager," was approved by Jackson's supervisor, Thomas Nash. Hamsher then transferred respondent to Heritage to fill this position.

Respondent objected to the transfer, and appealed to the Civil Service Commission. The Commission declined to hear the appeal because respondent had not suffered a reduction in his pay or grade. Respondent then filed suit in Federal District Court, alleging that the transfer was unconstitutional. The city was named as a defendant, along with Kinleberger, Hamsher, Jackson (whom respondent deleted from the list before trial), and Deborah Patterson, who had succeeded Hamsher at CDA.

At Heritage, respondent became embroiled in a series of disputes with Jackson and Jackson's successor, Robert Killen. Respondent was dissatisfied with the work he was assigned, which consisted of unchallenging clerical functions far below the level of responsibilities that he had previously enjoyed. At least one adverse personnel decision was taken against respondent, and he obtained partial relief after appealing that decision.

In December 1983, respondent was laid off from Heritage. The layoff was attributed to a lack of funds, and this apparently meant that respondent's supervisors had concluded that they could create two lower level positions with the funds that were being used to pay respondent's salary. Respondent then amended the complaint in his lawsuit to include a challenge to the layoff. He also appealed to the Civil Service Commission, but proceedings in that forum were postponed because of the pending lawsuit and have never been completed. Tr. Oral Arg. 31-32.

The case went to trial on two theories: (1) that respondent's First Amendment rights had been violated through retaliatory actions taken in response to his appeal of his 1980 suspension; and (2) that respondent's layoff from Heritage was carried out for pretextual reasons in violation of due process. The jury returned special verdicts exonerating

each of the three individual defendants, but finding the city liable under both theories. Judgment was entered on the verdicts, and the city appealed.

A panel of the Court of Appeals for the Eighth Circuit found that the due process claim had been submitted to the jury on an erroneous legal theory and vacated that portion of the judgment. With one judge dissenting, however, the panel affirmed the verdict holding the city liable for violating respondent's First Amendment rights. 798 F. 2d 1168 (1986). Only the second of these holdings is challenged here.

The Court of Appeals found that the jury had implicitly determined that respondent's layoff from Heritage was brought about by an unconstitutional city policy. *Id.*, at 1173. Applying a test under which a "policymaker" is one whose employment decisions are "final" in the sense that they are not subjected to *de novo* review by higher ranking officials, the Court of Appeals concluded that the city could be held liable for adverse personnel decisions taken by respondent's supervisors. *Id.*, at 1173-1175. In response to petitioner's contention that the city's personnel policies are actually set by the Civil Service Commission, the Court of Appeals concluded that the scope of review before that body was too "highly circumscribed" to allow it fairly to be said that the Commission, rather than the officials who initiated the actions leading to respondent's injury, were the "final authority" responsible for setting city policy. *Id.*, at 1175.

Turning to the question whether a rational jury could have concluded that respondent had been injured by an unconstitutional policy, the Court of Appeals found that respondent's transfer from CDA to Heritage had been "orchestrated" by Hamsher, that the transfer had amounted to a "constructive discharge," and that the injury had reached fruition when respondent was eventually laid off by Nash and Killen. *Id.*, at 1175-1176, and n. 8. The court held that the jury's verdict exonerating Hamsher and the other individual defendants could be reconciled with a finding of liability

against the city because "the named defendants were not the supervisors directly causing the lay off, when the actual damages arose." *Id.*, at 1173, n. 3. Cf. *Los Angeles v. Heller*, 475 U. S. 796 (1986).

The dissenting judge relied on our decision in *Pembaur v. Cincinnati*, 475 U. S. 469 (1986). He found that the power to set employment policy for petitioner city of St. Louis lay with the Mayor and Aldermen, who were authorized to enact ordinances, and with the Civil Service Commission, whose function was to hear appeals from city employees who believed that their rights under the city's Charter, or under applicable rules and ordinances, had not been properly respected. 798 F. 2d, at 1180. The dissent concluded that respondent had submitted no evidence proving that the Mayor and Aldermen, or the Commission, had established a policy of retaliating against employees for appealing from adverse personnel decisions. *Id.*, at 1179-1181. The dissenting judge also concluded that, even if there were such a policy, the record evidence would not support a finding that respondent was in fact transferred or laid off in retaliation for the 1980 appeal from his suspension. *Id.*, at 1181-1182.

We granted certiorari, 479 U. S. 1029 (1987), and we now reverse.

II

We begin by addressing a threshold procedural issue. The second question presented in the petition for certiorari reads as follows:

"Whether the failure of a local government to establish an appellate procedure for the review of officials' decisions which does not defer in substantial part to the original decisionmaker's decision constitutes a delegation of authority to establish final government policy such that liability may be imposed on the local government on the basis of the decisionmaker's act alone, when the act is neither taken pursuant to a rule of general applicability

nor is a decision of specific application adopted as the result of a formal process?" Pet. for Cert. *i*.

Although this question was manifestly framed in light of the holding of the Court of Appeals, respondent argues that petitioner failed to preserve the question through a timely objection to the jury instructions under Federal Rule of Civil Procedure 51. Arguing that both parties treated the identification of municipal "policymakers" as a question of fact at trial, respondent emphasizes that the jury was given the following instruction, which was offered by the city itself:

"As a general principle, a municipality is not liable under 42 U. S. C. 1983 for the actions of its employees. However, a municipality may be held liable under 42 U. S. C. 1983 if the allegedly unconstitutional act was committed by an official high enough in the government so that his or her actions can be said to represent a government decision." App. 113.

Relying on *Oklahoma City v. Tuttle*, 471 U. S. 808 (1985), and *Springfield v. Kibbe*, 480 U. S. 257 (1987), respondent contends that the jury instructions should be reviewed only for plain error, and that the jury's verdict should be tested only for sufficiency of the evidence. Declining to defend the legal standard adopted by the Court of Appeals, respondent vigorously insists that the judgment should be affirmed on the basis of the jury's verdict and petitioner's alleged failure to comply with Rule 51.

Petitioner argues that it preserved the legal issues presented by its petition for certiorari in at least two ways. First, it filed a pretrial motion for summary judgment, or alternatively for judgment on the pleadings. In support of that motion, petitioner argued that respondent had failed to allege the existence of any impermissible municipal policy or of any facts that would indicate that such a policy existed. Second, petitioner filed a motion for directed verdict at the close of respondent's case, renewed that motion at the close

of all the evidence, and eventually filed a motion for judgment notwithstanding the verdict.

Respondent's arguments do not bring our jurisdiction into question, and we must not lose sight of the fact, stressed in *Tuttle*, that the "decision to grant certiorari represents a commitment of scarce judicial resources with a view to deciding the merits of one or more of the questions presented in the petition." 471 U. S., at 816. In *Kibbe*, it is true, the writ was dismissed in part because the petitioner sought to challenge a jury instruction to which it had not objected at trial. In the case before us, the focus of petitioner's challenge is not on the jury instruction itself, but on the denial of its motions for summary judgment and a directed verdict. Although the same legal issue was raised both by those motions and by the jury instruction, "the failure to object to an instruction does not render the instruction the 'law of the case' for purposes of appellate review of the denial of a directed verdict or judgment notwithstanding the verdict." *Kibbe, supra*, at 264 (dissenting opinion) (citations omitted). Petitioner's legal position in the District Court—that respondent had failed to establish an unconstitutional municipal policy—was consistent with the legal standard that it now advocates. It should not be surprising if petitioner's arguments in the District Court were much less detailed than the arguments it now makes in response to the decision of the Court of Appeals. That, however, does not imply that petitioner failed to preserve the issue raised in its petition for certiorari. Cf. *post*, at 165–167 (STEVENS, J., dissenting). Accordingly, we find no obstacle to reviewing the question presented in the petition for certiorari, a question that was very clearly considered, and decided, by the Court of Appeals.

We note, too, that petitioner has throughout this litigation been confronted with a legal landscape whose contours are "in a state of evolving definition and uncertainty." *Newport v. Fact Concerts, Inc.*, 453 U. S. 247, 256 (1981). We therefore do not believe that our review of the decision of the

Court of Appeals, a decision raising a question that "is important and appears likely to recur in § 1983 litigation against municipalities," *id.*, at 257, will undermine the policy of judicial efficiency that underlies Rule 51. The definition of municipal liability manifestly needs clarification, at least in part to give lower courts and litigants a fairer chance to craft jury instructions that will not require scrutiny on appellate review.

III

A

Section 1 of the Ku Klux Act of 1871, Rev. Stat. § 1979, as amended, 42 U. S. C. § 1983, provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . ."

Ten years ago, this Court held that municipalities and other bodies of local government are "persons" within the meaning of this statute. Such a body may therefore be sued directly if it is alleged to have caused a constitutional tort through "a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *Monell v. New York City Dept. of Social Services*, 436 U. S. 658, 690 (1978). The Court pointed out that § 1983 also authorizes suit "for constitutional deprivations visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decisionmaking channels." *Id.*, at 690-691. At the same time, the Court rejected the use of the doctrine of *respondeat superior* and concluded that municipalities could be held liable only when an injury was inflicted by a govern-

ment's "lawmakers or by those whose edicts or acts may fairly be said to represent official policy." *Id.*, at 694.

Monell's rejection of *respondeat superior*, and its insistence that local governments could be held liable only for the results of unconstitutional governmental "policies," arose from the language and history of § 1983. For our purposes here, the crucial terms of the statute are those that provide for liability when a government "subjects [a person], or causes [that person] to be subjected," to a deprivation of constitutional rights. Aware that governmental bodies can act only through natural persons, the Court concluded that these governments should be held responsible when, and only when, their official policies cause their employees to violate another person's constitutional rights. Reading the statute's language in the light of its legislative history, the Court found that vicarious liability would be incompatible with the causation requirement set out on the face of § 1983. See *id.*, at 691. That conclusion, like decisions that have widened the scope of § 1983 by recognizing constitutional rights that were unheard of in 1871, has been repeatedly reaffirmed. See, e. g., *Owen v. City of Independence*, 445 U. S. 622, 633, 655, n. 39 (1980); *Polk County v. Dodson*, 454 U. S. 312, 325 (1981); *Tuttle*, 471 U. S., at 818, and n. 5 (plurality opinion); *id.*, at 828 (BRENNAN, J., concurring in part and concurring in judgment); *Pembaur v. Cincinnati*, 475 U. S., at 478-480, and nn. 7-8. Cf. *Newport v. Fact Concerts, Inc.*, *supra*, at 259 ("[B]ecause the 1871 Act was designed to expose state and local officials to a new form of liability, it would defeat the promise of the statute to recognize any pre-existing immunity without determining both the policies that it serves and its compatibility with the purposes of § 1983").

In *Monell* itself, it was undisputed that there had been an official policy requiring city employees to take actions that were unconstitutional under this Court's decisions. Without attempting to draw the line between actions taken pursuant to official policy and the independent actions of employees

and agents, the *Monell* Court left the "full contours" of municipal liability under § 1983 to be developed further on "another day." 436 U. S., at 695.

In the years since *Monell* was decided, the Court has considered several cases involving isolated acts by government officials and employees. We have assumed that an unconstitutional governmental policy could be inferred from a single decision taken by the highest officials responsible for setting policy in that area of the government's business. See, e. g., *Owen v. City of Independence*, *supra*; *Newport v. Fact Concerts, Inc.*, 453 U. S. 247 (1981). Cf. *Pembaur*, *supra*, at 480. At the other end of the spectrum, we have held that an unjustified shooting by a police officer cannot, without more, be thought to result from official policy. *Tuttle*, 471 U. S., at 821 (plurality opinion); *id.*, at 830-831, and n. 5 (BRENNAN, J., concurring in part and concurring in judgment). Cf. *Kibbe*, 480 U. S., at 260 (dissenting opinion).

Two Terms ago, in *Pembaur*, *supra*, we undertook to define more precisely when a decision on a single occasion may be enough to establish an unconstitutional municipal policy. Although the Court was unable to settle on a general formulation, JUSTICE BRENNAN's opinion articulated several guiding principles. First, a majority of the Court agreed that municipalities may be held liable under § 1983 only for acts for which the municipality itself is actually responsible, "that is, acts which the municipality has officially sanctioned or ordered." *Id.*, at 480. Second, only those municipal officials who have "final policymaking authority" may by their actions subject the government to § 1983 liability. *Id.*, at 483 (plurality opinion). Third, whether a particular official has "final policymaking authority" is a question of *state law*. *Ibid.* (plurality opinion). Fourth, the challenged action must have been taken pursuant to a policy adopted by the official or officials responsible under state law for making policy in *that area* of the city's business. *Id.*, at 482-483, and n. 12 (plurality opinion).

The Courts of Appeals have already diverged in their interpretations of these principles. Compare, for example, *Williams v. Butler*, 802 F. 2d 296, 299-302 (CA8 1986) (en banc), cert. pending *sub nom. Little Rock v. Williams*, No. 86-1049, with *Jett v. Dallas Independent School Dist.*, 798 F. 2d 748, 759-760 (CA5 1986) (dictum). Today, we set out again to clarify the issue that we last addressed in *Pembaur*.

B

We begin by reiterating that the identification of policymaking officials is a question of state law. "Authority to make municipal policy may be granted directly by a legislative enactment or may be delegated by an official who possesses such authority, and of course, whether an official had final policymaking authority is a question of state law." *Pembaur v. Cincinnati*, *supra*, at 483 (plurality opinion).¹ Thus the identification of policymaking officials is not a question of federal law, and it is not a question of fact in the usual sense. The States have extremely wide latitude in determining the form that local government takes, and local preferences have led to a profusion of distinct forms. Among the many kinds of municipal corporations, political subdivisions, and special districts of all sorts, one may expect to find a rich variety of ways in which the power of govern-

¹ Unlike JUSTICE BRENNAN, we would not replace this standard with a new approach in which state law becomes merely an "appropriate starting point" for an "assessment of a municipality's actual power structure." *Post*, at 143, 145. Municipalities cannot be expected to predict how courts or juries will assess their "actual power structures," and this uncertainty could easily lead to results that would be hard in practice to distinguish from the results of a regime governed by the doctrine of *respondeat superior*. It is one thing to charge a municipality with responsibility for the decisions of officials invested by law, or by a "custom or usage" having the force of law, with policymaking authority. It would be something else, and something inevitably more capricious, to hold a municipality responsible for every decision that is perceived as "final" through the lens of a particular factfinder's evaluation of the city's "actual power structure."

ment is distributed among a host of different officials and official bodies. See generally C. Rhyne, *The Law of Local Government Operations* §§ 1.3–1.7 (1980). Without attempting to canvass the numberless factual scenarios that may come to light in litigation, we can be confident that state law (which may include valid local ordinances and regulations) will always direct a court to some official or body that has the responsibility for making law or setting policy in any given area of a local government's business.²

We are not, of course, predicting that state law will always speak with perfect clarity. We have no reason to suppose,

²JUSTICE STEVENS, who believes that *Monell* incorrectly rejected the doctrine of *respondeat superior*, suggests a new theory that reflects his perceptions of the congressional purposes underlying § 1983. See *post*, at 148, n. 1. This theory would apparently ignore state law, and distinguish between "high" officials and "low" officials on the basis of an independent evaluation of the extent to which a particular official's actions have "the potential of controlling governmental decisionmaking," or are "perceived as the actions of the city itself." *Post*, at 171. Whether this evaluation would be conducted by judges or juries, we think the legal test is too imprecise to hold much promise of consistent adjudication or principled analysis. We can see no reason, except perhaps a desire to come as close as possible to *respondeat superior* without expressly adopting that doctrine, that could justify introducing such unpredictability into a body of law that is already so difficult.

As JUSTICE STEVENS acknowledges, see *post*, at 148, n. 1, this Court has repeatedly rejected his interpretation of Congress' intent. We have held that Congress intended to hold municipalities responsible under § 1983 only for the execution of official policies and customs, and not for injuries inflicted solely by employees or agents. See, e. g., *Monell v. New York City Dept. of Social Services*, 436 U. S. 658, 694 (1978); *Pembaur v. Cincinnati*, 475 U. S. 469, 478–480 (1986). Like the *Pembaur* plurality, we think it is self-evident that official policies can only be adopted by those legally charged with doing so. See *supra*, at 124, and n. 1. We are aware of nothing in § 1983 or its legislative history, and JUSTICE STEVENS points to nothing, that would support the notion that unauthorized acts of subordinate employees are official policies because they may have the "potential" to become official policies or may be "perceived as" official policies. Accordingly, we conclude that JUSTICE STEVENS' proposal is without a basis in the law.

however, that federal courts will face greater difficulties here than those that they routinely address in other contexts. We are also aware that there will be cases in which policy-making responsibility is shared among more than one official or body. In the case before us, for example, it appears that the Mayor and Aldermen are authorized to adopt such ordinances relating to personnel administration as are compatible with the City Charter. See St. Louis City Charter, Art. XVIII, § 7(b), App. 62-63. The Civil Service Commission, for its part, is required to "prescribe . . . rules for the administration and enforcement of the provisions of this article, and of any ordinance adopted in pursuance thereof, and not inconsistent therewith." § 7(a), App. 62. Assuming that applicable law does not make the decisions of the Commission reviewable by the Mayor and Aldermen, or vice versa, one would have to conclude that policy decisions made either by the Mayor and Aldermen or by the Commission would be attributable to the city itself. In any event, however, a federal court would not be justified in assuming that municipal policymaking authority lies somewhere other than where the applicable law purports to put it. And certainly there can be no justification for giving a jury the discretion to determine which officials are high enough in the government that their actions can be said to represent a decision of the government itself.

As the plurality in *Pembaur* recognized, special difficulties can arise when it is contended that a municipal policymaker has delegated his policymaking authority to another official. 475 U. S., at 482-483, and n. 12. If the mere exercise of discretion by an employee could give rise to a constitutional violation, the result would be indistinguishable from *respondeat superior* liability. If, however, a city's lawful policymakers could insulate the government from liability simply by delegating their policymaking authority to others, § 1983 could not serve its intended purpose. It may not be possible to draw an

elegant line that will resolve this conundrum, but certain principles should provide useful guidance.

First, whatever analysis is used to identify municipal policymakers, egregious attempts by local governments to insulate themselves from liability for unconstitutional policies are precluded by a separate doctrine. Relying on the language of § 1983, the Court has long recognized that a plaintiff may be able to prove the existence of a widespread practice that, although not authorized by written law or express municipal policy, is "so permanent and well settled as to constitute a 'custom or usage' with the force of law." *Adickes v. S. H. Kress & Co.*, 398 U. S. 144, 167-168 (1970). That principle, which has not been affected by *Monell* or subsequent cases, ensures that most deliberate municipal evasions of the Constitution will be sharply limited.

Second, as the *Pembaur* plurality recognized, the authority to make municipal policy is necessarily the authority to make *final* policy. 475 U. S., at 481-484. When an official's discretionary decisions are constrained by policies not of that official's making, those policies, rather than the subordinate's departures from them, are the act of the municipality. Similarly, when a subordinate's decision is subject to review by the municipality's authorized policymakers, they have retained the authority to measure the official's conduct for conformance with *their* policies. If the authorized policymakers approve a subordinate's decision and the basis for it, their ratification would be chargeable to the municipality because their decision is final.

C

Whatever refinements of these principles may be suggested in the future, we have little difficulty concluding that the Court of Appeals applied an incorrect legal standard in this case. In reaching this conclusion, we do not decide whether the First Amendment forbade the city to retaliate against respondent for having taken advantage of the grievance mechanism in 1980. Nor do we decide whether there

was evidence in this record from which a rational jury could conclude either that such retaliation actually occurred or that respondent suffered any compensable injury from whatever retaliatory action may have been taken. Finally, we do not address petitioner's contention that the jury verdict exonerating the individual defendants cannot be reconciled with the verdict against the city. Even assuming that all these issues were properly resolved in respondent's favor, we would not be able to affirm the decision of the Court of Appeals.

The city cannot be held liable under § 1983 unless respondent proved the existence of an unconstitutional municipal policy. Respondent does not contend that anyone in city government ever promulgated, or even articulated, such a policy. Nor did he attempt to prove that such retaliation was ever directed against anyone other than himself. Respondent contends that the record can be read to establish that his supervisors were angered by his 1980 appeal to the Civil Service Commission; that new supervisors in a new administration chose, for reasons passed on through some informal means, to retaliate against respondent two years later by transferring him to another agency; and that this transfer was part of a scheme that led, another year and a half later, to his layoff. Even if one assumes that all this was true, it says nothing about the actions of those whom the law established as the makers of municipal policy in matters of personnel administration. The Mayor and Aldermen enacted no ordinance designed to retaliate against respondent or against similarly situated employees. On the contrary, the city established an independent Civil Service Commission and empowered it to review and correct improper personnel actions. Respondent does not deny that his repeated appeals from adverse personnel decisions repeatedly brought him at least partial relief, and the Civil Service Commission never so much as hinted that retaliatory transfers or layoffs were permissible. Respondent points to no evidence indicating that the Commission delegated to anyone its final authority to

interpret and enforce the following policy set out in Article XVIII of the city's Charter, § 2(a), App. 49:

"Merit and fitness. All appointments and promotions to positions in the service of the city and all measures for the control and regulation of employment in such positions, and separation therefrom, shall be on the sole basis of merit and fitness"

The Court of Appeals concluded that "appointing authorities," like Hamsher and Killen, who had the authority to initiate transfers and layoffs, were municipal "policymakers." The court based this conclusion on its findings (1) that the decisions of these employees were not individually reviewed for "substantive propriety" by higher supervisory officials; and (2) that the Civil Service Commission decided appeals from such decisions, if at all, in a circumscribed manner that gave substantial deference to the original decisionmaker. 798 F. 2d, at 1174-1175. We find these propositions insufficient to support the conclusion that Hamsher and Killen were authorized to establish employment policy for the city with respect to transfers and layoffs. To the contrary, the City Charter expressly states that the Civil Service Commission has the power and the duty:

"To consider and determine any matter involved in the administration and enforcement of this [Civil Service] article and the rules and ordinances adopted in accordance therewith that may be referred to it for decision by the director [of personnel], or on appeal by any appointing authority, employe, or taxpayer of the city, from any act of the director or of any appointing authority. The decision of the commission in all such matters shall be final, subject, however, to any right of action under any law of the state or of the United States." St. Louis City Charter, Art. XVIII, § 7(d), App. 63.

This case therefore resembles the hypothetical example in *Pembaur*: "[I]f [city] employment policy was set by the

[Mayor and Aldermen and by the Civil Service Commission], only [those] bod[ies'] decisions would provide a basis for [city] liability. This would be true even if the [Mayor and Aldermen and the Commission] left the [appointing authorities] discretion to hire and fire employees and [they] exercised that discretion in an unconstitutional manner" 475 U. S., at 483, n. 12. A majority of the Court of Appeals panel determined that the Civil Service Commission's review of individual employment actions gave too much deference to the decisions of appointing authorities like Hamsher and Killen. Simply going along with discretionary decisions made by one's subordinates, however, is not a delegation to them of the authority to make policy. It is equally consistent with a presumption that the subordinates are faithfully attempting to comply with the policies that are supposed to guide them. It would be a different matter if a particular decision by a subordinate was cast in the form of a policy statement and expressly approved by the supervising policymaker. It would also be a different matter if a series of decisions by a subordinate official manifested a "custom or usage" of which the supervisor must have been aware. See *supra*, at 127. In both those cases, the supervisor could realistically be deemed to have adopted a policy that happened to have been formulated or initiated by a lower ranking official. But the mere failure to investigate the basis of a subordinate's discretionary decisions does not amount to a delegation of policymaking authority, especially where (as here) the wrongfulness of the subordinate's decision arises from a retaliatory motive or other unstated rationale. In such circumstances, the purposes of § 1983 would not be served by treating a subordinate employee's decision as if it were a reflection of municipal policy.

JUSTICE BRENNAN's opinion, concurring in the judgment, finds implications in our discussion that we do not think necessary or correct. See *post*, at 142-147. We nowhere say or imply, for example, that "a municipal charter's precatory

admonition against discrimination or any other employment practice not based on merit and fitness effectively insulates the municipality from any liability based on acts inconsistent with that policy." *Post*, at 145, n. 7. Rather, we would respect the decisions, embodied in state and local law, that allocate policymaking authority among particular individuals and bodies. Refusals to carry out stated policies could obviously help to show that a municipality's actual policies were different from the ones that had been announced. If such a showing were made, we would be confronted with a different case than the one we decide today.

Nor do we believe that we have left a "gaping hole" in § 1983 that needs to be filled with the vague concept of "*de facto* final policymaking authority." *Post*, at 144. Except perhaps as a step towards overruling *Monell* and adopting the doctrine of *respondeat superior*, ad hoc searches for officials possessing such "*de facto*" authority would serve primarily to foster needless unpredictability in the application of § 1983.

IV

We cannot accept either the Court of Appeals' broad definition of municipal policymakers or respondent's suggestion that a jury should be entitled to define for itself which officials' decisions should expose a municipality to liability. Respondent has suggested that the record will support an inference that policymaking authority was in fact delegated to individuals who took retaliatory action against him and who were not exonerated by the jury. Respondent's arguments appear to depend on a legal standard similar to the one suggested in JUSTICE STEVENS' dissenting opinion, *post*, at 171, which we do not accept. Our examination of the record and state law, however, suggests that further review of this case may be warranted in light of the principles we have discussed. That task is best left to the Court of Appeals, which will be free to invite additional briefing and argument if necessary. Accordingly, the decision of the Court of Appeals is

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reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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

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

Despite its somewhat confusing procedural background, this case at bottom presents a relatively straightforward question: whether respondent's supervisor at the Community Development Agency, Frank Hamsher, possessed the authority to establish final employment policy for the city of St. Louis such that the city can be held liable under 42 U. S. C. § 1983 for Hamsher's allegedly unlawful decision to transfer respondent to a dead-end job. Applying the test set out two Terms ago by the plurality in *Pembaur v. Cincinnati*, 475 U. S. 469 (1986), I conclude that Hamsher did not possess such authority and I therefore concur in the Court's judgment reversing the decision below. I write separately, however, because I believe that the commendable desire of today's plurality to "define more precisely when a decision on a single occasion may be enough" to subject a municipality to § 1983 liability, *ante*, at 123, has led it to embrace a theory of municipal liability that is both unduly narrow and unrealistic, and one that ultimately would permit municipalities to insulate themselves from liability for the acts of all but a small minority of actual city policymakers.

I

Respondent James H. Praprotnik worked for petitioner city of St. Louis for 15 years. A licensed architect, he began his career in 1968 as city planner and by 1980 had risen to a mid-level management position in the city's Community Development Agency (CDA), garnering consistently high job evaluations, substantial pay raises, and rapid promotions

during the intervening 12 years. 1980, however, marked the turning point in respondent's fortunes as a civil servant. In April of that year, his supervisor, Charles Kindleberger, suspended him for 15 days for failing to comply with a secondary employment policy that required all city professionals to obtain prior approval before undertaking any outside work. Respondent, who had objected to the policy since the head of the agency, CDA Director Donald Spaid, first announced it in 1978, appealed the suspension to the city's Civil Service Commission (CSC), arguing that the advance approval requirement was an improper invasion of his privacy and that in any event he had consistently complied with it. Although the CSC apparently did not question the validity of the policy, it found the penalty excessive, and therefore directed respondent's supervisors to reinstate him with backpay and to issue a letter of reprimand in lieu of the suspension.

Testimony at the trial below revealed that neither Spaid nor Kindleberger was pleased with respondent's actions, and that Spaid in particular was "very down on" respondent for his testimony before the CSC. 3 Record 1-54 to 1-55, 5 *id.*, at 3-237. In October 1980, just before the CSC rendered its decision, Kindleberger gave respondent an overall rating of "good" for the year, but recommended a two-step decrease in his salary. Kindleberger, who had just six months earlier proposed raising respondent's salary two grades, justified the reduction as part of a citywide pay scale reorganization. Respondent, however, viewed the recommendation as retaliation for his CSC appeal and petitioned the Department of Personnel for relief; the Department, which considers initial challenges to all performance ratings, granted partial relief, approving a one-step reduction, and the CSC affirmed this disposition on final appeal.

The following year witnessed a change in city administrations and the arrival of Frank Hamsher, who succeeded Spaid as CDA Director. Kindleberger, however, remained the supervisor responsible for respondent's performance

evaluation, and in October 1981 he rated respondent merely "adequate" overall. A confidential memorandum from one of respondent's superiors to Kindleberger explained that respondent did not get along well with others, citing as an example respondent's prior difficulties with former Director Spaid. Respondent, who had previously never received a rating of less than "good," again appealed to the Department of Personnel, which again ordered partial relief.

Six months later CDA underwent major budget and staff reductions and, as part of the resulting reorganization, Director Hamsher proposed transferring respondent's duties to the Heritage and Urban Design Commission (Heritage) and consolidating his functions with those of a vacant position at Heritage. Although there was testimony indicating that Heritage Commissioner Henry Jackson thought the transfer unnecessary, both Jackson and his superior, Director of Public Safety Thomas Nash, agreed to the consolidation, and the Director of Personnel formally approved the proposal. Respondent objected to the move and appealed to the CSC, but the CSC declined to review the decision, reasoning that because Heritage classified the consolidated position at the same grade as respondent's former job, the transfer was merely "lateral" and respondent had therefore suffered no "adverse" employment action. Thereafter, respondent filed this § 1983 suit against the city, Kindleberger, Hamsher, and Hamsher's successor at CDA, Deborah Patterson, alleging that the transfer violated his constitutional rights.¹

In the meantime, Jackson took over many of the architectural tasks CDA had ostensibly transferred to the new position and assigned respondent mainly clerical duties, an arrangement the latter found highly unsatisfactory. In November 1982, Jackson rated respondent "inadequate" overall and recommended a one-step reduction in his salary, as well

¹ Respondent also initially named Heritage Commissioner Henry Jackson as a defendant, but later dropped him from the suit after the latter left city government and moved out of the jurisdiction.

as an overall reduction in the classification of his position. Respondent successfully appealed his performance rating to the Personnel Department, which again granted partial relief. Nonetheless, in March 1983 his position was substantially downgraded and by the summer of that year Jackson's successor at Heritage, Robert Killen, proposed abolishing the position altogether. In December 1983, Killen carried through on his plan and, with the approval of Public Safety Director Nash, laid respondent off. Respondent amended his complaint in the District Court to reflect the layoff and simultaneously appealed the action to the CSC, but the CSC stayed its proceedings in light of the pendency of this lawsuit.

At trial, respondent sought to prove that the individual defendants had transferred him and eventually laid him off in retaliation for his use of the city's grievance machinery, thereby violating his First Amendment and due process rights. For its part, the city contended that the individual defendants were not personally responsible for the alleged ills that had befallen respondent. Conspicuous by their absence, city counsel argued, were Donald Spaid, whose displeasure over respondent's testimony before the CSC was allegedly the motivating force behind respondent's first proposed grade reduction and allegedly infected later performance evaluations; Robert Killen, who initiated and ultimately authorized the elimination of respondent's position at Heritage; and Thomas Nash, who approved the layoff. Respondent's counsel, however, defended the choice of defendants as those "primarily responsible" for the constitutional deprivations. 6 *id.*, at 4-56.

The District Court instructed the jury that generally a city is not liable under § 1983 for the acts of its employees, but that it may be held to answer for constitutional wrongs "committed by an official high enough in the government so that his or her actions can be said to represent a government decision." App. 113. In a lengthy and involved instruction, the court further advised the jury that it must find in favor of

respondent, and against the individual defendants, if it found six facts to be true, one of which was that "Hamsher and Kindleberger were personally involved in causing [respondent's] transfer and/or layoff." *Id.*, at 118. The jury exonerated the three individual defendants, but awarded respondent \$15,000 on each of his constitutional claims against petitioner.

The Court of Appeals for the Eighth Circuit vacated the judgment entered on respondent's due process claim (a ruling not at issue here) but affirmed the judgment as to the First Amendment claim. 798 F. 2d 1168 (1986). With respect to this latter claim, the court reasoned that the city could be held accountable for an improperly motivated transfer and layoff if it had delegated to the responsible officials, either directly or indirectly, the authority to act on behalf of the city, and if the decisions made within the scope of this delegated authority were essentially final. Applying this test, the court noted that under the City Charter, "appointing authorities," or department heads, such as Hamsher, could undertake transfers and layoffs subject only to the approval of the Director of Personnel, who undertook no substantive review of such decisions and simply conditioned his approval on formal compliance with city procedures. Moreover, because the CSC engaged in highly circumscribed and deferential review of layoffs and, at least so far as this case reveals, no review whatever of lateral transfers, the court concluded that an appointing authority's transfer and layoff decisions were final. *Id.*, at 1174-1175.

Having found that Hamsher was a final policymaker whose acts could subject petitioner to § 1983 liability, the court determined that the jury had ample evidence from which it could find that Hamsher transferred respondent in retaliation for the latter's exercise of his First Amendment rights, and that the transfer in turn precipitated respondent's layoff. This constructive discharge theory, the majority found, also reconciled the jury's apparently inconsistent verdicts: the

jury could have viewed Hamsher's unlawful motivation as the proximate cause of respondent's dismissal but, because Nash and Killen administered the final blows, it could have concluded that Hamsher, Kindleberger, and Patterson were not "personally involved" in the layoff as required by the instructions; accordingly, the jury could have reasonably exonerated the individual defendants while finding the city liable. *Id.*, at 1176, and n. 8.²

II

In light of the jury instructions below, the central question before us is whether the city delegated to CDA Director Frank Hamsher the authority to establish final employment policy for the city respecting transfers. For if it did not, then his allegedly unlawful decision to move respondent to an unfulfilling, dead-end position is simply not an act for which the city can be held responsible under § 1983. I am constrained to conclude that Hamsher possessed no such policy-making power here, and that, on the contrary, his allegedly retaliatory act simply constituted an abuse of the discretionary authority the city had entrusted to him.

The scope of Hamsher's authority with respect to transfers derives its significance from our determination in *Monell v. New York City Dept. of Social Services*, 436 U. S. 658 (1978), that a municipality is not liable under § 1983 for each and every wrong committed by its employees. In rejecting the concept of vicarious municipal liability, we emphasized that

²The instruction in question directed the jury to find in favor of respondent and against the individual defendants if it found, among other things, that Hamsher and Kindleberger "were personally involved in causing [respondent's] transfer and/or layoff." App. 118 (emphasis added). Although Hamsher was personally involved in the transfer, the Court of Appeals found the phrase "and/or" confusing and thus decided that the jury must have understood it to mean simply "and." 798 F. 2d, at 1172-1173, n. 3. Because I believe Hamsher was not a final policymaking official, I find it unnecessary to decide whether the court below properly construed the jury instructions or to determine whether the jury's verdicts were in fact inconsistent.

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"the touchstone of the §1983 action against a government body is an allegation that official policy is responsible for the deprivation of rights protected by the Constitution." *Id.*, at 690. More recently we have explained that the touchstone of "official policy" is designed "to distinguish acts of the municipality from acts of employees of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible." *Pembaur v. Cincinnati*, 475 U. S., at 479-480 (emphasis in original).

Municipalities, of course, conduct much of the business of governing through human agents. Where those agents act in accordance with formal policies, or pursuant to informal practices "so permanent and well settled as to constitute a 'custom or usage' with the force of law," *Adickes v. S. H. Kress & Co.*, 398 U. S. 144, 167-168 (1970), we naturally ascribe their acts to the municipalities themselves and hold the latter responsible for any resulting constitutional deprivations. *Monell*, which involved a challenge to a citywide policy requiring all pregnant employees to take unpaid leave after their fifth month of pregnancy, was just such a case. Nor have we ever doubted that a single decision of a city's properly constituted legislative body is a municipal act capable of subjecting the city to liability. See, e. g., *Newport v. Fact Concerts, Inc.*, 453 U. S. 247 (1981) (City Council canceled concert permit for content-based reasons); *Owen v. City of Independence*, 445 U. S. 622 (1980) (City Council passed resolution firing Police Chief without any pretermination hearing). In these cases we neither required nor, as the plurality suggests, assumed that these decisions reflected generally applicable "policies" as that term is commonly understood, because it was perfectly obvious that the actions of the municipalities' policymaking organs, whether isolated or not, were properly charged to the municipalities them-

selves.³ And, in *Pembaur* we recognized that “the power to establish policy is no more the exclusive province of the legislature at the local level than at the state or national level,” 475 U. S., at 480, and that the isolated decision of an executive municipal policymaker, therefore, could likewise give rise to municipal liability under § 1983.

In concluding that Frank Hamsher was a policymaker, the Court of Appeals relied on the fact that the city had delegated to him “the authority, either directly or indirectly, to act on [its] behalf,” and that his decisions within the scope of this delegated authority were effectively final. 798 F. 2d, at 1174. In *Pembaur*, however, we made clear that a municipality is not liable merely because the official who inflicted the constitutional injury had the final authority to *act* on its behalf; rather, as four of us explained, the official in question must possess “final authority to establish municipal policy with respect to the [challenged] action.” 475 U. S., at 481. Thus, we noted, “[t]he fact that a particular official—even a policymaking official—has discretion in the exercise of particular functions does not, without more, give rise to municipi-

³The plurality’s suggestion that in *Owen* and *Fact Concerts* we “assumed that an unconstitutional governmental policy could be *inferred* from a single decision,” see *ante*, at 123 (emphasis added), elevates the identification of municipal policy from touchstone to talisman. Section 1983 imposes liability where a municipality “subjects [a person], or causes [a person] to be subjected . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws . . .” Our decision in *Monell*, interpreting the statute to require a showing that such deprivations arise from municipal policy, did not employ the policy requirement as an end in itself, but rather as a means of determining which acts by municipal employees are properly attributed to the municipality. Congress, we held, did not intend to subject cities to liability simply because they employ tortfeasors. But where a municipality’s governing legislative body inflicts the constitutional injury, the municipal policy inquiry is essentially superfluous: the city is liable under the statute whether its decision reflects a considered policy judgment or nothing more than the bare desire to inflict harm.

pal liability based on an exercise of that discretion." *Id.*, at 481-482. By way of illustration, we explained that if, in a given county, the Board of County Commissioners established county employment policy and delegated to the County Sheriff alone the discretion to hire and fire employees, the county itself would not be liable if the Sheriff exercised this authority in an unconstitutional manner, because "the decision to act unlawfully would not be a decision of the Board." *Id.*, at 483, n. 12. We pointed out, however, that in that same county the Sheriff could be the final policymaker in other areas, such as law enforcement practices, and that if so, his or her decisions in such matters *could* give rise to municipal liability. *Ibid.* In short, just as in *Owen* and *Fact Concerts* we deemed it fair to hold municipalities liable for the isolated, unconstitutional acts of their legislative bodies, regardless of whether those acts were meant to establish generally applicable "policies," so too in *Pembaur* four of us concluded that it is equally appropriate to hold municipalities accountable for the isolated constitutional injury inflicted by an executive final municipal policymaker, even though the decision giving rise to the injury is not intended to govern future situations. In either case, as long as the contested decision is made in an area over which the official or legislative body *could* establish a final policy capable of governing future municipal conduct, it is both fair and consistent with the purposes of § 1983 to treat the decision as that of the municipality itself, and to hold it liable for the resulting constitutional deprivation.

In my view, *Pembaur* controls this case. As an "appointing authority," Hamsher was empowered under the City Charter to initiate lateral transfers such as the one challenged here, subject to the approval of both the Director of Personnel and the appointing authority of the transferee agency. The Charter, however, nowhere confers upon

agency heads any authority to establish city *policy*, final or otherwise, with respect to such transfers. Thus, for example, Hamsher was not authorized to promulgate binding guidelines or criteria governing how or when lateral transfers were to be accomplished. Nor does the record reveal that he in fact sought to exercise any such authority in these matters. There is no indication, for example, that Hamsher ever purported to institute or announce a practice of general applicability concerning transfers. Instead, the evidence discloses but one transfer decision—the one involving respondent—which Hamsher ostensibly undertook pursuant to a citywide program of fiscal restraint and budgetary reductions. At most, then, the record demonstrates that Hamsher had the authority to determine how best to *effectuate* a policy announced by his superiors, rather than the power to *establish* that policy. Like the hypothetical Sheriff in *Pembaur's* n.12, Hamsher had discretionary authority to transfer CDA employees laterally; that he may have used this authority to punish respondent for the exercise of his First Amendment rights does not, without more, render the city liable for respondent's resulting constitutional injury.⁴ The court below did not suggest that either Killen or Nash, who together orchestrated respondent's ultimate layoff,

⁴ While the Court of Appeals erred to the extent it equated the authority to act on behalf of a city with the power to establish municipal policy, in my view the lower court quite correctly concluded that the CSC's highly circumscribed and deferential review of Hamsher's decisions in no way rendered those decisions less than final. We of course generally accord great deference to the interpretation and application of state law by the courts of appeals, see *Brockett v. Spokane Arcades, Inc.*, 472 U. S. 491, 500 (1985); *United States v. Varig Airlines*, 467 U. S. 797, 815, n. 12 (1984), and that deference is certainly applicable to the Court of Appeals' assessment of the scope of CSC review. Moreover, the facts of this case reveal that the CSC believed it lacked the authority to review lateral transfers. Accordingly, had Hamsher actually possessed policymaking authority with respect to such decisions, I would have little difficulty concluding that such authority was final. See *infra* at, 145–146.

shared Hamsher's constitutionally impermissible animus. Because the court identified only one unlawfully motivated municipal employee involved in respondent's transfer and layoff, and because that employee did not possess final policy-making authority with respect to the contested decision,⁵ the city may not be held accountable for any constitutional wrong respondent may have suffered.

III

These determinations, it seems to me, are sufficient to dispose of this case, and I therefore think it unnecessary to decide, as the plurality does, who the actual policymakers in St. Louis are. I question more than the mere necessity of these determinations, however, for I believe that in the course of passing on issues not before us, the plurality announces legal principles that are inconsistent with our earlier cases and unduly restrict the reach of § 1983 in cases involving municipalities.

The plurality begins its assessment of St. Louis' power structure by asserting that the identification of policymaking officials is a question of state law, by which it means that the question is neither one of federal law nor of fact, at least "not . . . in the usual sense." See *ante*, at 124. Instead, the plurality explains, courts are to identify municipal policymakers

⁵I am unable to agree with JUSTICE STEVENS that the record provides sufficient evidence of complicity on the part of other municipal policymakers such that we may sustain the jury's verdict against petitioner on a conspiracy theory neither espoused nor addressed by the court below. JUSTICE STEVENS' dissent relies to a large extent on respondent's controversial public testimony about the Serra sculpture, and the unwelcome reception that testimony drew in the Mayor's office. See *post*, at 149-155. Whatever else may be said about the strength of this evidence, however, the dissent's reliance on it is flawed in one crucial respect: the jury instructions concerning respondent's First Amendment claim refer exclusively to the exercise of his appellate rights before the CSC and make no mention whatever of his public testimony. Under these circumstances, the jury was simply not at liberty to impose liability against petitioner based on the allegedly retaliatory actions of the Mayor and his close associates; thus we may not sustain its verdict on the basis of such evidence.

by referring exclusively to applicable state statutory law. *Ibid.* Not surprisingly, the plurality cites no authority for this startling proposition, nor could it, for we have never suggested that municipal liability should be determined in so formulaic and unrealistic a fashion. In any case in which the policymaking authority of a municipal tortfeasor is in doubt, state law will naturally be the appropriate starting point, but ultimately the factfinder must determine where such policymaking authority actually resides, and not simply "where the applicable law purports to put it." *Ante*, at 126. As the plurality itself acknowledges, local governing bodies may take myriad forms. We in no way slight the dignity of municipalities by recognizing that in not a few of them real and apparent authority may diverge, and that in still others state statutory law will simply fail to disclose where such authority ultimately rests. Indeed, in upholding the Court of Appeals' determination in *Pembaur* that the County Prosecutor was a policymaking official with respect to county law enforcement practices, a majority of this Court relied on testimony which revealed that the County Sheriff's office routinely forwarded certain matters to the Prosecutor and followed his instructions in those areas. See 475 U. S., at 485; *ibid.* (WHITE, J., concurring); *id.*, at 491 (O'CONNOR, J., concurring). While the majority splintered into three separate camps on the ultimate theory of municipal liability, and the case generated five opinions in all, not a single Member of the Court suggested that reliance on such extrastatutory evidence of the county's actual allocation of policymaking authority was in any way improper. Thus, although I agree with the plurality that juries should not be given open-ended "*discretion* to determine which officials are high enough in the government that their actions can be said to represent a decision of the government itself," *ante*, at 126 (emphasis added), juries can and must find the predicate facts necessary to a determination whether a given official possesses final policymaking authority. While the jury instructions in this case were regrettably vague, the plurality's solution tosses

the baby out with the bath water. The identification of municipal policymakers is an essentially factual determination "in the usual sense," and is therefore rightly entrusted to a properly instructed jury.

Nor does the "custom or usage" doctrine adequately compensate for the inherent inflexibility of a rule that leaves the identification of policymakers exclusively to state statutory law. That doctrine, under which municipalities and States can be held liable for unconstitutional practices so well settled and permanent that they have the force of law, see *Adickes v. S. H. Kress & Co.*, 398 U. S., at 167, has little if any bearing on the question whether a city has delegated *de facto* final policymaking authority to a given official. A city practice of delegating final policymaking authority to a subordinate or mid-level official would not be unconstitutional in and of itself, and an isolated unconstitutional act by an official entrusted with such authority would obviously not amount to a municipal "custom or usage." Under *Pembaur*, of course, such an isolated act *should* give rise to municipal liability. Yet a case such as this would fall through the gaping hole the plurality's construction leaves in § 1983, because state statutory law would not identify the municipal actor as a policymaking official, and a single constitutional deprivation, by definition, is not a well-settled and permanent municipal practice carrying the force of law.⁶

For these same reasons, I cannot subscribe to the plurality's narrow and overly rigid view of when a municipal official's policymaking authority is "final." Attempting to place a gloss on *Pembaur*'s finality requirement, the plurality suggests that whenever the decisions of an official are subject to

⁶ Indeed, the plurality appears to acknowledge as much when it explains that the "custom or usage" doctrine will forestall "egregious attempts by local governments to insulate themselves from liability for unconstitutional policies," and that "most deliberate municipal evasions of the Constitution will be sharply limited." *Ante*, at 127 (emphases added). Congress, however, did not enact § 1983 simply to provide redress for "most" constitutional deprivations, nor did it limit the statute's reach only to those deprivations that are truly "egregious."

some form of review—however limited—that official's decisions are nonfinal. Under the plurality's theory, therefore, even where an official wields policymaking authority with respect to a challenged decision, the city would not be liable for that official's policy decision unless *reviewing* officials affirmatively approved both the "decision and the basis for it." *Ante*, at 127. Reviewing officials, however, may as a matter of practice never invoke their plenary oversight authority, or their review powers may be highly circumscribed. See n. 4, *supra*. Under such circumstances, the subordinate's decision is in effect the final municipal pronouncement on the subject. Certainly a § 1983 plaintiff is entitled to place such considerations before the jury, for the law is concerned not with the niceties of legislative draftsmanship but with the realities of municipal decisionmaking, and any assessment of a municipality's actual power structure is necessarily a factual and practical one.⁷

Accordingly, I cannot endorse the plurality's determination, based on nothing more than its own review of the City Charter, that the Mayor, the Aldermen, and the CSC are the only policymakers for the city of St. Louis. While these offi-

⁷The plurality also asserts that "[w]hen an official's discretionary decisions are constrained by policies not of that official's making, those policies, rather than the subordinate's departures from them, are the act of the municipality." *Ante*, at 127. While I have no quarrel with such a proposition in the abstract, I cannot accept the plurality's apparent view that a municipal charter's precatory admonition against discrimination or any other employment practice not based on merit and fitness effectively insulates the municipality from any liability based on acts inconsistent with that policy. Again, the relevant inquiry is whether the policy in question is actually and effectively enforced through the city's review mechanisms. Thus in this case, a policy prohibiting lateral transfers for unconstitutional or discriminatory reasons would not shield the city from liability if an official possessing final policymaking authority over such transfers acted in violation of the prohibition, because the CSC would lack jurisdiction to review the decision and thus could not enforce the city policy. Where as here, however, the official merely possesses discretionary authority over transfers, the city policy is irrelevant, because the official's actions cannot subject the city to liability in any event.

cials may well have policymaking authority, that hardly ends the matter; the question before us is whether the officials responsible for respondent's allegedly unlawful transfer were final policymakers. As I have previously indicated, I do not believe that CDA Director Frank Hamsher possessed any policymaking authority with respect to lateral transfers and thus I do not believe that his allegedly improper decision to transfer respondent could, without more, give rise to municipal liability. Although the plurality reaches the same result, it does so by reasoning that because others could have reviewed the decisions of Hamsher and Killen, the latter officials simply could not have been final policymakers.

This analysis, however, turns a blind eye to reality, for it ignores not only the lower court's determination, nowhere disputed, that CSC review was highly circumscribed and deferential, but also the fact that in this very case the CSC *refused* to judge the propriety of Hamsher's transfer decision because a lateral transfer was not an "adverse" employment action falling within its jurisdiction. Nor does the plurality account for the fact that Hamsher's predecessor, Donald Spaid, promulgated what the city readily acknowledges was a binding policy regarding secondary employment;⁸ although the CSC ultimately modified the sanctions respondent suffered as a result of his apparent failure to comply with that policy, the record is devoid of any suggestion that the CSC reviewed the substance or validity of the policy itself. Under the plurality's analysis, therefore, even the hollowest promise of review is sufficient to divest all city officials save the mayor and governing legislative body of final policymaking authority. While clarity and ease of application may

⁸ Although the plurality is careful in its discussion of the facts to label Director Spaid's directive a "requirement" rather than a "policy," the city itself draws no such fine semantic distinctions. Rather, it states plainly that Spaid "promulgated a 'secondary employment' *policy* that sought to control outside employment by CDA architects," and that "[respondent] resented the policy" Brief for Petitioner 2-3 (emphasis added).

commend such a rule, we have remained steadfast in our conviction that Congress intended to hold municipalities accountable for those constitutional injuries inflicted not only by their lawmakers, but also "by those whose edicts or acts may fairly be said to represent official policy." *Monell*, 436 U. S., at 694. Because the plurality's mechanical "finality" test is fundamentally at odds with the pragmatic and factual inquiry contemplated by *Monell*, I cannot join what I perceive to be its unwarranted abandonment of the traditional factfinding process in § 1983 actions involving municipalities.

Finally, I think it necessary to emphasize that despite certain language in the plurality opinion suggesting otherwise, the Court today need not and therefore does not decide that a city can only be held liable under § 1983 where the plaintiff "prove[s] the existence of an unconstitutional municipal policy." See *ante*, at 128. Just last Term, we left open for the second time the question whether a city can be subjected to liability for a policy that, while not unconstitutional in and of itself, may give rise to constitutional deprivations. See *Springfield v. Kibbe*, 480 U. S. 257 (1987); see also *Oklahoma City v. Tuttle*, 471 U. S. 808 (1985). That question is certainly not presented by this case, and nothing we say today forecloses its future consideration.

IV

For the reasons stated above, I concur in the judgment of the Court reversing the decision below and remanding the case so that the Court of Appeals may determine whether respondent's layoff resulted from the actions of any improperly motivated final policymakers.

JUSTICE STEVENS, dissenting.

If this case involved nothing more than a personal vendetta between a municipal employee and his superiors, it would be quite wrong to impose liability on the city of St. Louis. In fact, however, the jury found that top officials in the city administration, relying on pretextual grounds, had taken a se-

ries of retaliatory actions against respondent because he had testified truthfully on two occasions, one relating to personnel policy and the other involving a public controversy of importance to the Mayor and the members of his cabinet. No matter how narrowly the Court may define the standards for imposing liability upon municipalities in § 1983 litigation, the judgment entered by the District Court in this case should be affirmed.

In order to explain why I believe that affirmance is required by this Court's precedents,¹ it is necessary to begin with a more complete statement of the disputed factual issues that the jury resolved in respondent's favor, and then to comment on the procedural posture of the case. Finally, I shall discuss the special importance of the character of the wrongful conduct disclosed by this record.

I

The city of St. Louis hired respondent as a licensed architect in 1968. During the ensuing decade, he was repeatedly

¹ This would, of course, be an easy case if the Court disavowed its dicta in Part II of the opinion in *Monell v. New York City Dept. of Social Services*, 436 U. S. 658, 691-695 (1978). See *id.*, at 714 (STEVENS, J., concurring in part). Like many commentators who have confronted the question, I remain convinced that Congress intended the doctrine of *respondeat superior* to apply in § 1983 litigation. See *Oklahoma City v. Tuttle*, 471 U. S. 808, 834-844 (1985) (STEVENS, J., dissenting); *Pembaur v. Cincinnati*, 475 U. S. 469, 489, n. 4 (1986) (STEVENS, J., concurring in part and concurring in judgment); see also Whitman, Government Responsibility for Constitutional Torts, 85 Mich. L. Rev. 225, 236, n. 43 (1986). Given the Court's reiteration of the contrary *ipse dixit* in *Monell* and subsequent opinions, however, see *Oklahoma City v. Tuttle*, *supra*, at 818; *Pembaur v. Cincinnati*, *supra*, at 477-480, I shall join the Court's attempt to draw an intelligible boundary between municipal agents' actions that bind and those that do not. Since it represents a departure from Congress' initial intention that *respondeat superior* principles apply in this context, this endeavor necessarily involves the Court in some consideration of "new theory," see *ante*, at 125, n. 2 (plurality). Even so, we should be guided by the congressional purposes that motivated the enactment of § 1983 rather than by a nonstatutory judge-made presumption that gives "extremely wide latitude" to a profusion of "local preferences." *Ante*, at 124.

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promoted and consistently given "superior" performance ratings. In April 1980, while serving as the Director of Urban Design in the Community Development Agency (CDA), he was recommended for a two-step salary increase by his immediate superior. See 3 Record 1-51.

Thereafter, on two occasions he gave public testimony that was critical of official city policy. In 1980 he testified before the Civil Service Commission (CSC) in support of his successful appeal from a 15-day suspension. In that testimony he explained that he had received advance oral approval of his outside employment and voiced his objections to the requirement of prior written approval.² The record demonstrates

²"Q. [Mr. Oldham, respondent's attorney] Mr. Praprotnik, during this period of time, was there a salary limit on salaries imposed by the City Charter?

"A. [Mr. Praprotnik] Yes. It was established at \$25,000 annually.

"Q. All right. And were employees in CDA permitted to have secondary employment—

"A. Yes, they were.

"Q. And were you required to fill out any particular type of form or document?

"A. Yes. We had to fill out an employee secondary employment questionnaire on an annual basis at the time of our review of our service rating.

"Q. Now, did you fill out a secondary employment form?

"A. Yes, I did, for each year.

"Q. Now. Were you then at any time suspended for a matter involving the secondary employment?

"A. Yes. I was suspended in April, April 29th, 1980, for failure to provide information to my immediate supervisors.

"Q. And did you provide that information to your immediate supervisors?

"A. Yes, I did.

"Q. Did you fill out a form which gave, in detail, the places where you had worked?

"A. Yes. As had always been required in the past, I had filled out the questionnaire and submitted it each year explaining that I had practiced architecture.

[Footnote 2 is continued on p. 150]

that this testimony offended his immediate superiors at the CDA.³

In 1981 respondent testified before the Heritage and Urban Design Commission (HUD) in connection with a pro-

"Q. Now, after you were suspended, did you take any action to protest that suspension or petition anybody for correction of the action taken against you?

"A. Yes. I had appealed that to the Civil Service Commission.

"Q. And after the hearing, was there a decision by the Commission?

"A. Yes. The Commission had ruled in favor of myself.

"Q. Could you tell me what your length of suspension was?

"A. It was for fifteen days.

"Q. And were you reinstated with back pay?

"A. Yes, I was." 3 Record 1-45-1-47.

"A. [Mr. Praprotnik to Ms. Ronzio, petitioner's attorney] I had been singled out to provide this information. No one else, as was—in the Civil Service Commission, no one else was asked to do this, to provide the listing of clients. And this was—and I had indicated the reason for that, because of the standards of ethical practice." 4 *id.*, at 2-35.

³"Q. [Mr. Oldham] And in this rating, what recommendation is made for you?

"A. [Mr. Praprotnik] This recommendation is—this is October 30th, 1980. This is a recommendation for a two-step decrease in salary.

"Q. Did you ever discuss with Mr. Kindleberger [Director of Planning, CDA] the reason why you were given two ratings on almost the same day, one for no change and one for a two-step decrease?

"A. Yes. I could not understand, you know, with the same evaluation performance being similar, that—at one point the recommendation of a two-step increase—and this occurring shortly thereafter with a two-step decrease.

"Q. All right. What did Mr. Kindleberger say to you about that?

"A. At the time, it was that, 'The director, Mr. Spaid [Director, CDA, until April, 1981], is very down on you.' That was his exact words.

"Q. Did he tell you why he was down on you?

"A. He stated that I had lied before the Commission, the Civil Service Commission." 3 *id.*, at 1-54-1-55.

"A. [Mr. Kindleberger to Ms. Ronzio] I guess I was somewhat irritated at the whole process at this point. And I thought that Mr. Praprotnik had gotten an adequate rating and that he was being dealt with fairly and that he was not being as cooperative as he might. I also thought, and still believe, that the process for appealing a rating was one that involved

posals to acquire a controversial rusting steel sculpture by Richard Serra. In his testimony he revealed the previously undisclosed fact that an earlier city administration had rejected an offer to acquire the same sculpture, and also explained that the erection of the sculpture would require the removal of structures on which the city had recently expended about \$250,000.⁴ This testimony offended top offi-

the Department of Personnel looking at the rating and participating in some kind of conciliatory procedures of the kind that were described earlier by Mr. Duffe [City Director of Personnel], whereby an attempt was made to get the individual that was unsatisfied and the supervisor together and get them talking to each other. And that after that, if there was still dissatisfaction, there was a process of going through the Civil Service Commission. And I thought it was inappropriate for Jim Praprotnik and his lawyer to get involved before it got over to the Department of Personnel and I told that to Mr. Brewster [Deputy Director, CDA]." 5 *id.*, at 3-230-3-231.

"Q. [Mr. Oldham] Did Mr. Spaid say something to the effect that he was down on Praprotnik?

"A. [Mr. Kindleberger] That sounds right.

"Q. And that he felt he had not been honest, had not testified honestly at the Civil Service Commission, or words to that effect?

"A. I don't know if Mr. Spaid said it, but I know I felt it at the time." 5 *id.*, at 3-237.

See also 3 *id.*, at 1-57, 1-58, 1-60, 1-66, 4 *id.*, at 2-94, 2-141.

"Q. [Mr. Oldham] I want to direct your attention to a period which involved a discussion of the Serra sculpture. Does that refresh your memory or do you have a recollection of that incident?

"A. [Mr. Praprotnik] Yes, I do.

"Q. What—could you tell me approximately when this incident occurred?

"A. This was immediately prior to the erection of the rusting steel sculpture which we have right out here on Market Street, the erection of that. And it was a meeting of the Heritage and Urban Design Commission of which I served as liaison from the Community Development Agency.

"Q. Were you requested to testify before the Commission?

"A. Yes, I was requested by the chairperson of that Commission.

"Q. And were you required to make some comment on the Serra sculpture and its appropriateness at that spot?

[Footnote 4 is continued on p. 152]

cials of the city government, possibly including the Mayor, who supported the acquisition of the Serra sculpture, as well as respondent's agency superiors.⁵ They made it perfectly

"A. That's correct. I was. And whether it conformed to the overall plan for the Gateway Mall, the center open space all the way down to the courthouse." 4 *id.*, at 2-3-2-4.

"Q. [Mr. Oldham] Do you know anything about the time that Mr. Praprotnik appeared before the Commission in regard to testimony involving the Serra sculpture?

"A. [Ms. Buckley, Chairperson, HUD] Yes, I do because I asked him to attend that meeting of the Commission.

"Mr. Praprotnik appeared and this was the first time I had seen him in this capacity. This was at this committee meeting of the Commission. He stated that the City had been presented the Serra sculpture once before. The people who were presenting it said this was the first time it was being presented to the City.

"Q. Could you describe who was present in the hearing room and the amount of interest there was in regard to the Serra sculpture?

"A. There was a great deal of interest. The hearing room was always filled because there were so many applicants of people [*sic*] who had projects they wanted to bring. But whenever something came in—

"Q. Was the mayor's office in there, too?

"A. I don't know all the people in the mayor's office but, yes, I knew from the whispering around me and from some of the faces that were familiar that, yes, these were the mayor's people, or at least the City people who came in to watch." 4 *id.*, at 2-88-2-90.

⁵"Q. [Mr. Oldham] All right. Now, after you testified before the Commission, did you have any conversation with Mr. Hamsher [Director, CDA, when respondent was transferred; elevated to Deputy Director of Development, Mayor's Office, in June, 1982, and present at that position when respondent was laid off]?

"A. [Mr. Praprotnik] Yes. I was called into the office immediately after that meeting the following morning. And together with Mr. Hamsher and also Mr. Kindleberger, was told that certain information that I had stated at that Commission meeting that I should have 'muffed it.'

"Q. You shouldn't have—

"A. Meaning that I should have concealed it, you know, from their—from exposure to the Commission.

[Footnote 5 is continued on p. 153]

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clear that they believed that respondent had violated a duty of loyalty to the Mayor by expressing his personal opinion about the sculpture. Thus, defendant Hamsher testified:

"Q. What information was Mr. Hamsher talking about?

"A. This was regarding the City's original expenditure of funds for that block amounting to an open space grant of approximately \$250,000 to develop the block originally, and the City was going to remove all of that for erection of this rusting steel sculpture.

"Q. Did that discussion result—was that discussion one of the factors that was used in your service rating?

"A. Yes, it was." 4 *id.*, at 2-4-2-6.

"Q. [Mr. Oldham] You did rate him on the Serra sculpture?

"A. [Mr. Karetski, Deputy City Planning Director, CDA] That was a factor, yes." 5 *id.*, at 3-45.

"Q. [Ms. Ronzio] [L]et me make a break at this point and ask you about something that happened while Mr. Praprotnik was at the Community Development Agency. There's been some discussion of the Serra sculpture incident?

"A. [Mr. Hamsher] Yes.

"Q. Did you have occasion to reprimand Mr. Praprotnik for something he said concerning the Serra sculpture, the rusting steel sculpture as someone described it, downtown here?

"A. I don't know that reprimand is the right term. I did have a discussion about something that occurred on that sculpture, yes.

"Q. Did you indicate you were displeased with what he had done?

"A. Yes, I did.

"Q. Will you tell us what it was you had the discussion with him about and what you were upset about?

"A. Yes. I read in the newspaper one morning that Mr. Praprotnik was quoted, something about his personal opinion about the merit or lack of merit of the sculpture. And I was concerned about that because a decision had been made by the City administration that we all worked for, that we wanted to recommend—that the City administration wanted to recommend the installation of the Serra sculpture.

"I happened to disagree with the decision myself. I'm not fond of the sculpture and wasn't then. But the mayor was elected by the people and he made the decision. He was going to support the installation of the sculpture.

"Therefore, it was my responsibility and the responsibility of others who worked for my agency to do so as well and not to express personal opinions

"I'm not fond of the sculpture and wasn't then. But the mayor was elected by the people and he made the decision. He was going to support the installation of the sculpture.

"Therefore, it was my responsibility and the responsibility of others who worked for my agency to do so

in public forums about what that sculpture was going to be and what it would look like.

"Q. Did you take any disciplinary actions such as suspension or reduction in pay?

"A. No, I did not. I believe I sent Mr. Praprotnik a note about it to make him understand that I thought this was important, but that's all my recollection was and I had a discussion with him. But I didn't take any personnel action about it. Frankly, I didn't give any further thought to it." 5 *id.*, at 3-179-3-181.

"Q. [Mr. Oldham] Did you know that Mr. Praprotnik had been requested to appear before the Heritage and Urban Design Committee?

"A. [Mr. Kindleberger] I think I did.

"Q. Is it an obligation of a City employee who is requested to testify before one of these commissions to enter [*sic*] honestly and truthfully?

"A. Well, I think the obligation for a senior management individual is to represent fairly the position of his boss which, in our case, happens to be the mayor. And I would—I just think that is something that is appropriate for senior management to do.

"Q. Now, when he was asked whether or not this had been presented to the City before and he said that it had—

"A. Well, obviously, any questions of fact, one should be truthful.

"Q. And if he's asked his professional opinion, what should he do?

"A. Well, if someone is asked their own personal, professional opinion, they should render it. But one has to be awfully careful that you don't somehow imply that is the staff's opinion or that is the agency's opinion. And I think it's a question of judgment, but that is one of the things that senior managers need to have is judgment.

"Q. The mayor was quite upset; wasn't he?

"A. I don't know that for a fact. He never spoke to me about it.

"Q. Isn't it true the Pulitzer family was very interested in this?

"A. The Serra sculpture?

"Q. Yes.

"A. Emily Pulitzer is a person who has long wanted that sculpture.

"Q. She is connected with the *Post-Dispatch*?

"A. I believe she is married to the publisher." 5 *id.*, at 3-249-3-251.

as well and not to express personal opinions in public forums about what that sculpture was going to be and what it would look like." 5 *id.*, at 3-180.

Defendant Kindleberger made the same point:

"Well, I think the obligation for a senior management individual is to represent fairly the position of his boss which, in our case, happens to be the mayor. And I would—I just think that is something that is appropriate for senior management to do." 5 *id.*, at 3-250.

After this testimony respondent was the recipient of a series of adverse personnel actions that culminated in his transfer from an important management-level professional position to a rather menial assignment for which he was "grossly over qualified," 3 *id.*, at 1-80, and his eventual layoff.⁶ In

⁶"Q. [Mr. Oldham] I'd like to direct your attention to March of 1982. Was that the period of time that there was a transfer?

"A. [Mr. Praprotnik] Yes. [O]n March 23rd, I was called to the director's office, Mr. Frank Hamsher, and was told that I would be transferred to the Heritage and Urban Design Commission. And this was two weeks prior to the pending layoff recommendations at the agency."

"Q. Did [Mr. Jackson, Commissioner, HUD] make any statement to you as to whether he had sought your services?

"A. Yes. He stated that he didn't want me in the first place, that he had requested a historic preservation planner for that position, which was several grades below my management position level."

"Q. Now, just prior to [the then unknown attempt to fire respondent, one year prior to his actual dismissal], did you receive a rating?

"A. Yes, I did, in October [1982].

"Q. Let me hand you that rating, which is Plaintiff's Exhibit 92, and ask you to look at the second page thereof. In that rating, does it make any statement about your qualifications or your overqualifications for the position?

"A. Yes. It states in the paragraph related to 'Have the duties in the employee's position changed significantly during this rating period,' it states—Mr. Jackson places in this space: 'Mr. Praprotnik's former position was as a supervisor at CDA . . . which included administration of his unit

preparing respondent's service ratings after the Serra sculpture incident, his superiors followed a "highly unusual" procedure that may have violated the city's personnel regulations.⁷ Moreover, management officials who were involved in implementing the decision to transfer respondent to a menial assignment made it clear that "there was no reason" for the transfer—except, it would seem, for the possible con-

and supervision of staff. In his new capacity here, there is no supervision of any professional staff and, in fact, the original vacancy was for an historic preservation planner I or II and which is intended to function as a junior staff position to existing staff and for which Mr. Praprotnik is grossly overqualified." 3 *id.*, at 1-66-1-67, 1-71, 1-79-1-80.

"Q. [Mr. Oldham] Would you describe [Mr. Praprotnik's tasks at HUD] as menial?

"A. [Ms. Buckley] I would." 4 *id.*, at 2-88.

"Q. [Mr. Oldham] Is he entitled to know the basis on which the service rating is given?

"A. [Mr. Brewster] That is standard operating procedure, I think, in any management procedure. Certainly, at CDA it was.

"Q. So this [Mr. Kindleberger's telling Mr. Brewster not to discuss the rating with Mr. Praprotnik] was unusual?

"A. I would say highly unusual.

"Q. After you made a study of the evaluation, what determinations did you make as to whether or not it had been properly and fairly done?

"A. As I recall, I found several discrepancies for which I did write a memo of finding on—I don't have it.

"Q. Can you recall, Mr. Brewster? We have enough exhibits. If you can recall from your own memory?

"A. Well, the substance of it, as I recall, would be that the so-called standards that they were rating Mr. Praprotnik on were standards that could not even be measured, either quantifiably or qualifiably. So, therefore, there were not, in any actuality, they did not have any merit to them.

"And, as I recall, the two, Karetski, who was rater number one, and Kindleberger, who was rater number two, actually collaborated in the rating prior to the rating being done, which, in my estimation, was completely in violation of the City rules and regulations which specifically state that rater number one is not supposed to be influenced in his rating by any person." 4 *id.*, at 2-106-2-107, 2-109.

nection with "the Serra sculpture incident."⁸ It is equally clear that the city's asserted basis for respondent's ultimate layoff in 1983—a lack of funds—was pretextual.⁹

Thus, evidence in the record amply supports the conclusion that respondent was first transferred and then laid off, not for fiscal and administrative reasons, but in retaliation for his public testimony before the CSC and HUD.¹⁰ It is undis-

⁸"Q. [Mr. Oldham] Did you ever discuss Mr. Praprotnik with Mr. Jackson as to whether they needed his services in the facility?

"A. [Ms. Buckley] I'll have to go back a minute to the Serra sculpture incident. After that meeting, the major meeting where the Serra sculpture was approved by the Commission, unfortunately, it must have been two or three weeks or a month or so later that Mr. Jackson called me and said that Mr. Praprotnik was going to come over to the Heritage office.

"He expressed, I guess I would say, disappointment and displeasure at this, saying there was no need.

"On a separate occasion shortly after that, Mr. Killen also called me and said Mr. Praprotnik was coming and there was no reason for him to come."

4 *id.*, at 2-90.

⁹"Q. [Mr. Oldham] What's the total [HUD] budget for [1982] then?

"A. [Mr. Praprotnik] The total budget for the year was \$144,339.

"Q. And what is the total budget for [1984]?

"A. The total budget is a hundred and fifty thousand.

"Q. So there's an increase of approximately \$6,000?

"A. Yes.

"Q. Now, what was the reason given for your layoff?

"A. Insufficient funds.

"Q. Is that the only reason that they gave in your notice?

"A. Yes." 3 *id.*, at 1-83, 1-85.

¹⁰As respondent's counsel put it in responding to petitioner's motion for a directed verdict at the close of plaintiff's evidence:

"Plaintiff written reprimand contrary to thrust of the decision of the Civil Service Commission. That's in evidence. That's true. Required plaintiff to make secondary employment reports that weren't required of others. There's evidence to that effect. Reduced his staff from nine to three. There's evidence of that allegation. Given plaintiff a low service rating on October 1st. There's evidence of that. Transferring him to a nonmanagement, nonsupervisory junior staff position. There's evidence

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puted that respondent's right to testify in support of his civil service appeal and his right to testify in opposition to the city's acquisition of the Serra sculpture were protected by the First Amendment to the Federal Constitution. Given the jury's verdict, the case is therefore one in which a municipal employee's federal constitutional rights were violated by officials of the city government. There is, however, a dispute over the identity of the persons who were responsible for that violation. At trial, respondent relied on alternative theories: Either his immediate superiors at CDA (who were named as individual defendants) should be held accountable, or, if the decisions were made at a higher level of government, the city should be held responsible.

The record contains a good deal of evidence of participation in the constitutional tort by respondent's superiors at CDA, by those directly under the Mayor, and perhaps by the Mayor himself.¹¹ Moreover, in closing argument, defense counsel

to that. Failure to establish goals against which he could be measured. All of these things. Finally, we say laying plaintiff off from a position on December 30th for the pretextual reason of lack of funds and a furtherance of the conspiracy to remove plaintiff from the Civil Service Commission. There's evidence of that, that he was laid off, that the reason was pretextual." 5 *id.*, at 3-26-3-27.

"Q. [Mr. Oldham] [T]here had to be a change in [HUD's] budget in order for you to be brought on board; is that correct?

"A. [Mr. Praprotnik] Yes.

"Q. Now, in order to get a change of budget, who had to be involved in that?

"A. That would involve the Board of Estimate and Apportionment, including the Mayor, the president of the Board of Aldermen, and the budget director—I'm sorry, the comptroller.

"Q. The comptroller. Those three people?

"A. Yes.

"Q. They're all high officials of the City.

"A. That's correct." 3 *id.*, at 1-74-1-75.

"Q. [Ms. Ronzio] [A]fter you got transferred to Heritage and Urban Design in April or May of '82, are you claiming that Frank Hamsher did anything to injure or damage you thereafter once you were transferred out from under his supervision?

[Footnote 11 is continued on p. 159]

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attempted to exonerate the three individual defendants by referring to the actions of higher officials who were not named as defendants.¹²

"A. [Mr. Praprotnik] Yes, I am.

"Q. All right. What would that be?

"A. That would be the control through the mayor's office of the budget situation within the Community Development Agency and the recommendations of the staffing and the funding coming to the Heritage and Urban Design Commission.

"Q. All right. Do you know what Mr. Hamsher's position was after you were transferred to Heritage? Did he remain director of CDA?

"A. He was director of CDA, yes, for a period of time after that.

"Q. For how long? Do you know?

"A. He had implemented the layoff [of various CDA personnel at the time respondent was transferred to HUD].

"Q. For how long? He implemented the layoff; that would have been in May. How long thereafter did he continue as director?

"A. I don't know when he was switched to the mayor's office.

"Q. Then he went to the mayor's office as an assistant; right?

"A. That's correct.

"Q. As an executive aide.

"You are claiming that from the mayor's office he controlled Heritage Department's budget?

"A. Yes.

"Q. And how did that affect you?

"A. It affected me by I was laid off for lack of funds to that agency.

"Q. So how did Mr. Hamsher do that?

"A. By control through the Community Development Agency and recommendations that could be made to its, you know, director at this time.

"Q. He was not director of Community Development Agency. Are you still maintaining that he controlled their budget?

"A. I'm saying that he influenced their budget. The mayor's office played a very strong control within the influence of various City departments.

"Q. [W]hat are you claiming, if anything, that Mr. Kindleberger did to damage you after you were out from under his supervision?

"A. He had influenced the direction of the demise of duties, all the way up to that time, with the planner options that he had made available to Mr. Hamsher.

"Q. I'm asking after you transferred.

[Footnote 11 is continued on p. 160; footnote 12 is on p. 162]

Thus, we have a case in which, after a full trial, a jury reasonably concluded that top officials in a city's administration, possibly including the Mayor, acting under color of

"A. After the transfer? Yes, he could still play a strong role because he was retained within the mayor's group and made recommendations to the Board of E&A that could have influenced the funding of our agency, the Heritage and Urban Design Commission.

"Q. You're using the word 'could.' Do you know for a fact that he did any of these things?

"A. Well, the budget had to go through the Community Development Agency, the approval. I'm saying he could have had that influence.

"Q. All right. So you don't know for a fact that he did do anything?

"A. I would say it was very likely that he would have had that influence."

"Q. [H]ow about Deborah Patterson [Director, CDA], who is also a defendant? Now, she never supervised you at all; is that correct? You were never under her supervision?

"A. She did not, that's correct.

"Q. She became director of CDA after you had already left the agency?

"A. That is correct.

"Q. What, if anything, are you claiming that she did to damage you, to injure you?

"A. There were meetings between my immediate supervisors at Heritage and Urban Design Commission and Deborah Patterson and CDA officials. So that influenced the budget going through and having to be approved by the Community Development Agency and also going through the mayor's office and the Board of E&A." 4 *id.*, at 2-75-2-77, 2-81-2-82.

"Q. [Ms. Ronzio] [W]hy do you think [Mr. Praprotnik] wasn't being treated fairly?

"A. [Mr. Zelsman, architect colleague of respondent at CDA] In my opinion, it was someone above him who did not want him in that position." 4 *id.*, at 2-97-2-98.

[From deposition; read at trial] "Q. [Mr. Oldham] Were there meetings in the mayor's office which involved you and his advisors and the mayor concerning the function and purpose of CDA?

"A. [Mr. Hamsher] I have had countless such meetings.

"Q. [Mr. Praprotnik] hadn't requested the transfer?

"A. No.

"Q. Had Mr. Jackson requested the transfer?

[Footnote 11 is continued on p. 161; footnote 12 is on p. 162]

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law, took retaliatory action against a gifted but freethinking municipal employee for exercising rights protected by the First Amendment to the Federal Constitution. The legal

"A. No.

"Q. It was done on your initiative then?

"A. It was done upon approval by the mayor of the transfer. It was done by me, Mr. Jackson, and Mr. Nash [City Director of the Department of Public Safety], all of whom assigned the appropriate paperwork to transfer Mr. Praprotnik.

"Q. Did Mr. Nash request the transfer?

"A. No, but he approved it.

"Q. So nobody from Heritage and Urban Design requested the transfer?

"A. That's correct.

"Q. And it was a decision that was made in the mayor's office and carried out by you; is that correct?

"A. It was a recommendation I made to the mayor, and the mayor concurred with it, and Mr. Nash and Mr. Jackson and myself carried it out." 4 *id.*, at 2-174, 2-177-2-178.

[From deposition; read at trial] "Q. [Mr. Oldham] Who would have the authority to take functions out of one appointing authority and move them over to another appointing authority? Who would have that authority?

"A. [Mr. Duffe] Well, it depends on the situation. The Board of Estimate and Apportionment in some cases; in other cases it would be the mayor to the best of my knowledge." 4 *id.*, at 2-180.

[From deposition; read at trial] "Q. [Mr. Oldham] Anybody else other than Mr. Hamsher, and yourself, and the mayor, who had the final decisions on these matters [transfer of functions between agencies]?

"A. [Mr. Edwards, City Executive Director of Development] Well, particularly I guess, the mayor had the final decision. As I recall the recommendations of Mr. Hamsher were adopted, you know, pretty generally. I don't remember any major divergence from his recommendation." 4 *id.*, at 2-185-2-186.

"Q. [Ms. Ronzio] What do you do, Mr. Hamsher? What is your occupation?

"A. [Mr. Hamsher] I am the counsel for development in the mayor's office, City of Saint Louis.

[Discussion of CDA's 1982 layoffs] "Q. Did you voice your concerns to the mayor?

"A. Oh, yes.

"Q. What was his reaction to your concerns?

[Footnote 11 is continued on p. 162; footnote 12 is on p. 162]

question is whether the city itself is liable for such conduct under § 1983.¹³

II

In the trial court there was little, if any, dispute over the governing rules of law. In advance of trial, the city filed a

"A. He listened. He and I discussed it back and forth. And he was elected by the people so he made the decision.

"Q. He said 'Go ahead and lay off'?"

"A. Yes." 5 *id.*, at 3-134, 3-167.

"Q. [Mr. Oldham] [Y]ou indicated that you work for the mayor; is that correct?"

"A. [Mr. Hamsher] Yes.

"Q. And doesn't the mayor keep a pretty tight rein on operations within the City?"

"A. Sure.

"Q. Isn't it fair to say, Mr. Hamsher, that you initiated the [transfer], that you had sort of recommended it through the mayor's office, sort of pushed to get it done?"

"A. I wouldn't say I pushed to get it done. I recommended it to the mayor. The mayor made a decision. And when the mayor makes a decision, all of us who work for him try to carry it out." 5 *id.*, at 3-184-3-185, 3-200.

¹² "Now, another thing I would seriously like you to consider is, who is not a defendant in this matter. Who is not a defendant? Donald Spaid is not a defendant. Donald Spaid is the guy who laid that first suspension on or who was the one—not laid the suspension on, but set up that secondary employment policy. He is the man who allegedly, according to Mr. Praprotnik, got so angry that he would go to any lengths to retaliate, directed his subordinates to retaliate.

"Don Spaid is not a defendant in this case. Okay?"

"Who laid Jim Praprotnik off? Who really laid him off? Who signed off on the form? Rob Killen signed the form. At the time Mr. Praprotnik was at Heritage and Urban Design and got laid off, Rob Killen was his appointing authority. It was his decision. He's the one who prepared that budget that went to Deborah Patterson.

"Who else is not a defendant? Rob Killen's boss, Tom Nash. Tom Nash allegedly approved it and went along with Rob Killen. Do you see him here? Nope. *Let's hang it on these guys.*" 6 *id.*, at 4-50-4-51 (emphasis added).

¹³ The concurrence disapproves of any reliance on evidence regarding the reaction of various high officials to respondent's Serra sculpture testimony

motion for summary judgment that the District Court ultimately denied because the record contained an affidavit stating that respondent "was transferred due to 'connivance' of the mayor, the mayor's chief of staff, and the city's personnel director." 1 Record 130. No one appears to have questioned the proposition that if such facts could be proved at trial, the city could be held liable.¹⁴

on the ground that "the jury instructions concerning respondent's First Amendment claim refer exclusively to the exercise of his appellate rights before the CSC and make no mention whatever of his public testimony." *Ante*, at 142, n. 5. Two points should suffice in response. First, the instruction in question told the jury that it "must" find for respondent if it found certain facts relating to the CSC appeals, but did not preclude the jury from finding for respondent on other grounds as well. Second, as the concurrence itself recognizes, see *ante*, at 135, a separate instruction, which I quote below in the text at n. 15, told the jury it could hold the city liable for actions committed by high enough officials. This instruction did not limit the field of high officials' actions that could give rise to municipal liability.

The concurrence also states that the record fails to provide "sufficient evidence of complicity on the part of other municipal policymakers such that we may sustain the jury's verdict against petitioner on a conspiracy theory neither espoused nor addressed by the court below." *Ante*, at 142, n. 5. But we are reviewing the Court of Appeals' *judgment*, not its *opinion*, and however flawed the latter, the former must be sustained if sufficient evidence exists to support, under a proper view of municipal liability, the verdict actually rendered. Moreover, as I discuss in greater detail in Part II, the jury was given wide rein to examine the conduct of the city's officials and to conclude whether or not high officials retaliated against respondent's exercise of his constitutional right to freedom of speech. The lengthy quotations from the record make it clear that sufficient evidence *was* introduced to support the jury's verdict.

¹⁴Petitioner points to the following argument made in support of its motion for summary judgment:

"In the instant case, Plaintiff has failed to even allege the existence of any such [municipal] policy. In fact, Plaintiff refers to City 'policy' only in one instance in his complaint—at paragraph 29(c), wherein he claims the City's layoff policy . . . was *not* followed. In the absence of allegations of impermissible policy, or of facts indicative that such policy exists, the City, itself, may not be held liable." Memorandum in Support of Motion for Summary

After respondent's evidence had been presented at trial, the city made a motion for a directed verdict, again advancing the argument that there was insufficient evidence in the record to support a judgment against the city. The argument on that motion does not indicate that the parties had any dispute about the applicable rules of law. For counsel for the city argued:

"I understand that you can be liable—a municipality can be held liable if its high ranking officials are allowed to violate someone's constitutional rights. I fail to see how you can find any evidence that the City of St. Louis did that." 5 *id.*, at 3–28.

The jury obviously disagreed with this assessment of the evidence. Moreover, the judge denied that motion, initially and at the close of all evidence, as well as the city's motion for a judgment notwithstanding the verdict.

Finally, the ultimate instruction to the jury on the issue of municipal liability was in fact proposed by the city's attorney, as the plurality acknowledges, *ante*, at 119; see Brief for Respondent 48; Reply Brief for Petitioner 6:

"As a general principle, a municipality is not liable under 42 U. S. C. § 1983 for the actions of its employees. However, a municipality may be held liable under 42 U. S. C. § 1983 if the allegedly unconstitutional act was

Judgment or, in the Alternative, for Judgment on the Pleadings 16, Reply Brief for Petitioner 5 (emphasis in original).

This argument, like all of petitioner's contentions in the trial court on the subject of municipal liability, was addressed to the sufficiency of respondent's factual support for binding the city, not to any legal issue regarding who could and who could not bind the city. The District Court, indeed, initially granted summary judgment for the city on the ground that "the Court is unable to discern any suggestion that defendants' allegedly wrongful actions were in accordance with city policy." 1 Record 126. But after receiving respondent's motion for reconsideration, accompanied by his affidavit, discussed in the text, *supra*, the District Court reversed itself and denied the city's motion.

committed by an official high enough in the government so that his or her actions can be said to represent a government decision." Instruction No. 15, App. 113.¹⁵

In my opinion it is far too late for the city to contend that the jury instructions on municipal liability were insufficient or erroneous.¹⁶ In *Oklahoma City v. Tuttle*, 471 U. S. 808 (1985), we permitted an objection to an instruction by defendant for the first time on appeal only because plaintiff failed to raise the contemporaneous-objection argument until its brief on the merits in this Court. We stated that such arguments "should be brought to our attention *no later* than in respondent's brief in opposition to the petition for certiorari." *Id.*, at 816 (emphasis in original). In this case, respondent properly pointed out in his response to the petition for a writ of

¹⁵ Proposing this instruction made good sense as litigation strategy, for respondent had sued not only the city but also three individual city officials, Frank Hamsher, Charles Kindleberger, and Deborah Patterson. Presumably the city's attorney, who was representing both the city and the officials, hoped that the jury would focus on the individual defendants, exonerate them, and, having focused on these defendants, hold the city innocent as well by concluding that higher-ups were not implicated. As we know from the verdict—judgment for the individual defendants but against the city—this strategy partially failed. Although petitioner argues that the verdicts were inconsistent, they actually make perfect sense in light of the evidence that officials in the Mayor's office, possibly including the Mayor himself, and various agency heads participated in a deliberate plan to deprive respondent of his job in violation of his First Amendment rights.

¹⁶ Federal Rule of Civil Procedure 51 is quite clear about a litigant's method of preserving objections to instructions:

"At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury. The court, at its election, may instruct the jury before or after argument, or both. *No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury.*" (Emphasis added.)

certiorari that petitioner had failed to object to the relevant jury instruction. Brief in Opposition 10–11.¹⁷

Apparently acknowledging that this case cannot be decided on the basis of any possible error in any of the jury instructions, the plurality views petitioner's motions for summary judgment and a directed verdict as raising and preserving a legal question concerning the standard for determining municipal liability. *Ante*, at 120. But these motions did not raise any legal issue that was disputed. It is most unfair to permit a defeated litigant in a civil case tried to a verdict before a jury to advance legal arguments that were not made in the District Court, especially when that litigant *agrees*, both in its motions and proposed instructions, with its opponent's view of the law.¹⁸ Although, as the plurality points out, the

¹⁷ In the Court of Appeals the city had argued that the trial court should have accepted the following instruction regarding municipal liability:

"An isolated incident of illegal conduct on the part of a municipality's agents, servants or employees is not sufficient to establish a governmental custom, usage or official policy such as would give rise to liability on the part of a municipality pursuant to 42 U. S. C. § 1983." Instruction No. A, App. 127.

The Court of Appeals properly upheld the trial court's rejection of this instruction, see *Pembaur v. Cincinnati*, 475 U. S. 469 (1986), and petitioner does not take issue with this holding.

¹⁸ The plurality states that petitioner's motions, although "much less detailed than the arguments it now makes in response to the decision of the Court of Appeals," nonetheless properly "preserve[d] the issue raised in its petition for certiorari." *Ante*, at 120. But petitioner made no arguments in these motions, much less sparsely detailed ones, on behalf of *any* legal standard for municipal liability. The plurality does not overcome the fact that petitioner's motions were made on the basis of evidentiary insufficiency. Finally, even if the mere making of motions for summary judgment, directed verdict, and judgment notwithstanding the verdict could preserve any legal issue that might arise in a case—a proposition we should be slow to accept—such preservation should quickly spoil when the moving party *admits*, in both an offered instruction and an argument on behalf of one of the motions, that the law is as its opponent would have it. As I have shown above, petitioner did just that in offering Instruction No. 15 and in arguing in support of a directed verdict.

question presented in the certiorari petition "was manifestly framed in light of the holding of the Court of Appeals," *ante*, at 119, the legal issue of municipal liability had never been raised in the District Court.

Given the procedural history, it is not only unfair to respondent, but also poor judicial practice, to use this case as a bulldozer to reshape "a legal landscape whose contours are 'in a state of evolving definition and uncertainty.'" *Ante*, at 120 (plurality opinion) (citation omitted). It would be far wiser in the long run simply to resolve the issues that have been properly framed by the litigants and preserved for review. Nevertheless, in view of the fact that the Court has "set out again to clarify the issue that we last addressed in *Pembaur*," *ante*, at 124 (plurality opinion), it is appropriate to explain my view of how our precedents in this area apply to this case.

III

In *Monell v. New York City Dept. of Social Services*, 436 U. S. 658 (1978), we held that municipal corporations are "persons" within the meaning of 42 U. S. C. § 1983. Since a corporation is incapable of doing anything except through the agency of human beings, that holding necessarily gave rise to the question of what human activity undertaken by agents of the corporation may create municipal liability in § 1983 litigation.¹⁹

The first case dealing with this question was, of course, *Monell*, in which female employees of the Department of So-

¹⁹ The "theme" of *Monell*—"that some basis for government liability other than vicarious liability for the acts of individuals must be found"—has proved to be a "difficult" one largely because "there is no obvious way to distinguish the acts of a municipality from the acts of the individuals whom it employs." Whitman, *supra* n. 1, at 236. In other words, every time a municipality is held liable in tort, even in a case like *Monell*, actions of its human agents are necessarily involved. Accordingly, our task is not to draw a line between the actions of the city and the actions of its employees, but rather to develop a principle for determining *which* human acts should bind a municipality.

cial Services and the Board of Education of New York City challenged the constitutionality of a citywide policy concerning pregnancy leave. Once it was decided that the city was a "person," it obviously followed that the city had to assume responsibility for that policy. Even if some departments had followed a lawful policy, I have no doubt that the city would nevertheless have been responsible for the decisions made by either of the two major departments that were directly involved in the litigation.

In *Owen v. City of Independence*, 445 U. S. 622 (1980), the Court held that municipalities are not entitled to qualified immunity based on the good faith of their officials. As a premise to this decision, we agreed with the Court of Appeals that the city "was responsible for the deprivation of petitioner's constitutional rights." *Id.*, at 633; see also *id.*, at 655, n. 39. Petitioner had been fired as City Chief of Police without a notice of reasons and without a hearing, after the City Council and the City Manager had publicly reprimanded him for his administration of the Police Department property room. This isolated personnel action was clearly *not* taken pursuant to a rule of general applicability; nonetheless, we had no problem with the Court of Appeals' conclusion that the action of the City Council and City Manager was binding on the city.²⁰

²⁰ Since *Owen*, Members of the Court have offered varying explanations for that conclusion: "[T]he release of the information was an official action—that is, a policy or custom—of the city," *Oklahoma City v. Tuttle*, 471 U. S., at 832 (BRENNAN, J., concurring in the judgment); "[A] municipality may be liable under § 1983 for a single decision by its properly constituted legislative body—whether or not that body had taken similar action in the past or intended to do so in the future—because even a single decision by such a body unquestionably constitutes an act of official government policy," *Pembaur v. Cincinnati*, 475 U. S., at 480 (BRENNAN, J.); "Formal procedures that involve, for example, voting by elected officials, prepared reports, extended deliberation, or official records indicate that the resulting decisions taken 'may fairly be said to represent official policy.'" *Id.*, at 500 (Powell, J., dissenting). Today, the plurality offers an explanation for *Owen* similar to that offered by Justice Powell in his

In the next municipal liability case, the Court held that an isolated unconstitutional seizure by a sole police officer did not bind the municipality. *Oklahoma City v. Tuttle*, 471 U. S. 808 (1985).²¹ Thus, that holding rejected the common-law doctrine of *respondeat superior* as the standard for measuring municipal liability under § 1983. It did not, of course, reject the possibility that liability might be predicated on the conduct of management level personnel with policymaking authority.

Finally, in *Pembaur v. Cincinnati*, 475 U. S., at 471, we definitively held that a "decision by municipal policymakers on a single occasion" was sufficient to support an award of damages against the municipality. In *Pembaur*, a County Prosecutor had advised County Sheriffs at the doorstep of a recalcitrant doctor to "go in and get [the witnesses]" to alleged charges of fraud by the doctor. *Id.*, at 473. Because the Sheriffs possessed only arrest warrants for the witnesses and not a search warrant for the doctor's office as well, the

Pembaur dissent: "We have assumed that an unconstitutional governmental policy could be inferred from a single decision taken by the highest officials responsible for setting policy in that area of the government's business." *Ante*, at 123. For its part, the concurrence's explanation of *Owen* resembles that offered by JUSTICE BRENNAN in *Pembaur*: "Nor have we ever doubted that a single decision of a city's properly constituted legislative body is a municipal act capable of subjecting the city to liability." *Ante*, at 138; see also *ante*, at 139, n. 3. But neither opinion explains *why* a single personnel decision by a legislature ought bind a municipality any differently than any other duly authorized personnel decision.

²¹ Although no one opinion commanded a majority of the Court, the narrowest reason for the holding was stated by JUSTICE BRENNAN. The jury had been instructed that it could infer *from the seizure alone* that the city had an unconstitutional policy of inadequate police training. Such an inference, according to JUSTICE BRENNAN, would be little more than *respondeat superior* in disguise. Whether independent proof of inadequate police training could result in municipal liability was a question that would have to wait for another day. See *Springfield v. Kibbe*, 480 U. S. 257 (1987) (dismissing as improvidently granted a writ of certiorari in a case raising this issue). Central to the holding in *Tuttle* was the fact that no high official was found to have been involved in the unconstitutional act.

advice was unconstitutional, see *Steagald v. United States*, 451 U. S. 204 (1981), and the question was whether the County Prosecutor's isolated act could subject the county to damages under § 1983 in a suit by the doctor. In the part of his opinion that commanded a majority of the Court, JUSTICE BRENNAN wrote:

"[A] government frequently chooses a course of action tailored to a particular situation and not intended to control decisions in later situations. If the decision to adopt that particular course of action is properly made by that government's authorized decisionmakers, it surely represents an act of official government 'policy' as that term is commonly understood. More importantly, where action is directed by those who establish governmental policy, the municipality is equally responsible whether that action is to be taken only once or to be taken repeatedly." *Pembaur v. Cincinnati*, 475 U. S., at 481 (footnote omitted).

Since the County Prosecutor was authorized to establish law enforcement policy, his decision in that area could be attributed to the county for purposes of § 1983 liability. As Justice Powell correctly pointed out in his dissent, "the Court . . . focus[ed] almost exclusively on the status of the decision-maker." *Id.*, at 498.

Thus, the Court has permitted a municipality to be held liable for the unconstitutional actions of its agents when those agents enforced a rule of general applicability (*Monell*); were of sufficiently high stature and acted through a formal process (*Owen*); or were authorized to establish policy in the particular area of city government in which the tort was committed (*Pembaur*). Under these precedents, the city of St. Louis should be held liable in this case.

Both *Pembaur* and the plurality and concurring opinions today acknowledge that a high official who has ultimate control over a certain area of city government can bind the city

through his unconstitutional actions even though those actions are not in the form of formal rules or regulations. See *Pembaur v. Cincinnati*, *supra*, at 479–481; *ante*, at 123 (plurality), at 139–140 (concurrence). Although the Court has explained its holdings by reference to the nonstatutory term “policy,” it plainly has not embraced the standard understanding of that word as covering a rule of general applicability. Instead it has used that term to include isolated acts not intended to be binding over a class of situations. But when one remembers that the real question in cases such as this is not “what constitutes city policy?” but rather “when should a city be liable for the acts of its agents?”, the inclusion of single acts by high officials makes sense, for those acts bind a municipality in a way that the misdeeds of low officials do not.

Every act of a high official constitutes a kind of “statement” about how similar decisions will be carried out; the assumption is that the same decision would have been made, and would again be made, across a class of cases. Lower officials do not control others in the same way. Since their actions do not dictate the responses of various subordinates, those actions lack the potential of controlling governmental decisionmaking; they are not perceived as the actions of the city itself. If a county police officer had broken down Dr. Pembaur’s door on the officer’s own initiative, this would have been seen as the action of an overanxious officer, and would not have sent a message to other officers that similar actions would be countenanced. One reason for this is that the County Prosecutor himself could step forward and say “that was wrong”; when the County Prosecutor authorized the action himself, only a self-correction would accomplish the same task, and until such time his action would have countywide ramifications. Here, the Mayor, those working for him, and the agency heads are high-ranking officials; accordingly, we must assume that their actions have citywide ramifications, both through their similar response to a like

class of situations, and through the response of subordinates who follow their lead.²²

Just as the actions of high-ranking and low-ranking municipal employees differ in nature, so do constitutional torts differ. An illegal search (*Pembaur*) or seizure (*Tuttle*) is quite different from a firing without due process (*Owen*); the retaliatory personnel action involved in today's case is in still another category. One thing that the torts in *Pembaur*, *Tuttle*, and *Owen* had in common is that they occurred "in the open"; in each of those cases, the ultimate judgment of unconstitutionality was based on whether undisputed events (the breaking-in in *Pembaur*, the shooting in *Tuttle*, the firing in *Owen*) comported with accepted constitutional norms. But

²² That high officials may bind a municipality in ways that low officials may not should not surprise, for the pyramidal structure of authority pervades the law. For instance, the law of agency distinguishes between a general agent and a special agent; the former is "authorized to conduct a series of transactions involving a continuity of service," while the latter is "authorized to conduct a single transaction or a series of transactions not involving continuity of service." Restatement (Second) of Agency §§ 3(1), (2) (1958). The distinction matters because only a general agent "subjects his principal to liability for acts done on his account which usually accompany or are incidental to transactions which the agent is authorized to conduct if, although they are forbidden by the principal, the other party reasonably believes that the agent is authorized to do them and has no notice that he is not so authorized." *Id.*, § 161. A special agent, to the contrary, "has no power to bind his principal by contracts or conveyances which he is not authorized or apparently authorized to make," with some exceptions. *Id.*, § 161A. A general agent thus binds his principal even through unauthorized acts precisely because those dealing with him perceive him as possessing broad authority to act on behalf of his principal. A special agent, possessing and known to possess only limited authority, cannot bind his principal for unauthorized acts because those dealing with him are on notice that his authority extends only so far. Likewise, a high municipal official can bind his principal (the city) for unauthorized actions because others—both lower officials and members of the public with whom he deals—perceive him as acting with broad authority and rely upon his actions in organizing their own behavior. The distinction between general agents and special agents has a firm "basis in the law." See *ante*, at 125, n. 2 (plurality opinion).

the typical retaliatory personnel action claim pits one story against another; although everyone admits that the transfer and discharge of respondent occurred, there is sharp, and ultimately central, dispute over the reasons—the motivation—behind the actions. *The very nature of the tort is to avoid a formal process.* Owen's relevance should thus be clear. For if the Court is willing to recognize the existence of municipal policy in a nonrule case as long as high enough officials engaged in a formal enough process, it should not deny the existence of such a policy merely because those same officials act "underground," as it were. It would be a truly remarkable doctrine for this Court to recognize municipal liability in an employee discharge case when high officials are foolish enough to act through a "formal process," but not when similarly high officials attempt to avoid liability by acting on the pretext of budgetary concerns, which is what this jury found based on the evidence presented at trial.

Thus, holding St. Louis liable in this case is supported by both *Pembaur* and *Owen*. We hold a municipality liable for the decisions of its high officials in large part because those decisions, by definition, would be applied across a class of cases. Just as we assume in *Pembaur* that the County Prosecutor (or his subordinates) would issue the same breakdown-the-door order in similar cases, and just as we assume in *Owen* that the City Council (or those following its lead) would fire an employee without notice of reasons or opportunity to be heard in similar cases, so too must we assume that whistleblowers like respondent would be dealt with in similar retaliatory fashion if they offend the Mayor, his staff, and relevant agency heads, or if they offend those lower ranking officials who follow the example of their superiors. Furthermore, just as we hold a municipality liable for discharging an employee without due process when its city council acts formally—for a due process violation is precisely the *type* of constitutional tort that a city council might commit when it acts formally—so too must we hold a municipality liable for discharging an employee in retaliation against his public speech

STEVENS, J., dissenting

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when similarly high officials act informally—for a First Amendment retaliation tort is precisely the *type* of constitutional tort that high officials might commit when they act in concert and informally.

Whatever difficulties the Court may have with binding municipalities on the basis of the unconstitutional conduct of individuals, it should have no such difficulties binding a city when many of its high officials—including officials directly under the Mayor, agency heads, and possibly the Mayor himself—cooperate to retaliate against a whistleblower for the exercise of his First Amendment rights.²³

I would affirm the judgment of the Court of Appeals.

²³ The plurality incorrectly claims that I have suggested “a new theory” for determining when a municipality should be bound by the acts of its agents. *Ante*, at 125, n. 2. As both the plurality and the concurrence recognize, a municipality, like any institution, can only act through the agency of human beings. By holding that isolated actions of high officials may give rise to municipal liability, see, e. g., *Owen v. City of Independence*; *Pembaur v. Cincinnati*, the Court has indicated that the mere status of city officials matters in determining whether the city may be held liable for the officials’ actions. The argument of both the plurality and the concurrence that this principle should be applied only in the particular area of government that the erring official controls is unpersuasive, given the multifarious ways in which governmental agents may inflict constitutional harm. This case is a perfect example of why the “area-by-area” approach will not do; personnel actions may be taken in response to an employee’s protected speech by a number of high officials, none of whom possesses specific authority over “personnel” policy. Nevertheless, simply by virtue of their high rank, their actions may influence the actions of other municipal officials. It is that kind of influence that provides the common thread binding *Monell* and the later § 1983 municipal liability cases. In short, what the Court has characterized as “a new theory” is actually a way of understanding our precedents that will permit a judge to explain to a jury that “policy” means nothing if not “influence,” and that while the isolated gunshot of an errant police officer would not influence his colleagues, see *Oklahoma City v. Tuttle*, adverse personnel actions taken by a city’s highest officials in response to an employee’s Civil Service Commission appeals and his public testimony would set an example for other, lower officials to follow.

Per Curiam

TRANS WORLD AIRLINES, INC. v. INDEPENDENT
FEDERATION OF FLIGHT ATTENDANTS

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

No. 86-1650. Argued January 12, 1988—Decided March 2, 1988
809 F. 2d 483, affirmed by an equally divided Court.

Murray Gartner argued the cause for petitioner. With him on the briefs were *Paul E. Donnelly*, *Mark A. Buckstein*, and *Michael A. Katz*.

Steven A. Fehr argued the cause for respondent. With him on the brief were *William A. Jolley*, *Doyle R. Pryor*, and *Scott A. Raisher*.*

PER CURIAM.

The judgment of the Court of Appeals for the Eighth Circuit is affirmed by an equally divided Court.

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

*Briefs of *amici curiae* urging reversal were filed for the Cross-over Flight Attendants by *Mark P. Johnson*; and for Some Working TWA Flight Attendants by *Robert F. Gore*, *Rossie D. Alston, Jr.*, and *Rex H. Reed*.

Marsha Berzon, *William Mahoney*, *John Clarke, Jr.*, and *Laurence Gold* filed a brief for the American Federation of Labor and Congress of Industrial Organizations et al. as *amici curiae* urging affirmance.

K MART CORP. v. CARTIER, INC., ET AL.

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

No. 86-495. Argued October 6, 1987—Decided March 7, 1988*

A “gray-market” good is a foreign-manufactured good that bears a valid United States trademark and is imported without the consent of the United States trademark owner. Section 526(a) of the Tariff Act of 1930 prohibits the importation of certain gray-market goods. The Customs Service’s implementing regulation allows importation where the foreign manufacturer is affiliated with the United States trademark owner or has received the owner’s authorization to use its trademark. Respondent Coalition to Preserve the Integrity of American Trademarks and two of its members filed a Federal District Court suit against the Government for injunctive and declaratory relief, asserting, *inter alia*, that the regulation is inconsistent with § 526(a) and is therefore invalid. Petitioner 47th Street Photo, Inc., intervened as a defendant and filed a motion to dismiss on the ground that the Court of International Trade had exclusive jurisdiction over the case. The District Court rejected the motion and upheld the regulation. The Court of Appeals affirmed the jurisdictional ruling, but reversed on the merits.

Held:

1. The District Court had jurisdiction under both the general federal-question provision, 28 U. S. C. § 1331, and the specific provision regarding actions “arising under any Act of Congress relating to . . . trademarks.” § 1338(a). P. 182.

2. The Court of International Trade did not have exclusive jurisdiction under 28 U. S. C. § 1581(i)(3), which grants such jurisdiction over certain suits involving “embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety.” Pp. 182–190.

(a) Although the Court of Appeals properly rejected the theory that § 526(a) imposes an “embarg[o]” within the meaning of § 1581(i)(3), the court’s reasoning—that § 1581(i)(3) only extends to embargoes arising

*Together with No. 86-624, *47th Street Photo, Inc. v. Coalition to Preserve the Integrity of American Trademarks et al.*, and No. 86-625, *United States et al. v. Coalition to Preserve the Integrity of American Trademarks et al.*, also on certiorari to the same court.

out of trade policy—is unpersuasive. Trade policy is not the sole, nor perhaps even the primary, purpose served by embargoes, which are also imposed, *inter alia*, to protect the public health, safety, or morality. Had Congress intended to constrain the meaning of “embargoes” as suggested by the Court of Appeals, it would have been unnecessary to exclude expressly health or safety embargoes from § 1581(i)(3)’s jurisdictional grant, or to deny the Court of International Trade jurisdiction over suits arising from the importation of prohibited “immoral articles,” see § 1581(j). P. 184.

(b) The ordinary meaning of “embargo,” which Congress apparently adopted in § 1581(i)(3), is a governmentally imposed quantitative restriction—of zero—on the importation of merchandise. Section 526(a)’s importation prohibition is not such an “embargo,” since, rather than reflecting a *governmental* restriction on the quantity of a particular product that will enter, it merely provides a mechanism by which a trademark owner might, at its own option, enlist the Customs Service’s aid in barring foreign-made goods bearing its trademark in order to enforce its own private trademark right. The contention that “embargo” should be defined as *any* governmental “import regulation that takes the *form* of a prohibition, regardless of . . . its ultimate purpose,” is rejected, since, in fact, not every governmental import prohibition is an embargo. Pp. 185–187.

(c) Section 1581(i)(3)’s purpose of eliminating jurisdictional confusion and its legislative history provide no indication that Congress intended to depart from the ordinary meaning of “embargoes.” If Congress had meant to give the Court of International Trade exclusive jurisdiction over “importation prohibitions” rather than “embargoes,” it would have said so. Pp. 187–190.

3. The Court of International Trade did not have exclusive jurisdiction under 28 U. S. C. § 1581(i)(4), which grants such jurisdiction over certain suits involving “administration and enforcement with respect to the matters referred to” in § 1581(a), which in turn applies to actions contesting the administrative “denial of a protest” challenging a Customs officer’s order excluding merchandise from entry. Since this action does not involve the “matte[r] referred to” in § 1581(a)—the “denial of a protest,” or at the very broadest, “a protest”—it cannot involve “administration and enforcement with respect to” that matter. Pp. 190–191.

4. The cases are restored to the calendar for reargument on the merits. P. 191.

252 U. S. App. D. C. 342, 790 F. 2d 903, affirmed in part.

BRENNAN, J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. SCALIA, J., filed a dissent-

ing opinion, in which REHNQUIST, C. J., and O'CONNOR, J., joined, *post*, p. 191. KENNEDY, J., took no part in the consideration or decision of the case.

Deputy Solicitor General Cohen argued the cause for petitioners in No. 86-625. With him on the briefs were *Solicitor General Fried*, *Assistant Attorney General Willard*, *Deputy Assistant Attorney General Spears*, *Jeffrey P. Minear*, *David M. Cohen*, and *Robert V. Zener*. *Robert W. Steele* argued the cause for petitioners in Nos. 86-495 and 86-624. With him on the briefs for petitioner in No. 86-495 were *Robert E. Hebda* and *James C. Tuttle*. *Nathan Lewin* and *Jamie S. Gorelick* filed briefs for petitioner in No. 86-624.

William H. Allen argued the cause for respondents. With him on the brief were *Eugene A. Ludwig* and *Scott D. Gilbert*.†

†Briefs of *amici curiae* urging reversal were filed for the State of Washington by *Kenneth O. Eikenberry*, Attorney General, and *John G. Hennen*, Senior Assistant Attorney General; for the American Free Trade Association by *Stephen Kurzman*, *Robert Ullman*, and *Steven R. Trost*; for the Consumers Union of U. S., Inc., by *Alan Mark Silbergeld*; for Darby Dental Supply Co. et al. by *Robert V. Marrow*; for the National Association of Catalog Showroom Merchandisers by *Richard B. Kelly* and *Thomas P. Mohen*; for the National Mass Retailing Institute by *William D. Coston* and *Robert J. Verdisco*; and for Progress Trading Co. by *William F. Sondericker*, *Robert L. Hoegle*, and *Frank W. Gaines, Jr.*

Briefs of *amici curiae* urging affirmance were filed for American Cyanamid Co. et al. by *David Ladd* and *Thomas W. Kirby*; for the American Intellectual Property Law Association, Inc., by *Neil A. Smith*; for Duracell Inc. by *James N. Bierman*, *Jay N. Varon*, and *Sheila McDonald Gill*; for Lever Brothers Co. by *Robert P. Devlin*; for the Motor Vehicle Manufacturers Association of the United States, Inc., by *William H. Crabtree*; for the United States Trademark Association by *Marie V. Driscoll*; and for Yamaha International Corp. et al. by *Robert E. Wagner* and *Robert E. Browne*.

Harold C. Wegner, *Barry E. Bretschneider*, *Donald R. Dinan*, *Charles F. Schill*, and *Albert P. Halluin* filed a brief for Cetus Corp. as *amicus curiae*.

JUSTICE BRENNAN delivered the opinion of the Court.

A “gray-market” good is a foreign-manufactured good bearing a valid United States trademark, which is imported without the consent of the United States trademark owner. This action presents the issues whether a federal district court has jurisdiction to hear a challenge to the Secretary of the Treasury’s regulation permitting the importation of certain gray-market goods, 19 CFR § 133.21 (1987), and, if so, whether the regulation is a reasonable agency interpretation of § 526(a) of the Tariff Act of 1930 (1930 Tariff Act), 46 Stat. 741, as amended, 19 U. S. C. § 1526.

I

Section 526(a) of the 1930 Tariff Act prohibits importing “into the United States any merchandise of foreign manufacture if such merchandise . . . bears a trademark owned by a citizen of, or by a corporation or association created or organized within, the United States, and registered in the Patent and Trademark Office by a person domiciled in the United States . . . , unless written consent of the owner of such trademark is produced at the time of making entry.” 19 U. S. C. § 1526(a).¹

¹ The full text of § 526(a), as codified, 19 U. S. C. § 1526(a), is as follows:
“(a) Importation prohibited

“Except as provided in subsection (d) of this section [an exception added in 1978 for the importation of articles for personal use], it shall be unlawful to import into the United States any merchandise of foreign manufacture if such merchandise, or the label, sign, print, package, wrapper, or receptacle, bears a trademark owned by a citizen of, or by a corporation or association created or organized within, the United States, and registered in the Patent and Trademark Office by a person domiciled in the United States, under the provisions of sections 81 to 109 of title 15, and if a copy of the certificate of registration of such trademark is filed with the Secretary of the Treasury, in the manner provided in section 106 of said title 15, unless written consent of the owner of such trademark is produced at the time of making entry.”

The Customs Service regulation that implements § 526(a) does not prohibit importation of gray-market goods where the foreign manufacturer is *affiliated* with the United States trademark owner or has received the owner's *authorization* to use its trademark. The regulation provides generally that "[f]oreign-made articles bearing a trademark identical with one owned and recorded by a citizen of the United States or a corporation or association created or organized within the United States are subject to seizure and forfeiture as prohibited importations." 19 CFR § 133.21(b) (1987).² But the

²The Customs Service regulation provides in relevant part:

"§ 133.21 Restrictions on importations of articles bearing recorded trademarks and trade names.

"(b) *Identical trademark.* Foreign-made articles bearing a trademark identical with one owned and recorded by a citizen of the United States or a corporation or association created or organized within the United States are subject to seizure and forfeiture as prohibited importations.

"(c) *Restrictions not applicable.* The restrictions set forth in paragraphs (a) and (b) of this section do not apply to imported articles when:

"(1) Both the foreign and the U. S. trademark or trade name are owned by the same person or business entity;

"(2) The foreign and domestic trademark or trade name owners are parent and subsidiary companies or are otherwise subject to common ownership or control (see §§ 133.2(d) [defining "common ownership and common control"] and 133.12(d) [providing that application to record trademark must report identity of any affiliate that uses same trade name abroad]);

"(3) The articles of foreign manufacture bear a recorded trademark or trade name applied under authorization of the U. S. owner;

"(4) The objectionable mark is removed or obliterated prior to importation in such a manner as to be illegible and incapable of being reconstituted, for example by:

"(i) Grinding off imprinted trademarks wherever they appear;

"(ii) Removing and disposing of plates bearing trademark or trade name;

"(5) The merchandise is imported by the recordant of the trademark or trade name or his designate;

"(6) The recordant gives written consent to an importation of articles otherwise subject to the restrictions set forth in paragraphs (a) and (b) of this section, and such consent is furnished to appropriate Customs officials; or

regulation furnishes a "common-control" exception from the ban, permitting the entry of gray-market goods manufactured abroad by the trademark owner or its affiliate:

"(c) *Restrictions not applicable.* The restrictions . . . do not apply to imported articles when:

"(1) Both the foreign and the U. S. trademark or trade name are owned by the same person or business entity; [or]

"(2) The foreign and domestic trademark or trade name owners are parent and subsidiary companies or are otherwise subject to common ownership or control"

The Customs Service regulation further provides an "authorized-use" exception, which permits importation of gray-market goods where

"(3) [t]he articles of foreign manufacture bear a recorded trademark or trade name applied under authorization of the U. S. owner" 19 CFR § 133.21(c) (1987).

Respondent Coalition to Preserve the Integrity of American Trademarks, an association of United States trademark owners, and two of its members (all three collectively referred to as COPIAT) brought suit in the United States District Court for the District of Columbia, seeking both a declaration that the Customs Service regulation is invalid and an injunction against its enforcement.³ Specifically, COPIAT asserted that the common-control and authorized-use exceptions are inconsistent with both § 526(a) of the 1930 Tariff Act, and § 42 of the Lanham Trade-Mark Act, 15 U. S. C. § 1124, which prohibits the importation of goods bearing marks that "copy or simulate" United States trademarks. Petitioners

"(7) The articles of foreign manufacture bear a recorded trademark and the personal exemption is claimed and allowed under § 148.55 of this chapter." 19 CFR § 133.21 (1987).

³ COPIAT sued the United States, the Secretary of the Treasury, and the Commissioner of Customs.

K mart Corporation and 47th Street Photo, Inc., intervened as defendants.

After rejecting 47th Street Photo's motion to dismiss on the ground that the Court of International Trade had exclusive jurisdiction over the case, the District Court upheld the Customs Service regulation against both challenges. 598 F. Supp. 844 (1984). The Court of Appeals affirmed the District Court's jurisdictional ruling but reversed on the merits. 252 U. S. App. D. C. 342, 790 F. 2d 903 (1986) (hereinafter *COPIAT*). We granted certiorari, 479 U. S. 1005 (1986), to resolve conflicts among the Courts of Appeals on both the jurisdictional issue, compare *Vivitar Corp. v. United States*, 761 F. 2d 1552, 1557-1560 (CA Fed. 1985), aff'g 593 F. Supp. 420 (Ct. Int'l Trade 1984), cert. denied, 474 U. S. 1055 (1986), with *Olympus Corp. v. United States*, 792 F. 2d 315, 317-319 (CA2 1986), aff'g 627 F. Supp. 911 (EDNY 1985), cert. pending, No. 86-757; and *COPIAT*, *supra*, at 344-346, 790 F. 2d, at 905-907, and the merits, compare *Vivitar Corp.*, *supra*, at 1560-1571, and *Olympus Corp.*, *supra*, at 319-322, with *COPIAT*, *supra*, at 346-355, 790 F. 2d, at 907-916. We now affirm the Court of Appeals' conclusion that the District Court had jurisdiction, and restore these cases to the calendar for reargument on the merits.

II

Only petitioner 47th Street Photo contends that we lack jurisdiction over this litigation. Both the general federal-question provision, 28 U. S. C. § 1331, and the specific provision regarding actions "arising under any Act of Congress relating to . . . trade-marks," § 1338(a), would, standing alone, vest the district courts with jurisdiction over this action.⁴ The District Court would be divested of jurisdiction, however, if this action fell within one of several specific grants of

⁴ For the Lanham Trade-Mark Act claim, *COPIAT* also invoked a specific provision of that Act conferring to the district courts jurisdiction over all claims arising under the Act. 15 U. S. C. § 1121.

exclusive jurisdiction to the Court of International Trade. Petitioner propounds two theories in support of its claim that exclusive jurisdiction lies in the Court of International Trade. We reject both.

A

Petitioner's first theory is that § 526(a) imposes an "embarg[o]" within the meaning of 28 U. S. C. § 1581(i)(3), which grants the Court of International Trade exclusive jurisdiction over suits against the Government arising out of federal laws that provide for "embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety" ⁵ The Court of Appeals rejected that theory on the ground that "Section 1581(i)(3) only extends to quotas and embargoes arising out of trade policy, the sort of measures that have traditionally limited the importation of shoes, textiles, automobiles, and the like." *COPIAT, supra*, at 346, 790 F. 2d, at 907. We agree with the Court of Appeals that § 526(a) is not an "embargo," but reach that conclusion on different reasoning.

⁵ As relevant here, 28 U. S. C. § 1581 provides:

"(i) In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)–(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for—

"(1) revenue from imports or tonnage;

"(2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;

"(3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or

"(4) administration and enforcement with respect to the matters referred to in paragraphs (1)–(3) of this subsection and subsections (a)–(h) of this section.

"(j) The Court of International Trade shall not have jurisdiction of any civil action arising under section 305 of the Tariff Act of 1930."

(1)

An embargo is a "[g]overnment order prohibiting commercial trade with individuals or businesses of other nations." Black's Law Dictionary 468 (5th ed. 1979). It is "[a] policy which prevents goods from entering a nation" and which "may be imposed on a product or on an individual country." J. Berenyi, *The Modern American Business Dictionary* 103 (1982). To be sure, embargoes, like those that the Court of Appeals enumerated, often implement trade policy. But (even assuming that the exclusion of foreign-manufactured goods bearing United States trademarks cannot fairly be said to implement trade policy) trade policy is not the sole, nor perhaps even the primary, purpose served by embargoes. The Government typically imposes embargoes to protect public health, see, *e. g.*, 21 U. S. C. § 381 (adulterated, misbranded, or unapproved foods, drugs, and cosmetics); safety, see, *e. g.*, 15 U. S. C. § 1397 (motor vehicles that do not conform to federal safety standards); or morality, see, *e. g.*, 19 U. S. C. § 1305 (obscene pictures, lottery tickets, and articles for causing unlawful abortion), or to further interests relating to foreign affairs, see, *e. g.*, 22 U. S. C. § 2370(a) (embargo on Cuba); law enforcement, see, *e. g.*, 15 U. S. C. §§ 1241-1244 (switchblade knives); or ecology, see, *e. g.*, 19 CFR § 12.60 (1987) (fur-seal or sea-otter skins).

We have discovered no evidence that Congress intended to constrain the ordinary meaning of the word "embargoes" to mean "embargoes that are grounded in trade policy." To the contrary, had Congress so intended, it would have been quite unnecessary to exclude expressly from the Court of International Trade's jurisdiction, as Congress did, embargoes that are for the "protection of the public health or safety," 28 U. S. C. § 1581(i)(3), or that prohibit the importation of certain "immoral articles," see § 1581(j) (excluding suits arising out of 19 U. S. C. § 1305, which prohibits importation of a panoply of "immoral articles").

(2)

Although we reject the Court of Appeals' analysis, we nevertheless agree with its conclusion that § 526(a) does not impose an embargo. As the above-quoted definitions suggest, the ordinary meaning of "embargo," and the meaning that Congress apparently adopted in the statutory language "embargoes or other quantitative restrictions," is a governmentally imposed quantitative restriction—of zero—on the importation of merchandise.

An importation prohibition is not an embargo if rather than reflecting a *governmental* restriction on the quantity of a particular product that will enter, it merely provides a mechanism by which a private party might, at its own option, enlist the Government's aid in restricting the quantity of imports in order to enforce a private right. Suppose, for example, that a domestic producer grants a foreign distributor exclusive distribution rights abroad, and that a provision of the contract, captioned "Importation prohibited," bars the foreign distributor from competing for domestic sales. If the foreign distributor nevertheless brazenly imports into the United States, the domestic manufacturer may invoke any of a number of contract remedies—including monetary or injunctive relief in court—to enforce its private right. A court-issued injunction is, technically, a "[g]overnment order prohibiting commercial trade." Yet one could no more deem the private party's enforcement of its "Importation prohibition" an "embargo" than deem damages for its breach a "tarif[f], dut[y], fe[e] or other ta[x] on the importation of merchandise," 28 U. S. C. § 1581(i)(2). The private party, not the Government, by deciding whether and how to exercise its private right, determines the quantity of any particular product that can be imported.

Section 526(a)'s "Importation prohibition" is of the same type. Trademark law, like contract law, confers private rights, which are themselves rights of exclusion. It grants the

trademark owner a bundle of such rights, one of which is the right to enlist the Customs Service's aid to bar foreign-made goods bearing that trademark. See 71 Cong. Rec. 3871 (1929) (remarks of Sen. George) (§ 526(a) "undoubtedly had its origin not in an effort to exclude merchandise bearing a trade-mark, but for the purpose of protecting the interest of the owner of the trade-mark who had gone to the trouble of registering it"); 62 Cong. Rec. 11603 (1922) (remarks of Sen. Sutherland) (§ 526(a) is designed to "protect the property rights of American citizens who have purchased trade-marks from foreigners"). Thus, § 526(a)—like the court-issued injunction enforcing a contractual "Importation prohibition"—is very different from an embargo. It does not set a governmentally determined quantitative limit on the entry of, or foreign trafficking in, any particular product: The owner of the trademark can import to its heart's content, and will usually do so until the market is content; and any other importer may also import a particular foreign-manufactured trademarked good *ad infinitum*, if it acquires the trademark owner's consent to import. Nor does the Government have *any* control over the extent or the nature of § 526(a)'s prohibition. The trademark owner has sole authority to decide that all products bearing its trademark will enter or that none will, and to decide what entity may import them, under what conditions, and for what purpose. There is no reason to suppose that Congress would have intended to distort the term "embargo" beyond its ordinary meaning to encompass a provision that merely grants particular trademark owners a private property right—whose enforcement is entirely in the owners', not the Government's, control—to exclude intrabrand competition from abroad.⁶

⁶ Section 526(a) is an unusual (if not a unique) breed of importation prohibition in that it takes *all* control out of the Government's hands and puts it in the hands of private parties. The only other importation prohibitions mentioned by the parties or JUSTICE SCALIA that might even conceivably match that description are the prohibitions against the importation of

JUSTICE SCALIA's conclusion that § 526(a) falls within the "ordinary meaning" of "embargo," *post*, at 196, follows from a rather extraordinary definition of the term as *any* governmental "import regulation that takes the *form* of a governmental prohibition on imports, regardless of . . . its ultimate purpose," *post*, at 195 (emphasis added). As the court-enforced contractual prohibition illustrates, not every governmental importation prohibition is an embargo. To hold otherwise would yield applications of the term "embargo" that are unnatural, to say the least. For example, the prohibitory nature of regulations providing that the "*importation* into the United States of milk and cream is *prohibited*" except by a permitholder, 19 CFR § 12.7(a) (1987) (emphasis added), and that "Customs officers *shall not permit the importation* of any milk or cream that is not tagged in accordance with [applicable] regulations," § 12.7(b) (emphasis added), would convert licensing and tagging requirements into embargoes on unlicensed or improperly tagged dairy products. Similarly, a requirement that certain meat products be inspected prior to importation would magically become an embargo of uninspected (but not necessarily tainted) meat when Congress uses a formulation like "meat . . . products *shall not be released from Customs* custody prior to inspection," § 12.8 (emphasis added). This sampling of import regulations demonstrates that JUSTICE SCALIA's departure from ordinary meaning, much more than our adherence to it, would "leave [§ 526(a)] to drift on the currents of lawyerly invention," *post*, at 196.

(3)

Contrary to petitioner's contentions, our adherence to the ordinary meaning of "embargo" is not at all inconsistent with the purposes of the Customs Courts Act of 1980, Pub. L. 96-417, 94 Stat. 1727, which enacted the jurisdictional provi-

goods that infringe trademarks, see 15 U. S. C. § 1124, or copyrights, see 17 U. S. C. §§ 601-603.

sion. Congress intended, first and foremost, to remedy the confusion over the division of jurisdiction between the Customs Court (now the Court of International Trade) and the district courts and to "ensure . . . uniformity in the judicial decisionmaking process." See H. R. Rep. No. 96-1235, p. 20 (1980). But Congress did not commit to the Court of International Trade's exclusive jurisdiction *every* suit against the Government challenging customs-related laws and regulations. Had Congress wished to do so it could have expressed such an intent much more clearly and simply by, for example, conveying to the specialized court "exclusive jurisdiction . . . over all civil actions against the [Government] directly affecting imports," S. 2857, 95th Cong., 2d Sess. (1978), or over "all civil actions against the [Government] which arise directly from import transactions and which arise under the Tariff Act of 1930 [or any one of several specified trade statutes]," S. 1654, 96th Cong., 1st Sess. (1979); see also H. R. 6394, 96th Cong., 2d Sess. (1980).

In rejecting bills that would have implemented such a categorical approach, Congress opted for a scheme that achieved the desired goals of uniformity and clarity by delineating precisely the particular customs-related matters over which the Court of International Trade would have exclusive jurisdiction. Thus, for example, Congress granted the Court of International Trade exclusive jurisdiction over suits relating to "tariffs, duties, fees, or other taxes on the importation of merchandise," but not if they are for the "raising of revenue." 28 U. S. C. § 1581(i)(2). Similarly, Congress made no provision for direct review in the Court of International Trade of facial challenges to conditions of entry, such as labeling or marking requirements, see, *e. g.*, 19 CFR §§ 11.6-11.7 (1987) (packaging and marking of distilled spirits, wines, and malt liquors); §§ 11.12-11.12b (labeling of wool, fur, and textile products), and inspection, see, *e. g.*, § 11.1 (inspection of cigars, cigarettes, medicinal preparations, and perfumery); § 12.8 (inspection of meats). Or, to focus more closely on the

genre of trade regulation at issue here, no one disputes that Congress declined to grant the Court of International Trade exclusive jurisdiction over import prohibitions relating to "public health and safety" or "immoral articles." See *supra*, at 184. By choosing the word "embargoes" over the phrase "importation prohibitions," Congress likewise declined to grant the Court of International Trade exclusive jurisdiction over importation prohibitions that are not embargoes. To depart from the words Congress chose would infect the courts with the same jurisdictional confusion that Congress intended to cure.

Concededly, Congress did not fully explain its exclusion of certain customs-related matters from the Court of International Trade's jurisdiction. There is, for example, no obvious reason why Congress declined to grant that court jurisdiction to review challenges to conditions of importation of the type mentioned above. There may likewise be no adequate explanation for Congress' omission of importation prohibitions that do not fall within the ordinary meaning of "embargoes." Whatever the reason, however, we disagree with petitioner that the omission is inconsistent with Congress' intent to "utiliz[e] the specialized expertise of the United States Customs Court and the United States Court of Customs and Patent Appeals" H. R. Rep. No. 96-1235, *supra*, at 20. The Customs Court, which the Customs Court Act of 1980 renamed the Court of International Trade, and the Court of Customs and Patent Appeals, which the Federal Courts Improvement Act of 1982 merged with the Court of Claims to form the United States Court of Appeals for the Federal Circuit, had rarely dealt with, much less developed a "specialized expertise" in, trademark law. Nor is there any indication (aside from petitioner's strained reading of the term "embargo") that Congress wished the new institutions to acquire expertise in the area in which its predecessors had none.

In sum, the purpose and legislative history of the jurisdictional provision provide no hint that Congress intended to depart from the ordinary meaning of "embargoes."

B

Petitioner's second theory for vesting exclusive jurisdiction in the Court of International Trade is more easily rejected. It begins with 28 U. S. C. § 1581(a), which grants "[t]he Court of International Trade . . . exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930." The "protest" referred to in subsection (a) is an administrative remedy available to challenge specified decisions by Customs officers, including a decision ordering "the exclusion of merchandise from entry . . . under any provision of the customs laws." 19 U. S. C. § 1514(a)(4) (emphasis added). Petitioner acknowledges that the present action is not a protest because it challenges a Customs Service decision to permit the entry of, not to exclude, gray-market goods. It asserts instead that since this suit involves subject matter that would have given rise to a protest had gray-market goods been excluded rather than admitted, the Court of International Trade had exclusive jurisdiction "as a corollary to protest jurisdiction under 28 U. S. C. § 1581(a)." Brief for Petitioner 47th Street Photo, Inc. 17 (quoting *Vivitar*, 761 F. 2d, at 1560). The source of that putative corollary is 28 U. S. C. § 1581(i)(4), which confers on the Court of International Trade jurisdiction over suits against the Government arising out of federal laws pertaining to "administration and enforcement with respect to the matters referred to in [, *inter alia*,] subsection[n] (a)."

We agree with the Court of Appeals that § 1581(i)(4) will not bear petitioner's reading. See also *Olympus Corp.*, 792 F. 2d, at 317-319. The "matte[r] referred to" in § 1581(a) is "the denial of [a] protes[t]," or at the very broadest, "a protest." Since this suit involves no "protest," much less a de-

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SCALIA, J., dissenting

nial of one, it cannot by any stretch of the imagination involve a "law . . . providing for . . . administration and enforcement" of a protest. *Id.*, at 318.

III

We affirm the Court of Appeals' conclusion that the District Court had jurisdiction, and restore these cases to the calendar for reargument on the merits.

It is so ordered.

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

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

In a Court that selects its docketed cases on the basis of the general importance of the issues they present, jurisdictional questions tend to get short shrift. The central issue in this suit, the so-called "gray-market" issue, which may have immediate and substantial effects on the national economy, has provoked no less than 15 *amici* briefs; while the jurisdictional question, which could have the undesirable consequence of preventing our immediate resolution of the merits, has been briefed in only 11 pages by petitioners and 6 pages by respondents. Understandably enough, no one, myself included, is eager to conclude that we are powerless to resolve the issue that is this suit's claim to national attention.

Even so, we must carefully review any question that asks us to determine the limits of a federal court's power, particularly when, as in this suit, two different sets of courts have concluded that they have exclusive jurisdiction over the subject of the suit. Compare *Vivitar Corp. v. United States*, 761 F. 2d 1552, 1557-1560 (CA Fed. 1985), cert. denied, 474 U. S. 1055 (1986); with cases below, 252 U. S. App. D. C. 342, 344-346, 790 F. 2d 903, 905-907 (1986); and *Olympus Corp. v. United States*, 792 F. 2d 315, 317-319 (CA2 1986). Moreover, while the gray-market question is of greater im-

mediate economic importance (though we would soon enough have another occasion to address it), the jurisdictional question, if decided incorrectly, may generate uncertainty and hence litigation into the indefinite future. In my view, the Court's resolution of this question strains the plain language of the statute, and blurs a clear jurisdictional line that Congress has established.

The Court of International Trade's exclusive jurisdiction extends to any civil action against the United States, its agencies or officers, "that arises out of any law of the United States providing for . . . embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety." 28 U. S. C. § 1581(i)(3). The statute does not define "embargo," and there is no reason to give it anything other than its ordinary meaning. An embargo is "a prohibition imposed by law upon commerce either in general or in one or more of its branches," Webster's Third New International Dictionary 738 (1981), a "[g]overnment order prohibiting commercial trade with individuals or businesses of other nations," Black's Law Dictionary 468 (5th ed. 1979), an "[a]uthoritative stoppage of foreign commerce or of any special trade," Funk & Wagnalls New International Dictionary of the English Language 411 (1984).

The present lawsuit challenges a Customs Service regulation, 19 CFR § 133.21(c) (1987), that implements § 526(a) of the Tariff Act of 1930, 19 U. S. C. § 1526(a). That statutory provision, which begins with the caption "(a) Importation prohibited," excludes from the United States foreign-made merchandise bearing a trademark owned and recorded by a United States citizen or corporation. Section 526(a) is, to borrow language from the Senate debate, "an *embargo* against any foreign country shipping goods here where an American claims he has a trade-mark upon them." 62 Cong. Rec. 11603 (1922) (remarks of Sen. Kellogg) (*emphasis added*). Because this suit against the United States arises out of a law provid-

ing for an embargo, I would hold that it is within the exclusive jurisdiction of the Court of International Trade.

The Court acknowledges that the term "embargo" means a "governmentally imposed" import prohibition, *ante*, at 185, but it seems to me that its analysis departs from that truth. Surely § 526(a) prohibits imports, and that prohibition, enacted by Congress and enforced by an executive agency, is surely governmentally imposed. One might argue that the privately invocable exception to § 526(a) causes it not to be an *absolute* governmental prohibition, and that only *absolute* governmental prohibitions qualify as embargoes. The Court rightly avoids that line of analysis, however, since many of the provisions commonly regarded as embargoes contain privately invocable exceptions, such as exemptions for certain privately determined uses. See, *e. g.*, 19 U. S. C. A. § 1202, p. 265, Schedule 1, Part 4, Subpart E; 19 CFR §§ 12.80(b)(v), (vi) (1987). But if, despite its privately invocable exception, § 526(a) meets the requirement of being a prohibition, it unquestionably meets the requirement of being a governmentally imposed one. Here, as with other embargoes, the availability of a privately invocable exception affects the *extent* of the prohibition; but the residual prohibition, whatever its extent, is governmental.

The Court seeks to set § 526(a) apart from other embargoes with privately invocable exceptions by observing that "rather than reflecting a *governmental* restriction on the quantity of a particular product that will enter, it merely provides a mechanism by which a private party might, at its own option, enlist the Government's aid in restricting the quantity of imports in order to enforce a private right." *Ante*, at 185. Perhaps it is meant to provide such a mechanism, but that relates not to whether it is a governmental prohibition, but to what the *purpose* of the governmental prohibition happens to be. It is no more in accord with common usage to say that a provision cannot be an embargo if its purpose is to protect private rights than to say (as did the Court of Appeals in the

analysis that the Court readily rejects, *ibid.*, that it cannot be an embargo if its purpose is something other than trade policy. Embargoes are imposed for many different purposes, including sometimes the protection of private rights. Assuredly those which have the latter purpose are *different* from those that do not, but it is beyond me why that purpose, any more than any other one, would cause them not to be governmentally imposed import prohibitions. In my view, for example, the prohibition on the importation of art stolen from a private nonprofit museum, see 19 CFR §§ 12.104–12.104h (1987), is unquestionably an embargo. Moreover, since the lever that the Court is using for its analysis is the prohibition's asserted lack of "governmental" character, it should make no difference whether the objective of the prohibition is to protect a private "right," or to protect some other private interest, or the interest of some *nonprivate* entity other than the Government itself. Thus, on the Court's analysis there would be excluded from the term "embargo" the prohibition on importing pre-Columbian sculptures or murals, which does not apply if the importer produces a certificate issued by the country of origin stating that the goods were not unlawfully exported. 19 U. S. C. § 2092; 19 CFR § 12.107 (1987). This is simply not in accord with normal understanding.

The Court seeks to establish the inherently "nonembargo" character of a prohibition protecting private property rights by noting that a court injunction enforcing a contractual import prohibition is not an embargo. *Ante*, at 185. I agree that an injunction is not an embargo, but that conclusion does not follow from the fact that the injunction issued at the instance of a private individual to protect property rights. A court injunction issued at the instance of a Government agency, to prevent importation that was part of a conspiracy in violation of the Sherman Act, would likewise not generally be thought of as an embargo—because the word is normally applied only to prohibitions imposed by the Legislative or Executive Branches of Government.

The short of the matter is that an "embargo" is an import regulation that takes the form of a governmental prohibition on imports, regardless of any exceptions it may contain and regardless of its ultimate purpose—just as quotas, tariffs, and conditions on importation are identifiable forms of import regulation regardless of their exceptions and purposes. The Court points out, *ante*, at 187, that it may sometimes be difficult to distinguish a condition on importation from a prohibition on importation containing exceptions. That may be true, but since we are agreed that only prohibitions and not conditions come within the meaning of embargo, that ambiguity will have to be grappled with under the Court's view of things no less than under mine. It is irrelevant to the present issue, unless the existence of one ambiguity within a statute justifies the needless creation of another. Under my analysis, when a provision has been identified as an import prohibition (however difficult that may be—and it is neither difficult nor contested here) that is an end of the matter. Under the Court's analysis, one must proceed further to examine the exceptions to the prohibition and its purpose.

Today's decision leaves some doubt as to what prohibitions on importation other than § 526(a) are not governmental, and hence not embargoes, because they benefit private parties and are avoidable by private consent. Even if the Court's holding can be limited to prohibitions that protect private "rights," then at least the status of the prohibitions on the importation of goods that infringe trademarks or copyrights is called into question. See 15 U. S. C. § 1124; 17 U. S. C. §§ 601–603. And since, as noted earlier, the purpose of protecting private "rights" (whatever that might mean) is logically no more invalidating than the purpose of protecting private "interests," or even, more broadly, nongovernmental interests, the status of other import prohibitions is cast in doubt as well.

These uncertainties arise from today's particular departure from the meaning of "embargo" as "a governmental prohi-

SCALIA, J., dissenting

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bition on importation." Much greater, unfortunately, are the uncertainties that arise from today's acknowledgment of the principle that departure is permissible. Having cast § 526(a) loose from the moorings of its language, we leave it to drift on the currents of lawyerly invention. It remains to be seen what other limitations on the ordinary meaning of "embargo," no more apparent to the naked mind than the present one, may exist.

Syllabus

NORWEST BANK WORTHINGTON ET AL. v.
AHLERS ET UX.CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT

No. 86-958. Argued January 12, 1988—Decided March 7, 1988

Respondents, who operate a family farm, obtained secured loans from petitioners. Following a 1984 default on the loan payments, one petitioner filed a state-court replevin action seeking possession of the farm equipment pledged as security, but respondents obtained an automatic stay of the action when they filed a petition for reorganization under Chapter 11 of the Bankruptcy Code (Code). On petitioners' motions for relief from the automatic stay, the District Court found respondents' reorganization plan to be unfeasible and affirmed the Bankruptcy Court's decision to grant petitioners relief. The Court of Appeals reversed, finding that respondents could file a feasible reorganization plan (as suggested by the court), and rejecting petitioners' contention that the Code's "absolute priority rule," 11 U. S. C. § 1129(b)(2)(B)(ii) (1982 ed. and Supp. IV)—which provides that a dissenting class of unsecured creditors must be provided for in full before any junior class can receive or retain any property under the plan—barred confirmation of any plan which allowed respondents to retain their equity interest in the farm, which was junior to creditors' unsecured claims. The court held that under *Case v. Los Angeles Lumber Products Co.*, 308 U. S. 106, the absolute priority rule did not bar respondents from retaining their equity interest if they contributed "money or money's worth" to the reorganized enterprise, and that their yearly contributions of "labor, experience, and expertise" would constitute such a contribution, therefore permitting confirmation of a reorganization plan over petitioners' objections.

Held: The absolute priority rule applies, and respondents' promise of future labor warrants no exception to its operation. Pp. 202-211.

(a) The dicta in *Case v. Los Angeles Lumber Products Co.*, relied upon by the Court of Appeals, is not applicable here. Viewed from the time of the plan's approval, respondents' promise of future services was intangible, inalienable, and, in all likelihood, unenforceable. Unlike "money or money's worth," such promise cannot be exchanged in any market for something of value to the creditors today. No broader exception to the absolute priority rule than that suggested in *Los Angeles Lumber's* dicta exists. The statutory language and § 1129(b)'s legislative history bar any expansion of any exception to the absolute priority

rule beyond that recognized in this Court's cases at the time Congress enacted the 1978 Bankruptcy Code. Pp. 202–206.

(b) The provisions of the Code do not support the contentions that the equitable nature of bankruptcy proceedings prevents petitioners from voting in the class of unsecured creditors, and requires confirmation of a “fair and equitable” reorganization plan in the best interests of all creditors and debtors; and that respondents’ wholly unsecured creditors (as opposed to petitioners, who have undersecured claims) would fare better under the proposed reorganization plan than if the farm was liquidated. Whatever equitable powers remain in the bankruptcy courts must be exercised within the Code’s confines. Pp. 206–207.

(c) There is no merit to respondents’ argument that the absolute priority rule does not apply on the ground that, because the farm has no “going concern” value (apart from their own labor on it), any equity interest they retain in a reorganization is worthless to the senior unsecured creditors and therefore is not “property” under the rule. Even where debts far exceed the current value of assets, a debtor who retains his equity interest in the enterprise retains “property.” The legislative history suggests that Congress’ meaning of “property” was broad, including both tangible and intangible property. The interest respondents would retain under any reorganization must be considered “property,” and therefore can only be retained pursuant to a plan accepted by their creditors or formulated in compliance with the absolute priority rule. Pp. 207–209.

(d) Relief from current problems facing farm families cannot come from a misconstruction of the bankruptcy laws, but rather only from action by Congress. Moreover, the Family Farmers Bankruptcy Act of 1986 creates a new Chapter 12 bankruptcy proceeding whereby family farmers can retain an equity interest in their farms while making loan repayments under a reorganization plan. To uphold the Court of Appeals’ decision would create a method of proceeding under Chapter 11 which would be far more advantageous to farmers than is Chapter 12; this would be contrary to Congress’ intent. Pp. 209–211.

794 F. 2d 388, reversed and remanded.

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

Gordon B. Conn, Jr., argued the cause for petitioners. With him on the brief were *Michael R. Stewart*, *Dennis M. Ryan*, *A. Patrick Leighton*, and *David A. Kastelic*.

William L. Needler argued the cause for respondents. With him on the brief were *James C. Truax* and *Francis E. Stepnowski*.*

JUSTICE WHITE delivered the opinion of the Court.

In this case, the Court of Appeals found that respondents' promise of future "labor, experience, and expertise" permitted confirmation of their Chapter 11 reorganization plan over the objections of their creditors, even though the plan violated the "absolute priority rule" of the Bankruptcy Code. Because we find this conclusion at odds with the Code and our cases, we reverse.

I

Respondents operate a failing family farm in Nobles County, Minnesota. Between 1965 and 1984 they obtained loans from petitioners, securing the loans with their farmland, machinery, crops, livestock, and farm proceeds. In November 1984, respondents defaulted on their loan payments to petitioner Norwest Bank Worthington; at the time,

*Briefs of *amici curiae* urging reversal were filed for the United States by Solicitor General Fried, Assistant Attorney General Willard, Deputy Solicitor General Cohen, and Roy T. Englert, Jr.; for the American Bankers Association by John J. Gill III and Michael F. Crotty; for the American College of Real Estate Lawyers by Robert M. Zinman, Bruce S. Lane, Edward I. Cutler, and David A. Richards; for the American Council of Life Insurance by Phillip E. Stano, Jack H. Blaine, Robert M. Zinman, and Edward J. Zimmerman; and for the Nebraska Bankers Association, Inc., by William B. Brandt.

A brief of *amici curiae* urging affirmance was filed for the State of Arkansas et al. by Phillip L. Kunkel and Raymond T. Nimmer, and by the Attorneys General for their respective States as follows: Steve Clark of Arkansas, Joseph I. Lieberman of Connecticut, Thomas J. Miller of Iowa, Neil F. Hartigan of Illinois, David L. Armstrong of Kentucky, Hubert H. Humphrey III of Minnesota, Mike Greely of Montana, Robert M. Spire of Nebraska, Robert Abrams of New York, Nicholas Spaeth of North Dakota, T. Travis Medlock of South Carolina, Roger Tellinghuisen of South Dakota, and Jim Mattox of Texas.

the aggregate loan balance owed the petitioners exceeded \$1 million.

Following the default, Norwest filed a replevin action in Minnesota state court seeking possession of the farm equipment respondents had pledged as security. However, two weeks later respondents obtained an automatic stay of the replevin proceedings, when they filed a petition for reorganization under Chapter 11 of the Bankruptcy Code. See 11 U. S. C. § 362(a) (1982 ed. and Supp. IV).

Petitioners filed motions in the Bankruptcy Court for relief from the automatic stay. 11 U. S. C. § 362(d) (1982 ed., Supp. IV). After decisions by the Bankruptcy and the District Courts, these motions were ultimately considered by the Court of Appeals, which prohibited petitioners from repossessing any equipment, pending a determination by the District Court of the probability of success of a reorganization plan to be filed by respondents. App. to Pet. for Cert. A-76—A-77. On remand, the District Court found respondents' reorganization plan to be "utter[ly] unfeasibl[e]." *Id.*, at A-86. It therefore affirmed the Bankruptcy Court's initial decision to grant petitioners relief from the automatic stay.

On appeal, the Court of Appeals reversed. It found that respondents could file a feasible reorganization plan. 794 F. 2d 388, 399 (CA8 1986). Consequently, the Court of Appeals remanded the case with instructions that the Bankruptcy Court entertain and confirm a reorganization plan which comported with an outline suggested in a lengthy appendix to the Eighth Circuit's opinion. *Id.*, at 408-414.

In reaching this conclusion, the Court of Appeals rejected petitioners' contention that, because of the "absolute priority rule" in the Bankruptcy Code, 11 U. S. C. § 1129(b)(2)(B)(ii) (1982 ed. and Supp. IV), their legitimate objections to any reorganization plan which allowed respondents to retain an interest in the farm property was sufficient to bar confirmation

of such a plan.¹ Petitioners contended that the absolute priority rule prohibited respondents from retaining their equity interest in the farm, which is junior to the creditors' unsecured claims. But the Court of Appeals, relying on this Court's decision in *Case v. Los Angeles Lumber Products Co.*, 308 U. S. 106 (1939), held that the absolute priority rule did not bar respondents from retaining their equity interest in the farm if they contributed "money or money's worth" to the reorganized enterprise. It further concluded that respondents' "yearly contributions of labor, experience, and expertise" would constitute a contribution of "money or money's worth," and therefore would permit confirmation of a reorganization plan over petitioners' objections. 794 F. 2d, at 402-403. Judge John Gibson, in dissent, criticized the majority's application of the absolute priority rule and its read-

¹ In relevant part, 11 U. S. C. § 1129(b) (1982 ed. and Supp. IV) provides:

"(1) . . . [T]he court . . . shall confirm the plan . . . if the plan . . . is fair and equitable

"(2) . . . [T]he condition that a plan be fair and equitable . . . includes the following requirements:

"(B) With respect to a class of unsecured claims—

"(i) the plan provides that each holder of a claim of such class receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or

"(ii) the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property."

Petitioners contended, and the Court of Appeals agreed, that they must be treated as unsecured creditors for purpose of any reorganization plan because their claims were substantially undersecured. See 794 F. 2d 388, 399 (CA8 1986); 11 U. S. C. § 506(a). Petitioners further argued, and the Court of Appeals also agreed, that any reorganization plan for respondents could not comply with § 1129(b)(2)(B)(i), because respondents could not possibly provide petitioners with property equal to the allowed amount of their claims. See 794 F. 2d, at 401.

Thus, the Court of Appeals concluded that respondents' reorganization plan would have to comply with § 1129(b)(2)(B)(ii)—the codification of the absolute priority rule—in order to be confirmed. *Ibid.*

ing of *Los Angeles Lumber* as “unprecedented, illogical, and unfair.” 794 F. 2d, at 406. He concluded that the absolute priority rule barred respondents’ retention of an equity interest in the farm over petitioners’ legitimate objections.

After the Eighth Circuit — sharply divided — denied rehearing en banc, *id.*, at 414–415, petitioners sought review by this Court. We granted certiorari to consider the Court of Appeals’ application of the absolute priority rule, 483 U. S. 1004 (1987), and now reverse.

II

As the Court of Appeals stated, the absolute priority rule “provides that a dissenting class of unsecured creditors must be provided for in full before any junior class can receive or retain any property [under a reorganization] plan.” 794 F. 2d, at 401. The rule had its genesis in judicial construction of the undefined requirement of the early bankruptcy statute that reorganization plans be “fair and equitable.” See *Northern Pacific R. Co. v. Boyd*, 228 U. S. 482, 504–505 (1913); *Louisville Trust Co. v. Louisville, N. A. & C. R. Co.*, 174 U. S. 674, 684 (1899). The rule has since gained express statutory force, and was incorporated into Chapter 11 of the Bankruptcy Code adopted in 1978. See 11 U. S. C. § 1129(b)(2)(B)(ii) (1982 ed., Supp. IV). Under current law, no Chapter 11 reorganization plan can be confirmed over the creditors’ legitimate objections (absent certain conditions not relevant here) if it fails to comply with the absolute priority rule.

There is little doubt that a reorganization plan in which respondents retain an equity interest in the farm is contrary to the absolute priority rule.² The Court of Appeals did not

² Respondents do not contest this conclusion, but rather, argue (1) that their proposal to retain an equity interest in the farm and equipment is confirmable under an exception to the absolute priority rule, Brief for Respondents 21–25, and (2) that the rule does not (or should not) apply to their reorganization plan for various reasons, *id.*, at 14–21. For rea-

suggest otherwise in ruling for respondents, but found that such a plan could be confirmed over petitioners' objections because of an "exception" or "modification" to the absolute priority rule recognized in this Court's cases.

The Court of Appeals relied on the following dicta in *Case v. Los Angeles Lumber Products Co.*, *supra*, at 121-122:

"It is, of course, clear that there are circumstances under which stockholders may participate in a plan of reorganization of an insolvent debtor. . . .

"[W]e believe that to accord 'the creditor of his full right of priority against the corporate assets' where the debtor is insolvent, the stockholder's participation must be based on a contribution in money or money's worth, reasonably equivalent in view of all the circumstances to the participation of the stockholder."

The Court of Appeals found this language applicable to this case, concluding that respondents' future contributions of "labor, experience, and expertise" in running the farm—because they have "value" and are "measurable"—are "money or money's worth" within the meaning of *Los Angeles Lumber*. 794 F. 2d, at 402. We disagree.³

sons we discuss *infra*, at 204-206, and in Part III, we find these arguments unpersuasive.

³The United States, as *amicus curiae*, urges us to reverse the Court of Appeals' ruling and hold that codification of the absolute priority rule has eliminated any "exception" to that rule suggested by *Los Angeles Lumber*. See Brief for United States as *Amicus Curiae* 17-23. Relying on the statutory language and the legislative history, the United States argues that the 1978 Bankruptcy Code "dropped the infusion-of-new-capital exception to the absolute priority rule." *Id.*, at 22.

We need not reach this question to resolve the instant dispute. As we discuss *infra*, at 204-206, we think it clear that even if the *Los Angeles Lumber* exception to the absolute priority rule has survived enactment of the Bankruptcy Code, this exception does not encompass respondents' promise to contribute their "labor, experience, and expertise" to the reorganized enterprise.

Thus, our decision today should not be taken as any comment on the continuing vitality of the *Los Angeles Lumber* exception—a question which

Los Angeles Lumber itself rejected an analogous proposition, finding that the promise of the existing shareholders to pledge their "financial standing and influence in the community" and their "continuity of management" to the reorganized enterprise was "[in]adequate consideration" that could not possibly be deemed "money's worth." 308 U. S., at 122. No doubt, the efforts promised by the *Los Angeles Lumber* equity holders—like those of respondents—had "value" and would have been of some benefit to any reorganized enterprise. But ultimately, as the Court said in *Los Angeles Lumber*, "[t]hey reflect merely vague hopes or possibilities." *Id.*, at 122–123. The same is true of respondents' pledge of future labor and management skills.

Viewed from the time of approval of the plan, respondents' promise of future services is intangible, inalienable, and, in all likelihood, unenforceable. It "has no place in the asset column of the balance sheet of the new [entity]." *Los Angeles Lumber*, 308 U. S., at 122–123. Unlike "money or money's worth," a promise of future services cannot be exchanged in any market for something of value to the creditors *today*. In fact, no decision of this Court or any Court of Appeals, other than the decision below, has ever found a promise to contribute future labor, management, or expertise sufficient to qualify for the *Los Angeles Lumber* exception to the absolute priority rule.⁴ In short, there is no

has divided the lower courts since passage of the Code in 1978. Compare, *e. g.*, *In re Sawmill Hydraulics, Inc.*, 72 B. R. 454, 456, and n. 1 (Bkrcty. Ct. CD Ill. 1987), with, *e. g.*, *In re Pine Lake Village Apartment Co.*, 19 B. R. 819, 833 (Bkrcty. Ct. SDNY 1982). Rather, we simply conclude that even if an "infusion-of-'money-or-money's-worth'" exception to the absolute priority rule has survived the enactment of § 1129(b), respondents' proposed contribution to the reorganization plan is inadequate to gain the benefit of this exception.

⁴"[P]revious attempts to qualify non-capital equity in the absolute priority context have been unanimously rejected." Koger & Acconcia, *In re Ahlers: Capitalizing on Sweat*, 42 J. Mo. Bar 455, 458 (1986). See also 794 F. 2d, at 407 (Gibson, J., dissenting); *In re Baugh*, 73 B. R. 414, 418

way to distinguish between the promises respondents proffer here and those of the shareholders in *Los Angeles Lumber*; neither is an adequate contribution to escape the absolute priority rule.

Respondents suggest that, even if their proposed contributions to the reorganized farm do not fit within the *Los Angeles Lumber* dicta, they do satisfy some broader exception to the absolute priority rule. Brief for Respondents 23-24. But no such broader exception exists. Even if Congress meant to retain the *Los Angeles Lumber* exception to the absolute priority rule when it codified the rule in Chapter 11—a proposition that can be debated, see n. 3, *supra*—it is clear that Congress had no intention to expand that exception any further. When considering adoption of the current Code, Congress received a proposal by the Bankruptcy Commission to modify the absolute priority rule to permit equity holders to participate in a reorganized enterprise based on their contribution of “continued management . . . essential to the business” or other participation beyond “money or money’s worth.” See H. R. Doc. No. 93-137, pt. 1, pp. 258-259 (1973). This proposal—quite similar to the Court of Appeals’ holding in this case—prompted adverse reactions from numerous sources.⁵ Congress ultimately rejected the proposed liberalization of

(Bkrty. Ct. ED Ark. 1987); *In re Pecht*, 57 B. R. 137, 139-141 (Bkrty. Ct. ED Va. 1986).

In support of their position, respondents rely extensively on *SEC v. United States Realty & Improvement Co.*, 310 U. S. 434 (1940). See Tr. of Oral Arg. 31-33, 35-37. However, the relevant portion of that case concerned a chapter of the old bankruptcy statutes under which the absolute priority rule did not apply. See *SEC v. United States Realty & Improvement Co.*, *supra*, at 453-454. Thus, that case is wholly inapposite here.

⁵ See, e. g., Hearings on S. 235 and S. 236 before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, 94th Cong., 1st Sess., pt. 2, p. 1044 (1975) (statement of Prof. Vernon Countryman); *id.*, at 710 (statement of Phillip A. Loomis, Jr., Comm’r of the Securities and Exchange Comm’n); Brudney, The Bankruptcy Commission’s Proposed “Modifications” of the Absolute Priority Rule, 48 Am. Bankr. L. J. 305, 336-339 (1974).

the absolute priority rule and adopted the codification of the rule now found in 11 U. S. C. § 1129(b)(2)(B)(ii) (1982 ed. and Supp. IV). "This [section] codifies the absolute priority rule from the dissenting class on down." See H. R. Rep. No. 95-595, p. 413 (1977). We think the statutory language and the legislative history of § 1129(b) clearly bar any expansion of any exception to the absolute priority rule beyond that recognized in our cases at the time Congress enacted the 1978 Bankruptcy Code.

In sum, we find no support in the Code or our previous decisions for the Court of Appeals' application of the absolute priority rule in this case. We conclude that the rule applies here, and respondents' promise of future labor warrants no exception to its operation.

III

Respondents advance two additional arguments seeking to obviate the conclusion mandated by the absolute priority rule.

A

Respondents first advance a variety of "equitable arguments" which, they say, prevent the result we reach today. Respondents contend that the nature of bankruptcy proceedings—namely, their status as proceedings in "equity"—prevents petitioners from inequitably voting in the class of unsecured creditors, and requires that a "fair and equitable" reorganization plan in the best interests of all creditors and debtors be confirmed. See Brief for Respondents 14-16, 23-24. Similarly, the Court of Appeals found it significant that—in its view—respondents' wholly unsecured creditors (as opposed to petitioners, who have partially secured claims) would fare better under the proposed reorganization plan than if the farm was liquidated. 794 F. 2d, at 402.

The short answer to these arguments is that whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code. The Code provides that undersecured creditors can

vote in the class of unsecured creditors, 11 U. S. C. § 506(a), the Code provides that a “fair and equitable” reorganization plan is one which complies with the absolute priority rule, 11 U. S. C. § 1129(b)(2)(B)(ii) (1982 ed. and Supp. IV), and the Code provides that it is up to the creditors—and not the courts—to accept or reject a reorganization plan which fails to provide them adequate protection or fails to honor the absolute priority rule, 11 U. S. C. § 1126 (1982 ed. and Supp. IV).

The Court of Appeals may well have believed that petitioners or other unsecured creditors would be better off if respondents’ reorganization plan was confirmed. But that determination is for the creditors to make in the manner specified by the Code. 11 U. S. C. § 1126(c). Here, the principal creditors entitled to vote in the class of unsecured creditors (*i. e.*, petitioners) objected to the proposed reorganization. This was their prerogative under the Code, and courts applying the Code must effectuate their decision.

B

Respondents further argue that the absolute priority rule has no application in this case, where the property which the junior interest holders wish to retain has no value to the senior unsecured creditors. In such a case, respondents argue, “the creditors are deprived of nothing if such a so-called ‘interest’ continues in the possession of the reorganized debtor.” Brief for Respondents 19. Here, respondents contend, because the farm has no “going concern” value (apart from their own labor on it), any equity interest they retain in a reorganization of the farm is worthless, and therefore is not “property” under 11 U. S. C. § 1129(b)(2)(B)(ii) (1982 ed. and Supp. IV).

We join with the consensus of authority which has rejected this “no value” theory.⁶ Even where debts far exceed the

⁶ Respondents note that one Bankruptcy Court has accepted the “no value” theory in a case similar to this one. See *In re Star City Rebuilders*,

current value of assets, a debtor who retains his equity interest in the enterprise retains "property." Whether the value is "present or prospective, for dividends or only for purposes of control" a retained equity interest is a property interest to "which the creditors [are] entitled . . . before the stockholders [can] retain it for any purpose whatever." *Northern Pacific R. Co. v. Boyd*, 228 U. S., at 508. Indeed, even in a sole proprietorship, where "going concern" value may be minimal, there may still be some value in the control of the enterprise; obviously, also at issue is the interest in potential future profits of a now-insolvent business. See *SEC v. Candauqua Enterprises Corp.*, 339 F. 2d 14, 21 (CA2 1964) (Friendly, J.). And while the Code itself does not define what "property" means as the term is used in § 1129(b), the relevant legislative history suggests that Congress' meaning was quite broad. "[P]roperty' includes both tangible and intangible property." See H. R. Rep. No. 95-595, at 413.

Moreover, respondents' "no value" theory is particularly inapposite in this case. This argument appears not to have been presented to the Eighth Circuit, which implicitly concluded—to the contrary of respondents' position here—that the equity interest respondents desire to retain has some value. See 794 F. 2d, at 402-403. Even cursory consideration reveals that the respondents' retained interest under the plan might be "valuable" for one of several reasons. For example, the Court of Appeals provided that respondents would be entitled to a share of any profits earned by the sale of secured property during the reorganization period, *id.*, at

Inc., 62 B. R. 983, 988-989 (WD Va. 1986). But even in so doing, the Bankruptcy Court acknowledged that the bulk of authority was to the contrary. See *id.*, at 989; see also *In re Modern Glass Specialists, Inc.*, 42 B. R. 139, 140-141 (Bkrcty. Ct. ED Wisc. 1984); *In re Huckabee Auto Co.*, 33 B. R. 132, 141 (Bkrcty. Ct. MD Ga. 1981); *In re Landau Boat Co.*, 8 B. R. 436, 438-439 (Bkrcty. Ct. WD Mo. 1981).

Petitioners contend that the *Star City* decision is the *only* one to accept the "no value" theory. See Tr. of Oral Arg. 16. Respondents did not contest this assertion or provide authority to the contrary.

403, and n. 18 — an interest which can hardly be considered “worthless.” And there is great common sense in petitioners’ contention that “obviously, there is some going concern value here, or the parties would not have been litigating over it for the last three years.” Tr. of Oral Arg. 15–16.

Consequently, we think that the interest respondents would retain under any reorganization must be considered “property” under § 1129(b)(2)(B)(ii), and therefore can only be retained pursuant to a plan accepted by their creditors or formulated in compliance with the absolute priority rule. Since neither is true in this case, the Court of Appeals’ judgment for respondents cannot stand.

IV

In rejecting respondents’ position, we do not take lightly the concerns which militated the Eighth Circuit towards its result. As a Bankruptcy Judge commented on the Court of Appeals’ decision in this case:

“We understand the motivation behind the majority opinion in *Ahlers*. Farm bankruptcies are in a state of crisis and we, too, sympathize with the plight of the American farmer. Nevertheless, the solution proposed by the *Ahlers* majority is contrary to the Bankruptcy Code and a long line of case law.” *In re Stegall*, 64 B. R. 296, 300 (Bkrcty. Ct. CD Ill. 1986).

Family farms hold a special place in our Nation’s history and folklore. Respondents and *amici* paint a grim picture of the problems facing farm families today, and present an eloquent appeal for action on their behalf.⁷ Yet relief from current farm woes cannot come from a misconstruction of the applicable bankruptcy laws, but rather, only from action by Congress.⁸

⁷ See Brief for Respondents 8–11; Brief for State of Arkansas et al. as *Amici Curiae* 1–2.

⁸ Even if current farm problems “justified” a judicial modification of the absolute priority rule along the line of the Court of Appeals’ opinion, not

The error of the Court of Appeals' approach is further revealed by an examination of a measure Congress has recently enacted to cope with these very same concerns, the Family Farmers Bankruptcy Act of 1986, Pub. L. 99-554, § 255, 100 Stat. 3105-3114. The Act creates a new Chapter 12 bankruptcy proceeding, under which family farmers can retain an equity interest in their farms while making loan repayments under a reorganization plan. See 11 U. S. C. § 1201 *et seq.* (1982 ed., Supp. IV).⁹

The legislative history of the Act makes it clear that one of Congress' principal concerns in adopting Chapter 12 was the difficulties farmers encountered in seeking to reorganize under Chapter 11.¹⁰ And yet, as respondents concede, the Court of Appeals' decision here creates a method of proceeding under Chapter 11 which is far more advantageous to farmers than is Chapter 12. See Brief for Respondents 6-9; Tr. of Oral Arg. 23-25. Thus, given respondents' reading of Chapter 11, Congress enacted a relief provision in Chapter 12

the least of the problems with the decision below is that there is no way to limit it to family farms, or even to small businesses generally. The shareholders of any corporate debtor might be able to evade the absolute priority rule under the Eighth Circuit's reasoning; such a result surely cannot be squared with the case law or the Code as they are discussed *supra*.

⁹ Respondents apparently cannot qualify for relief under Chapter 12 because they do not meet the requirements that Congress has adopted in defining what is an eligible "family farm" for purposes of Chapter 12. See Tr. of Oral Arg. 23; 11 U. S. C. § 101(17) (1982 ed., Supp. IV).

In addition, respondents may be disqualified from filing under Chapter 12 because they had previously filed under Chapter 11. The Bankruptcy Courts are divided on the issue. Compare, *e. g.*, *In re Big Dry Angus Ranch, Inc.*, 69 B. R. 695, 699-701 (Mont. 1987), with, *e. g.*, *In re B. A. V., Inc.*, 68 B. R. 411, 412-413 (Colo. 1986).

¹⁰ See 132 Cong. Rec. 28592 (1986) (statement of Sen. Thurmond); *id.*, at 28593 (statement of Sen. Grassley). Congress seemed particularly aware of the specific obstacle that the absolute priority rule posed to farm reorganizations. See Anderson, *An Analysis of Pending Bills to Provide Family Farm Debtor Relief Under the Bankruptcy Code*, reprinted in 132 Cong. Rec. 28593, 28599 (1986).

which is less favorable to its intended beneficiaries than is current law. But in adopting Chapter 12, Congress thought it was doing just the opposite.¹¹ “[W]here, as here, Congress adopts a new law . . . [it] normally can be presumed to have had knowledge of the interpretation given to the [old] law.” *Lorillard v. Pons*, 434 U. S. 575, 581 (1978). We think Congress’ understanding of Chapter 11 and its absolute priority rule—and not respondents’—is the correct one. We do not believe that Congress created, in Chapter 12, an option for farm reorganizations less accessible to most farmers than current Chapter 11 proceedings.

V

In sum, because we find the decision below to be contrary to the Bankruptcy Code and this Court’s previous cases, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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

¹¹ “Under this new chapter, it will be easier for a family farmer to confirm a plan of reorganization.” Joint Explanatory Statement of the Committee of Conference, reprinted in 132 Cong. Rec. 28143, 28144 (1986).

ARKANSAS BEST CORP. *v.* COMMISSIONER OF
INTERNAL REVENUE

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

No. 86-751. Argued December 9, 1987—Decided March 7, 1988

Under § 1221 of the Internal Revenue Code, the term “capital asset” means “property held by the taxpayer (whether or not connected with his trade or business), but does not include” five specified classes of property. Between 1968 and 1974, petitioner, a diversified holding company, acquired approximately 65% of a bank’s stock. The bank was apparently prosperous until 1972, when federal examiners classified it as a problem bank. In 1975, petitioner sold the bulk of the stock at a loss, which it claimed as an ordinary-loss deduction on its federal income tax return for that year. The Commissioner of Internal Revenue disallowed the deduction, finding that the loss was a capital loss rather than an ordinary loss. The Tax Court, relying on cases interpreting *Corn Products Refining Co. v. Commissioner*, 350 U. S. 46, held that, since the stock acquired through 1972 was purchased with a substantial investment purpose, it was a capital asset under § 1221 and therefore gave rise to a capital loss when it was sold; however, the loss realized on the stock acquired after 1972 was subject to ordinary-loss treatment since that stock had been bought and held exclusively for the business purpose of protecting petitioner’s reputation by fending off the bank’s failure. The Court of Appeals reversed the latter determination, ruling that all of the stock sold in 1975 was subject to capital-loss treatment.

Held: A taxpayer’s motivation in purchasing an asset is irrelevant to the question whether it falls within the broad definition of “capital asset” in § 1221. Petitioner’s reading of *Corn Products* as authorizing ordinary-asset treatment for any asset acquired and held for business rather than investment purposes is too expansive. That reading finds no support in § 1221’s language, which does not mention a business-motive test, and is in direct conflict with § 1221’s broad definition of capital asset. Similarly, the contention that § 1221’s five listed exceptions are merely illustrative rather than exhaustive is refuted by the statute’s “does not include” phrase, and by the legislative history and the applicable Treasury regulation. Moreover, petitioner’s reading would make surplusage of three of the statutory exceptions, whose excluded classes of property would undoubtedly satisfy a business-motive test. *Corn Products* must instead be interpreted as standing for the narrow proposition that “hedg-

ing" transactions that are an integral part of a business' inventory-purchase system fall within § 1221's first exception for "property . . . which would properly be included in the [taxpayer's] inventory." Since petitioner, which is not a dealer in securities, has never suggested that its bank stock falls within the inventory exclusion, *Corn Products* has no application in the present context. Because petitioner's bank stock falls within § 1221's broad definition of "capital asset" and is outside the classes of excluded property, the loss arising from its sale is a capital loss. Pp. 216-223.

800 F. 2d 215, affirmed.

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

Vester T. Hughes, Jr., argued the cause for petitioner. With him on the briefs were *David Bryant* and *Stephen D. Good*.

Alan I. Horowitz argued the cause for respondent. With him on the brief were *Solicitor General Fried*, *Acting Assistant Attorney General Durney*, *Deputy Solicitor General Lauber*, and *Michael L. Paup*.*

JUSTICE MARSHALL delivered the opinion of the Court.

The issue presented in this case is whether capital stock held by petitioner Arkansas Best Corporation (Arkansas Best) is a "capital asset" as defined in § 1221 of the Internal Revenue Code regardless of whether the stock was purchased and held for a business purpose or for an investment purpose.

I

Arkansas Best is a diversified holding company. In 1968 it acquired approximately 65% of the stock of the National

**Thomas Smidt II*, *Charles L. Saunders, Jr.*, and *A. Jerry Busby* filed a brief for Circle K Corp. as *amici curiae* urging reversal.

Briefs of *amici curiae* were filed for Kraft, Inc., by *Don S. Harnack*, *James L. Malone III*, *Richard A. Hanson*, and *Thomas J. McHugh*; and for the National Council of Farmer Cooperatives by *Arthur E. Bryan, Jr.*, *George W. Benson*, and *James S. Krzyminski*.

Bank of Commerce (Bank) in Dallas, Texas. Between 1969 and 1974, Arkansas Best more than tripled the number of shares it owned in the Bank, although its percentage interest in the Bank remained relatively stable. These acquisitions were prompted principally by the Bank's need for added capital. Until 1972, the Bank appeared to be prosperous and growing, and the added capital was necessary to accommodate this growth. As the Dallas real estate market declined, however, so too did the financial health of the Bank, which had a heavy concentration of loans in the local real estate industry. In 1972, federal examiners classified the Bank as a problem bank. The infusion of capital after 1972 was prompted by the loan portfolio problems of the bank.

Petitioner sold the bulk of its Bank stock on June 30, 1975, leaving it with only a 14.7% stake in the Bank. On its federal income tax return for 1975, petitioner claimed a deduction for an ordinary loss of \$9,995,688 resulting from the sale of the stock. The Commissioner of Internal Revenue disallowed the deduction, finding that the loss from the sale of stock was a capital loss, rather than an ordinary loss, and that it therefore was subject to the capital loss limitations in the Internal Revenue Code.¹

Arkansas Best challenged the Commissioner's determination in the United States Tax Court. The Tax Court, relying on cases interpreting *Corn Products Refining Co. v. Commissioner*, 350 U. S. 46 (1955), held that stock purchased with a substantial investment purpose is a capital asset which, when sold, gives rise to a capital gain or loss, whereas stock purchased and held for a business purpose, without any substantial investment motive, is an ordinary asset whose sale gives rise to ordinary gains or losses. See 83 T. C. 640,

¹ Title 26 U. S. C. § 1211(a) states that "[i]n the case of a corporation, losses from sales or exchanges of capital assets shall be allowed only to the extent of gains from such sales or exchanges." Section 1212(a) establishes rules governing carrybacks and carryovers of capital losses, permitting such losses to offset capital gains in certain earlier or later years.

653-654 (1984). The court characterized Arkansas Best's acquisitions through 1972 as occurring during the Bank's "'growth' phase," and found that these acquisitions "were motivated primarily by investment purpose and only incidentally by some business purpose." *Id.*, at 654. The stock acquired during this period therefore constituted a capital asset, which gave rise to a capital loss when sold in 1975. The court determined, however, that the acquisitions after 1972 occurred during the Bank's "'problem' phase," *ibid.*, and, except for certain minor exceptions, "were made exclusively for business purposes and subsequently held for the same reasons." *Id.*, at 656. These acquisitions, the court found, were designed to preserve petitioner's business reputation, because without the added capital the Bank probably would have failed. *Id.*, at 656-657. The loss realized on the sale of this stock was thus held to be an ordinary loss.

The Court of Appeals for the Eighth Circuit reversed the Tax Court's determination that the loss realized on stock purchased after 1972 was subject to ordinary-loss treatment, holding that all of the Bank stock sold in 1975 was subject to capital-loss treatment. 800 F. 2d 215 (1986). The court reasoned that the Bank stock clearly fell within the general definition of "capital asset" in Internal Revenue Code § 1221, and that the stock did not fall within any of the specific statutory exceptions to this definition. The court concluded that Arkansas Best's purpose in acquiring and holding the stock was irrelevant to the determination whether the stock was a capital asset. We granted certiorari, 480 U. S. 930, and now affirm.

II

Section 1221 of the Internal Revenue Code defines "capital asset" broadly as "property held by the taxpayer (whether or not connected with his trade or business)," and then excludes five specific classes of property from capital-asset

status. In the statute's present form,² the classes of property exempted from the broad definition are (1) "property of a kind which would properly be included in the inventory of the taxpayer"; (2) real property or other depreciable property used in the taxpayer's trade or business; (3) "a copyright, a literary, musical, or artistic composition," or similar property; (4) "accounts or notes receivable acquired in the ordinary course of trade or business for services rendered" or from the sale of inventory; and (5) publications of the Federal Government. Arkansas Best acknowledges that the Bank stock falls within the literal definition of "capital asset" in § 1221, and is outside of the statutory exclusions. It asserts, however, that this determination does not end the inquiry. Petitioner argues that in *Corn Products Refining Co. v. Commissioner*, *supra*, this Court rejected a literal reading of § 1221, and concluded that assets acquired and sold for ordinary business purposes rather than for investment purposes should be given ordinary-asset treatment. Petitioner's reading of *Corn Products* finds much support in the academic literature³ and in the courts.⁴ Unfortunately for petitioner, this broad reading finds no support in the language of § 1221.

² In 1975, when petitioner sold its Bank stock, § 1221 contained a different exception (5), which excluded certain federal and state debt obligations. See 26 U. S. C. § 1221(5) (1970 ed.). That exception was repealed by the Economic Recovery Tax Act of 1981, Pub. L. 97-34, § 505(a), 95 Stat. 331. The present exception (5) was added by the Tax Reform Act of 1976, Pub. L. 94-455, § 2132(a), 90 Stat. 1925. These changes have no bearing on this case.

³ See, e. g., 2 B. Bittker, *Federal Taxation of Income, Estates and Gifts* ¶ 51.10.3, p. 51-62 (1981); Chirelstein, *Capital Gain and the Sale of a Business Opportunity: The Income Tax Treatment of Contract Termination Payments*, 49 Minn. L. Rev. 1, 41 (1964); Troxell & Noall, *Judicial Erosion of the Concept of Securities as Capital Assets*, 19 Tax L. Rev. 185, 187 (1964); Note, *The Corn Products Doctrine and Its Application to Partnership Interests*, 79 Colum. L. Rev. 341, and n. 3 (1979).

⁴ See, e. g., *Campbell Taggart, Inc. v. United States*, 744 F. 2d 442, 456-458 (CA5 1984); *Steadman v. Commissioner*, 424 F. 2d 1, 5 (CA6), cert. denied, 400 U. S. 869 (1970); *Booth Newspapers, Inc. v. United*

In essence, petitioner argues that "property held by the taxpayer (whether or not connected with his trade or business)" does not include property that is acquired and held for a business purpose. In petitioner's view an asset's status as "property" thus turns on the motivation behind its acquisition. This motive test, however, is not only nowhere mentioned in § 1221, but it is also in direct conflict with the parenthetical phrase "whether or not connected with his trade or business." The broad definition of the term "capital asset" explicitly makes irrelevant any consideration of the property's connection with the taxpayer's business, whereas petitioner's rule would make this factor dispositive.⁵

In a related argument, petitioner contends that the five exceptions listed in § 1221 for certain kinds of property are illustrative, rather than exhaustive, and that courts are therefore free to fashion additional exceptions in order to further the general purposes of the capital-asset provisions. The language of the statute refutes petitioner's construction. Section 1221 provides that "capital asset" means "property held by the taxpayer[,]. . . but does not include" the five classes

States, 157 Ct. Cl. 886, 893-896, 303 F. 2d 916, 920-921 (1962); *W. W. Windle Co. v. Commissioner*, 65 T. C. 694, 707-713 (1976).

⁵ Petitioner mistakenly relies on cases in which this Court, in narrowly applying the general definition of "capital asset," has "construed 'capital asset' to exclude property representing income items or accretions to the value of a capital asset themselves properly attributable to income," even though these items are property in the broad sense of the word. *United States v. Midland-Ross Corp.*, 381 U. S. 54, 57 (1965). See, e. g., *Commissioner v. Gillette Motor Co.*, 364 U. S. 130 (1960) ("capital asset" does not include compensation awarded taxpayer that represented fair rental value of its facilities); *Commissioner v. P. G. Lake, Inc.*, 356 U. S. 260 (1958) ("capital asset" does not include proceeds from sale of oil payment rights); *Hort v. Commissioner*, 313 U. S. 28 (1941) ("capital asset" does not include payment to lessor for cancellation of unexpired portion of a lease). This line of cases, based on the premise that § 1221 "property" does not include claims or rights to ordinary income, has no application in the present context. Petitioner sold capital stock, not a claim to ordinary income.

of property listed as exceptions. We believe this locution signifies that the listed exceptions are exclusive. The body of § 1221 establishes a general definition of the term "capital asset," and the phrase "does not include" takes out of that broad definition only the classes of property that are specifically mentioned. The legislative history of the capital-asset definition supports this interpretation, see H. R. Rep. No. 704, 73d Cong., 2d Sess., 31 (1934) ("[T]he definition includes all property, except as specifically excluded"); H. R. Rep. No. 1337, 83d Cong., 2d Sess., A273 (1954) ("[A] capital asset is property held by the taxpayer with certain exceptions"), as does the applicable Treasury regulation, see 26 CFR § 1.1221-1(a) (1987) ("The term 'capital assets' includes all classes of property not specifically excluded by section 1221").

Petitioner's reading of the statute is also in tension with the exceptions listed in § 1221. These exclusions would be largely superfluous if assets acquired primarily or exclusively for business purposes were not capital assets. Inventory, real or depreciable property used in the taxpayer's trade or business, and accounts or notes receivable acquired in the ordinary course of business, would undoubtedly satisfy such a business-motive test. Yet these exceptions were created by Congress in separate enactments spanning 30 years.⁶ Without any express direction from Congress, we are unwilling to read § 1221 in a manner that makes surplusage of these statutory exclusions.

⁶The inventory exception was part of the original enactment of the capital-asset provision in 1924. See Revenue Act of 1924, ch. 234, § 208(a)(8), 43 Stat. 263. Depreciable property used in a trade or business was excluded in 1938, see Revenue Act of 1938, ch. 289, § 117(a)(1), 52 Stat. 500, and real property used in a trade or business was excluded in 1942, see Revenue Act of 1942, ch. 619, § 151(a), 56 Stat. 846. The exception for accounts and notes receivable acquired in the ordinary course of trade or business was added in 1954. Internal Revenue Code of 1954, § 1221(4), 68A Stat. 322.

In the end, petitioner places all reliance on its reading of *Corn Products Refining Co. v. Commissioner*, 350 U. S. 46 (1955)—a reading we believe is too expansive. In *Corn Products*, the Court considered whether income arising from a taxpayer's dealings in corn futures was entitled to capital-gains treatment. The taxpayer was a company that converted corn into starches, sugars, and other products. After droughts in the 1930's caused sharp increases in corn prices, the company began a program of buying corn futures to assure itself an adequate supply of corn and protect against price increases. See *id.*, at 48. The company "would take delivery on such contracts as it found necessary to its manufacturing operations and sell the remainder in early summer if no shortage was imminent. If shortages appeared, however, it sold futures only as it bought spot corn for grinding." *Id.*, at 48-49. The Court characterized the company's dealing in corn futures as "hedging." *Id.*, at 51. As explained by the Court of Appeals in *Corn Products*, "[h]edging is a method of dealing in commodity futures whereby a person or business protects itself against price fluctuations at the time of delivery of the product which it sells or buys." 215 F. 2d 513, 515 (CA2 1954). In evaluating the company's claim that the sales of corn futures resulted in capital gains and losses, this Court stated:

"Nor can we find support for petitioner's contention that hedging is not within the exclusions of [§1221]. Admittedly, petitioner's corn futures do not come within the literal language of the exclusions set out in that section. They were not stock in trade, actual inventory, property held for sale to customers or depreciable property used in a trade or business. But the capital-asset provision of [§1221] must not be so broadly applied as to defeat rather than further the purpose of Congress. Congress intended that profits and losses arising from the everyday operation of a business be considered as ordinary income or loss rather than capital gain or loss.

... Since this section is an exception from the normal tax requirements of the Internal Revenue Code, the definition of a capital asset must be narrowly applied and its exclusions interpreted broadly." 350 U. S., at 51-52 (citations omitted).

The Court went on to note that hedging transactions consistently had been considered to give rise to ordinary gains and losses, and then concluded that the corn futures were subject to ordinary-asset treatment. *Id.*, at 52-53.

The Court in *Corn Products* proffered the oft-quoted rule of construction that the definition of "capital asset" must be narrowly applied and its exclusions interpreted broadly, but it did not state explicitly whether the holding was based on a narrow reading of the phrase "property held by the taxpayer," or on a broad reading of the inventory exclusion of § 1221. In light of the stark language of § 1221, however, we believe that *Corn Products* is properly interpreted as involving an application of § 1221's inventory exception. Such a reading is consistent both with the Court's reasoning in that case and with § 1221. The Court stated in *Corn Products* that the company's futures transactions were "an integral part of its business designed to protect its manufacturing operations against a price increase in its principal raw material and to assure a ready supply for future manufacturing requirements." 350 U. S., at 50. The company bought, sold, and took delivery under the futures contracts as required by the company's manufacturing needs. As Professor Bittker notes, under these circumstances, the futures can "easily be viewed as surrogates for the raw material itself." 2 B. Bittker, *Federal Taxation of Income, Estates and Gifts* ¶51.10.3, p. 51-62 (1981). The Court of Appeals for the Second Circuit in *Corn Products* clearly took this approach. That court stated that when commodity futures are "utilized solely for the purpose of stabilizing inventory cost[,] . . . [they] cannot reasonably be separated from the inventory items," and concluded that "property used in hedging trans-

actions properly comes within the exclusions of [§ 1221]." 215 F. 2d, at 516. This Court indicated its acceptance of the Second Circuit's reasoning when it began the central paragraph of its opinion: "Nor can we find support for petitioner's contention that hedging is not within the exclusions of [§ 1221]." 350 U. S., at 51. In the following paragraph, the Court argued that the Treasury had consistently viewed such hedging transactions as a form of insurance to stabilize the cost of inventory, and cited a Treasury ruling which concluded that the value of a manufacturer's raw-material inventory should be adjusted to take into account hedging transactions in futures contracts. See *id.*, at 52-53 (citing G. C. M. 17322, XV-2 Cum. Bull. 151 (1936)). This discussion, read in light of the Second Circuit's holding and the plain language of § 1221, convinces us that although the corn futures were not "actual inventory," their use as an integral part of the taxpayer's inventory-purchase system led the Court to treat them as substitutes for the corn inventory such that they came within a broad reading of "property of a kind which would properly be included in the inventory of the taxpayer" in § 1221.

Petitioner argues that by focusing attention on whether the asset was acquired and sold as an integral part of the taxpayer's everyday business operations, the Court in *Corn Products* intended to create a general exemption from capital-asset status for assets acquired for business purposes. We believe petitioner misunderstands the relevance of the Court's inquiry. A business connection, although irrelevant to the initial determination whether an item is a capital asset, is relevant in determining the applicability of certain of the statutory exceptions, including the inventory exception. The close connection between the futures transactions and the taxpayer's business in *Corn Products* was crucial to whether the corn futures could be considered surrogates for the stored inventory of raw corn. For if the futures dealings were not part of the company's inventory-purchase system,

and instead amounted simply to speculation in corn futures, they could not be considered substitutes for the company's corn inventory, and would fall outside even a broad reading of the inventory exclusion. We conclude that *Corn Products* is properly interpreted as standing for the narrow proposition that hedging transactions that are an integral part of a business' inventory-purchase system fall within the inventory exclusion of § 1221.⁷ Arkansas Best, which is not a dealer in securities, has never suggested that the Bank stock falls within the inventory exclusion. *Corn Products* thus has no application to this case.

It is also important to note that the business-motive test advocated by petitioner is subject to the same kind of abuse that the Court condemned in *Corn Products*. The Court explained in *Corn Products* that unless hedging transactions were subject to ordinary gain and loss treatment, taxpayers engaged in such transactions could "transmute ordinary income into capital gain at will." 350 U. S., at 53-54. The hedger could garner capital-asset treatment by selling the future and purchasing the commodity on the spot market, or ordinary-asset treatment by taking delivery under the future contract. In a similar vein, if capital stock purchased and held for a business purpose is an ordinary asset, whereas the same stock purchased and held with an investment motive is a capital asset, a taxpayer such as Arkansas Best could have significant influence over whether the asset would receive capital or ordinary treatment. Because stock is most natu-

⁷ Although congressional inaction is generally a poor measure of congressional intent, we are given some pause by the fact that over 25 years have passed since *Corn Products Refining Co. v. Commissioner* was initially interpreted as excluding assets acquired for business purposes from the definition of "capital asset," see *Booth Newspapers, Inc. v. United States*, 157 Ct. Cl. 886, 303 F. 2d 916 (1962), without any sign of disfavor from Congress. We cannot ignore the unambiguous language of § 1221, however, no matter how reticent Congress has been. If a broad exclusion from capital-asset status is to be created for assets acquired for business purposes, it must come from congressional action, not silence.

rally viewed as a capital asset, the Internal Revenue Service would be hard pressed to challenge a taxpayer's claim that stock was acquired as an investment, and that a gain arising from the sale of such stock was therefore a capital gain. Indeed, we are unaware of a single decision that has applied the business-motive test so as to require a taxpayer to report a gain from the sale of stock as an ordinary gain. If the same stock is sold at a loss, however, the taxpayer may be able to garner ordinary-loss treatment by emphasizing the business purpose behind the stock's acquisition. The potential for such abuse was evidenced in this case by the fact that as late as 1974, when Arkansas Best still hoped to sell the Bank stock at a profit, Arkansas Best apparently expected to report the gain as a capital gain. See 83 T. C., at 647-648.

III

We conclude that a taxpayer's motivation in purchasing an asset is irrelevant to the question whether the asset is "property held by a taxpayer (whether or not connected with his business)" and is thus within § 1221's general definition of "capital asset." Because the capital stock held by petitioner falls within the broad definition of the term "capital asset" in § 1221 and is outside the classes of property excluded from capital-asset status, the loss arising from the sale of the stock is a capital loss. *Corn Products Refining Co. v. Commissioner, supra*, which we interpret as involving a broad reading of the inventory exclusion of § 1221, has no application in the present context. Accordingly, the judgment of the Court of Appeals is affirmed.

It is so ordered.

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

BASIC INC. ET AL. *v.* LEVINSON ET AL.CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT

No. 86-279. Argued November 2, 1987—Decided March 7, 1988

The Securities and Exchange Commission's Rule 10b-5, promulgated under § 10(b) of the Securities Exchange Act of 1934 (Act), prohibits, in connection with the purchase or sale of any security, the making of any untrue statement of a material fact or the omission of a material fact that would render statements made not misleading. In December 1978, Combustion Engineering, Inc., and Basic Incorporated agreed to merge. During the preceding two years, representatives of the two companies had various meetings and conversations regarding the possibility of a merger; during that time Basic made three public statements denying that any merger negotiations were taking place or that it knew of any corporate developments that would account for heavy trading activity in its stock. Respondents, former Basic shareholders who sold their stock between Basic's first public denial of merger activity and the suspension of trading in Basic stock just prior to the merger announcement, filed a class action against Basic and some of its directors, alleging that Basic's statements had been false or misleading, in violation of § 10(b) and Rule 10b-5, and that respondents were injured by selling their shares at prices artificially depressed by those statements. The District Court certified respondents' class, but granted summary judgment for petitioners on the merits. The Court of Appeals affirmed the class certification, agreeing that under a "fraud-on-the-market" theory, respondents' reliance on petitioners' misrepresentations could be presumed, and thus that common issues predominated over questions pertaining to individual plaintiffs. The Court of Appeals reversed the grant of summary judgment and remanded, rejecting the District Court's view that preliminary merger discussions are immaterial as a matter of law, and holding that even discussions that might not otherwise have been material, become so by virtue of a statement denying their existence.

Held:

1. The standard set forth in *TSC Industries, Inc. v. Northway, Inc.*, 426 U. S. 438, whereby an omitted fact is material if there is a substantial likelihood that its disclosure would have been considered significant by a reasonable investor, is expressly adopted for the § 10(b) and Rule 10b-5 context. Pp. 230-232.

2. The “agreement-in-principle” test, under which preliminary merger discussions do not become material until the would-be merger partners have reached agreement as to the price and structure of the transaction, is rejected as a bright-line materiality test. Its policy-based rationales do not justify the exclusion of otherwise significant information from the definition of materiality. Pp. 232–236.

3. The Court of Appeals’ view that information concerning otherwise insignificant developments becomes material solely because of an affirmative denial of their existence is also rejected: Rule 10b–5 requires that the statements be *misleading* as to a *material* fact. Pp. 237–238.

4. Materiality in the merger context depends on the probability that the transaction will be consummated, and its significance to the issuer of the securities. Thus, materiality depends on the facts and is to be determined on a case-by-case basis. Pp. 238–241.

5. The courts below properly applied a presumption of reliance, supported in part by the fraud-on-the-market theory, instead of requiring each plaintiff to show direct reliance on Basic’s statements. Such a presumption relieves the Rule 10b–5 plaintiff of an unrealistic evidentiary burden, and is consistent with, and supportive of, the Act’s policy of requiring full disclosure and fostering reliance on market integrity. The presumption is also supported by common sense and probability: an investor who trades stock at the price set by an impersonal market does so in reliance on the integrity of that price. Because most publicly available information is reflected in market price, an investor’s reliance on any public material misrepresentations may be presumed for purposes of a Rule 10b–5 action. Pp. 241–247.

6. The presumption of reliance may be rebutted: Rule 10b–5 defendants may attempt to show that the price was not affected by their misrepresentation, or that the plaintiff did not trade in reliance on the integrity of the market price. Pp. 248–249.

786 F. 2d 741, vacated and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, and STEVENS, JJ., joined, and in Parts I, II, and III of which WHITE and O’CONNOR, JJ., joined. WHITE, J., filed an opinion concurring in part and dissenting in part, in which O’CONNOR, J., joined, *post*, p. 250. REHNQUIST, C. J., and SCALIA and KENNEDY, JJ., took no part in the consideration or decision of the case.

Joel W. Sternman argued the cause for petitioners. With him on the briefs were *H. Stephen Madsen*, *Norman S. Jeavons*, *William W. Golub*, *Ambrose Doskow*, *Arnold I. Roth*, and *Katherine M. Blakeley*.

Wayne A. Cross argued the cause for respondents. With him on the brief were *David S. Elkind* and *Lee A. Pickard*.*

JUSTICE BLACKMUN delivered the opinion of the Court.

This case requires us to apply the materiality requirement of § 10(b) of the Securities Exchange Act of 1934 (1934 Act), 48 Stat. 881, as amended, 15 U. S. C. § 78a *et seq.*, and the Securities and Exchange Commission's Rule 10b-5, 17 CFR § 240.10b-5 (1987), promulgated thereunder, in the context of preliminary corporate merger discussions. We must also determine whether a person who traded a corporation's shares on a securities exchange after the issuance of a materially misleading statement by the corporation may invoke a rebuttable presumption that, in trading, he relied on the integrity of the price set by the market.

I

Prior to December 20, 1978, Basic Incorporated was a publicly traded company primarily engaged in the business of manufacturing chemical refractories for the steel industry. As early as 1965 or 1966, Combustion Engineering, Inc., a company producing mostly alumina-based refractories, expressed some interest in acquiring Basic, but was deterred from pursuing this inclination seriously because of antitrust concerns it then entertained. See App. 81-83. In 1976, however, regulatory action opened the way to a renewal of

*Briefs of *amici curiae* urging reversal were filed for the American Corporate Counsel Association by *Stephen M. Shapiro*, *Andrew L. Frey*, *Kenneth S. Geller*, *Daniel Harris*, and *Mark I. Levy*; for *Arthur Andersen & Co. et al.* by *Victor M. Earle III*, *Carl D. Liggio*, *Donald Dreyfus*, *Harris J. Amhowitz*, *Kenneth H. Lang*, *Richard H. Murray*, *Leonard P. Novello*, and *Eldon Olson*; and for the American Institute of Certified Public Accountants by *Louis A. Craco*.

Solicitor General Fried, *Deputy Solicitor General Cohen*, *Jerrold J. Ganzfried*, *Daniel L. Goelzer*, *Paul Gonson*, *Jacob H. Stillman*, *Eric Summergrad*, *Katharine B. Gresham*, and *Max Berueffly* filed a brief for the United States as *amicus curiae*.

Combustion's interest.¹ The "Strategic Plan," dated October 25, 1976, for Combustion's Industrial Products Group included the objective: "Acquire Basic Inc. \$30 million." App. 337.

Beginning in September 1976, Combustion representatives had meetings and telephone conversations with Basic officers and directors, including petitioners here,² concerning the possibility of a merger.³ During 1977 and 1978, Basic made three public statements denying that it was engaged in merger negotiations.⁴ On December 18, 1978, Basic asked

¹ In what are known as the *Kaiser-Lavino* proceedings, the Federal Trade Commission took the position in 1976 that basic or chemical refractories were in a market separate from nonbasic or acidic or alumina refractories; this would remove the antitrust barrier to a merger between Basic and Combustion's refractories subsidiary. On October 12, 1978, the Initial Decision of the Administrative Law Judge confirmed that position. See *In re Kaiser Aluminum & Chemical Corp.*, 93 F. T. C. 764, 771, 809-810 (1979). See also the opinion of the Court of Appeals in this case, 786 F. 2d 741, 745 (CA6 1986).

² In addition to Basic itself, petitioners are individuals who had been members of its board of directors prior to 1979: Anthony M. Caito, Samuel Eels, Jr., John A. Gelbach, Harley C. Lee, Max Muller, H. Chapman Rose, Edmund G. Sylvester, and John C. Wilson, Jr. Another former director, Mathew J. Ludwig, was a party to the proceedings below but died on July 17, 1986, and is not a petitioner here. See Brief for Petitioners ii.

³ In light of our disposition of this case, any further characterization of these discussions must await application, on remand, of the materiality standard adopted today.

⁴ On October 21, 1977, after heavy trading and a new high in Basic stock, the following news item appeared in the Cleveland Plain Dealer:

"[Basic] President Max Muller said the company knew no reason for the stock's activity and that no negotiations were under way with any company for a merger. He said Flintkote recently denied Wall Street rumors that it would make a tender offer of \$25 a share for control of the Cleveland-based maker of refractories for the steel industry." App. 363.

On September 25, 1978, in reply to an inquiry from the New York Stock Exchange, Basic issued a release concerning increased activity in its stock and stated that

"management is unaware of any present or pending company development that would result in the abnormally heavy trading activity and price fluctuation."

the New York Stock Exchange to suspend trading in its shares and issued a release stating that it had been "approached" by another company concerning a merger. *Id.*, at 413. On December 19, Basic's board endorsed Combustion's offer of \$46 per share for its common stock, *id.*, at 335, 414-416, and on the following day publicly announced its approval of Combustion's tender offer for all outstanding shares.

Respondents are former Basic shareholders who sold their stock after Basic's first public statement of October 21, 1977, and before the suspension of trading in December 1978. Respondents brought a class action against Basic and its directors, asserting that the defendants issued three false or misleading public statements and thereby were in violation of § 10(b) of the 1934 Act and of Rule 10b-5. Respondents alleged that they were injured by selling Basic shares at artificially depressed prices in a market affected by petitioners' misleading statements and in reliance thereon.

The District Court adopted a presumption of reliance by members of the plaintiff class upon petitioners' public statements that enabled the court to conclude that common questions of fact or law predominated over particular questions pertaining to individual plaintiffs. See Fed. Rule Civ. Proc. 23(b)(3). The District Court therefore certified respondents' class.⁵ On the merits, however, the District Court granted

tuation in company shares that have been experienced in the past few days." *Id.*, at 401.

On November 6, 1978, Basic issued to its shareholders a "Nine Months Report 1978." This Report stated:

"With regard to the stock market activity in the Company's shares we remain unaware of any present or pending developments which would account for the high volume of trading and price fluctuations in recent months." *Id.*, at 403.

⁵ Respondents initially sought to represent all those who sold Basic shares between October 1, 1976, and December 20, 1978. See Amended Complaint in No. C79-1220 (ND Ohio), ¶ 5. The District Court, however, recognized a class period extending only from October 21, 1977, the date of the first public statement, rather than from the date negotiations allegedly

summary judgment for the defendants. It held that, as a matter of law, any misstatements were immaterial: there were no negotiations ongoing at the time of the first statement, and although negotiations were taking place when the second and third statements were issued, those negotiations were not "destined, with reasonable certainty, to become a merger agreement in principle." App. to Pet. for Cert. 103a.

The United States Court of Appeals for the Sixth Circuit affirmed the class certification, but reversed the District Court's summary judgment, and remanded the case. 786 F. 2d 741 (1986). The court reasoned that while petitioners were under no general duty to disclose their discussions with Combustion, any statement the company voluntarily released could not be "so incomplete as to mislead." *Id.*, at 746, quoting *SEC v. Texas Gulf Sulphur Co.*, 401 F. 2d 833, 862 (CA2 1968) (en banc), cert. denied *sub nom. Coates v. SEC*, 394 U. S. 976 (1969). In the Court of Appeals' view, Basic's statements that no negotiations were taking place, and that it knew of no corporate developments to account for the heavy trading activity, were misleading. With respect to materiality, the court rejected the argument that preliminary merger discussions are immaterial as a matter of law, and held that "once a statement is made denying the existence of any discussions, even discussions that might not have been material in absence of the denial are material because they make the statement made untrue." 786 F. 2d, at 749.

The Court of Appeals joined a number of other Circuits in accepting the "fraud-on-the-market theory" to create a rebuttable presumption that respondents relied on petitioners' ma-

commenced. In its certification decision, as subsequently amended, the District Court also excluded from the class those who had purchased Basic shares after the October 1977 statement but sold them before the September 1978 statement, App. to Pet. for Cert. 123a-124a, and those who sold their shares after the close of the market on Friday, December 15, 1978. *Id.*, at 137a.

terial misrepresentations, noting that without the presumption it would be impractical to certify a class under Federal Rule of Civil Procedure 23(b)(3). See 786 F. 2d, at 750-751.

We granted certiorari, 479 U. S. 1083 (1987), to resolve the split, see Part III, *infra*, among the Courts of Appeals as to the standard of materiality applicable to preliminary merger discussions, and to determine whether the courts below properly applied a presumption of reliance in certifying the class, rather than requiring each class member to show direct reliance on Basic's statements.

II

The 1934 Act was designed to protect investors against manipulation of stock prices. See S. Rep. No. 792, 73d Cong., 2d Sess., 1-5 (1934). Underlying the adoption of extensive disclosure requirements was a legislative philosophy: "There cannot be honest markets without honest publicity. Manipulation and dishonest practices of the market place thrive upon mystery and secrecy." H. R. Rep. No. 1383, 73d Cong., 2d Sess., 11 (1934). This Court "repeatedly has described the 'fundamental purpose' of the Act as implementing a 'philosophy of full disclosure.'" *Santa Fe Industries, Inc. v. Green*, 430 U. S. 462, 477-478 (1977), quoting *SEC v. Capital Gains Research Bureau, Inc.*, 375 U. S. 180, 186 (1963).

Pursuant to its authority under § 10(b) of the 1934 Act, 15 U. S. C. § 78j, the Securities and Exchange Commission promulgated Rule 10b-5.⁶ Judicial interpretation and applica-

⁶ In relevant part, Rule 10b-5 provides:

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

"(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading . . . ,

"in connection with the purchase or sale of any security."

tion, legislative acquiescence, and the passage of time have removed any doubt that a private cause of action exists for a violation of § 10(b) and Rule 10b-5, and constitutes an essential tool for enforcement of the 1934 Act's requirements. See, e. g., *Ernst & Ernst v. Hochfelder*, 425 U. S. 185, 196 (1976); *Blue Chip Stamps v. Manor Drug Stores*, 421 U. S. 723, 730 (1975).

The Court previously has addressed various positive and common-law requirements for a violation of § 10(b) or of Rule 10b-5. See, e. g., *Santa Fe Industries, Inc. v. Green*, *supra* ("manipulative or deceptive" requirement of the statute); *Blue Chip Stamps v. Manor Drug Stores*, *supra* ("in connection with the purchase or sale" requirement of the Rule); *Dirks v. SEC*, 463 U. S. 646 (1983) (duty to disclose); *Chiarella v. United States*, 445 U. S. 222 (1980) (same); *Ernst & Ernst v. Hochfelder*, *supra* (scienter). See also *Carpenter v. United States*, 484 U. S. 19 (1987) (confidentiality). The Court also explicitly has defined a standard of materiality under the securities laws, see *TSC Industries, Inc. v. Northway, Inc.*, 426 U. S. 438 (1976), concluding in the proxy-solicitation context that "[a]n omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote." *Id.*, at 449.⁷ Acknowledging that certain information concerning corporate developments could well be of "dubious significance," *id.*, at 448, the Court was careful not to set too low a standard of materiality; it was concerned that a minimal standard might bring an overabundance of information within its reach, and lead management "simply to bury the shareholders in an avalanche of trivial information—a result that is hardly conducive to informed decisionmaking." *Id.*, at 448-449. It further explained that to fulfill the materiality requirement "there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the

⁷ *TSC Industries* arose under § 14(a), as amended, of the 1934 Act, 15 U. S. C. § 78n(a), and Rule 14a-9, 17 CFR § 240.14a-9 (1975).

reasonable investor as having significantly altered the 'total mix' of information made available." *Id.*, at 449. We now expressly adopt the *TSC Industries* standard of materiality for the § 10(b) and Rule 10b-5 context.⁸

III

The application of this materiality standard to preliminary merger discussions is not self-evident. Where the impact of the corporate development on the target's fortune is certain and clear, the *TSC Industries* materiality definition admits straightforward application. Where, on the other hand, the event is contingent or speculative in nature, it is difficult to ascertain whether the "reasonable investor" would have considered the omitted information significant at the time. Merger negotiations, because of the ever-present possibility that the contemplated transaction will not be effectuated, fall into the latter category.⁹

A

Petitioners urge upon us a Third Circuit test for resolving this difficulty.¹⁰ See Brief for Petitioners 20-22. Under this

⁸This application of the § 14(a) definition of materiality to § 10(b) and Rule 10b-5 is not disputed. See Brief for Petitioners 17, n. 12; Brief for Respondents 30, n. 10; Brief for SEC as *Amicus Curiae* 8, n. 4. See also *McGrath v. Zenith Radio Corp.*, 651 F. 2d 458, 466, n. 4 (CA7), cert. denied, 454 U. S. 835 (1981), and *Goldberg v. Meridor*, 567 F. 2d 209, 218-219 (CA2 1977), cert. denied, 434 U. S. 1069 (1978).

⁹We do not address here any other kinds of contingent or speculative information, such as earnings forecasts or projections. See generally Hiler, *The SEC and the Courts' Approach to Disclosure of Earnings Projections, Asset Appraisals, and Other Soft Information: Old Problems, Changing Views*, 46 Md. L. Rev. 1114 (1987).

¹⁰See *Staffin v. Greenberg*, 672 F. 2d 1196, 1207 (CA3 1982) (defining duty to disclose existence of ongoing merger negotiations as triggered when agreement-in-principle is reached); *Greenfield v. Heublein, Inc.*, 742 F. 2d 751 (CA3 1984) (applying agreement-in-principle test to materiality inquiry), cert. denied, 469 U. S. 1215 (1985). Citing *Staffin*, the United States Court of Appeals for the Second Circuit has rejected a claim that defendant was under an obligation to disclose various events related to merger negotiations. *Reiss v. Pan American World Airways, Inc.*,

approach, preliminary merger discussions do not become material until "agreement-in-principle" as to the price and structure of the transaction has been reached between the would-be merger partners. See *Greenfield v. Heublein, Inc.*, 742 F. 2d 751, 757 (CA3 1984), cert. denied, 469 U. S. 1215 (1985). By definition, then, information concerning any negotiations not yet at the agreement-in-principle stage could be withheld or even misrepresented without a violation of Rule 10b-5.

Three rationales have been offered in support of the "agreement-in-principle" test. The first derives from the concern expressed in *TSC Industries* that an investor not be overwhelmed by excessively detailed and trivial information, and focuses on the substantial risk that preliminary merger discussions may collapse: because such discussions are inherently tentative, disclosure of their existence itself could mislead investors and foster false optimism. See *Greenfield v. Heublein, Inc.*, 742 F. 2d, at 756; *Reiss v. Pan American World Airways, Inc.*, 711 F. 2d 11, 14 (CA2 1983). The other two justifications for the agreement-in-principle standard are based on management concerns: because the requirement of "agreement-in-principle" limits the scope of disclosure obligations, it helps preserve the confidentiality of merger discussions where earlier disclosure might prejudice the negotiations; and the test also provides a usable, bright-line rule for determining when disclosure must be made. See *Greenfield v. Heublein, Inc.*, 742 F. 2d, at 757; *Flamm*

711 F. 2d 11, 13-14 (1983). The Seventh Circuit recently endorsed the agreement-in-principle test of materiality. See *Flamm v. Eberstadt*, 814 F. 2d 1169, 1174-1179 (describing agreement-in-principle as an agreement on price and structure), cert. denied, 484 U. S. 853 (1987). In some of these cases it is unclear whether the court based its decision on a finding that no duty arose to reveal the existence of negotiations, or whether it concluded that the negotiations were immaterial under an interpretation of the opinion in *TSC Industries, Inc. v. Northway, Inc.*, 426 U. S. 438 (1976).

v. *Eberstadt*, 814 F. 2d 1169, 1176–1178 (CA7), cert. denied, 484 U. S. 853 (1987).

None of these policy-based rationales, however, purports to explain why drawing the line at agreement-in-principle reflects the significance of the information upon the investor's decision. The first rationale, and the only one connected to the concerns expressed in *TSC Industries*, stands soundly rejected, even by a Court of Appeals that otherwise has accepted the wisdom of the agreement-in-principle test. "It assumes that investors are nitwits, unable to appreciate—even when told—that mergers are risky propositions up until the closing." *Flamm v. Eberstadt*, 814 F. 2d, at 1175. Disclosure, and not paternalistic withholding of accurate information, is the policy chosen and expressed by Congress. We have recognized time and again, a "fundamental purpose" of the various Securities Acts, "was to substitute a philosophy of full disclosure for the philosophy of *caveat emptor* and thus to achieve a high standard of business ethics in the securities industry." *SEC v. Capital Gains Research Bureau, Inc.*, 375 U. S., at 186. Accord, *Affiliated Ute Citizens v. United States*, 406 U. S. 128, 151 (1972); *Santa Fe Industries, Inc. v. Green*, 430 U. S., at 477. The role of the materiality requirement is not to "attribute to investors a child-like simplicity, an inability to grasp the probabilistic significance of negotiations," *Flamm v. Eberstadt*, 814 F. 2d, at 1175, but to filter out essentially useless information that a reasonable investor would not consider significant, even as part of a larger "mix" of factors to consider in making his investment decision. *TSC Industries, Inc. v. Northway, Inc.*, 426 U. S., at 448–449.

The second rationale, the importance of secrecy during the early stages of merger discussions, also seems irrelevant to an assessment whether their existence is significant to the trading decision of a reasonable investor. To avoid a "bidding war" over its target, an acquiring firm often will insist that negotiations remain confidential, see, e. g., *In re Car-*

nation Co., Exchange Act Release No. 22214, 33 S. E. C. Docket 1025 (1985), and at least one Court of Appeals has stated that "silence pending settlement of the price and structure of a deal is beneficial to most investors, most of the time." *Flamm v. Eberstadt*, 814 F. 2d, at 1177.¹¹

We need not ascertain, however, whether secrecy necessarily maximizes shareholder wealth—although we note that the proposition is at least disputed as a matter of theory and empirical research¹²—for this case does not concern the *timing* of a disclosure; it concerns only its accuracy and completeness.¹³ We face here the narrow question whether information concerning the existence and status of preliminary merger discussions is significant to the reasonable investor's trading decision. Arguments based on the premise that some disclosure would be "premature" in a sense are more properly considered under the rubric of an issuer's duty to disclose. The "secrecy" rationale is simply inapposite to the definition of materiality.

¹¹ Reasoning backwards from a goal of economic efficiency, that Court of Appeals stated: "Rule 10b-5 is about *fraud*, after all, and it is not fraudulent to conduct business in a way that makes investors better off . . ." 814 F. 2d, at 1177.

¹² See, e. g., Brown, Corporate Secrecy, the Federal Securities Laws, and the Disclosure of Ongoing Negotiations, 36 Cath. U. L. Rev. 93, 145-155 (1986); Bebchuk, The Case for Facilitating Competing Tender Offers, 95 Harv. L. Rev. 1028 (1982); *Flamm v. Eberstadt*, 814 F. 2d, at 1177, n. 2 (citing scholarly debate). See also *In re Carnation Co.*, Exchange Act Release No. 22214, 33 S. E. C. Docket 1025, 1030 (1985) ("The importance of accurate and complete issuer disclosure to the integrity of the securities markets cannot be overemphasized. To the extent that investors cannot rely upon the accuracy and completeness of issuer statements, they will be less likely to invest, thereby reducing the liquidity of the securities markets to the detriment of investors and issuers alike").

¹³ See *SEC v. Texas Gulf Sulphur Co.*, 401 F. 2d 833, 862 (CA2 1968) (en banc) ("Rule 10b-5 is violated whenever assertions are made, as here, in a manner reasonably calculated to influence the investing public . . . if such assertions are false or misleading or are so incomplete as to mislead . . ."), cert. denied *sub nom. Coates v. SEC*, 394 U. S. 976 (1969).

The final justification offered in support of the agreement-in-principle test seems to be directed solely at the comfort of corporate managers. A bright-line rule indeed is easier to follow than a standard that requires the exercise of judgment in the light of all the circumstances. But ease of application alone is not an excuse for ignoring the purposes of the Securities Acts and Congress' policy decisions. Any approach that designates a single fact or occurrence as always determinative of an inherently fact-specific finding such as materiality, must necessarily be overinclusive or underinclusive. In *TSC Industries* this Court explained: "The determination [of materiality] requires delicate assessments of the inferences a 'reasonable shareholder' would draw from a given set of facts and the significance of those inferences to him" 426 U. S., at 450. After much study, the Advisory Committee on Corporate Disclosure cautioned the SEC against administratively confining materiality to a rigid formula.¹⁴ Courts also would do well to heed this advice.

We therefore find no valid justification for artificially excluding from the definition of materiality information concerning merger discussions, which would otherwise be considered significant to the trading decision of a reasonable investor, merely because agreement-in-principle as to price and structure has not yet been reached by the parties or their representatives.

¹⁴ "Although the Committee believes that ideally it would be desirable to have absolute certainty in the application of the materiality concept, it is its view that such a goal is illusory and unrealistic. The materiality concept is judgmental in nature and it is not possible to translate this into a numerical formula. The Committee's advice to the [SEC] is to avoid this quest for certainty and to continue consideration of materiality on a case-by-case basis as disclosure problems are identified." House Committee on Interstate and Foreign Commerce, Report of the Advisory Committee on Corporate Disclosure to the Securities and Exchange Commission, 95th Cong., 1st Sess., 327 (Comm. Print 1977).

B

The Sixth Circuit explicitly rejected the agreement-in-principle test, as we do today, but in its place adopted a rule that, if taken literally, would be equally insensitive, in our view, to the distinction between materiality and the other elements of an action under Rule 10b-5:

"When a company whose stock is publicly traded makes a statement, as Basic did, that 'no negotiations' are underway, and that the corporation knows of 'no reason for the stock's activity,' and that 'management is unaware of any present or pending corporate development that would result in the abnormally heavy trading activity,' information concerning ongoing acquisition discussions becomes material *by virtue of the statement denying their existence*. . . .

". . . In analyzing whether information regarding merger discussions is material such that it must be affirmatively disclosed to avoid a violation of Rule 10b-5, the discussions and their progress are the primary considerations. However, once a statement is made denying the existence of any discussions, even discussions that might not have been material in absence of the denial are material because they make the statement made untrue." 786 F. 2d, at 748-749 (emphasis in original).¹⁵

¹⁵ Subsequently, the Sixth Circuit denied a petition for rehearing en banc in this case. App. to Pet. for Cert. 144a. Concurring separately, Judge Wellford, one of the original panel members, then explained that he did not read the panel's opinion to create a "conclusive presumption of materiality for any undisclosed information claimed to render inaccurate statements denying the existence of alleged preliminary merger discussions." *Id.*, at 145a. In his view, the decision merely reversed the District Court's judgment, which had been based on the agreement-in-principle standard. *Ibid.*

This approach, however, fails to recognize that, in order to prevail on a Rule 10b-5 claim, a plaintiff must show that the statements were *misleading* as to a *material* fact. It is not enough that a statement is false or incomplete, if the misrepresented fact is otherwise insignificant.

C

Even before this Court's decision in *TSC Industries*, the Second Circuit had explained the role of the materiality requirement of Rule 10b-5, with respect to contingent or speculative information or events, in a manner that gave that term meaning that is independent of the other provisions of the Rule. Under such circumstances, materiality "will depend at any given time upon a balancing of both the indicated probability that the event will occur and the anticipated magnitude of the event in light of the totality of the company activity." *SEC v. Texas Gulf Sulphur Co.*, 401 F. 2d, at 849. Interestingly, neither the Third Circuit decision adopting the agreement-in-principle test nor petitioners here take issue with this general standard. Rather, they suggest that with respect to preliminary merger discussions, there are good reasons to draw a line at agreement on price and structure.

In a subsequent decision, the late Judge Friendly, writing for a Second Circuit panel, applied the *Texas Gulf Sulphur* probability/magnitude approach in the specific context of preliminary merger negotiations. After acknowledging that materiality is something to be determined on the basis of the particular facts of each case, he stated:

"Since a merger in which it is bought out is the most important event that can occur in a small corporation's life, to wit, its death, we think that inside information, as regards a merger of this sort, can become material at an earlier stage than would be the case as regards lesser transactions—and this even though the mortality rate of mergers in such formative stages is doubtless high." *SEC v. Geon Industries, Inc.*, 531 F. 2d 39, 47-48 (1976).

We agree with that analysis.¹⁶

Whether merger discussions in any particular case are material therefore depends on the facts. Generally, in order to assess the probability that the event will occur, a factfinder will need to look to indicia of interest in the transaction at the highest corporate levels. Without attempting to catalog all such possible factors, we note by way of example that board resolutions, instructions to investment bankers, and actual negotiations between principals or their intermediaries may serve as indicia of interest. To assess the magnitude of the transaction to the issuer of the securities allegedly manipulated, a factfinder will need to consider such facts as the size of the two corporate entities and of the potential premiums over market value. No particular event or factor short of closing the transaction need be either necessary or sufficient by itself to render merger discussions material.¹⁷

¹⁶The SEC in the present case endorses the highly fact-dependent probability/magnitude balancing approach of *Texas Gulf Sulphur*. It explains: "The *possibility* of a merger may have an immediate importance to investors in the company's securities even if no merger ultimately takes place." Brief for SEC as *Amicus Curiae* 10. The SEC's insights are helpful, and we accord them due deference. See *TSC Industries, Inc. v. Northway, Inc.*, 426 U. S., at 449, n. 10.

¹⁷To be actionable, of course, a statement must also be misleading. Silence, absent a duty to disclose, is not misleading under Rule 10b-5. "No comment" statements are generally the functional equivalent of silence. See *In re Carnation Co.*, Exchange Act Release No. 22214, 33 S. E. C. Docket 1025 (1985). See also New York Stock Exchange Listed Company Manual § 202.01, reprinted in 3 CCH Fed. Sec. L. Rep. ¶ 23,515 (1987) (premature public announcement may properly be delayed for valid business purpose and where adequate security can be maintained); American Stock Exchange Company Guide §§ 401-405, reprinted in 3 CCH Fed. Sec. L. Rep. ¶¶ 23,124A-23,124E (1985) (similar provisions).

It has been suggested that given current market practices, a "no comment" statement is tantamount to an admission that merger discussions are underway. See *Flamm v. Eberstadt*, 814 F. 2d, at 1178. That may well hold true to the extent that issuers adopt a policy of truthfully denying merger rumors when no discussions are underway, and of issuing "no comment" statements when they are in the midst of negotiations. There

As we clarify today, materiality depends on the significance the reasonable investor would place on the withheld or misrepresented information.¹⁸ The fact-specific inquiry we endorse here is consistent with the approach a number of courts have taken in assessing the materiality of merger negotiations.¹⁹ Because the standard of materiality we have

are, of course, other statement policies firms could adopt; we need not now advise issuers as to what kind of practice to follow, within the range permitted by law. Perhaps more importantly, we think that creating an exception to a regulatory scheme founded on a prodisclosure legislative philosophy, because complying with the regulation might be "bad for business," is a role for Congress, not this Court. See also *id.*, at 1182 (opinion concurring in judgment and concurring in part).

¹⁸ We find no authority in the statute, the legislative history, or our previous decisions for varying the standard of materiality depending on who brings the action or whether insiders are alleged to have profited. See, e. g., *Pavlidis v. New England Patriots Football Club, Inc.*, 737 F. 2d 1227, 1231 (CA1 1984) ("A fact does not become more material to the shareholder's decision because it is withheld by an insider, or because the insider might profit by withholding it"); cf. *Aaron v. SEC*, 446 U. S. 680, 691 (1980) ("[S]cienter is an element of a violation of § 10(b) and Rule 10b-5, regardless of the identity of the plaintiff or the nature of the relief sought").

We recognize that trading (and profit making) by insiders can serve as an indication of materiality, see *SEC v. Texas Gulf Sulphur Co.*, 401 F. 2d, at 851; *General Portland, Inc. v. LaFarge Coppee S. A.*, [1982-1983] CCH Fed. Sec. L. Rep. ¶99,148, p. 95,544 (ND Tex. 1981). We are not prepared to agree, however, that "[i]n cases of the disclosure of inside information to a favored few, determination of materiality has a different aspect than when the issue is, for example, an inaccuracy in a publicly disseminated press release." *SEC v. Geon Industries, Inc.*, 531 F. 2d 39, 48 (CA2 1976). Devising two different standards of materiality, one for situations where insiders have traded in abrogation of their duty to disclose or abstain (or for that matter when any disclosure duty has been breached), and another covering affirmative misrepresentations by those under no duty to disclose (but under the ever-present duty not to mislead), would effectively collapse the materiality requirement into the analysis of defendant's disclosure duties.

¹⁹ See, e. g., *SEC v. Shapiro*, 494 F. 2d 1301, 1306-1307 (CA2 1974) (in light of projected very substantial increase in earnings per share, negotiations material, although merger still less than probable); *Holmes v. Bate-*

adopted differs from that used by both courts below, we remand the case for reconsideration of the question whether a grant of summary judgment is appropriate on this record.²⁰

IV

A

We turn to the question of reliance and the fraud-on-the-market theory. Succinctly put:

“The fraud on the market theory is based on the hypothesis that, in an open and developed securities market, the price of a company’s stock is determined by the available material information regarding the company and its business. . . . Misleading statements will there-

son, 583 F. 2d 542, 558 (CA1 1978) (merger negotiations material although they had not yet reached point of discussing terms); *SEC v. Gaspar*, [1984–1985] CCH Fed. Sec. L. Rep. ¶92,004, pp. 90,977–90,978 (SDNY 1985) (merger negotiations material although they did not proceed to actual tender offer); *Dungan v. Colt Industries, Inc.*, 532 F. Supp. 832, 837 (ND Ill. 1982) (fact that defendants were seriously exploring the sale of their company was material); *American General Ins. Co. v. Equitable General Corp.*, 493 F. Supp. 721, 744–745 (ED Va. 1980) (merger negotiations material four months before agreement-in-principle reached). Cf. *Susquehanna Corp. v. Pan American Sulphur Co.*, 423 F. 2d 1075, 1084–1085 (CA5 1970) (holding immaterial “unilateral offer to negotiate” never acknowledged by target and repudiated two days later); *Berman v. Gerber Products Co.*, 454 F. Supp. 1310, 1316, 1318 (WD Mich. 1978) (mere “overtures” immaterial).

²⁰ The Sixth Circuit rejected the District Court’s narrow reading of Basic’s “no developments” statement, see n. 4, *supra*, which focused on whether petitioners *knew* of any reason for the activity in Basic stock, that is, whether petitioners were aware of leaks concerning ongoing discussions. 786 F. 2d, at 747. See also Comment, Disclosure of Preliminary Merger Negotiations Under Rule 10b–5, 62 Wash. L. Rev. 81, 82–84 (1987) (noting prevalence of leaks and studies demonstrating that substantial trading activity immediately preceding merger announcements is the “rule, not the exception”). We accept the Court of Appeals’ reading of the statement as the more natural one, emphasizing management’s knowledge of *developments* (as opposed to leaks) that would explain unusual trading activity. See *id.*, at 92–93; see also *SEC v. Texas Gulf Sulphur Co.*, 401 F. 2d, at 862–863.

fore defraud purchasers of stock even if the purchasers do not directly rely on the misstatements. . . . The causal connection between the defendants' fraud and the plaintiffs' purchase of stock in such a case is no less significant than in a case of direct reliance on misrepresentations." *Peil v. Speiser*, 806 F. 2d 1154, 1160-1161 (CA3 1986).

Our task, of course, is not to assess the general validity of the theory, but to consider whether it was proper for the courts below to apply a rebuttable presumption of reliance, supported in part by the fraud-on-the-market theory. Cf. the comments of the dissent, *post*, at 252-255.

This case required resolution of several common questions of law and fact concerning the falsity or misleading nature of the three public statements made by Basic, the presence or absence of scienter, and the materiality of the misrepresentations, if any. In their amended complaint, the named plaintiffs alleged that in reliance on Basic's statements they sold their shares of Basic stock in the depressed market created by petitioners. See Amended Complaint in No. C79-1220 (ND Ohio), ¶¶ 27, 29, 35, 40; see also *id.*, ¶ 33 (alleging effect on market price of Basic's statements). Requiring proof of individualized reliance from each member of the proposed plaintiff class effectively would have prevented respondents from proceeding with a class action, since individual issues then would have overwhelmed the common ones. The District Court found that the presumption of reliance created by the fraud-on-the-market theory provided "a practical resolution to the problem of balancing the substantive requirement of proof of reliance in securities cases against the procedural requisites of [Federal Rule of Civil Procedure] 23." The District Court thus concluded that with reference to each public statement and its impact upon the open market for Basic shares, common questions predominated over individual questions, as required by Federal Rules of Civil Procedure 23(a)(2) and (b)(3).

Petitioners and their *amici* complain that the fraud-on-the-market theory effectively eliminates the requirement that a plaintiff asserting a claim under Rule 10b-5 prove reliance. They note that reliance is and long has been an element of common-law fraud, see, *e. g.*, Restatement (Second) of Torts § 525 (1977); W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on Law of Torts* § 108 (5th ed. 1984), and argue that because the analogous express right of action includes a reliance requirement, see, *e. g.*, § 18(a) of the 1934 Act, as amended, 15 U. S. C. § 78r(a), so too must an action implied under § 10(b).

We agree that reliance is an element of a Rule 10b-5 cause of action. See *Ernst & Ernst v. Hochfelder*, 425 U. S., at 206 (quoting Senate Report). Reliance provides the requisite causal connection between a defendant's misrepresentation and a plaintiff's injury. See, *e. g.*, *Wilson v. Comtech Telecommunications Corp.*, 648 F. 2d 88, 92 (CA2 1981); *List v. Fashion Park, Inc.*, 340 F. 2d 457, 462 (CA2), cert. denied *sub nom. List v. Lerner*, 382 U. S. 811 (1965). There is, however, more than one way to demonstrate the causal connection. Indeed, we previously have dispensed with a requirement of positive proof of reliance, where a duty to disclose material information had been breached, concluding that the necessary nexus between the plaintiffs' injury and the defendant's wrongful conduct had been established. See *Affiliated Ute Citizens v. United States*, 406 U. S., at 153-154. Similarly, we did not require proof that material omissions or misstatements in a proxy statement decisively affected voting, because the proxy solicitation itself, rather than the defect in the solicitation materials, served as an essential link in the transaction. See *Mills v. Electric Auto-Lite Co.*, 396 U. S. 375, 384-385 (1970).

The modern securities markets, literally involving millions of shares changing hands daily, differ from the face-to-face

transactions contemplated by early fraud cases,²¹ and our understanding of Rule 10b-5's reliance requirement must encompass these differences.²²

"In face-to-face transactions, the inquiry into an investor's reliance upon information is into the subjective pricing of that information by that investor. With the presence of a market, the market is interposed between seller and buyer and, ideally, transmits information to the investor in the processed form of a market price. Thus the market is performing a substantial part of the valuation process performed by the investor in a face-to-face transaction. The market is acting as the unpaid agent of the investor, informing him that given all the information available to it, the value of the stock is worth the market price." *In re LTV Securities Litigation*, 88 F. R. D. 134, 143 (ND Tex. 1980).

Accord, *e. g.*, *Peil v. Speiser*, 806 F. 2d, at 1161 ("In an open and developed market, the dissemination of material misrepresentations or withholding of material information typically affects the price of the stock, and purchasers generally rely on the price of the stock as a reflection of its value"); *Blackie*

²¹ W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on Law of Torts* 726 (5th ed. 1984) ("The reasons for the separate development of [the tort action for misrepresentation and nondisclosure], and for its peculiar limitations, are in part historical, and in part connected with the fact that in the great majority of the cases which have come before the courts the misrepresentations have been made in the course of a bargaining transaction between the parties. Consequently the action has been colored to a considerable extent by the ethics of bargaining between distrustful adversaries") (footnote omitted).

²² Actions under Rule 10b-5 are distinct from common-law deceit and misrepresentation claims, see *Blue Chip Stamps v. Manor Drug Stores*, 421 U. S. 723, 744-745 (1975), and are in part designed to add to the protections provided investors by the common law, see *Herman & MacLean v. Huddleston*, 459 U. S. 375, 388-389 (1983).

v. *Barrack*, 524 F. 2d 891, 908 (CA9 1975) (“[T]he same causal nexus can be adequately established indirectly, by proof of materiality coupled with the common sense that a stock purchaser does not ordinarily seek to purchase a loss in the form of artificially inflated stock”), cert. denied, 429 U. S. 816 (1976).

B

Presumptions typically serve to assist courts in managing circumstances in which direct proof, for one reason or another, is rendered difficult. See, e. g., 1 D. Louisell & C. Mueller, *Federal Evidence* 541–542 (1977). The courts below accepted a presumption, created by the fraud-on-the-market theory and subject to rebuttal by petitioners, that persons who had traded Basic shares had done so in reliance on the integrity of the price set by the market, but because of petitioners’ material misrepresentations that price had been fraudulently depressed. Requiring a plaintiff to show a speculative state of facts, i. e., how he would have acted if omitted material information had been disclosed, see *Affiliated Ute Citizens v. United States*, 406 U. S., at 153–154, or if the misrepresentation had not been made, see *Sharp v. Coopers & Lybrand*, 649 F. 2d 175, 188 (CA3 1981), cert. denied, 455 U. S. 938 (1982), would place an unnecessarily unrealistic evidentiary burden on the Rule 10b–5 plaintiff who has traded on an impersonal market. Cf. *Mills v. Electric Auto-Lite Co.*, 396 U. S., at 385.

Arising out of considerations of fairness, public policy, and probability, as well as judicial economy, presumptions are also useful devices for allocating the burdens of proof between parties. See E. Cleary, *McCormick on Evidence* 968–969 (3d ed. 1984); see also Fed. Rule Evid. 301 and Advisory Committee Notes, 28 U. S. C. App., p. 685. The presumption of reliance employed in this case is consistent with, and, by facilitating Rule 10b–5 litigation, supports, the congressional policy embodied in the 1934 Act. In drafting that Act,

Congress expressly relied on the premise that securities markets are affected by information, and enacted legislation to facilitate an investor's reliance on the integrity of those markets:

"No investor, no speculator, can safely buy and sell securities upon the exchanges without having an intelligent basis for forming his judgment as to the value of the securities he buys or sells. The idea of a free and open public market is built upon the theory that competing judgments of buyers and sellers as to the fair price of a security brings [*sic*] about a situation where the market price reflects as nearly as possible a just price. Just as artificial manipulation tends to upset the true function of an open market, so the hiding and secreting of important information obstructs the operation of the markets as indices of real value." H. R. Rep. No. 1383, at 11.

See *Lipton v. Documation, Inc.*, 734 F. 2d 740, 748 (CA11 1984), cert. denied, 469 U. S. 1132 (1985).²³

The presumption is also supported by common sense and probability. Recent empirical studies have tended to confirm Congress' premise that the market price of shares traded on well-developed markets reflects all publicly available information, and, hence, any material misrepresentations.²⁴ It has been noted that "it is hard to imagine that

²³ Contrary to the dissent's suggestion, the incentive for investors to "pay attention" to issuers' disclosures comes from their motivation to make a profit, not their attempt to preserve a cause of action under Rule 10b-5. Facilitating an investor's reliance on the market, consistently with Congress' expectations, hardly calls for "dismantling the federal scheme which mandates disclosure." See *post*, at 259.

²⁴ See *In re LTV Securities Litigation*, 88 F. R. D. 134, 144 (ND Tex. 1980) (citing studies); Fischel, Use of Modern Finance Theory in Securities Fraud Cases Involving Actively Traded Securities, 38 Bus. Law. 1, 4, n. 9 (1982) (citing literature on efficient-capital-market theory); Dennis, Materiality and the Efficient Capital Market Model: A Recipe for the Total Mix, 25 Wm. & Mary L. Rev. 373, 374-381, and n. 1 (1984). We need not determine by adjudication what economists and social scientists have debated

there ever is a buyer or seller who does not rely on market integrity. Who would knowingly roll the dice in a crooked crap game?" *Schlanger v. Four-Phase Systems Inc.*, 555 F. Supp. 535, 538 (SDNY 1982). Indeed, nearly every court that has considered the proposition has concluded that where materially misleading statements have been disseminated into an impersonal, well-developed market for securities, the reliance of individual plaintiffs on the integrity of the market price may be presumed.²⁵ Commentators generally have applauded the adoption of one variation or another of the fraud-on-the-market theory.²⁶ An investor who buys or sells stock at the price set by the market does so in reliance on the integrity of that price. Because most publicly available information is reflected in market price, an investor's reliance on any public material misrepresentations, therefore, may be presumed for purposes of a Rule 10b-5 action.

through the use of sophisticated statistical analysis and the application of economic theory. For purposes of accepting the presumption of reliance in this case, we need only believe that market professionals generally consider most publicly announced material statements about companies, thereby affecting stock market prices.

²⁵ See, e. g., *Peil v. Speiser*, 806 F. 2d 1154, 1161 (CA3 1986); *Harris v. Union Electric Co.*, 787 F. 2d 355, 367, and n. 9 (CA8), cert. denied, 479 U. S. 823 (1986); *Lipton v. Documation, Inc.*, 734 F. 2d 740 (CA11 1984), cert. denied, 469 U. S. 1132 (1985); *T. J. Raney & Sons, Inc. v. Fort Cobb, Oklahoma Irrigation Fuel Authority*, 717 F. 2d 1330, 1332-1333 (CA10 1983), cert. denied *sub nom.* *Linde, Thomson, Fairchild, Langworthy, Kohn & Van Dyke v. T. J. Raney & Sons, Inc.*, 465 U. S. 1026 (1984); *Panzirer v. Wolf*, 663 F. 2d 365, 367-368 (CA2 1981), vacated and remanded *sub nom.* *Price Waterhouse v. Panzirer*, 459 U. S. 1027 (1982); *Ross v. A. H. Robins Co.*, 607 F. 2d 545, 553 (CA2 1979), cert. denied, 446 U. S. 946 (1980); *Blackie v. Barrack*, 524 F. 2d 891, 905-908 (CA9 1975), cert. denied, 429 U. S. 816 (1976).

²⁶ See, e. g., Black, *Fraud on the Market: A Criticism of Dispensing with Reliance Requirements in Certain Open Market Transactions*, 62 N. C. L. Rev. 435 (1984); Note, *The Fraud-on-the-Market Theory*, 95 Harv. L. Rev. 1143 (1982); Note, *Fraud on the Market: An Emerging Theory of Recovery Under SEC Rule 10b-5*, 50 Geo. Wash. L. Rev. 627 (1982).

C

The Court of Appeals found that petitioners "made public, material misrepresentations and [respondents] sold Basic stock in an impersonal, efficient market. Thus the class, as defined by the district court, has established the threshold facts for proving their loss." 786 F. 2d, at 751.²⁷ The court acknowledged that petitioners may rebut proof of the elements giving rise to the presumption, or show that the misrepresentation in fact did not lead to a distortion of price or that an individual plaintiff traded or would have traded despite his knowing the statement was false. *Id.*, at 750, n. 6.

Any showing that severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff, or his decision to trade at a fair market price, will be sufficient to rebut the presumption of reliance. For example, if petitioners could show that the "market makers" were privy to the truth about the merger discussions here with Combustion, and thus that the market price would not have been affected by their misrepresentations, the causal connection could be broken: the basis for finding that the fraud had been transmitted through market price would be gone.²⁸ Similarly, if, despite petitioners' allegedly fraudulent at-

²⁷ The Court of Appeals held that in order to invoke the presumption, a plaintiff must allege and prove: (1) that the defendant made public misrepresentations; (2) that the misrepresentations were material; (3) that the shares were traded on an efficient market; (4) that the misrepresentations would induce a reasonable, relying investor to misjudge the value of the shares; and (5) that the plaintiff traded the shares between the time the misrepresentations were made and the time the truth was revealed. See 786 F. 2d, at 750.

Given today's decision regarding the definition of materiality as to preliminary merger discussions, elements (2) and (4) may collapse into one.

²⁸ By accepting this rebuttable presumption, we do not intend conclusively to adopt any particular theory of how quickly and completely publicly available information is reflected in market price. Furthermore, our decision today is not to be interpreted as addressing the proper measure of damages in litigation of this kind.

tempt to manipulate market price, news of the merger discussions credibly entered the market and dissipated the effects of the misstatements, those who traded Basic shares after the corrective statements would have no direct or indirect connection with the fraud.²⁹ Petitioners also could rebut the presumption of reliance as to plaintiffs who would have divested themselves of their Basic shares without relying on the integrity of the market. For example, a plaintiff who believed that Basic's statements were false and that Basic was indeed engaged in merger discussions, and who consequently believed that Basic stock was artificially underpriced, but sold his shares nevertheless because of other unrelated concerns, *e. g.*, potential antitrust problems, or political pressures to divest from shares of certain businesses, could not be said to have relied on the integrity of a price he knew had been manipulated.

V

In summary:

1. We specifically adopt, for the § 10(b) and Rule 10b-5 context, the standard of materiality set forth in *TSC Industries, Inc. v. Northway, Inc.*, 426 U. S., at 449.
2. We reject "agreement-in-principle as to price and structure" as the bright-line rule for materiality.
3. We also reject the proposition that "information becomes material by virtue of a public statement denying it."

²⁹ We note there may be a certain incongruity between the assumption that Basic shares are traded on a well-developed, efficient, and information-hungry market, and the allegation that such a market could remain misinformed, and its valuation of Basic shares depressed, for 14 months, on the basis of the three public statements. Proof of that sort is a matter for trial, throughout which the District Court retains the authority to amend the certification order as may be appropriate. See Fed. Rules Civ. Proc. 23(c)(1) and (c)(4). See 7B C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure* 128-132 (1986). Thus, we see no need to engage in the kind of factual analysis the dissent suggests that manifests the "oddities" of applying a rebuttable presumption of reliance in this case. See *post*, at 259-263.

4. Materiality in the merger context depends on the probability that the transaction will be consummated, and its significance to the issuer of the securities. Materiality depends on the facts and thus is to be determined on a case-by-case basis.

5. It is not inappropriate to apply a presumption of reliance supported by the fraud-on-the-market theory.

6. That presumption, however, is rebuttable.

7. The District Court's certification of the class here was appropriate when made but is subject on remand to such adjustment, if any, as developing circumstances demand.

The judgment of the Court of Appeals is vacated, and the case is remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

THE CHIEF JUSTICE, JUSTICE SCALIA, and JUSTICE KENNEDY took no part in the consideration or decision of this case.

JUSTICE WHITE, with whom JUSTICE O'CONNOR joins, concurring in part and dissenting in part.

I join Parts I–III of the Court's opinion, as I agree that the standard of materiality we set forth in *TSC Industries, Inc. v. Northway, Inc.*, 426 U. S. 438, 449 (1976), should be applied to actions under § 10(b) and Rule 10b–5. But I dissent from the remainder of the Court's holding because I do not agree that the “fraud-on-the-market” theory should be applied in this case.

I

Even when compared to the relatively youthful private cause-of-action under § 10(b), see *Kardon v. National Gypsum Co.*, 69 F. Supp. 512 (ED Pa. 1946), the fraud-on-the-market theory is a mere babe.¹ Yet today, the Court em-

¹The earliest Court of Appeals case adopting this theory cited by the Court is *Blackie v. Barrack*, 524 F. 2d 891 (CA9 1975), cert. denied, 429 U. S. 816 (1976). Moreover, widespread acceptance of the fraud-on-the-

braces this theory with the sweeping confidence usually reserved for more mature legal doctrines. In so doing, I fear that the Court's decision may have many adverse, unintended effects as it is applied and interpreted in the years to come.

A

At the outset, I note that there are portions of the Court's fraud-on-the-market holding with which I am in agreement. Most importantly, the Court rejects the version of that theory, heretofore adopted by some courts,² which equates "causation" with "reliance," and permits recovery by a plaintiff who claims merely to have been *harmed* by a material misrepresentation which altered a market price, notwithstanding proof that the plaintiff did not in any way *rely* on that price. *Ante*, at 248. I agree with the Court that if Rule 10b-5's reliance requirement is to be left with any content at all, the fraud-on-the-market presumption must be capable of being rebutted by a showing that a plaintiff did not "rely" on the market price. For example, a plaintiff who decides, months in advance of an alleged misrepresentation, to purchase a stock; one who buys or sells a stock for reasons unrelated to its price; one who actually sells a stock "short" days before the misrepresentation is made—surely none of these people can state a valid claim under Rule 10b-5. Yet, some federal courts have allowed such claims to stand under one variety or another of the fraud-on-the-market theory.³

market theory in the Courts of Appeals cannot be placed any earlier than five or six years ago. See *ante*, at 246-247, n. 24; Brief for Securities and Exchange Commission as *Amicus Curiae* 21, n. 24.

² See, e. g., *Zweig v. Hearst Corp.*, 594 F. 2d 1261, 1268-1271 (CA9 1979); *Arthur Young & Co. v. United States District Court*, 549 F. 2d 686, 694-695 (CA9), cert. denied, 434 U. S. 829 (1977); *Pellman v. Cinerama, Inc.*, 89 F. R. D. 386, 388 (SDNY 1981).

³ Cases illustrating these factual situations are, respectively, *Zweig v. Hearst Corp.*, *supra*, at 1271 (Ely, J., dissenting); *Abrams v. Johns-Manville Corp.*, [1981-1982] CCH Fed. Sec. L. Rep. ¶98,348, p. 92,157

Happily, the majority puts to rest the prospect of recovery under such circumstances. A nonrebuttable presumption of reliance—or even worse, allowing recovery in the face of “affirmative evidence of nonreliance,” *Zweig v. Hearst Corp.*, 594 F. 2d 1261, 1272 (CA9 1979) (Ely, J., dissenting)—would effectively convert Rule 10b-5 into “a scheme of investor’s insurance.” *Shores v. Sklar*, 647 F. 2d 462, 469, n. 5 (CA5 1981) (en banc), cert. denied, 459 U. S. 1102 (1983). There is no support in the Securities Exchange Act, the Rule, or our cases for such a result.

B

But even as the Court attempts to limit the fraud-on-the-market theory it endorses today, the pitfalls in its approach are revealed by previous uses by the lower courts of the broader versions of the theory. Confusion and contradiction in court rulings are inevitable when traditional legal analysis is replaced with economic theorization by the federal courts.

(SDNY 1981); *Fausett v. American Resources Management Corp.*, 542 F. Supp. 1234, 1238-1239 (Utah 1982).

The *Abrams* decision illustrates the particular pliability of the fraud-on-the-market presumption. In *Abrams*, the plaintiff represented a class of purchasers of defendant’s stock who were allegedly misled by defendant’s misrepresentations in annual reports. But in a deposition taken shortly after the plaintiff filed suit, she testified that she had bought defendant’s stock primarily because she thought that favorable changes in the Federal Tax Code would boost sales of its product (insulation).

Two years later, after the defendant moved for summary judgment based on the plaintiff’s failure to prove reliance on the alleged misrepresentations, the plaintiff resuscitated her case by executing an affidavit which stated that she “certainly [had] assumed that the market price of Johns-Manville stock was an accurate reflection of the worth of the company” and would not have paid the then-going price if she had known otherwise. *Abrams, supra*, at 92,157. Based on this affidavit, the District Court permitted the plaintiff to proceed on her fraud-on-the-market theory.

Thus, *Abrams* demonstrates how easily a *post hoc* statement will enable a plaintiff to bring a fraud-on-the-market action—even in the rare case where a plaintiff is frank or foolhardy enough to admit initially that a factor other than price led her to the decision to purchase a particular stock.

In general, the case law developed in this Court with respect to § 10(b) and Rule 10b-5 has been based on doctrines with which we, as judges, are familiar: common-law doctrines of fraud and deceit. See, e. g., *Santa Fe Industries, Inc. v. Green*, 430 U. S. 462, 471-477 (1977). Even when we have extended civil liability under Rule 10b-5 to a broader reach than the common law had previously permitted, see *ante*, at 244, n. 22, we have retained familiar legal principles as our guideposts. See, e. g., *Herman & MacLean v. Huddleston*, 459 U. S. 375, 389-390 (1983). The federal courts have proved adept at developing an evolving jurisprudence of Rule 10b-5 in such a manner. But with no staff economists, no experts schooled in the "efficient-capital-market hypothesis," no ability to test the validity of empirical market studies, we are not well equipped to embrace novel constructions of a statute based on contemporary microeconomic theory.⁴

The "wrong turns" in those Court of Appeals and District Court fraud-on-the-market decisions which the Court implicitly rejects as going too far should be ample illustration of the dangers when economic theories replace legal rules as the basis for recovery. Yet the Court today ventures into this area beyond its expertise, beyond—by its own admission—the confines of our previous fraud cases. See *ante*, at 243-244. Even if I agreed with the Court that "modern securi-

⁴This view was put well by two commentators who wrote a few years ago:

"Of all recent developments in financial economics, the efficient capital market hypothesis ('ECMH') has achieved the widest acceptance by the legal culture. . . .

"Yet the legal culture's remarkably rapid and broad acceptance of an economic concept that did not exist twenty years ago is not matched by an equivalent degree of *understanding*." Gilson & Kraakman, *The Mechanisms of Market Efficiency*, 70 Va. L. Rev. 549, 549-550 (1984) (footnotes omitted; emphasis added).

While the fraud-on-the-market theory has gained even broader acceptance since 1984, I doubt that it has achieved any greater understanding.

ties markets . . . involving millions of shares changing hands daily" require that the "understanding of Rule 10b-5's reliance requirement" be changed, *ibid.*, I prefer that such changes come from Congress in amending § 10(b). The Congress, with its superior resources and expertise, is far better equipped than the federal courts for the task of determining how modern economic theory and global financial markets require that established legal notions of fraud be modified. In choosing to make these decisions itself, the Court, I fear, embarks on a course that it does not genuinely understand, giving rise to consequences it cannot foresee.⁵

For while the economists' theories which underpin the fraud-on-the-market presumption may have the appeal of mathematical exactitude and scientific certainty, they are—in the end—nothing more than theories which may or may not prove accurate upon further consideration. Even the most earnest advocates of economic analysis of the law recognize this. See, *e. g.*, Easterbrook, Afterword: Knowledge and Answers, 85 Colum. L. Rev. 1117, 1118 (1985). Thus, while the majority states that, for purposes of reaching its result it need only make modest assumptions about the way in which "market professionals generally" do their jobs, and how the conduct of market professionals affects stock prices, *ante*, at 246, n. 23, I doubt that we are in much of a position

⁵ For example, Judge Posner in his *Economic Analysis of Law* § 15.8, pp. 423-424 (3d ed. 1986), submits that the fraud-on-the-market theory produces the "economically correct result" in Rule 10b-5 cases but observes that the question of damages under the theory is quite problematic. Notwithstanding the fact that "[a]t first blush it might seem obvious," the proper calculation of damages when the fraud-on-the-market theory is applied must rest on several "assumptions" about "social costs" which are "difficult to quantify." *Ibid.* Of course, answers to the question of the proper measure of damages in a fraud-on-the-market case are essential for proper implementation of the fraud-on-the-market presumption. Not surprisingly, the difficult damages question is one the Court expressly declines to address today. *Ante*, at 248, n. 27.

to assess which theories aptly describe the functioning of the securities industry.

Consequently, I cannot join the Court in its effort to reconfigure the securities laws, based on recent economic theories, to better fit what it perceives to be the new realities of financial markets. I would leave this task to others more equipped for the job than we.

C

At the bottom of the Court's conclusion that the fraud-on-the-market theory sustains a presumption of reliance is the assumption that individuals rely "on the integrity of the market price" when buying or selling stock in "impersonal, well-developed market[s] for securities." *Ante*, at 247. Even if I was prepared to accept (as a matter of common sense or general understanding) the assumption that most persons buying or selling stock do so in response to the market price, the fraud-on-the-market theory goes further. For in adopting a "presumption of reliance," the Court *also* assumes that buyers and sellers rely—not just on the market price—but on the "integrity" of that price. It is this aspect of the fraud-on-the-market hypothesis which most mystifies me.

To define the term "integrity of the market price," the majority quotes approvingly from cases which suggest that investors are entitled to "rely on the price of a stock as a reflection of its value.'" *Ante*, at 244 (quoting *Peil v. Speiser*, 806 F. 2d 1154, 1161 (CA3 1986)). But the meaning of this phrase eludes me, for it implicitly suggests that stocks have some "true value" that is measurable by a standard other than their market price. While the scholastics of medieval times professed a means to make such a valuation of a commodity's "worth,"⁶ I doubt that the federal courts of our day are similarly equipped.

⁶ See E. Salin, Just Price, 8 *Encyclopaedia of Social Sciences* 504–506 (1932); see also R. de Roover, *Economic Thought: Ancient and Medieval Thought*, 4 *International Encyclopedia of Social Sciences* 433–435 (1968).

Even if securities had some "value"—knowable and distinct from the market price of a stock—investors do not always share the Court's presumption that a stock's price is a "reflection of [this] value." Indeed, "many investors purchase or sell stock because they believe the price *inaccurately* reflects the corporation's worth." See Black, *Fraud on the Market: A Criticism of Dispensing with Reliance Requirements in Certain Open Market Transactions*, 62 N. C. L. Rev. 435, 455 (1984) (emphasis added). If investors really believed that stock prices reflected a stock's "value," many sellers would never sell, and many buyers never buy (given the time and cost associated with executing a stock transaction). As we recognized just a few years ago: "[I]nvestors act on inevitably incomplete or inaccurate information, [consequently] there are always winners and losers; but those who have 'lost' have not necessarily been defrauded." *Dirks v. SEC*, 463 U. S. 646, 667, n. 27 (1983). Yet today, the Court allows investors to recover who can show little more than that they sold stock at a lower price than what might have been.⁷

I do not propose that the law retreat from the many protections that § 10(b) and Rule 10b-5, as interpreted in our prior cases, provide to investors. But any extension of these laws, to approach something closer to an investor in-

⁷This is what the Court's rule boils down to in practical terms. For while, in theory, the Court allows for rebuttal of its "presumption of reliance"—a proviso with which I agree, see *supra*, at 251—in practice the Court must realize, as other courts applying the fraud-on-the-market theory have, that such rebuttal is virtually impossible in all but the most extraordinary case. See *Blackie v. Barrack*, 524 F. 2d, at 906-907, n. 22; *In re LTV Securities Litigation*, 88 F. R. D. 134, 143, n. 4 (ND Tex. 1980).

Consequently, while the Court considers it significant that the fraud-on-the-market presumption it endorses is a rebuttable one, *ante*, at 242, 248, the majority's implicit rejection of the "pure causation" fraud-on-the-market theory rings hollow. In most cases, the Court's theory will operate just as the causation theory would, creating a nonrebuttable presumption of "reliance" in future Rule 10b-5 actions.

surance scheme, should come from Congress, and not from the courts.

II

Congress has not passed on the fraud-on-the-market theory the Court embraces today. That is reason enough for us to abstain from doing so. But it is even more troubling that, to the extent that any view of Congress on this question can be inferred indirectly, it is contrary to the result the majority reaches.

A

In the past, the scant legislative history of § 10(b) has led us to look at Congress' intent in adopting other portions of the Securities Exchange Act when we endeavor to discern the limits of private causes of action under Rule 10b-5. See, e. g., *Ernst & Ernst v. Hochfelder*, 425 U. S. 185, 204-206 (1976). A similar undertaking here reveals that Congress flatly rejected a proposition analogous to the fraud-on-the-market theory in adopting a civil liability provision of the 1934 Act.

Section 18 of the Act expressly provides for civil liability for certain misleading statements concerning securities. See 15 U. S. C. § 78r(a). When the predecessor of this section was first being considered by Congress, the initial draft of the provision allowed recovery by any plaintiff "who shall have purchased or sold a security the price of which may have been affected by such [misleading] statement." See S. 2693, 73d Cong., 2d Sess., § 17(a) (1934). Thus, as initially drafted, the precursor to the express civil liability provision of the 1934 Act would have permitted suits by plaintiffs based solely on the fact that the price of the securities they bought or sold was *affected* by a misrepresentation: a theory closely akin to the Court's holding today.

Yet this provision was roundly criticized in congressional hearings on the proposed Securities Exchange Act, because it failed to include a more substantial "reliance" require-

ment.⁸ Subsequent drafts modified the original proposal, and included an express reliance requirement in the final version of the Act. In congressional debates over the redrafted version of this bill, the then-Chairman of the House Committee, Representative Sam Rayburn, explained that the "bill as originally written was very much challenged on the ground that reliance should be required. This objection has been met." 78 Cong. Rec. 7701 (1934). Moreover, in a previous case concerning the scope of §10(b) and Rule 10b-5, we quoted approvingly from the legislative history of this revised provision, which emphasized the presence of a strict reliance requirement as a prerequisite for recovery. See *Ernst & Ernst v. Hochfelder*, *supra*, at 206 (citing S. Rep. No. 792, 73d Cong., 2d Sess., 12-13 (1934)).

Congress thus anticipated meaningful proof of "reliance" before civil recovery can be had under the Securities Exchange Act. The majority's adoption of the fraud-on-the-market theory effectively eviscerates the reliance rule in actions brought under Rule 10b-5, and negates congressional intent to the contrary expressed during adoption of the 1934 Act.

B

A second congressional policy that the majority's opinion ignores is the strong preference the securities laws display for widespread public disclosure and distribution to investors of material information concerning securities. This congressionally adopted policy is expressed in the numerous and varied disclosure requirements found in the federal securities

⁸See Stock Exchange Practices, Hearings on S. Res. 84, 56, and 97 before the Senate Committee on Banking and Currency, 73d Cong., 2d Sess., pt. 15, p. 6638 (1934) (statement of Richard Whitney, President of the New York Stock Exchange); Stock Exchange Regulation, Hearing on H. R. 7852 and 8720, before the House Committee on Interstate and Foreign Commerce, 73d Cong., 2d Sess., 226 (1934) (statement of Richard Whitney).

law scheme. See, *e. g.*, 15 U. S. C. §§ 78m, 78o(d) (1982 ed. and Supp. IV).

Yet observers in this field have acknowledged that the fraud-on-the-market theory is at odds with the federal policy favoring disclosure. See, *e. g.*, Black, 62 N. C. L. Rev., at 457-459. The conflict between Congress' preference for disclosure and the fraud-on-the-market theory was well expressed by a jurist who rejected the latter in order to give force to the former:

"[D]isclosure . . . is crucial to the way in which the federal securities laws function. . . . [T]he federal securities laws are intended to put investors into a position from which they can help themselves by relying upon disclosures that others are obligated to make. This system is not furthered by allowing monetary recovery to those who refuse to look out for themselves. If we say that a plaintiff may recover in some circumstances even though he did not read and rely on the defendants' public disclosures, then no one need pay attention to those disclosures and the method employed by Congress to achieve the objective of the 1934 Act is defeated." *Shores v. Sklar*, 647 F. 2d, at 483 (Randall, J., dissenting).

It is no surprise, then, that some of the same voices calling for acceptance of the fraud-on-the-market theory also favor dismantling the federal scheme which mandates disclosure. But to the extent that the federal courts must make a choice between preserving effective disclosure and trumpeting the new fraud-on-the-market hypothesis, I think Congress has spoken clearly—favoring the current prodisclosure policy. We should limit our role in interpreting § 10(b) and Rule 10b-5 to one of giving effect to such policy decisions by Congress.

III

Finally, the particular facts of this case make it an exceedingly poor candidate for the Court's fraud-on-the-market the-

ory, and illustrate the illogic achieved by that theory's application in many cases.

Respondents here are a class of sellers who sold Basic stock between October 1977 and December 1978, a 14-month period. At the time the class period began, Basic's stock was trading at \$20 a share (at the time, an all-time high); the last members of the class to sell their Basic stock got a price of just over \$30 a share. App. 363, 423. It is indisputable that virtually every member of the class made money from his or her sale of Basic stock.

The oddities of applying the fraud-on-the-market theory in this case are manifest. First, there are the facts that the plaintiffs are sellers and the class period is so lengthy—both are virtually without precedent in prior fraud-on-the-market cases.⁹ For reasons I discuss in the margin, I think these two facts render this case less apt to application of the fraud-on-the-market hypothesis.

Second, there is the fact that in this case, there is no evidence that petitioner Basic's officials made the troublesome misstatements for the purpose of manipulating stock prices, or with any intent to engage in underhanded trading of Basic stock. Indeed, during the class period, petitioners do not

⁹None of the Court of Appeals cases the Court cites as endorsing the fraud-on-the-market theory, *ante*, at 246–247, n. 24, involved seller-plaintiffs. Rather, all of these cases were brought by purchasers who bought securities in a short period following some material misstatement (or similar act) by an issuer, which was alleged to have falsely inflated a stock's price.

Even if the fraud-on-the-market theory provides a permissible link between such a misstatement and a decision to purchase a security shortly thereafter, surely that link is far more attenuated between misstatements made in October 1977, and a decision to sell a stock the following September, 11 months later. The fact that the plaintiff-class is one of sellers, and that the class period so long, distinguish this case from *any other* cited in the Court's opinion, and make it an even poorer candidate for the fraud-on-the-market presumption. Cf., e. g., *Schlanger v. Four-Phase Systems Inc.*, 555 F. Supp. 535 (SDNY 1982) (permitting class of sellers to use fraud-on-the-market theory where the class period was eight days long).

appear to have purchased or sold *any* Basic stock whatsoever. App. to Pet. for Cert. 27a. I agree with *amicus* who argues that “[i]mposition of damages liability under Rule 10b-5 makes little sense . . . where a defendant is neither a purchaser nor a seller of securities.” See Brief for American Corporate Counsel Association as *Amicus Curiae* 13. In fact, in previous cases, we had recognized that Rule 10b-5 is concerned primarily with cases where the fraud is committed by one trading the security at issue. See, e. g., *Blue Chip Stamps v. Manor Drug Stores*, 421 U. S. 723, 736, n. 8 (1975). And it is difficult to square liability in this case with § 10(b)’s express provision that it prohibits fraud “*in connection with the purchase or sale of any security.*” See 15 U. S. C. § 78j(b) (emphasis added).

Third, there are the peculiarities of what kinds of investors will be able to recover in this case. As I read the District Court’s class certification order, App. to Pet. for Cert. 123a-126a; *ante*, at 228-229, n. 5, there are potentially many persons who did not purchase Basic stock until *after* the first false statement (October 1977), but who nonetheless *will* be able to recover under the Court’s fraud-on-the-market theory. Thus, it is possible that a person who heard the first corporate misstatement and *disbelieved* it—i. e., someone who purchased Basic stock thinking that petitioners’ statement was false—may still be included in the plaintiff-class on remand. How a person who undertook such a speculative stock-investing strategy—and made \$10 a share doing so (if he bought on October 22, 1977, and sold on December 15, 1978)—can say that he was “defrauded” by virtue of his reliance on the “integrity” of the market price is beyond me.¹⁰

¹⁰ The Court recognizes that a person who *sold* his Basic shares believing petitioners’ statements to be false may not be entitled to recovery. *Ante*, at 249. Yet it seems just as clear to me that one who *bought* Basic stock under this same belief—hoping to profit from the uncertainty over Basic’s merger plans—should not be permitted to recover either.

And such speculators may not be uncommon, at least in this case. See App. to Pet. for Cert. 125a.

Indeed, the facts of this case lead a casual observer to the almost inescapable conclusion that many of those who bought or sold Basic stock during the period in question flatly disbelieved the statements which are alleged to have been "materially misleading." Despite three statements denying that merger negotiations were underway, Basic stock hit record-high after record-high during the 14-month class period. It seems quite possible that, like Casca's knowing disbelief of Caesar's "thrice refusal" of the Crown,¹¹ clever investors were skeptical of petitioners' three denials that merger talks were going on. Yet such investors, the savviest of the savvy, will be able to recover under the Court's opinion, as long as they now claim that they believed in the "integrity of the market price" when they sold their stock (between September and December 1978).¹² Thus, persons who bought after hearing and relying on the *falsity* of petitioners' statements may be able to prevail and recover money damages on remand.

And who will pay the judgments won in such actions? I suspect that all too often the majority's rule will "lead to large judgments, payable in the last analysis by innocent investors, for the benefit of speculators and their lawyers." Cf. *SEC v. Texas Gulf Sulphur Co.*, 401 F. 2d 833, 867 (CA2 1968) (en banc) (Friendly, J., concurring), cert. denied, 394 U. S. 976 (1969). This Court and others have previously recognized that "inexorably broadening . . . the class of plaintiff[s] who may sue in this area of the law will ultimately result in more harm than good." *Blue Chip Stamps v. Manor Drug Stores*, *supra*, at 747-748. See also *Ernst & Ernst v. Hochfelder*, 425 U. S., at 214; *Ultramares Corp. v. Touche*,

¹¹ See W. Shakespeare, *Julius Caesar*, Act I, Scene II.

¹² The ease with which such a *post hoc* claim of "reliance on the integrity of the market price" can be made, and gain acceptance by a trial court, is illustrated by *Abrams v. Johns-Manville Corp.*, discussed in n. 3, *supra*.

255 N. Y. 170, 179-180, 174 N. E. 441, 444-445 (1931) (Cardozo, C. J.). Yet such a bitter harvest is likely to be the reaped from the seeds sown by the Court's decision today.

IV

In sum, I think the Court's embracement of the fraud-on-the-market theory represents a departure in securities law that we are ill suited to commence—and even less equipped to control as it proceeds. As a result, I must respectfully dissent.

Per Curiam

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HAIG ET AL. *v.* BISSONETTE ET AL.CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT

No. 86-987. Decided March 21, 1988

800 F. 2d 812, affirmed for absence of quorum.

PER CURIAM.

Because the Court lacks a quorum, 28 U. S. C. § 1, and since a majority of the qualified Justices are of the opinion that the case cannot be heard and determined at the next Term of the Court, the judgment of the United States Court of Appeals for the Eighth Circuit is affirmed under 28 U. S. C. § 2109, which provides that under these circumstances the Court shall enter its order affirming the judgment of the court from which the case was brought for review with the same effect as upon affirmance by an equally divided Court.

THE CHIEF JUSTICE, JUSTICE O'CONNOR, JUSTICE SCALIA, and JUSTICE KENNEDY took no part in this decision.

Per Curiam

BUCHANAN v. STANSHIPS, INC., ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 87-133. Decided March 21, 1988

Petitioners filed a wrongful-death action against respondents under the Death on the High Seas Act (Act). This Act contains no provision regarding costs, and the District Court's judgment for respondents did not mention costs. After petitioners filed a notice of appeal, respondents filed an application for costs styled as a "Motion to Amend or Alter Judgment" under Federal Rule of Civil Procedure 59(e), which the District Court granted. Petitioners did not file a second notice of appeal. The Court of Appeals dismissed petitioners' appeal for failure to file a timely appeal because, under Federal Rule of Appellate Procedure 4(a)(4), a notice of appeal filed before the disposition of a Rule 59(e) motion has no effect, and a "new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion."

Held: A prevailing party's motion for costs in a wrongful-death action brought under the Death on the High Seas Act does not constitute a Rule 59 motion rendering ineffective a notice of appeal filed prior to the disposition of that motion. Rule 59(e) generally is invoked only to support reconsideration of matters encompassed in the decision on the merits, not when a party is seeking what is due because of the judgment. Because the Act does not provide for costs, respondents' motion for costs raised issues wholly collateral to the judgment on the main cause of action and is properly viewed as a motion for costs to a prevailing party under Federal Rule of Civil Procedure 54(d). The incorrect designation of respondents' Rule 54(d) motion as a Rule 59(e) motion cannot change this fact or deprive petitioners of the benefit of their timely notice of appeal.

Certiorari granted; reversed and remanded.

PER CURIAM.

Federal Rule of Appellate Procedure 4(a)(4) provides that if any party files a timely motion "under Rule 59 [of the Federal Rules of Civil Procedure] to alter or amend the judgment," then the time for appeal "shall run from the entry of the order . . . granting or denying" such a motion. The Rule specifically indicates that a notice of appeal filed before the

disposition of such a motion "shall have no effect" but that a "new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion." In this case, we are asked to determine whether a prevailing party's motion for costs constitutes a Rule 59 motion and thereby renders ineffective a notice of appeal filed prior to the disposition of that motion.

I

Petitioners, a widow and her minor child, brought this wrongful-death action against respondents in the United States District Court for the Middle District of Louisiana under the Death on the High Seas Act, ch. 111, 41 Stat. 537, 46 U. S. C. § 761 *et seq.* The court initially granted summary judgment for respondents, but the Court of Appeals for the Fifth Circuit reversed this ruling. 744 F. 2d 1070 (1984). On remand, the District Court conducted a bench trial. Then, on January 26, 1987, the court entered judgment in favor of respondents, dismissing petitioners' suit with prejudice. Pet. for Cert. 15. The judgment made no mention of costs. The next day petitioners filed a notice of appeal in the District Court pursuant to Federal Rule of Appellate Procedure 3. *Id.*, at 16.

On January 29, 1987, respondents filed an application for the allowance of costs, styled as a "Motion to Alter or Amend Judgment." *Id.*, at 17. The motion asked that the District Court "amend its judgment" to reflect that respondents were "entitled to recover their taxable costs," and specifically invoked Rule 59 of the Federal Rules of Civil Procedure. *Ibid.* The District Court issued an order granting respondents' request the next day. *Id.*, at 18.

Petitioners did not file a second notice of appeal following the District Court's order granting respondents' motion. Respondents subsequently moved the Court of Appeals to dismiss petitioners' appeal for lack of subject-matter jurisdiction due to failure to file a timely notice of appeal. *Id.*, at 19.

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Respondents argued that Rule 4(a)(4) of the Federal Rules of Appellate Procedure rendered petitioners' first notice of appeal void because the motion for the allowance of costs was a Rule 59(e) motion. Relying on its prior decision in *Harcon Barge Co. v. D & G Boat Rentals, Inc.*, 784 F. 2d 665 (CA5) (en banc), cert. denied, 479 U. S. 930 (1986), the Court of Appeals agreed and dismissed petitioners' appeal. Pet. for Cert. 25. See also *Charles v. Daley*, 799 F. 2d 343, 347 (CA7 1986) (adopting the analysis of *Harcon Barge*). Petitioners seek certiorari, noting that the Court of Appeals' decision is in tension with our decision in *White v. New Hampshire Dept. of Employment Security*, 455 U. S. 445 (1982), and in conflict with decisions of the Ninth Circuit and the Eleventh Circuit, see *Durham v. Kelly*, 810 F. 2d 1500 (CA9 1987); *Alimenta (U. S. A.), Inc. v. Anheuser-Busch Cos.*, 803 F. 2d 1160 (CA11 1986); *Lucas v. Florida Power & Light Co.*, 729 F. 2d 1300 (CA11 1984).

II

Federal Rule of Civil Procedure 59(e) concerns "motion[s] to alter or amend the judgment." The Rule requires that such motions be filed within 10 days of the initial entry of judgment. "[T]he federal courts generally have invoked Rule 59(e) only to support reconsideration of matters properly encompassed in a decision on the merits." *White, supra*, at 451. In *White*, we held that a motion for attorney's fees under 42 U. S. C. § 1988 was not a Rule 59(e) motion. We reasoned that because § 1988 provides for fees independently of the underlying cause of action and only for a "prevailing party," a motion for fees required an inquiry "separate from the decision on the merits—an inquiry that cannot even commence until one party has 'prevailed.'" 455 U. S., at 451-452. Cf. *Budinich v. Becton Dickinson & Co.*, 807 F. 2d 155 (CA10 1986) cert. granted, 484 U. S. 895 (1987) (presenting issue whether a different rule applies when fees are not provided for independently, as by § 1988, but as an aspect

of the underlying action). Such a motion therefore “‘does not imply a change in the judgment, but merely seeks what is due *because of* the judgment.’” 455 U. S., at 452 (emphasis added) (quoting *Knighton v. Watkins*, 616 F. 2d 795, 797 (CA5 1980)).

Respondents’ postjudgment motion for costs similarly sought only what was due *because of* the judgment. Because the Death on the High Seas Act contains no provision regarding costs, respondents’ motion for costs necessarily was predicated on Federal Rule of Civil Procedure 54(d). Assessment of such costs does not involve reconsideration of any aspect of the decision on the merits. Under Rule 54(d), the “prevailing party” automatically is entitled to costs “unless the court otherwise directs.” Indeed, the Rule contemplates that applications for costs will be presented in the first instance not to the court but to the clerk; a district judge need not take up the issue at all unless the losing party makes a timely motion for judicial review. Fed. Rule Civ. Proc. 54(d) (“On motion served within 5 days [after the clerk’s taxing of costs], the action of the clerk may be reviewed by the court”); 10 C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure* § 2679, p. 396 (2d ed. 1983). A sharp distinction between the judgment on the merits and an award of costs under Rule 54(d) also is evident in Rule 58’s instruction that “[e]ntry of the judgment shall not be delayed for the taxing of costs.” Thus it is apparent that the Rules “attemp[t] to divorce the process of entering judgment from that of determining and assessing the costs.” 10 Wright, Miller, & Kane, *supra*, § 2679, p. 392.

While a different issue may be presented if expenses of this sort were provided as an aspect of the underlying action, we are satisfied that a motion for costs filed pursuant to Rule 54(d) does not seek “to alter or amend the judgment” within the meaning of Rule 59(e). Instead, such a request for costs raises issues wholly collateral to the judgment in the main cause of action, issues to which Rule 59(e)

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was not intended to apply. *White, supra*, at 451. Cf. *FCC v. League of Women Voters*, 468 U. S. 364, 373–374, n. 10 (1984) (issue of entitlement to “attorney’s fees and costs” described as “wholly collateral” to judgment on the merits) (emphasis added); *Eisen v. Carlisle & Jacquelin*, 417 U. S. 156, 172 (1974) (order assigning costs held immediately appealable under the “collateral order” doctrine because it “involved a collateral matter unrelated to the merits”). Respondents’ inaccurate designation of their costs request as a Rule 59(e) motion cannot change this fact. Nor can respondents’ incorrect label deprive petitioners of the benefit of their timely notice of appeal. Because respondents’ motion, properly viewed, was a Rule 54(d) motion for costs rather than a Rule 59(e) motion to alter or amend a judgment, petitioners’ notice of appeal was timely under the Federal Rules of Appellate Procedure.

Certiorari is therefore granted, the decision of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE MARSHALL, dissenting.

I continue to believe that it is unfair to litigants and damaging to the integrity and accuracy of this Court’s decisions to decide a case summarily without the benefit of full briefing on the merits of the question decided. See *Commissioner v. McCoy*, 484 U. S. 3, 7 (1987) (MARSHALL, J., dissenting); *Montana v. Hall*, 481 U. S. 400, 405 (1987) (MARSHALL, J., dissenting). The Rules of this Court encourage litigants filing petitions for certiorari to address whether plenary consideration of the case is appropriate and discourage detailed discussions on the merits. Respondents in this case followed that advice. Respondents filed a seven-page brief in opposition to the petition for certiorari, of which only four pages dealt with the issue whether a prevailing party’s motion for costs constitutes a Federal Rule of Civil Procedure 59(e) motion to alter or amend judgment. Respondents re-

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lied almost exclusively on the Fifth Circuit's unanimous en banc decision in *Harcon Barge Co. v. D & G Boat Rentals, Inc.*, 784 F. 2d 665 (1986), which this Court had declined to review. 479 U. S. 930 (1986). The Fifth Circuit's decision in this case, applying the "bright-line rule" of *Harcon*, Pet. for Cert. 26, undoubtedly benefited from full briefing, something the Court today decides is unnecessary for its determination that the Fifth Circuit was wrong. It is my ongoing view that when the Court is considering a summary disposition of a case, it should at a minimum so inform the litigants and invite them to submit supplemental briefs on the merits. Such modest steps are necessary to ensure fair and reasoned decisionmaking. I dissent.

Syllabus

GULFSTREAM AEROSPACE CORP. v.
MAYACAMAS CORP.CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

No. 86-1329. Argued December 7, 1987—Decided March 22, 1988

Petitioner sued respondent in state court for breach of contract. Respondent did not remove the action to federal court, but, one month later, filed a diversity action against petitioner in the Federal District Court for breach of the same contract. The District Court denied petitioner's motion to stay or dismiss the action before it, finding that the facts of the case fell short of those necessary to justify the requested discontinuance under *Colorado River Water Conservation Dist. v. United States*, 424 U. S. 800, which held that, in "exceptional" circumstances, a district court may stay or dismiss an action because of the pendency of similar state-court litigation. The Court of Appeals dismissed petitioner's appeal for lack of jurisdiction, holding that neither 28 U. S. C. § 1291—which provides for appeals from "final decisions" of the district courts—nor § 1292(a)(1)—which authorizes appeals from interlocutory orders granting or denying injunctions—allowed an immediate appeal from the District Court's order. The court also declined to treat petitioner's notice of appeal as an application for a writ of mandamus under the All Writs Act.

Held:

1. A district court order denying a motion to stay or dismiss an action when a similar suit is pending in state court is not immediately appealable under § 1291 or § 1292(a)(1). Pp. 275-288.

(a) Since the order in question does not end the litigation but ensures that it will continue in the District Court, it is not appealable under § 1291. The order does not fall within the collateral-order exception to § 1291, since it fails to satisfy the exception's "conclusiveness" requirement in that it is inherently tentative and not made with the expectation that it will be the final word on the subject addressed. Given both the nature of the factors to be considered under *Colorado River* and the natural tendency of courts to attempt to eliminate matters that need not be decided from their dockets, a district court usually will expect to revisit and reassess an order denying a stay in light of events occurring in the normal course of litigation. Pp. 275-278.

(b) Since the order in question relates only to the conduct or progress of litigation before the District Court, it cannot be considered an in-

junction appealable under § 1292(a)(1). Petitioner's claim that the order is appealable pursuant to the doctrine of *Enelow v. New York Life Ins. Co.*, 293 U. S. 379, and *Ettelson v. Metropolitan Life Ins. Co.*, 317 U. S. 188, under which orders granting or denying stays of "legal" proceedings on "equitable" grounds were considered to be immediately appealable injunctions, is rejected. The *Enelow-Ettelson* doctrine is overruled since it is based on outmoded procedural differentiations and produces arbitrary and anomalous results in modern practice. Pp. 279-288.

2. Petitioner has failed to satisfy its burden of showing that the District Court's refusal to order a stay or dismissal of the suit before it constituted an abuse of discretion sufficient to warrant the extraordinary remedy of mandamus in the Court of Appeals. Petitioner's assertion that a party's decision to spurn removal and bring a separate federal-court suit invariably constitutes "exceptional" circumstances warranting stay or dismissal under the *Colorado River* doctrine is rejected. Pp. 288-290.

806 F. 2d 928, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which all other Members joined, except KENNEDY, J., who took no part in the consideration or decision of the case. SCALIA, J., filed a concurring opinion, *post*, p. 290.

Elliot L. Bien argued the cause and filed briefs for petitioner.

Gregory H. Ward argued the cause for respondent. With him on the brief was *James H. A. Pooley*.

JUSTICE MARSHALL delivered the opinion of the Court.

The primary issue in this case is whether a district court order denying a motion to stay or dismiss an action when a similar suit is pending in state court is immediately appealable.

I

Petitioner Gulfstream Aerospace Corporation and respondent Mayacamas Corporation entered into a contract under which respondent agreed to purchase an aircraft manufactured by petitioner. Respondent subsequently refused to make payments due, claiming that petitioner, by increasing

the production and availability of its aircrafts, had frustrated respondent's purpose in the transaction, which was to sell the aircraft when demand was high. Petitioner thereupon filed suit against respondent for breach of contract in the Superior Court of Chatham County, Georgia. Respondent, declining to remove this action to federal court, filed both an answer and a counterclaim. In addition, approximately one month after the commencement of petitioner's state-court suit, respondent filed a diversity action against petitioner in the United States District Court for the Northern District of California. This action alleged breach of the same contract that formed the basis of petitioner's state-court suit.

Petitioner promptly moved for a stay or dismissal of the federal-court action pursuant to the doctrine of *Colorado River Water Conservation Dist. v. United States*, 424 U. S. 800 (1976). In *Colorado River*, we held that in "exceptional" circumstances, a federal district court may stay or dismiss an action solely because of the pendency of similar litigation in state court. *Id.*, at 818; see *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U. S. 1, 13-19 (1983).¹ Petitioner argued that the circumstances of this case supported a stay or dismissal of the federal-court action under *Colorado River*. The District Court disagreed. Finding that "the facts of this case fall short of those necessary to justify" the discontinuance of a federal-court proceeding under *Colorado River*, the District Court denied petitioner's motion. See No. C 85-20658 RPA (ND Cal., Jan. 24, 1986).

Petitioner filed a notice of appeal with the United States Court of Appeals for the Ninth Circuit, alleging that the

¹The factors to be considered in determining whether any exceptional circumstances exist include the relative comprehensiveness, convenience, and progress of the state-court and federal-court actions. See, e. g., *Arizona v. San Carlos Apache Tribe*, 463 U. S. 545, 570 (1983).

Court of Appeals had jurisdiction over the appeal under either 28 U. S. C. § 1291² or 28 U. S. C. § 1292(a)(1).³ Petitioner also requested the Court of Appeals, in the event it found that neither of these sections provided appellate jurisdiction, to treat the notice of appeal as an application for a writ of mandamus, brought pursuant to the All Writs Act, 28 U. S. C. § 1651,⁴ and to grant the application. The Court of Appeals dismissed the appeal for lack of jurisdiction, holding that neither § 1291 nor § 1292(a)(1) allowed an immediate appeal from the District Court's order. 806 F. 2d 928, 929-930 (1987).⁵ The Court of Appeals then declined to treat petitioner's notice of appeal as an application for mandamus on the ground that the District Court's order would not cause "serious hardship or prejudice" to petitioner. *Id.*, at 930. Finally, the Court of Appeals stated that even if the notice of appeal were to be treated as an application for mandamus, petitioner did not have a right to the writ because "[i]t was well within the district court's discretion to deny" petitioner's motion. *Id.*, at 930-931.

²Section 1291 provides, in pertinent part:

"The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court."

³Section 1292(a)(1) provides, in pertinent part:

"[T]he courts of appeals shall have jurisdiction of appeals from:

"(1) Interlocutory orders of the district courts of the United States . . . or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court."

⁴The All Writs Act provides, in pertinent part:

"The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

⁵One judge dissented from the dismissal for lack of jurisdiction. He stated that the District Court's order was appealable under § 1292(a)(1). See 806 F. 2d, at 931 (Sneed, J.). He then noted that he would have affirmed the order. See *ibid.*

We granted certiorari, 481 U. S. 1068 (1987), to resolve a division in the Circuits as to whether a district court's denial of a motion to stay litigation pending the resolution of a similar proceeding in state court is immediately appealable.⁶ We now affirm.

II

Petitioner's principal contention in this case is that the District Court's order denying the motion to stay or dismiss the federal-court litigation is immediately appealable under § 1291. That section provides for appellate review of "final decisions" of the district courts. This Court long has stated that as a general rule a district court's decision is appealable under this section only when the decision "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U. S. 229, 233 (1945).⁷ The order at issue in this case has no such effect: indeed, the order ensures that litigation will continue in the District Court. In *Cohen v. Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949), however, we recognized a "small

⁶ Compare 806 F. 2d 928 (CA9 1987) (case below) (holding that a district court's denial of a motion to stay an action pending resolution of a state-court proceeding is not immediately appealable), with *Microsoft Computer Systems, Inc. v. Ontel Corp.*, 686 F. 2d 531 (CA7 1982) (holding that a district court's denial of such a motion is immediately appealable under § 1292(a)(1)).

⁷ Justice Frankfurter, speaking for a unanimous Court, explained the rationale for this rule in *Cobbledick v. United States*, 309 U. S. 323, 325 (1940):

"Since the right to a judgment from more than one court is a matter of grace and not a necessary ingredient of justice, Congress from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration. Thereby is avoided the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment. To be effective, judicial administration must not be leaden-footed. Its momentum would be arrested by permitting separate reviews of the component elements in a unified cause."

class" of decisions that are appealable under § 1291 even though they do not terminate the underlying litigation. *Id.*, at 546. We stated in *Cohen* that a district court's decision is appealable under § 1291 if it "finally determine[s] claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Ibid.* Petitioner asserts that the District Court's decision in this case falls within *Cohen*'s "collateral order" doctrine.

Since *Cohen*, we have had many occasions to revisit and refine the collateral-order exception to the final-judgment rule. We have articulated a three-pronged test to determine whether an order that does not finally resolve a litigation is nonetheless appealable under § 1291. See *Coopers & Lybrand v. Livesay*, 437 U. S. 463 (1978); see also, *e. g.*, *Richardson-Merrell Inc. v. Koller*, 472 U. S. 424, 431 (1985); *Firestone Tire & Rubber Co. v. Risjord*, 449 U. S. 368, 375 (1981). First, the order must "conclusively determine the disputed question." *Coopers & Lybrand v. Livesay*, 437 U. S., at 468. Second, the order must "resolve an important issue completely separate from the merits of the action." *Ibid.* Third and finally, the order must be "effectively unreviewable on appeal from a final judgment." *Ibid.* (footnote omitted). If the order at issue fails to satisfy any one of these requirements, it is not appealable under the collateral-order exception to § 1291.

This Court held in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U. S. 1 (1983), that a district court order granting a stay of litigation pursuant to *Colorado River* meets each of the three requirements of the collateral-order doctrine and therefore is appealable under § 1291. 460 U. S., at 11-13. In applying the collateral-order doctrine, we found that an order refusing to proceed with litigation because of the pendency of a similar action in state court satisfies the second and third prongs of the test.

We stated that such an order “plainly presents an important issue separate from the merits” and that it would be “unreviewable if not appealed now” because once the state court has decided the issues in the litigation, the federal court must give that determination *res judicata* effect. *Id.*, at 12 (footnote omitted). The Court gave more extended treatment to the first requirement of the collateral-order doctrine that the order “conclusively determine the disputed question.” We contrasted two kinds of nonfinal orders: those that are “inherently tentative,” *id.*, at 12, n. 14, quoting *Coopers & Lybrand v. Livesay*, *supra*, at 469, n. 11, and those that, although technically amendable, are “made with the expectation that they will be the final word on the subject addressed,” 460 U. S., at 12, n. 14. We used the order challenged in *Coopers & Lybrand v. Livesay*, *supra*, which denied certification of a class, as an example of the kind of order that is inherently tentative because a district court ordinarily would expect to reassess and revise such an order in response to events occurring “in the ordinary course of litigation.” *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, *supra*, at 13, n. 14. We then stated that an order granting a stay of litigation in federal court pursuant to the doctrine of *Colorado River* was not of this tentative nature. An order granting a *Colorado River* stay, we noted, “necessarily contemplates that the federal court will have nothing further to do in resolving any substantive part of the case” because a district court may enter such an order only if it has full confidence that the parallel state proceeding will “be an adequate vehicle for the complete and prompt resolution of the issues between the parties.” 460 U. S., at 28; see *id.*, at 13. Given that a district court normally would expect the order granting the stay to settle the matter for all time, the “conclusiveness” prong of the collateral-order doctrine is satisfied and the order is appealable under § 1291.

Application of the collateral-order test to an order denying a motion to stay or dismiss an action pursuant to *Colorado*

River, however, leads to a different result. We need not decide whether the denial of such a motion satisfies the second and third prongs of the collateral-order test — the separability of the decision from the merits of the action and the reviewability of the decision on appeal from final judgment — because the order fails to meet the initial requirement of a conclusive determination of the disputed question. A district court that denies a *Colorado River* motion does not “necessarily contemplate” that the decision will close the matter for all time. In denying such a motion, the district court may well have determined only that it should await further developments before concluding that the balance of factors to be considered under *Colorado River*, see n. 1, *supra*, warrants a dismissal or stay. The district court, for example, may wish to see whether the state-court proceeding becomes more comprehensive than the federal-court action or whether the former begins to proceed at a more rapid pace. Thus, whereas the granting of a *Colorado River* motion necessarily implies an expectation that the state court will resolve the dispute, the denial of such a motion may indicate nothing more than that the district court is not completely confident of the propriety of a stay or dismissal at that time. Indeed, given both the nature of the factors to be considered under *Colorado River* and the natural tendency of courts to attempt to eliminate matters that need not be decided from their dockets, a district court usually will expect to revisit and reassess an order denying a stay in light of events occurring in the normal course of litigation. Because an order denying a *Colorado River* motion is “inherently tentative” in this critical sense — because it is not “made with the expectation that [it] will be the final word on the subject addressed” — the order is not a conclusive determination within the meaning of the collateral-order doctrine and therefore is not appealable under § 1291.

III

Petitioner argues in the alternative that the District Court's order in this case is immediately appealable under § 1292(a)(1), which gives the courts of appeals jurisdiction of appeals from interlocutory orders granting or denying injunctions. An order by a federal court that relates only to the conduct or progress of litigation before that court ordinarily is not considered an injunction and therefore is not appealable under § 1292(a)(1). See *Switzerland Cheese Assn., Inc. v. E. Horne's Market, Inc.*, 385 U. S. 23, 25 (1966); *International Products Corp. v. Koons*, 325 F. 2d 403, 406 (CA2 1963) (Friendly, J.). Under the *Enelow-Ettelson* doctrine, however, certain orders that stay or refuse to stay judicial proceedings are considered injunctions and therefore are immediately appealable. Petitioner asserts that the order in this case, which denied a motion for a stay of a federal-court action pending the resolution of a concurrent state-court proceeding, is appealable under § 1292(a)(1) pursuant to the *Enelow-Ettelson* doctrine.

The line of cases we must examine to resolve this claim began some 50 years ago, when this Court decided *Enelow v. New York Life Ins. Co.*, 293 U. S. 379 (1935). At the time of that decision, law and equity remained separate jurisprudential systems in the federal courts. The same judges administered both these systems, however, so that a federal district judge was both a chancellor in equity and a judge at law. In *Enelow*, the plaintiff sued at law to recover on a life insurance policy. The insurance company raised the affirmative defense that the policy had been obtained by fraud and moved the District Court to stay the trial of the law action pending resolution of this equitable defense. The District Court granted this motion, and the plaintiff appealed. This Court likened the stay to an injunction issued by an equity court to restrain an action at law. The Court stated:

"[T]he grant or refusal of . . . a stay by a court of equity of proceedings at law is a grant or refusal of an injunction

within the meaning of [the statute.] And, in this aspect, it makes no difference that the two cases, the suit in equity for an injunction and the action at law in which proceedings are stayed, are both pending in the same court, in view of the established distinction between 'proceedings at law and proceedings in equity in the national courts'

"It is thus apparent that when an order or decree is made . . . requiring, or refusing to require, that an equitable defense shall first be tried, the court, exercising what is essentially an equitable jurisdiction, in effect grants or refuses an injunction restraining proceedings at law precisely as if the court had acted upon a bill of complaint in a separate suit for the same purpose." *Id.*, at 382-383.

The Court thus concluded that the District Court's order was appealable under § 1292(a)(1).

In *Ettelson v. Metropolitan Life Ins. Co.*, 317 U. S. 188 (1942), the Court reaffirmed the rule of *Enelow*, notwithstanding that the Federal Rules of Civil Procedure had fully merged law and equity in the interim. The relevant facts of *Ettelson* were identical to those of *Enelow*, and the Court responded to them in the same fashion. In response to the argument that the fusion of law and equity had destroyed the analogy between the stay ordered in the action and an injunction issued by a chancellor of a separate proceeding at law, the Court stated only that the plaintiffs were "in no different position than if a state equity court had restrained them from proceeding in the law action." 317 U. S., at 192. Thus, the order granting the stay was held to be immediately appealable as an injunction.

The historical analysis underlying the results in *Enelow* and *Ettelson* has bred a doctrine of curious contours. Under the *Enelow-Ettelson* rule, most recently restated in *Balti-*

more Contractors, Inc. v. Bodinger, 348 U. S. 176 (1955), an order by a federal court staying or refusing to stay its own proceedings is appealable under § 1292(a)(1) as the grant or denial of an injunction if two conditions are met. First, the action in which the order is entered must be an action that, before the merger of law and equity, was by its nature an action at law. Second, the order must arise from or be based on some matter that would then have been considered an equitable defense or counterclaim. If both conditions are satisfied, the historical equivalent of the modern order would have been an injunction, issued by a separate equity court, to restrain proceedings in an action at law. If either condition is not met, however, the historical analogy fails. When the underlying suit is historically equitable and the stay is based on a defense or counterclaim that is historically legal, the analogy fails because a law judge had no power to issue an injunction restraining equitable proceedings. And when both the underlying suit and the defense or counterclaim on which the stay is based are historically equitable, or when both are historically legal, the analogy fails because when a chancellor or a law judge stayed an action in his own court, he was not issuing an injunction, but merely arranging matters on his docket. Thus, unless a stay order is made in a historically legal action on the basis of a historically equitable defense or counterclaim, the order cannot be analogized to a premerger injunction and therefore cannot be appealed under § 1292(a)(1) pursuant to the *Enelow-Ettelson* doctrine.

The parties in this case dispute whether the *Enelow-Ettelson* rule makes the District Court's decision to deny a stay immediately appealable under § 1292(a)(1). Both parties agree that an action for breach of contract was an action at law prior to the merger of law and equity. They vigorously contest, however, whether the stay of an action pending the resolution of similar proceedings in a state court is equitable in the requisite sense. Petitioner relies primarily on the decision of the United States Court of Appeals for the

Seventh Circuit in *Microsoftware Computer Systems, Inc. v. Ontel Corp.*, 686 F. 2d 531 (1982). That court held that a stay issued under *Colorado River* is based on the policy of avoiding "the unnecessary and wasteful duplication of lawsuits," which is historically an equitable defense. 686 F. 2d, at 536. Respondent, on the other hand, urges us to adopt the reasoning of the Ninth Circuit in this case. In its decision, the court below drew a distinction between motions that raised equitable "defenses" and motions that raised equitable "considerations." 806 F. 2d, at 929-930. The court held that a motion for a stay pursuant to *Colorado River* was based only on equitable considerations and that the *Enelow-Ettelson* rule therefore did not apply.⁸

We decline to address the issue of appealability in these terms; indeed, the sterility of the debate between the parties illustrates the need for a more fundamental consideration of the precedents in this area. This Court long has understood that the *Enelow-Ettelson* rule is deficient in utility and sense. In the two cases we have decided since *Ettelson* relating to the rule, we criticized its perpetuation of "outmoded procedural differentiations" and its consequent tendency to produce incongruous results. *Baltimore Contractors, Inc. v. Bodinger*, *supra*, at 184; see *Morgantown v. Royal Ins. Co.*, 337 U. S. 254, 257-258 (1949). We refrained then from overruling the *Enelow* and *Ettelson* decisions,⁹ but today we take

⁸ Accord, *Gold v. Johns-Manville Sales Corp.*, 723 F. 2d 1068, 1073 (CA3 1983) (holding that stays issued to avoid duplicative litigation are not based on equitable defenses and therefore are not appealable under § 1292(a)(1)); *Andrews v. Southern Discount Co. of Georgia*, 662 F. 2d 722, 724 (CA11 1981) (same); *Jackson Brewing Co. v. Clarke*, 303 F. 2d 844, 846 (CA5) (same), cert. denied, 371 U. S. 891 (1962).

⁹ A dissenting opinion in *Morgantown* accused the majority of having overruled *Enelow* and *Ettelson*. See *Morgantown v. Royal Ins. Co.*, 337 U. S., at 261-263 (Black, J., dissenting). The Court in *Baltimore Contractors*, however, interpreted *Morgantown* as having left the *Enelow-Ettelson* doctrine intact and itself declined to overturn the rule. See *Baltimore Contractors, Inc. v. Bodinger*, 348 U. S., at 184-185.

that step. A half century's experience has persuaded us, as it has persuaded an impressive array of judges and commentators, that the rule is unsound in theory, unworkable and arbitrary in practice, and unnecessary to achieve any legitimate goals.

As an initial matter, the *Enelow-Ettelson* doctrine is, in the modern world of litigation, a total fiction. Even when the rule was announced, it was artificial. Although at that time law and equity remained two separate systems, they were administered by the same judges. When a single official was both chancellor and law judge, a stay of an action at law on equitable grounds required nothing more than an order issued by the official regulating the progress of the litigation before him, and the decision to call this order an injunction just because it would have been an injunction in a system with separate law and equity judges had little justification. With the merger of law and equity, which was accomplished by the Federal Rules of Civil Procedure, the practice of describing these stays as injunctions lost all connection with the reality of the federal courts' procedural system. As Judge Charles Clark, the principal draftsman of the Rules, wrote:

"[W]e lack any rationale to explain the concept of a judge enjoining himself when he merely decides upon the method he will follow in trying the case. The metamorphosis of a law judge into a hostile chancellor on the other 'side' of the court could not have been overclear to the lay litigant under the divided procedure; but if now without even that fictitious sea change one judge in one form of action may split his judicial self at one instant into two mutually antagonistic parts, the litigant surely will think himself in Alice's Wonderland." *Beaunit Mills, Inc. v. Eday Fabric Sales Corp.*, 124 F. 2d 563, 565 (CA2 1942).

The *Enelow* rule had presupposed two different systems of justice administered by separate tribunals, even if these tri-

bunals were no more than two "sides" to the same court; with the abandonment of that separation, the premise of the rule disappeared. The doctrine, and the distinctions it drew between equitable and legal actions and defenses, lost all moorings to the actual practice of the federal courts.

The artificiality of the *Enelow-Ettelson* doctrine is not merely an intellectual infelicity; the gulf between the historical procedures underlying the rule and the modern procedures of federal courts renders the rule hopelessly unworkable in operation. The decisions in *Enelow* and *Ettelson* treated as straightforward the questions whether the underlying suit, on the one hand, and the motion for a stay, on the other, would properly have been brought in a court of equity or in a court of law. Experience since the merger of law and equity, however, has shown that both questions are frequently difficult and sometimes insoluble. Suits that involve diverse claims and request diverse forms of relief often are not easily categorized as equitable or legal. As one Court of Appeals complained in handling such a suit, "*Enelow-Ettelson* is virtually impossible to apply to a complaint . . . in which the averments and prayers are a purée of legal and equitable theories and of claims that had no antecedents in the old bifurcated system." *Danford v. Schwabacher*, 488 F. 2d 454, 456 (CA9 1973). Actions for declaratory judgments are neither legal nor equitable, and courts have therefore had to look to the kind of action that would have been brought had Congress not provided the declaratory judgment remedy. Thus, the rule has placed courts "in the unenviable position not only of solving modern procedural problems by the application of labels which have no currency, but also of considering the nature of law suits which were never brought." *Diematic Manufacturing Corp. v. Packaging Industries, Inc.*, 516 F. 2d 975, 978 (CA2), cert. denied, 423 U. S. 913 (1975). The task of characterizing stays as based in either law or equity has proved equally intractable. In an early case applying the doctrine, for example, this Court held that

a stay of an action at law pending arbitration is appealable as an injunction because "the special defense setting up the arbitration agreement is an equitable defense." *Shanferoke Coal & Supply Corp. v. Westchester Service Corp.*, 293 U. S. 449, 452 (1935). But as one Court of Appeals has noted, a chancellor could not have enforced an arbitration agreement and, correlatively, could not have stayed a suit at law pending arbitration. See *Olson v. Paine, Webber, Jackson & Curtis, Inc.*, 806 F. 2d 731, 735 (CA7 1986), citing, *e. g.*, J. Story, Commentaries on Equity Pleadings § 804 (J. Gould 10th rev. ed. 1892). More recently, lower courts have differed as to whether a stay pending the completion of administrative proceedings is based on an equitable defense. Compare *H. W. Caldwell & Son, Inc. v. United States ex rel. John H. Moon & Sons, Inc.*, 407 F. 2d 21, 22 (CA5 1969), with *Pepper v. Miani*, 734 F. 2d 1420, 1422 (CA10 1984). The conflict regarding the proper characterization of *Colorado River* stays is just one more example of the confusion that results from requiring courts to assign obsolete labels to orders that may or may not have an analogue in the bifurcated system of equity and law.

Most important, the *Enelow-Ettelson* doctrine is "divorced from any rational or coherent appeals policy." *Lee v. Ply*Gem Industries, Inc.*, 193 U. S. App. D. C. 112, 115, 593 F. 2d 1266, 1269 (footnote omitted), cert. denied, 441 U. S. 967 (1979). Under the rule, appellate jurisdiction of orders granting or denying stays depends upon a set of considerations that in no way reflects or relates to the need for interlocutory review. There is no reason to think that appeal of a stay order is more suitable in cases in which the underlying action is at law and the stay is based on equitable grounds than in cases in which one of these conditions is not satisfied. The rule's focus on historical distinctions thus produces arbitrary and anomalous results. See *Baltimore Contractors, Inc. v. Bodinger*, 348 U. S., at 184 (noting the "incongruity of taking jurisdiction from a stay in a law type

[proceeding] and denying jurisdiction in an equity type proceeding"). Two orders may involve similar issues and produce similar consequences, and yet one will be appealable whereas the other will not.¹⁰

For these reasons, the lower federal courts repeatedly have lambasted the *Enelow-Ettelson* doctrine. The rule has been called "a remnant from the jurisprudential attic," *Danford v. Schwabacher*, *supra*, at 455, "an anachronism wrapped up in an atavism," *Hartford Financial Systems, Inc. v. Florida Software Services, Inc.*, 712 F. 2d 724, 727 (CA1 1983), and a "Byzantine peculiarit[y]," *New England Power Co. v. Asiatic Petroleum Corp.*, 456 F. 2d 183, 189 (CA1 1972). With the exception of the Federal Circuit, which apparently has not yet confronted an *Enelow-Ettelson* appeal, every Circuit is on record with criticism of the doctrine.¹¹ One Circuit Judge has urged his court to reject

¹⁰ The tendency of the *Enelow-Ettelson* rule to produce bizarre outcomes is illustrated by the decision in *Travel Consultants, Inc. v. Travel Management Corp.*, 125 U. S. App. D. C. 108, 367 F. 2d 334 (1966), cert. denied, 386 U. S. 912 (1967). In that case, the plaintiff brought suit for specific performance, the defendant counterclaimed for damages for breach of contract, and the trial court stayed its own proceedings pending arbitration. When the defendant challenged the stay order, the Court of Appeals decided that it had jurisdiction to review the "part" of the order staying the legal counterclaim, but did not have jurisdiction to review the "part" of the order staying the equitable claim for specific performance. The Court of Appeals recognized that this result was anomalous, but concluded correctly that it was compelled by this Court's decisions.

¹¹ See, e. g., *Langley v. Colonial Leasing Co. of New England*, 707 F. 2d 1, 2, n. 2, 5 (CA1 1983); *Standard Chlorine of Delaware, Inc. v. Leonard*, 384 F. 2d 304, 307-309 (CA2 1967); *Nascone v. Spudnuts, Inc.*, 735 F. 2d 763, 767-770 (CA3 1984); *Chapman v. International Ladies' Garment Workers' Union*, 401 F. 2d 626, 628 (CA4 1968); *Wallace v. Norman Industries, Inc.*, 467 F. 2d 824, 827 (CA5 1972); *Mansbach v. Prescott, Ball & Turben*, 598 F. 2d 1017, 1022-1023 (CA6 1979); *Matterhorn, Inc. v. NCR Corp.*, 763 F. 2d 866, 870-871 (CA7 1985); *Mellon-Bank, N. A. v. Pritchard-Keang Nam Corp.*, 651 F. 2d 1244, 1247-1248 (CA8 1981); *Mediterranean Enterprises, Inc. v. Ssangyong Corp.*, 708 F. 2d 1458, 1462, n. 3 (CA9 1983); *Pepper v. Miani*, 734 F. 2d 1420, 1421 (CA10 1984); *Miller v. Drexel Burnham Lambert, Inc.*, 791 F. 2d 850, 853, n. 3 (CA11 1986)

the doctrine outright. See *Mar-Len of Louisiana, Inc. v. Parsons-Gilbane*, 732 F. 2d 444, 445-447 (CA5 1984) (Rubin, J., dissenting). Although a majority of the panel declined to do so, it agreed that the *Enelow-Ettelson* rule was "'artificial,'" "'medieval,'" and "'outmoded.'" 732 F. 2d., at 445, n. 1 (citations omitted). Another Circuit Judge, in a majority opinion, recently wrote an extensive and scholarly critique of the doctrine and concluded only with great reluctance that repudiating the doctrine would be improper. *Olson v. Paine, Webber, Jackson & Curtis, Inc.*, *supra*, at 733-742 (Posner, J.).

Commentators have been no less scathing in their evaluations of the *Enelow-Ettelson* rule. Professor Moore and his collaborators have noted the difficulty of applying archaic labels to modern actions and defenses and expressed the wish that "the Supreme Court will accept the first opportunity offered to decide that the reason for the *Enelow-Ettelson* rule having ceased, the rule is no more." 9 J. Moore, B. Ward, & J. Lucas, *Moore's Federal Practice* ¶110.20[3], p. 245 (1987). Professor Wright and his collaborators have gone further, arguing that the extensive experience that the Courts of Appeals have had in attempting to rationalize and apply the rule would justify them in rejecting it. 16 C. Wright, A. Miller, E. Cooper, & E. Gressman, *Federal Practice and Procedure* §3923, p. 65 (1977).

The case against perpetuation of this sterile and antiquated doctrine seems to us conclusive. We therefore overturn the cases establishing the *Enelow-Ettelson* rule and hold that orders granting or denying stays of "legal" proceedings on "equitable" grounds are not automatically appealable under §1292(a)(1). This holding will not prevent interlocutory review of district court orders when such review is truly needed. Section 1292(a)(1) will, of course, continue to provide appellate jurisdiction over orders that grant or deny injunctions and orders that have the practical effect of granting

(*per curiam*); *Lee v. Ply*Gem Industries, Inc.*, 193 U. S. App. D. C. 112, 115, 593 F. 2d 1266, 1269, cert. denied, 441 U. S. 967 (1979).

or denying injunctions and have "serious, perhaps irreparable, consequence." *Carson v. American Brands, Inc.*, 450 U. S. 79, 84 (1981), quoting *Baltimore Contractors, Inc. v. Bodinger, supra*, at 181. As for orders that were appealable under § 1292(a)(1) solely by virtue of the *Enelow-Ettelson* doctrine, they may, in appropriate circumstances, be reviewed under the collateral-order doctrine of § 1291, see *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U. S. 1 (1983), and the permissive appeal provision of § 1292(b),¹² as well as by application for writ of mandamus.¹³ Our holding today merely prevents interlocutory review of district court orders on the basis of historical circumstances that have no relevance to modern litigation. Because we repudiate the *Enelow-Ettelson* doctrine, we reject petitioner's claim that the District Court's order in this case is appealable under § 1292(a)(1) pursuant to that doctrine.

IV

Petitioner finally contends that if the order denying the motion for a stay or dismissal is not appealable, the Court of Appeals should have issued a writ of mandamus directing the

¹² Section 1292(b) states, in pertinent part:

"When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order"

Several Courts of Appeals have viewed Congress' enactment of § 1292(b), which occurred after the *Enelow* and *Ettelson* decisions, as further justification for abandoning the *Enelow-Ettelson* doctrine. See, e. g., *Olson v. Paine, Webber, Jackson & Curtis, Inc.*, 806 F. 2d 731, 738 (CA7 1986).

¹³ Issuance of a writ of mandamus will be appropriate in exceptional cases involving stay orders. This Court has made clear, for example, that a stay order that deprives a party of the right to trial by jury is reversible by mandamus. See *Beacon Theatres, Inc. v. Westover*, 359 U. S. 500, 510-511 (1959).

District Court to vacate the order and grant the motion. In making this argument, petitioner points primarily to respondent's decision to eschew removal of the state-court action in favor of bringing a separate suit in federal court. Petitioner asserts that in the absence of "imperative circumstances" not present in this case, a district court must respond to this kind of conduct by staying or dismissing the action brought in that court. Brief for Petitioner 23. Refusal to do so, petitioner concludes, is a "demonstrable abuse of discretion" warranting the issuance of a writ of mandamus. *Id.*, at 5.

This Court repeatedly has observed that the writ of mandamus is an extraordinary remedy, to be reserved for extraordinary situations. See, e. g., *Kerr v. United States District Court*, 426 U. S. 394, 402 (1976). The federal courts traditionally have used the writ only "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Roche v. Evaporated Milk Assn.*, 319 U. S. 21, 26 (1943). In accord with this historic practice, we have held that only "exceptional circumstances amounting to a judicial 'usurpation of power'" will justify issuance of the writ. *Will v. United States*, 389 U. S. 90, 95 (1967), quoting *De Beers Consol. Mines, Ltd. v. United States*, 325 U. S. 212, 217 (1945). Moreover, we have held that the party seeking mandamus has the "burden of showing that its right to issuance of the writ is 'clear and indisputable.'" *Bankers Life & Cas. Co. v. Holland*, 346 U. S. 379, 384 (1953), quoting *United States v. Duell*, 172 U. S. 576, 582 (1899).

Petitioner has failed to satisfy this stringent standard.¹⁴ This Court held in *Colorado River* that a federal court should

¹⁴ Because we find that petitioner has failed to demonstrate its right to a writ of mandamus, we need not consider whether the Court of Appeals acted appropriately in declining to treat petitioner's notice of appeal as an application for the writ. The Courts of Appeals have responded in divergent ways to requests from a party to convert a notice of appeal into a peti-

stay or dismiss an action because of the pendency of a concurrent state-court proceeding only in "exceptional" circumstances, 424 U. S., at 818, and with "the clearest of justifications," *id.*, at 819. Petitioner has failed to show that the District Court clearly overstepped its authority in holding that the circumstances of this case were not so exceptional as to warrant a stay or dismissal under *Colorado River*. This Court never has intimated acceptance of petitioner's view that the decision of a party to spurn removal and bring a separate suit in federal court invariably warrants the stay or dismissal of the suit under the *Colorado River* doctrine. Moreover, petitioner has pointed to no other circumstance in this case that would require a federal court to stay the litigation. Petitioner therefore has failed to show that the District Court's order denying a stay or dismissal of the federal-court suit warranted the issuance of a writ of mandamus.

V

The District Court's order denying petitioner's motion to stay or dismiss respondent's suit because of the pendency of similar litigation in state court was not immediately appealable under § 1291 or § 1292(a)(1). In addition, the District Court's order did not call for the issuance of a writ of mandamus. Accordingly, the judgment of the Court of Appeals is affirmed.

It is so ordered.

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

JUSTICE SCALIA, concurring.

I join the Court's opinion, but write separately principally to express what seems to me a necessary addition to the anal-

tion for mandamus. See, e. g., *In re Harmon*, 425 F. 2d 916 (CA1 1970) (treating a notice of appeal as a request for permission to file a petition for mandamus); *Wilkins v. Erickson*, 484 F. 2d 969 (CA8 1973) (treating a notice of appeal as a petition for mandamus); 806 F. 2d 928 (CA9 1987) (case below) (treating a notice of appeal as a petition for mandamus only if party shows serious hardship or prejudice). We take no position on this matter.

ysis in Part II. While I agree that the present order does not come within the *Cohen* exception to the final-judgment rule under § 1291, I think it oversimplifies somewhat to assign as the reason merely that the order is “inherently tentative.” A categorical order otherwise qualifying for *Cohen* treatment does not necessarily lose that status, and become “nonfinal,” merely because the court may contemplate—or even, for that matter, invite—renewal of the aggrieved party’s request for relief at a later date. The claim to *immediate* relief (in this case, the right to be free of the obstruction of a parallel federal proceeding) is categorically and irretrievably denied. The court’s decision is “the final word on the subject” insofar as the time period between the court’s initial denial and its subsequent reconsideration of the renewed motion is concerned. Thus, it is inconceivable that we would hold denial of a motion to dismiss an indictment on grounds of absolute immunity (an order that is normally appealable at once, see *Nixon v. Fitzgerald*, 457 U. S. 731 (1982)), to be nonfinal and unappealable, simply because the court announces that it will reconsider the motion at the conclusion of the prosecution’s case.

In my view, refusing to apply the *Cohen* exception makes little sense in the present case because not only (1) the motion is likely to be renewed and reconsidered, but also (2) the relief will be just as effective, or nearly as effective, if accorded at a later date—that is, the harm caused during the interval between initial denial and reconsideration will not be severe. Moreover, since these two conditions will almost always be met when the asserted basis for an initial stay motion is the pendency of state proceedings, the more general conclusion that initial orders denying *Colorado River* motions are never immediately appealable is justified.

I note that today’s result could also be reached by application of the rule adopted by the First Circuit, that to come within the *Cohen* exception the issue on appeal must involve “an important and unsettled question of controlling law, not merely a question of the proper exercise of the trial court’s

SCALIA, J., concurring

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discretion.”” *Boreri v. Fiat S. P. A.*, 763 F. 2d 17, 21 (1985), quoting *United States v. Sorren*, 605 F. 2d 1211, 1213 (1979). See also, e. g., *Sobol v. Heckler Congressional Committee*, 709 F. 2d 129, 130–131 (1983); *Midway Mfg. Co. v. Omni Video Games, Inc.*, 668 F. 2d 70, 71 (1981); *In re Continental Investment Corp.*, 637 F. 2d 1, 4 (1980). This approach has some support in our opinions, see *Cohen v. Beneficial Industrial Loan Corp.*, 337 U. S. 541, 546 (1949); *Coopers & Lybrand v. Livesay*, 437 U. S. 463, 468 (1978), as well as in policy, see *Donlon Industries v. Forte*, 402 F. 2d 935, 937 (CA2 1968) (Friendly, J.) (when an issue is reviewable only on an abuse-of-discretion basis the “likelihood of reversal is too negligible to justify the delay and expense incident to an [immediate] appeal and the consequent burden on hard-pressed appellate courts”); *Midway Mfg. Co.*, *supra*, at 72 (questions of discretion “are less likely to be reversed and offer less reason for the appellate court to intervene”). This rationale has not been argued here, and we should not embrace it without full adversarial exploration of its consequences. I do think, however, that our finality jurisprudence is sorely in need of further limiting principles, so that *Cohen* appeals will be, as we originally announced they would be, a “small class [of decisions] . . . too important to be denied review.” 337 U. S., at 546.

Syllabus

SCHNEIDEWIND ET AL. *v.* ANR PIPELINE CO. ET AL.CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT

No. 86-986. Argued November 2, 1987—Decided March 22, 1988

Under a Michigan statute (Act 144), a public utility transporting natural gas in Michigan for public use must obtain approval of the Michigan Public Service Commission (MPSC) before issuing long-term securities. Act 144 directs the MPSC to approve a proposed security issuance when it is satisfied that the funds derived therefrom are to be applied to lawful purposes and that the issuance is essential to the successful carrying out of the purposes, or represents accumulated and undistributed earnings invested in capital assets and not previously capitalized. Respondent companies, which serve customers in other States as well as in Michigan, are natural gas companies within the meaning of the federal Natural Gas Act of 1938 (NGA), and are subject to the jurisdiction of the Federal Energy Regulatory Commission (FERC). They filed suit against petitioners, members of the MPSC, in Federal District Court, seeking a declaratory judgment that the MPSC lacked jurisdiction over their security issuances because Act 144 was pre-empted by the NGA and because it violated the Commerce Clause. The court rejected respondents' claims. The Court of Appeals reversed, holding that both the pre-emptive effect of the federal regulatory scheme and the Commerce Clause barred application of Act 144 to respondents.

Held: The MPSC regulation of respondents through Act 144 impinges on a field that the federal regulatory scheme has occupied to the exclusion of state law, and Act 144 therefore is pre-empted. Pp. 300-310.

(a) Although FERC is not expressly authorized to regulate natural gas companies' issuance of securities, the NGA is a comprehensive scheme of federal regulation of all wholesales of natural gas in interstate commerce that gives FERC a number of tools—such as its authority to fix rates and to withhold certificates of public convenience and necessity—for examining and controlling the issuance of such securities in the exercise of its comprehensive authority. Pp. 300-304.

(b) Congressional intent to pre-empt state regulation of securities issuances to finance the interstate transportation and sale of natural gas cannot be inferred, as respondents contended, from the mere fact that States might have been precluded from such regulation under “dormant” Commerce Clause principles at the time of the NGA's enactment in 1938. Nor can any inferences as to the States' authority to regulate be drawn,

as petitioners contended, from Congress' subsequent failure to enact proposed legislation that would have given FERC explicit authority to regulate the issuance of natural gas companies' securities. Pp. 304-306.

(c) When applied to natural gas companies, Act 144 amounts to a regulation of rates and facilities used in transportation and sale for resale of natural gas in interstate commerce, a field occupied by federal regulation. Although every state statute that has some indirect effect on natural gas companies' rates and facilities is not pre-empted, Act 144's effect is not "indirect." Its central purpose is to regulate matters that Congress intended FERC to regulate exclusively. Pp. 306-309.

(d) The conclusion that Act 144 seeks to regulate a field that the NGA has occupied is also supported by the imminent possibility of collision between Act 144 and the NGA. P. 310.

801 F. 2d 228, affirmed.

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

Don L. Keskey, Assistant Attorney General of Michigan, argued the cause for petitioners. With him on the briefs were *Frank J. Kelley*, Attorney General, *Louis J. Caruso*, Solicitor General, *Thomas L. Casey*, Assistant Solicitor General, and *Henry J. Boynton*, Assistant Attorney General.

Howard J. Trienens argued the cause for respondents. With him on the brief were *Rex E. Lee*, *Carter G. Phillips*, *John C. Jones*, and *Fredric N. Goldberg*.*

JUSTICE BLACKMUN delivered the opinion of the Court.

This case presents the Court once again with a question concerning a State's ability to regulate the activities of natural gas companies.

*Briefs of *amici curiae* urging reversal were filed for the Council of State Governments et al. by *Benna Ruth Solomon*, *Beate Bloch*, *Marcia E. Carpeni*, and *Robert F. Shapiro*; and for the National Association of Regulatory Utility Commissioners by *William Paul Rodgers, Jr.*

Briefs of *amici curiae* urging affirmance were filed for the Interstate Natural Gas Association of America by *Raymond N. Shibley*, *M. Reamy Ancarrow*, and *John H. Cheatham III*; and for the Legal Foundation of America by *Jean Fleming Powers* and *David Crump*.

I

Respondents ANR Pipeline Company (Pipeline) and ANR Storage Company (Storage) are wholly owned subsidiaries of American Natural Resources Company (Resources), a Delaware corporation which, like Pipeline and Storage, has its principal place of business in Michigan. Both Pipeline and Storage are natural gas companies, within the meaning of the Natural Gas Act of 1938 (NGA or Act), ch. 556, 52 Stat. 821, as amended, 15 U. S. C. § 717 *et seq.*¹ Thus, both are subject to the jurisdiction of the Federal Energy Regulatory Commission (FERC), the regulatory body charged with implementation of the NGA. See § 1(b) of the Act, 15 U. S. C. § 717(b).²

Pipeline is a Delaware corporation that owns and operates an interstate natural gas pipeline system transporting gas, exclusively for resale, to 51 gas distribution centers in Michigan and eight other States, where the gas is either delivered to customers of Pipeline or stored for future delivery. Pipe-

¹“‘Natural-gas company’ means [an individual or a corporation] engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale.” §§ 2(6) and (1) of the NGA, 15 U. S. C. §§ 717a(6) and (1).

Petitioners argued below that Storage was not a natural gas company within the meaning of the NGA, contending that the storage of gas constitutes neither the transportation nor the sale of gas in interstate commerce. Both courts below rejected this argument, see 627 F. Supp. 923, 925-926 (WD Mich. 1985), and 801 F. 2d 228, 230, n. 3 (CA6 1986), reasoning that “transportation” includes storage. “‘Underground gas storage facilities are a necessary and integral part of the operation of piping gas from the area of production to the area of consumption.’” *Ibid.*, quoting *Columbia Gas Transmission Corp. v. Exclusive Gas Storage Easement*, 776 F. 2d 125, 129 (CA6 1985), and 578 F. Supp. 930, 933 (ND Ohio 1983). We agree. Petitioners, in any event, do not press the point here.

²By the NGA, “Congress undertook to establish federal regulation over most of the wholesale transactions of electric and gas utilities engaged in interstate commerce, and created the Federal Power Commission . . . (now the Federal Energy Regulatory Commission) . . . to carry out that task.” *Arkansas Elec. Coop. Corp. v. Arkansas Public Serv. Comm’n*, 461 U. S. 375, 378 (1983).

line purchases its natural gas from producers in Texas, Oklahoma, Kansas, Louisiana, and Wyoming.

Storage, which operates independently from Pipeline, is a Michigan corporation organized by Resources in 1978 to develop and operate gas storage reservoirs for nonaffiliated customers. Storage receives gas from outside Michigan and, on demand, redelivers it for sale outside that State. Storage operates four storage fields in Michigan.

Petitioners are members of the Michigan Public Service Commission (MPSC). Under Michigan's Public Utilities Securities Act, 1909 Mich. Pub. Acts No. 144, as amended (Act 144), Mich. Comp. Laws Ann. § 460.301 *et seq.* (1967 and Supp. 1987),³ a public utility exercising or claiming the right

³ Act 144 provides in relevant part:

"Sec. 1. (1) . . . [A] corporation, association, or individual exercising or claiming the right to carry or transport natural gas for public use, directly or indirectly, . . . by or through a pipeline or engaged in the business of piping or transporting natural gas for public use, directly or indirectly, or engaged in the business of purchasing natural gas for distribution may issue stocks, bonds, notes, or other evidences of indebtedness payable at periods of more than 12 months after the date of issuance, if necessary for the acquisition of property, the construction, completion, extension, or improvement of facilities or for the improvement or maintenance of service or for the discharge or lawful refunding of obligations and may issue stock to represent accumulated earnings invested in capital assets and not previously capitalized, if the Michigan public service commission issues an order authorizing the issue and the amount of the issue, and states that in the opinion of the commission the use of the capital or property to be acquired to be secured by the issue of the stock, bonds, notes, or other evidences of indebtedness, is reasonably required for the purposes of the person, corporation, or association, or that the issue of the stock fairly represents accumulated and undistributed earnings invested in capital assets and not previously capitalized. Approval of securities does not presume that the projects to be constructed or property to be acquired will be included in the company's rate base.

"(2) A person, corporation, or association desiring authority to issue stocks, bonds, notes, or other evidences of indebtedness shall make written application to the commission in the form as the commission requires. After receiving the application, the commission, for the purpose of determining whether the commission should grant the authority, may make an

to transport natural gas in Michigan for public use⁴ must obtain MPSC approval before issuing long-term securities. Act 144 directs the MPSC to approve a security issuance

inquiry or investigation, hold hearings, and examine witnesses, books, papers, documents, or contracts the commission considers of importance in enabling it to reach a determination. An interested person, including municipalities and organizations whose membership consists of a substantial number of ratepayers within the service area of the utility, shall have the right to intervene as provided in the rules of the commission

"(3) If from the application filed and other information obtained from the investigation authorized in this act the commission is satisfied that the funds derived from the issue of stocks, bonds, or notes are to be applied to lawful purposes and that the issue and amount is essential to the successful carrying out of the purposes, or that the issue of the stock fairly represents accumulated and undistributed earnings invested in capital assets and not previously capitalized, the commission shall grant authority to make the issue. In granting the authority, the commission may impose as a condition of the grant reasonable terms and conditions that the commission considers proper.

"(4) A person, corporation, or association may issue notes for lawful purposes, payable at periods of not more than 24 months, without authority from the commission; but the notes shall not in whole or in part, be refunded by an issue of stock or bonds or by an evidence of indebtedness running for more than 12 months without the consent of the commission.

"(5) This act shall apply to stock, shares, bonds, or notes issued to or taken by the incorporators or their agents, assigns, or trustees of a corporation or association in the first instance, and shall also apply to stock, bonds, or notes issued to or taken by the stockholders of the corporation or association, their agents, assigns, or trustees, after the first instance.

"(8) This act shall not apply to a person, corporation, or association which is engaged in the business of carrying, transporting, piping, purchasing for distribution, or selling natural gas into this state, which derives less than 5% of its consolidated gross revenues from all of its operations from natural gas operations in this state, and which does not offer residential natural gas service to the general public under rules promulgated by the Michigan public service commission." Mich. Comp. Laws Ann. § 460.301 (Supp. 1987).

⁴Subsection (8) of Act 144 provides, however, see n. 3, *supra*, that the Michigan statute does not apply to a natural gas company that "derives less than 5% of its consolidated gross revenues from all of its operations from natural gas operations in [Michigan]."

when it "is satisfied that the funds derived . . . are to be applied to lawful purposes and that the issue and amount is essential to the successful carrying out of the purposes, or that the issue of the stock fairly represents accumulated and undistributed earnings invested in capital assets and not previously capitalized." § 460.301(3). The MPSC may conduct an investigation, including an appraisal of the company's property at the company's expense, in deciding whether to allow the issue, § 460.301(2), and it "may impose as a condition of the grant reasonable terms and conditions that [it] considers proper." § 460.301(3).

Pipeline and Storage filed in the United States District Court for the Western District of Michigan an amended complaint against petitioners in their official capacities, seeking a declaratory judgment that the MPSC lacks jurisdiction over their security issuances and thus that they may lawfully issue and market securities without MPSC approval.⁵ Respondents argued that Act 144 was pre-empted by the NGA and that Act 144 violates the Commerce Clause, U. S. Const., Art. I, § 8, cl. 3.

The District Court concluded that Act 144 was neither pre-empted by the federal regulatory scheme nor in violation of the Commerce Clause. 627 F. Supp. 923 (WD Mich. 1985). On the pre-emption issue, the court concluded that "compliance with both federal and state regulations is not a physical impossibility, and Act 144 does not stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.*, at 930. As to the Commerce Clause, the court concluded that Act 144 was "an evenhanded and relatively limited state regulation which, as applied to [respondents], has historically had an indirect and minimal ef-

⁵The parties agreed that the District Court should decide the case on the basis of a stipulation of facts, an appendix thereto, respondents' answers to three sets of interrogatories, and respondents' replies to two sets of requests for admissions. 627 F. Supp. 923 (WD Mich. 1985).

fect on interstate commerce," while serving legitimate local interests. 627 F. Supp., at 933.

The United States Court of Appeals for the Sixth Circuit reversed, holding that both the pre-emptive effect of the federal regulatory scheme and the Commerce Clause bar application of Act 144 to respondents. 801 F. 2d 228 (1986). The Court of Appeals concluded that Act 144 was pre-empted because, by omitting any requirement of advance approval of the issuance of securities "in an otherwise 'comprehensive' regulatory scheme, Congress has implicitly determined that the States should not impose such regulations," 801 F. 2d, at 233-234, and because of the possibility of a conflict between federal and state regulation of natural gas company projects and financing plans, *id.*, at 235-236. Furthermore, the court reasoned, inasmuch as "the burdens of expense, delay, and administrative hassle of 'advance approval' securities regulation far outweigh the benefits, if any, of Michigan's interests in protecting consumers and investors . . . Act 144 unconstitutionally burdens interstate commerce." *Id.*, at 238.

Because of a conflict between the views of the Sixth Circuit and those of the Michigan Supreme Court set forth in *Michigan Gas Storage Co. v. Michigan Pub. Serv. Comm'n*, 405 Mich. 376, 275 N. W. 2d 457 (1979), we granted certiorari to decide whether Michigan may require respondents to obtain MPSC approval before issuing and marketing securities.

II

The circumstances in which federal law pre-empts state regulation are familiar. See *Arkansas Elec. Coop. Corp. v. Arkansas Public Serv. Comm'n*, 461 U. S. 375, 383 (1983). See also *Fidelity Federal Savings & Loan Assn. v. De la Cuesta*, 458 U. S. 141, 152-154 (1982). A pre-emption question requires an examination of congressional intent. *Id.*, at 152. Of course, Congress explicitly may define the extent to which its enactments pre-empt state law. See, e. g., *Shaw v. Delta Air Lines, Inc.*, 463 U. S. 85, 95-96 (1983). In the

absence of explicit statutory language, however, Congress implicitly may indicate an intent to occupy a given field to the exclusion of state law. Such a purpose properly may be inferred where the pervasiveness of the federal regulation precludes supplementation by the States, where the federal interest in the field is sufficiently dominant, or where "the object sought to be obtained by the federal law and the character of obligations imposed by it . . . reveal the same purpose." *Rice v. Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947). Finally, even where Congress has not entirely displaced state regulation in a particular field, state law is pre-empted when it actually conflicts with federal law. Such a conflict will be found "when it is impossible to comply with both state and federal law, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U. S. 132, 142-143 (1963), or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress, *Hines v. Davidowitz*, 312 U. S. 52, 67 (1941).'" *California Coastal Comm'n v. Granite Rock Co.*, 480 U. S. 572, 581 (1987), quoting *Silkwood v. Kerr-McGee Corp.*, 464 U. S. 238, 248 (1984).

In this case we conclude that Act 144 regulates in a field the NGA has occupied to the exclusion of state law, and that it therefore is pre-empted.

III

A

The NGA long has been recognized as a "comprehensive scheme of federal regulation of 'all wholesales of natural gas in interstate commerce.'" *Northern Natural Gas Co. v. State Corporation Comm'n of Kansas*, 372 U. S. 84, 91 (1963), quoting *Phillips Petroleum Co. v. Wisconsin*, 347 U. S. 672, 682 (1954).⁶ The NGA confers upon FERC ex-

⁶ The Natural Gas Policy Act of 1978 (NGPA), 92 Stat. 3351, 15 U. S. C. § 3301 *et seq.*, did not compromise the comprehensive nature of federal regulatory authority over interstate gas transactions. *Transcontinental Gas*

clusive jurisdiction over the transportation and sale of natural gas in interstate commerce for resale. *Northern Natural Gas Co.*, 372 U. S., at 89. FERC exercises authority over the rates and facilities of natural gas companies used in this transportation and sale through a variety of powers. Sections 4, 5, and 7 of the NGA, as amended, 15 U. S. C. §§ 717c, 717d, and 717f, give FERC a number of tools for examining and controlling the issuance of securities of natural gas companies in the exercise of its comprehensive authority.

First, in exercising its authority to determine a "just and reasonable" rate for the transportation or sale of natural gas subject to its jurisdiction, FERC may conduct hearings and undertake a detailed examination of a company. § 4 of the NGA, as amended, 15 U. S. C. § 717c. For example, to calculate a reasonable rate of return on invested capital, FERC examines a company's capital structure (the percentages of its capital that come from debt, common stock, and preferred stock), establishes the rate of return allowable on each type of capital, and determines an overall rate of return as a weighted average, in accordance with the amount of each kind of capital. *Public Service Comm'n of New York v. FERC*, 259 U. S. App. D. C. 86, 96, 813 F. 2d 448, 458 (1987). Thus, a natural gas company's capital structure is related directly to the rates FERC allows it to charge. When a company's "equity ratio moves beyond generally accepted limits," however, FERC may calculate a company's rates on an imputed "reasonable capital structure" rather than on the actual structure. *Alabama-Tennessee Natural Gas Co.*, 38 FERC ¶61,251, p. 61,849, aff'd in relevant

Pipe Line Corp. v. State Oil and Gas Bd. of Mississippi, 474 U. S. 409, 420-421 (1986). See *Arkansas Louisiana Gas Co. v. Hall*, 453 U. S. 571, 580 (1981). The enactment of the NGPA reflected a congressional belief that a different system of natural gas pricing was needed to balance supply and demand. *Transcontinental Gas*, 474 U. S., at 421. The changes the NGPA wrought in FERC's authority have no bearing on the outcome of this case.

part on rehearing, 40 FERC ¶61,244, pp. 61,813–61,816 (1987). Thus, FERC exercises its ratemaking authority to limit the burden on ratepayers of abnormally high equity ratios. See, e. g., *Tarpon Transmission Co.*, 41 FERC ¶61,044 (1987). In addition, this power effectively permits FERC to control, albeit indirectly, a natural gas company's capital structure. FERC's power to prevent an overcapitalized company from financing its equity through inflated rates presumably acts as a strong deterrent to the development of such a capital structure.

Second, a natural gas company must obtain from FERC a "certificate of public convenience and necessity" before it constructs, extends, acquires, or operates any facility for the transportation or sale of natural gas in interstate commerce. §7(c)(1)(A) of the NGA, as amended, 15 U. S. C. §717f(c)(1)(A). FERC will grant the certificate only if it finds the company able and willing to undertake the project in compliance with the rules and regulations of the federal regulatory scheme. §7(e), as amended, 15 U. S. C. §717f(e). FERC may attach "to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require." *Ibid.* In fulfilling this statutory duty, FERC has promulgated extensive regulations that require a statement of the plans for financing a proposed facility and a detailed description of any proposed securities issuance. 18 CFR §157.14(14) (1987).⁷ FERC, like the Federal Power Com-

⁷ This required disclosure includes:

"(i) A detailed description of applicant's outstanding and proposed securities and liabilities

"(ii) The manner in which applicant proposes to dispose of securities . . . ; the persons, if known, to whom they will be sold . . . and if not known, the class or classes of such persons.

"(iii) A statement showing for each proposed issue, by total amount and by unit, the estimated sale price and estimated net proceeds to the applicant.

mission, its predecessor, has not hesitated to use its certification power to ensure that a project is financed in accordance with the public interest.⁸

“(vi) Statement of anticipated cash flow, including provision during the period of construction and the first 3 full years of operation of proposed facilities for interest requirements, dividends, and capital retirements.

“(vii) Statement showing, over the life of each issue, the annual amount of securities which applicant expects to retire through operation of a sinking fund or other extinguishment of the obligation.

“(viii) A balance sheet and income statement (12 months) of most recent date available.

“(ix) Comparative pro forma balance sheets and income statements for the period of construction and each of the first 3 full years of operation, giving effect to the proposed construction and proposed financing of the project.

“(x) Conformed copies of all agreements, contracts, mortgages, deeds of trust, indentures, agreements to advance materials or supplies or render services in return for applicant's securities, underwriting agreements, and any other agreements or documents of a similar nature.

“(xi) Conformed copies of all reports, letters, or other documents, submitted by applicant to underwriters, insurance companies, or others regarding financing, including business studies, forecasts of earnings, and other similar financial or accounting reports, statements, or documents.

“(xii) Conformed copies of all applications and supporting exhibits, registration statements, or other similar submittals, if any, to the Securities and Exchange Commission, including all supplements, changes or modifications of the above.

“(xiii) Any additional data and information upon which applicant proposes to rely in showing the adequacy and availability to it of resources for financing its proposed project.” 18 CFR § 157.14(14) (1987).

⁸ See *Trailblazer Pipeline Co.*, 18 FERC ¶ 61,244, p. 61,503 (1982) (certificate “conditioned on applicants’ waiver of their right to apply for the recovery of their equity investment in this project should it fail”); *Midwestern Gas Transmission Co.*, 21 F. P. C. 653, 656 (1959) (certificate issued on condition that company pay no dividends on common stock until interim notes were converted into preferred stock, or total long-term debt was reduced to 75% or less of total capitalization). Each of these opinions was amended on rehearing in ways not relevant here. See 23 FERC ¶ 62,355 (1983), 26 FERC ¶ 61,068 (1984), and 34 FERC ¶ 62,016 (1986) relating to *Trailblazer*, and 30 F. P. C. 759 (1963) and 30 F. P. C. 1313 (1963) relating to *Midwestern*.

Third, FERC has various powers and obligations that both allow and require it to protect against the deleterious effects of ill-considered or improper securities issuances in this area. For example, officers and directors of natural gas companies are prohibited from profiting from the company's securities issues. See § 12, 15 U. S. C. § 717k. No company may abandon any service or facility without FERC approval, including a finding by FERC that either the available gas supply is depleted, or "the present or future public convenience or necessity permit such abandonment." § 7(b), 15 U. S. C. § 717f(b). A company must keep its accounts in accordance with FERC's Uniform System of Accounts and must submit those accounts for review as FERC deems necessary. §§ 8 and 10, 15 U. S. C. §§ 717g and 717i; 18 CFR pt. 201 (1987). Finally, FERC has the authority to examine and to change "any rule, regulation, practice, or contract affecting [rates that] is unjust, unreasonable, unduly discriminatory, or preferential." § 5(a), 15 U. S. C. § 717d(a).

Although the NGA gives FERC these substantial powers and obligations, it is also true, as petitioners remind us, that FERC is not expressly authorized to regulate the issuance of securities by natural gas companies. Of course, if such express authority were granted, pre-emption would be more apparent, given the comprehensive nature of FERC's authority. In the absence of an express provision, however, we must examine whether the preissuance review of securities in which Michigan engages amounts to a regulation in the field of gas transportation and sales for resale that Congress intended FERC to occupy.

B

As an initial matter, respondents argue that Act 144 is preempted by the NGA because "[s]ecurities issuances used to finance the interstate sale and transportation of natural gas were clearly beyond the power of the states to control in 1938." Brief for Respondents 12. They premise this argument on this Court's statements that Congress intended, by

enacting the NGA, to cover areas of natural gas regulation that the States could not reach under the Court's "dormant" Commerce Clause decisions. See, e. g., *Panhandle Eastern Pipe Line Co. v. Public Service Comm'n of Indiana*, 332 U. S. 507, 514-516 (1947) (NGA covers sales for resale by interstate carriers; States regulate direct sales to consumers even though made by interstate carriers). Thus, if the Commerce Clause barred the States from a certain method of regulation when the NGA was enacted in 1938, respondents argue, that type of regulation was covered by the NGA and is now pre-empted. Our inquiry, however, is not so easily answered.

Even if Commerce Clause jurisprudence would have barred Act 144's regulation at the time of the enactment of the NGA, an issue never directly settled by the Court, that would not decide this case. The authorities on which respondents rely state only what is now well settled: Congress occupied the field of matters relating to wholesale sales and transportation of natural gas in interstate commerce. See, e. g., *Illinois Gas Co. v. Central Illinois Public Service Co.*, 314 U. S. 498, 506-507 (1942). The question remains, however, whether Act 144 regulates *within* this exclusively federal domain. Furthermore, in the absence of an express statement in the NGA of an intent to pre-empt this kind of state law, respondents' syllogism may be flawed. "To the extent that Congress sought to freeze its perception of [the scope of constitutionally permissible state regulation] into law . . . it did so only as a means to accomplishing the end of workable federal regulation, not as an end in itself." *Arkansas Elec. Coop. Corp. v. Arkansas Public Serv. Comm'n*, 461 U. S., at 384, n. 8. If Congress did not intend a particular kind of federal regulation, pre-empting state regulation of that kind would not necessarily have served Congress' purpose. *Ibid.* An intent to pre-empt state regulation thus cannot be inferred from the mere fact that States were

precluded from such regulation at the time of the NGA's enactment.

Similarly, petitioners' reliance on Congress' subsequent failure to enact proposed legislation that would have given FERC explicit authority to regulate the issuance of securities of natural gas companies⁹ deserves only passing mention. This Court generally is reluctant to draw inferences from Congress' failure to act. See, *e. g.*, *American Trucking Assns., Inc. v. Atchison, T. & S. F. R. Co.*, 387 U. S. 397, 416-418 (1967); *Red Lion Broadcasting Co. v. FCC*, 395 U. S. 367, 381, n. 11 (1969). Indeed, those Members of Congress who did not support these bills may have been as convinced by testimony that the NGA already provided "broad and complete . . . jurisdiction and control over the issuance of securities" as by arguments that the matter was best left to the States. See Hearings on H. R. 5306 before a Subcommittee of the House Committee on Interstate and Foreign Commerce, 81st Cong., 2d Sess., 53 (1950). Furthermore, even if, in enacting the NGA, Congress had decided to deny FERC access to a particular regulatory tool, it would not necessarily follow that Congress intended to allow the States the use of that tool. Congress may have determined that this particular form of regulation simply should not be employed. That authoritative federal determination would have full pre-emptive force. *Transcontinental Gas Pipe Line Corp. v. State Oil and Gas Bd. of Mississippi*, 474 U. S. 409, 422 (1986).

C

We turn then, to the crux of the issue: whether Act 144 is a regulation of the rates and facilities of natural gas companies used in transportation and sale for resale of natural gas in interstate commerce. Since we find that it is, we conclude that it is pre-empted.

⁹See, *e. g.*, as introduced, H. R. 5306 and S. 2746, 81st Cong., 1st Sess. (1949); S. 1880, 84th Cong., 1st Sess., § 3 (1955).

As noted earlier, Act 144 allows the MPSC to examine a security issuance of a natural gas company to determine whether it is "to be applied to lawful purposes and . . . is essential to the successful carrying out of the purposes, [or] represents accumulated and undistributed earnings invested in capital assets and not previously capitalized." Mich. Comp. Laws Ann. § 460.301(3) (Supp. 1987). The Michigan Supreme Court has authoritatively construed Act 144 as designed to protect investors in the gas company's securities and to protect ratepayers. *Attorney General v. MPSC*, 412 Mich. 385, 402, 316 N. W. 2d 187, 193 (1982). By guarding against the "evils and injurious effects on the public of overcapitalization," *Indiana & Michigan Power Co. v. Public Service Comm'n*, 405 Mich. 400, 410, 275 N. W. 2d 450, 453 (1979), Act 144 both protects investors and ensures "efficient and uninterrupted service at reasonable rates." *Ibid.* It is our view, however, that when applied to natural gas companies, Act 144 amounts to a regulation of rates and facilities, a field occupied by federal regulation. The objectives sought by Act 144 are the same as those sought by the NGA.

Petitioners argue that, without Act 144, a company could take on so much debt through securities issuances that it would lack the resources to maintain its Michigan facilities properly. This could threaten the supply of gas to Michigan consumers, petitioners argue, lead to a rate increase, or hurt investors in the company. In another scenario, a company might take on more equity than it needs, requiring it to charge higher rates (because equity usually requires a higher rate of return). Petitioners also explain that Act 144 protects against overcapitalization in the sense of a lack of correlation between a company's capital stock and the value of its property. An imbalance in this respect, petitioners argue, could also threaten the supply of gas at reasonable rates.¹⁰

¹⁰ It is perhaps worthy of note that the purported purposes of Act 144, as applied to respondents, appear highly artificial at best. Storage does not

Each of these uses of Act 144, however, is an attempt to regulate matters within FERC's exclusive jurisdiction. By keeping a natural gas company from raising its equity levels above a certain point, Michigan seeks to ensure that the company will charge only what Michigan considers to be a "reasonable rate." This is regulation of rates. The other aim of Act 144, seeking to ensure that a company is financed in a way that will allow proper maintenance of its facilities and continuance of its services, for the benefit of both ratepayers and investors, also falls within FERC's exclusive purview since those facilities are a critical part of the transportation of natural gas and sale for resale in interstate commerce. In short, the things Act 144 regulation is directed at, the control of rates and facilities of natural gas companies, are precisely the things over which FERC has comprehensive authority.¹¹

Of course, every state statute that has some indirect effect on rates and facilities of natural gas companies is not preempted. Cf. *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U. S. 724, 753-756 (1985). Act 144's effect, however, is not "indirect." In this case we are presented with a state

serve any Michigan consumers. Thus, it is hard to see what effect regulation of Storage could have on the supply of gas at reasonable rates to Michigan consumers. As to investors, since respondents issue their securities on international and national financial markets, Michigan investors are involved with these issuances only to the extent they operate and invest through these markets. Thus, even petitioners must concede that Michigan investors probably will never own more than a small percentage of respondents' outstanding securities.

¹¹ Of course, one area FERC does not exclusively control is "securities regulation" in the traditional sense of the term, *i. e.*, protection of investors from fraudulent or deceptive issuances. Michigan has an interest in guarding against the sale of such securities in Michigan. To this end, Michigan, like many other States, has a "blue sky" law that governs the registration and sale of securities sold within the State. See Mich. Comp. Laws Ann. § 451.701 *et seq.* (1967 and Supp. 1987). While such traditional "securities regulation" is not FERC's direct concern, Act 144 is not that kind of regulation. Act 144 applies only to utilities and is not limited to securities sold within Michigan.

law whose central purpose is to regulate matters that Congress intended FERC to regulate. Not only is such regulation the function of the federal regulatory scheme, but the NGA has equipped FERC adequately to address the precise concerns Act 144 purports to manage. As reviewed above, FERC can control potential instances of overcapitalization, and its effects on both ratepayers and investors, by its regulation of rates. To the extent that Act 144 is directed at "overcapitalization" in the sense of a lack of correlation between a company's capital stock and the value of its property, FERC directly monitors the same matter through its accounting requirements. As to natural gas companies that threaten the continued supply of gas by seeking to finance their operations through excessive debt, FERC may prevent such problems through its certification power. Indeed, as discussed above, FERC's detailed examination of a company's finances includes review of security issuances involved in financing new facilities.¹² In addition, FERC has its power to prevent abandonments. Finally, FERC's authority to regulate and fix practices affecting rates allows the agency to address directly any unduly leveraged, unduly risky, or unduly capitalized investments.

Thus, while the NGA does not expressly grant FERC pre-issuance authority over the securities of natural gas companies, FERC achieves the regulatory ends of such review with regard to rates and facilities through the exercise of its express regulatory responsibilities.

¹² Normally, regulations do not pre-empt state authority unless they declare their intent to do so with "some specificity." See *California Coastal Comm'n v. Granite Rock Co.*, 480 U. S. 572, 583 (1987). These regulations are indicative, however, of the broad powers FERC has at its disposal in regulating natural gas companies, and thus the extent to which Act 144 intrudes on a field of regulation that federal legislation has occupied. See *R. J. Reynolds Tobacco Co. v. Durham County*, 479 U. S. 130, 148-149 (1986); but cf. *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U. S. 707, 717 (1985).

D

Our conclusion that Act 144 seeks to regulate a field that the NGA has occupied also is supported by the imminent possibility of collision between Act 144 and the NGA. See *Northern Natural Gas Co. v. State Corporation Comm'n of Kansas*, 372 U. S., at 91-93; *Maryland v. Louisiana*, 451 U. S. 725, 751 (1981). If the MPSC ever denied a natural gas company authority to issue a security under Act 144 for a FERC-approved project, the disagreement between state and federal authorities over the wisdom of the project and its proposed financing would interfere with the federal regulatory scheme. Furthermore, any state-ordered alteration in a company's capital structure would impinge on the federal ratemaking authority.

When a state regulation "affect[s] the ability of [FERC] to regulate comprehensively . . . the transportation and sale of natural gas, and to achieve the uniformity of regulation which was an objective of the Natural Gas Act" or presents the "prospect of interference with the federal regulatory power," then the state law may be pre-empted even though "collision between the state and federal regulation may not be an inevitable consequence." *Northern Natural Gas Co.*, 372 U. S., at 91-92. Although hypothetical conflicts will not always show an intent to pre-empt state authority, see *Rice v. Santa Fe Elevator Corp.*, 331 U. S. 218, 237 (1947), this "imminent possibility" further demonstrates the NGA's complete occupation of the field that Act 144 seeks to regulate.

We therefore conclude that the MPSC regulation of respondents through Act 144 impinges on a field that the federal regulatory scheme has occupied and, consequently, that Act 144 is pre-empted.¹³

¹³ Petitioners place much reliance on *Rice v. Santa Fe Elevator Corp.*, 331 U. S. 218 (1947), where this Court rejected a facial challenge to a state statute that regulated the securities issuances of grain warehouses in a fashion similar to the operation of Act 144. The Court reached its conclusion even though the United States Warehouse Act, 39 Stat. 486, as

IV

Because we have concluded that Act 144 is pre-empted by the NGA, we need not decide whether, absent federal occupation of the field, Act 144 violates the Commerce Clause. See *Transcontinental Gas Pipe Line Corp. v. State Oil and Gas Bd. of Mississippi*, 474 U. S., at 425.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

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

amended, 7 U. S. C. § 241 *et seq.* (1946 ed.), through licensing provisions, regulated the facilities, rates, and services of grain warehouses. That case, however, involved a field of regulation that, unlike the regulation of natural gas company securities issuances, "the States ha[d] traditionally occupied." 331 U. S., at 230. Indeed, petitioners and their *amici* point to no State other than Michigan that has applied a regulation similar to Act 144 to natural gas companies engaged solely in activities subject to FERC's jurisdiction. Moreover, the United States Warehouse Act was not nearly so comprehensive as the NGA. Indeed, a warehouseman was not required to operate under the Act, *id.*, at 233, and even as to warehousemen who were licensed under the Act, the Secretary of Agriculture had made no attempt to regulate these matters, *id.*, at 237. In the words of the *Rice* Court: "The test . . . is whether the matter on which the State asserts the right to act is in any way regulated by the Federal Act." *Id.*, at 236. In the present case, Act 144 fails that test.

BOOS ET AL. v. BARRY, MAYOR OF THE DISTRICT OF
COLUMBIA, ET AL.

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

No. 86-803. Argued November 9, 1987—Decided March 22, 1988

District of Columbia Code § 22-1115 makes it unlawful, within 500 feet of a foreign embassy, either to display any sign that tends to bring the foreign government into “public odium” or “public disrepute” (display clause), or to congregate and refuse to obey a police dispersal order (congregation clause). Petitioners, who wish to engage in conduct that would violate both clauses, filed suit in Federal District Court against respondent city officials, asserting a facial First Amendment challenge to § 22-1115. The court granted respondents’ motion for summary judgment, and the Court of Appeals affirmed, concluding that both clauses were constitutional.

Held: The judgment is affirmed in part and reversed in part.

255 U. S. App. D. C. 19, 798 F. 2d 1450, affirmed in part and reversed in part.

JUSTICE O’CONNOR delivered the opinion of the Court with respect to Parts I, II-B, III, IV, and V, concluding that:

1. Section 22-1115’s display clause is facially violative of the First Amendment, since it is a content-based restriction on political speech in a public forum, which is not narrowly tailored to serve a compelling state interest. Assuming, without deciding, that protecting the dignity of foreign diplomats by shielding them from criticism of their governments is a “compelling” interest for First Amendment purposes, the ready availability of a significantly less restrictive alternative—18 U. S. C. § 112, which prohibits intimidating, coercing, or harassing foreign officials or obstructing them in the performance of their duties—amply demonstrates that the display clause is not sufficiently narrowly tailored to withstand exacting scrutiny. Respondents’ defense of the clause is further undercut by § 1302 of the Omnibus Diplomatic Security and Antiterrorism Act of 1986, in which Congress requested that the District of Columbia review and revise § 22-1115 in the interest of protecting First Amendment rights, and the District responded by repealing the section, contingent on the prior extension of § 112 to the District. This Court may rely on the judgment of Congress, the body primarily responsible for implementing international law obligations, that § 112 adequately satisfies the Government’s interest in protecting diplomatic personnel and

that, accordingly, § 22-1115's display clause is not narrowly tailored. Pp. 321-329.

2. Section 22-1115's congregation clause, as construed by the Court of Appeals, is not facially violative of the First Amendment. The clause is not overbroad, even though its actual language is problematic both because it applies to *any* congregation for *any* reason within 500 feet of an embassy and because it appears to place no limits on police dispersal authority. These difficulties are alleviated by the Court of Appeals' narrowing construction that the clause permits dispersal only of congregations that are directed at an embassy and only when the police reasonably believe that the embassy's "security or peace" is threatened. Thus, the clause does not reach a substantial amount of constitutionally protected conduct, since it merely regulates the place and manner of certain demonstrations, is site specific to areas within 500 feet of embassies, and does not prohibit peaceful congregations. Nor is the clause, as narrowed, impermissibly vague simply because the Court of Appeals has not defined or limited the word "peace." Given the particular context for which the clause is crafted, it is apparent that the prohibited quantum of disturbance is determined by whether normal embassy activities have been or are about to be disrupted. Pp. 329-332.

3. The contention that, since § 22-1116 excludes labor picketing from § 22-1115's general prohibitions, both of § 22-1115's clauses require unequal treatment of nonlabor and labor activities in violation of the Equal Protection Clause is without merit. Section 22-1116's primary function of ensuring that the display clause did not prohibit labor picketing is largely pre-empted by this Court's conclusion that that clause violates the First Amendment. Moreover, under the Court of Appeals' construction of the congregation clause as applying only to congregations that threaten an embassy's security or peace, any peaceful congregation, including a peaceful labor congregation, is permitted. This Court will not adopt the unreasonable interpretation that § 22-1116's sole purpose is to protect *violent* labor congregations. Thus, § 22-1116 does not violate equal protection. Pp. 332-334.

JUSTICE O'CONNOR, joined by JUSTICE STEVENS and JUSTICE SCALIA, concluded in Part II-A that § 22-1115's display clause is content-based, since whether it prohibits picketing in front of a particular embassy depends entirely upon whether the picket signs are critical of the foreign government. The argument that the clause is content neutral because it does not select between particular viewpoints, but determines a sign's permissible message solely on the basis of the foreign government's policies, is without merit, since even a viewpoint-neutral regulation violates the First Amendment when it prohibits an entire category of speech—here, signs critical of foreign governments. Also rejected is the conten-

tion that, since the clause's real concern is not the suppression of speech, but is rather the "secondary effect" of implementing the international law obligation to shield diplomats from speech that offends their dignity, the clause is content neutral under *Renton v. Playtime Theatres, Inc.*, 475 U. S. 41. As used in *Renton*, the phrase "secondary effects" refers to secondary features that happen to be associated with the particular type of speech but have nothing to do with its content, whereas, here, the asserted justification for the display clause focuses *only* on the content of picket signs and their primary and direct emotive impact on their audience. Pp. 318-321.

JUSTICE BRENNAN, joined by JUSTICE MARSHALL, agreeing that even under the *Renton* analysis § 22-1115's display clause constitutes a content-based restriction, and that "secondary effects" cannot include listeners' reactions to speech, concluded that the content-based nature of a restriction on speech cannot turn on whether the restriction "aims" at "secondary effects," and that, at any rate, the *Renton* analysis should be limited to the context of businesses purveying sexually explicit materials and not applied to political speech. The *Renton* analysis creates extensive dangers and uncertainty, and denies speakers the equal right to speak and listeners the right to an undistorted debate. The traditional bright-line rule should continue to apply, whereby any restriction on speech, the application of which turns on the speech's content, is content-based regardless of its underlying motivation. Pp. 334-338.

O'CONNOR, J., delivered the opinion of the Court with respect to Parts I, II-B, and V, in which BRENNAN, MARSHALL, STEVENS, and SCALIA, JJ., joined, and with respect to Parts III and IV, in which all participating Members joined, and an opinion with respect to Part II-A, in which STEVENS and SCALIA, JJ., joined. BRENNAN, J., filed an opinion concurring in part and concurring in the judgment, in which MARSHALL, J., joined, *post*, p. 334. REHNQUIST, C. J., filed an opinion concurring in part and dissenting in part, in which WHITE and BLACKMUN, JJ., joined, *post*, p. 338. KENNEDY, J., took no part in the consideration or decision of the case.

Raymond D. Battocchi argued the cause for petitioners. With him on the briefs were *Isaac N. Groner*, *Walter H. Fleischer*, *Alfred F. Belcuore*, and *James A. Bensfield*.

Edward E. Schwab argued the cause for respondents. With him on the brief was *Charles L. Reischel*. *Michael S. Arif* filed a brief for respondent *Father R. David Finzer*.

Edwin S. Kneedler argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Fried*, *Assistant Attorney General Willard*, *Deputy Solicitor General Wallace*, *Anthony J. Steinmeyer*, and *Barbara Biddle*.*

JUSTICE O'CONNOR delivered the opinion of the Court, except as to Part II-A.

The question presented in this case is whether a provision of the District of Columbia Code, § 22-1115, violates the First Amendment. This section prohibits the display of any sign within 500 feet of a foreign embassy if that sign tends to bring that foreign government into "public odium" or "public disrepute." It also prohibits any congregation of three or more persons within 500 feet of a foreign embassy.

I

Petitioners are three individuals who wish to carry signs critical of the Governments of the Soviet Union and Nicaragua on the public sidewalks within 500 feet of the embassies of those Governments in Washington, D. C. Petitioners Bridget M. Brooker and Michael Boos, for example, wish to display signs stating "RELEASE SAKHAROV" and "SOLIDARITY" in front of the Soviet Embassy. Petitioner J. Michael Waller wishes to display a sign reading "STOP THE KILLING" within 500 feet of the Nicaraguan Embassy. All of the petitioners also wish to congregate with two or more other persons within 500 feet of official foreign buildings.

Asserting that D. C. Code § 22-1115 (1981) prohibited them from engaging in these expressive activities, petition-

*Briefs of *amici curiae* urging reversal were filed for the American Civil Liberties Union et al. by *Arthur B. Spitzer*, *John A. Powell*, and *Elizabeth Symonds*; for the American Jewish Congress by *Joel H. Levy*, *Marc D. Stern*, *Lois C. Waldman*, and *Amy Adelson*; for the Legal Affairs Council et al. by *Wyatt B. Durette, Jr.*; and for the Washington Legal Foundation et al. by *Daniel J. Popeo* and *Paul D. Kamenar*.

Seth P. Waxman filed a brief for *Geraldine M. Lipkin et al.* as *amici curiae* urging affirmance.

ers, together with respondent Father R. David Finzer, brought a facial First Amendment challenge to that provision in the District Court for the District of Columbia. They named respondents, the Mayor and certain other law enforcement officials of the District of Columbia, as defendants. The United States intervened as *amicus curiae* supporting the constitutionality of the statute.

Congress enacted § 22-1115 in 1938, S. J. Res. 191, ch. 29, § 1, 52 Stat. 30 (1938), pursuant to its authority under Article I, § 8, cl. 10, of the Constitution to "define and punish . . . Offenses against the Law of Nations." Section 22-1115 reads in pertinent part as follows:

"It shall be unlawful to display any flag, banner, placard, or device designed or adapted to intimidate, coerce, or bring into public odium any foreign government, party, or organization, or any officer or officers thereof, or to bring into public disrepute political, social, or economic acts, views, or purposes of any foreign government, party or organization . . . within 500 feet of any building or premises within the District of Columbia used or occupied by any foreign government or its representative or representatives as an embassy, legation, consulate, or for other official purposes . . . or to congregate within 500 feet of any such building or premises, and refuse to disperse after having been ordered so to do by the police authorities of said District."

The first portion of this statute, the "display" clause, applies to signs tending to bring a foreign government into public odium or public disrepute, such as signs critical of a foreign government or its policies. The display clause applies only to the display of signs, not to the spoken word. See *Zaimi v. United States*, 155 U. S. App. D. C. 66, 82, 476 F. 2d 511, 527 (1973). The second portion of the statute, the "congregation" clause, addresses a different concern. It prohibits congregation, which District of Columbia common

law defines as an assemblage of three or more people. *District of Columbia v. Reed*, Cr. No. 2021-67 (D. C. Ct. Gen. Sess., May 11, 1967) (reprinted in App. in *Kinoy v. District of Columbia*, 130 U. S. App. D. C. 290, 298, 400 F. 2d 761, 769 (1968)); *Hunter v. District of Columbia*, 47 App. D. C. 406, 409 (1918). Both of these prohibitions generally operate within a 500-foot zone surrounding embassies or consulates owned by foreign governments, but the statute also can extend to other buildings if foreign officials are inside for some official purpose.

The District Court granted respondents' motion for summary judgment, relying upon an earlier Court of Appeals decision, *Frend v. United States*, 69 App. D. C. 281, 100 F. 2d 691 (1938), cert. denied, 306 U. S. 640 (1939), that had sustained the statute against a similar First Amendment challenge. A divided panel of the Court of Appeals for the District of Columbia affirmed. *Finzer v. Barry*, 255 U. S. App. D. C. 19, 798 F. 2d 1450 (1986). Although it found *Frend* "persuasive precedent," the Court of Appeals thought *Frend* was not binding because it "was decided almost a half century ago and in the interval the Supreme Court has developed constitutional law in ways that must be taken into account." 255 U. S. App. D. C., at 23, 798 F. 2d, at 1454.

The Court of Appeals considered the two aspects of §22-1115 separately. First, the court concluded that the display clause was a content-based restriction on speech. Relying, however, upon our decisions in *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U. S. 37, 45 (1983), and *Carey v. Brown*, 447 U. S. 455, 461-462 (1980), the court nonetheless found it constitutional because it was justified by a compelling governmental interest and was narrowly drawn to serve that interest. Second, the Court of Appeals concluded that the congregation clause should be construed to authorize an order to disperse "only when the police reasonably believe that a threat to the security or peace of the embassy is present," and that as construed, the

congregation clause survived First Amendment scrutiny. 255 U. S. App. D. C., at 40, 798 F. 2d, at 1471.

We granted certiorari, 479 U. S. 1083 (1987). We now reverse the Court of Appeals' conclusion as to the display clause, but affirm as to the congregation clause.

II

A

Analysis of the display clause must begin with several important features of that provision. First, the display clause operates at the core of the First Amendment by prohibiting petitioners from engaging in classically political speech. We have recognized that the First Amendment reflects a "profound national commitment" to the principle that "debate on public issues should be uninhibited, robust, and wide-open," *New York Times Co. v. Sullivan*, 376 U. S. 254, 270 (1964), and have consistently commented on the central importance of protecting speech on public issues. See, e. g., *Connick v. Myers*, 461 U. S. 138, 145 (1983); *NAACP v. Claiborne Hardware Co.*, 458 U. S. 886, 913 (1982); *Carey v. Brown*, *supra*, at 467. This has led us to scrutinize carefully any restrictions on public issue picketing. See, e. g., *United States v. Grace*, 461 U. S. 171 (1983); *Carey v. Brown*, *supra*; *Police Department of Chicago v. Mosley*, 408 U. S. 92 (1972).

Second, the display clause bars such speech on public streets and sidewalks, traditional public fora that "time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. CIO*, 307 U. S. 496, 515 (1939) (Roberts, J.). In such places, which occupy a "special position in terms of First Amendment protection," *United States v. Grace*, 461 U. S., at 180, the government's ability to restrict expressive activity "is very limited." *Id.*, at 177.

Third, § 22-1115 is content based. Whether individuals may picket in front of a foreign embassy depends entirely upon whether their picket signs are critical of the foreign

government or not. One category of speech has been completely prohibited within 500 feet of embassies. Other categories of speech, however, such as favorable speech about a foreign government or speech concerning a labor dispute with a foreign government, are permitted. See D. C. Code § 22-1116 (1981).

Both the majority and dissent in the Court of Appeals accepted this common sense reading of the statute and concluded that the display clause was content based. The majority indicated, however, that it could be argued that the regulation was not content based. 255 U. S. App. D. C., at 38, n. 15, 798 F. 2d, at 1469, n. 15. Both respondents and the United States have now made such an argument in this Court. They contend that the statute is not content based because the government is not itself selecting between viewpoints; the permissible message on a picket sign is determined solely by the policies of a foreign government.

We reject this contention, although we agree the provision is not viewpoint based. The display clause determines which viewpoint is acceptable in a neutral fashion by looking to the policies of foreign governments. While this prevents the display clause from being directly viewpoint based, a label with potential First Amendment ramifications of its own, see, e. g., *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U. S. 789, 804 (1984); *Schacht v. United States*, 398 U. S. 58, 63 (1970), it does not render the statute content neutral. Rather, we have held that a regulation that "does not favor either side of a political controversy" is nonetheless impermissible because the "First Amendment's hostility to content-based regulation extends . . . to prohibition of public discussion of an entire topic." *Consolidated Edison Co. v. Public Service Comm'n*, 447 U. S. 530, 537 (1980). Here the government has determined that an entire category of speech—signs or displays critical of foreign governments—is not to be permitted.

We most recently considered the definition of a content-neutral statute in *Renton v. Playtime Theatres, Inc.*, 475 U. S. 41 (1986). Drawing on prior decisions, we described "‘content-neutral’ speech restrictions as those that ‘are justified without reference to the content of the regulated speech.’" *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 771 (1976) (emphasis added)." *Id.*, at 48. The regulation at issue in *Renton* described prohibited speech by reference to the type of movie theater involved, treating "theaters that specialize in adult films differently from other kinds of theaters." *Id.*, at 47. But while the regulation in *Renton* applied only to a particular category of speech, its justification had nothing to do with that speech. The content of the films being shown inside the theaters was irrelevant and was not the target of the regulation. Instead, the ordinance was aimed at the "secondary effects of such theaters in the surrounding community," *ibid.* (emphasis in original), effects that are almost unique to theaters featuring sexually explicit films, *i. e.*, prevention of crime, maintenance of property values, and protection of residential neighborhoods. In short, the ordinance in *Renton* did not aim at the suppression of free expression.

Respondents attempt to bring the display clause within *Renton* by arguing that here too the real concern is a secondary effect, namely, our international law obligation to shield diplomats from speech that offends their dignity. We think this misreads *Renton*. We spoke in that decision only of secondary effects of speech, referring to regulations that apply to a particular category of speech because the regulatory targets happen to be associated with that type of speech. So long as the justifications for regulation have nothing to do with content, *i. e.*, the desire to suppress crime has nothing to do with the actual films being shown inside adult movie theaters, we concluded that the regulation was properly analyzed as content neutral.

Regulations that focus on the direct impact of speech on its audience present a different situation. Listeners' reactions to speech are not the type of "secondary effects" we referred to in *Renton*. To take an example factually close to *Renton*, if the ordinance there was justified by the city's desire to prevent the psychological damage it felt was associated with viewing adult movies, then analysis of the measure as a content-based statute would have been appropriate. The hypothetical regulation targets the direct impact of a particular category of speech, not a secondary feature that happens to be associated with that type of speech.

Applying these principles to the case at hand leads readily to the conclusion that the display clause is content-based. The clause is justified *only* by reference to the content of speech. Respondents and the United States do not point to the "secondary effects" of picket signs in front of embassies. They do not point to congestion, to interference with ingress or egress, to visual clutter, or to the need to protect the security of embassies. Rather, they rely on the need to protect the dignity of foreign diplomatic personnel by shielding them from speech that is critical of their governments. This justification focuses *only* on the content of the speech and the direct impact that speech has on its listeners. The emotive impact of speech on its audience is not a "secondary effect." Because the display clause regulates speech due to its potential primary impact, we conclude it must be considered content-based.

B

Our cases indicate that as a *content-based* restriction on *political speech* in a *public forum*, § 22-1115 must be subjected to the most exacting scrutiny. Thus, we have required the State to show that the "regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U. S., at 45. Accord, *Board of Airport Comm'rs of Los Angeles v. Jews for Jesus*, 482 U. S.

569, 572–573 (1987); *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U. S. 788, 800 (1985); *United States v. Grace*, 461 U. S., at 177.

We first consider whether the display clause serves a compelling governmental interest in protecting the dignity of foreign diplomatic personnel. Since the dignity of foreign officials will be affronted by signs critical of their governments or governmental policies, we are told, these foreign diplomats must be shielded from such insults in order to fulfill our country's obligations under international law.

As a general matter, we have indicated that in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide "adequate 'breathing space' to the freedoms protected by the First Amendment." *Hustler Magazine, Inc. v. Falwell*, ante, at 56. See also, e. g., *New York Times Co. v. Sullivan*, 376 U. S., at 270. A "dignity" standard, like the "outrageousness" standard that we rejected in *Hustler*, is so inherently subjective that it would be inconsistent with "our longstanding refusal to [punish speech] because the speech in question may have an adverse emotional impact on the audience." *Hustler Magazine*, supra, at 55.

We are not persuaded that the differences between foreign officials and American citizens require us to deviate from these principles here. The dignity interest is said to be compelling in this context primarily because its recognition and protection is part of the United States' obligations under international law. The Vienna Convention on Diplomatic Relations, April 18, 1961, [1972] 23 U. S. T. 3227, T. I. A. S. No. 7502, which all parties agree represents the current state of international law, imposes on host states

"[the] special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity." *Id.*, at 3237–3238, Art. 22.

As a general proposition, it is of course correct that the United States has a vital national interest in complying with international law. The Constitution itself attempts to further this interest by expressly authorizing Congress "[t]o define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations." U. S. Const., Art. I, § 8, cl. 10. Cf. *The Federalist* No. 3, p. 43 (C. Rossiter ed. 1961) (J. Jay). Moreover, protecting foreign emissaries has a long history and noble purpose. In this country national concern for the protection of ambassadors and foreign ministers even predates the Constitution. In 1781 the Continental Congress adopted a resolution calling on the States to enact laws punishing "infractions of the immunities of ambassadors and other public ministers, authorised and received as such by the United States in Congress assembled," targeting in particular "violence offered to their persons, houses, carriages and property." 21 J. Continental Cong. 1136-1137 (G. Hunt ed. 1912).

The need to protect diplomats is grounded in our Nation's important interest in international relations. As a leading commentator observed in 1758, "[i]t is necessary that nations should treat and hold intercourse together, in order to promote their interests,—to avoid injuring each other,—and to adjust and terminate their disputes." E. Vattel, *The Law of Nations* 452 (J. Chitty ed. 1844) (translation). This observation is even more true today given the global nature of the economy and the extent to which actions in other parts of the world affect our own national security. Diplomatic personnel are essential to conduct the international affairs so crucial to the well-being of this Nation. In addition, in light of the concept of reciprocity that governs much of international law in this area, see C. Wilson, *Diplomatic Privileges and Immunities* 32 (1967), we have a more parochial reason to protect foreign diplomats in this country. Doing so ensures that similar protections will be accorded those that we send abroad to represent the United States, and thus serves our

national interest in protecting our own citizens. Recent history is replete with attempts, some unfortunately successful, to harass and harm our ambassadors and other diplomatic officials. These underlying purposes combine to make our national interest in protecting diplomatic personnel powerful indeed.

At the same time, it is well established that "no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution." *Reid v. Covert*, 354 U. S. 1, 16 (1957). See 1 Restatement of Foreign Relations Law of the United States § 131, Comment *a*, p. 53 (Tent. Draft No. 6, Apr. 12, 1985) ("[R]ules of international law and provisions of international agreements of the United States are subject to the Bill of Rights and other prohibitions, restrictions or requirements of the Constitution and cannot be given effect in violation of them").

Thus, the fact that an interest is recognized in international law does not automatically render that interest "compelling" for purposes of First Amendment analysis. We need not decide today whether, or to what extent, the dictates of international law could ever require that First Amendment analysis be adjusted to accommodate the interests of foreign officials. Even if we assume that international law recognizes a dignity interest and that it should be considered sufficiently "compelling" to support a content-based restriction on speech, we conclude that § 22-1115 is not narrowly tailored to serve that interest. See, e. g., *Perry Education Assn.*, 460 U. S., at 45; *Board of Airport Comm'rs of Los Angeles*, 482 U. S., at 573.

The most useful starting point for assessing § 22-1115 is to compare it with an analogous statute adopted by Congress, which is the body primarily responsible for implementing our obligations under the Vienna Convention. Title 18 U. S. C. § 112(b)(2) subjects to criminal punishment willful acts or attempts to "intimidate, coerce, threaten, or harass a foreign

official or an official guest or obstruct a foreign official in the performance of his duties."

Its legislative history reveals that § 112 was developed as a deliberate effort to implement our international obligations. See, *e. g.*, 118 Cong. Rec. 27112-27113 (1972). At the same time, the history reflects a substantial concern with the effect of any such legislation on First Amendment freedoms. For example, the original provision contained a prohibition on willful acts or attempts to "intimidate, coerce, threaten, or harass . . . or obstruct a foreign official," as does the current version of § 112. In a portion with similarities to the display clause, however, it also punished anyone who

"parades, pickets, displays any flag, banner, sign, placard, or device, or utters any word, phrase, sound, or noise, for the purpose of intimidating, coercing, threatening, or harassing any foreign official or obstructing him in the performance of his duties." Act for Protection of Foreign Official Guests of the United States, Pub. L. 92-539, Title III, § 301(c)(1), 86 Stat. 1070, 1073 (1972).

Concerned with the effects that such a provision might have on First Amendment freedoms, the Senate added a new subsection, which directed:

"[N]othing contained in this section shall be construed or applied so as to abridge the exercise of rights guaranteed under the first amendment to the Constitution of the United States." § 301(e), 86 Stat. 1073.

See S. Rep. No. 92-1105, p. 19 (1972).

After the 1972 passage of § 112 in this form, congressional concerns about its impact on First Amendment freedoms apparently escalated rather than abated. In 1976, Congress revisited the area and repealed the antipicketing provision, leaving in place only the current prohibition on willful acts or attempts to "intimidate, coerce, threaten, or harass a foreign

official." § 112(b)(2). In modifying § 112, Congress was motivated by First Amendment concerns:

"This language [of the original anti-picketing provision] raises serious Constitutional questions because it appears to include within its purview conduct and speech protected by the First Amendment." S. Rep. No. 94-1273, p. 8, n. 9 (1976); H. R. Rep. No. 94-1614, p. 6, n. 9 (1976).

Thus, after a careful balancing of our country's international obligations with our Constitution's protection of free expression, Congress has determined that § 112 adequately satisfies the Government's interest in protecting diplomatic personnel outside the District of Columbia. It is the necessary, "appropriate" step that Congress has enacted to fulfill our international obligations. Cf. Vienna Convention on Diplomatic Relations, Art. 22, § 2, 23 U. S. T., at 3237 ("special duty to take all appropriate steps").

Section 112 applies to all conduct "within the United States but outside the District of Columbia." § 112(b)(3). In the legislative history, the exclusion of the District from the statute's reach is explained with reference to § 22-1115; Congress was informed that a "similar" statute already applied inside the District. S. Rep. No. 92-1105, *supra*, at 19; H. R. Rep. No. 92-1268, p. 5 (1972). The two statutes, however, are not identical, and the differences between them are constitutionally significant. In two obvious ways, § 112 is considerably less restrictive than the display clause of § 22-1115. First and foremost, § 112 is not narrowly directed at the content of speech but at any activity, including speech, that has the prohibited effects. Moreover, § 112, unlike § 22-1115, does not prohibit picketing; it only prohibits activity undertaken to "intimidate, coerce, threaten, or harass." Indeed, unlike the display clause, even the repealed antipicketing portion of § 112 permitted peaceful picketing.

Given this congressional development of a significantly less restrictive statute to implement the Vienna Convention,

there is little force to the argument that we should give deference to a supposed congressional judgment that the Convention demands the more problematic approach reflected in the display clause. If § 112 is all that is necessary in the rest of the country, petitioners contend it should be all that is necessary in the District of Columbia. The only counterargument offered by respondents is that the District has a higher concentration of foreign embassies than other locales and that a more restrictive statute is therefore necessary. But this is arguably factually incorrect (New York City is reported to have a greater number of foreign embassies, missions, or consulates than does the District of Columbia, see Note, *Regulating Embassy Picketing in the Public Forum*, 55 Geo. Wash. L. Rev. 908, 928, n. 140 (1987)), and logically beside the point since the need to protect "dignity" is equally present whether there is one embassy or mission or one hundred. The United States points to Congress' exclusive legislative authority over the District of Columbia, U. S. Const., Art. I, § 8, cl. 17, and argues that this justifies more extensive measures. We fail to see, however, why the potential legislative power to enact more extensive measures makes such measures necessary.

Congressional action since the Court of Appeals' ruling in this case casts even further doubt on the validity of the display clause and causes one to doubt whether that court would have reached the same result under the law as it now stands. In § 1302 of the Omnibus Diplomatic Security and Antiterrorism Act of 1986, Congress said:

"(1) [T]he District of Columbia law concerning demonstrations near foreign missions in the District of Columbia (D. C. Code, sec. 22-1115) may be inconsistent with the reasonable exercise of the rights of free speech and assembly, that law may have been selectively enforced, and peaceful demonstrators may have been unfairly arrested under the law;

"(2) the obligation of the United States to provide adequate security for the missions and personnel of foreign governments must be balanced with the reasonable exercise of the rights of free speech and assembly; and

"(3) therefore, the Council of the District of Columbia should review and, if appropriate, make revisions in the laws of the District of Columbia concerning demonstrations near foreign missions, in consultation with the Secretary of State and the Secretary of the Treasury." Pub. L. 99-399, § 1302, 100 Stat. 853, 897.

This sense-of-the-Congress resolution originated as a proposal to repeal § 22-1115 directly and to amend § 112 to include the District. The sponsor of this proposal noted that in excluding the District from the reach of § 112, Congress had apparently assumed that § 22-1115 and § 112 were similar, when in fact the two laws are "in no way similar." 132 Cong. Rec. 15329 (1986) (Sen. Grassley). The Senate passed the bill repealing § 22-1115, see *ibid.*, but the Conference Committee was concerned with objections to congressional repeal arising from the tenets of "home rule" for the District of Columbia. See *id.*, at 20913. Cf. District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. 93-198, 87 Stat. 774 (establishing home rule). These objections led Congress to replace a repeal of § 22-1115 with the sense-of-the-Congress language quoted above.

The District of Columbia government has responded to the congressional request embodied in the Omnibus Act by repealing § 22-1115. The repeal is contingent, however, on Congress' first acting to extend § 112 to the District. See Protection for Foreign Officials, Official Guests, and Internationally Protected Persons Amendment Act of 1987, § 3, D. C. Act 7-138, 35 D. C. Reg. 728-729 (Feb. 5, 1988). Cf. § 112(b)(3) (Section applies "within the United States but outside the District of Columbia").

While this most recent round of legislative action concerning § 22-1115 has not yet led to making the repeal of that provision effective, it has undercut significantly respondents' defense of the display clause. When considered together with earlier congressional action implementing the Vienna Convention, the claim that the display clause is sufficiently narrowly tailored is gravely weakened: if ever it did so, Congress no longer considers this statute necessary to comply with our international obligations. Relying on congressional judgment in this delicate area, we conclude that the availability of alternatives such as § 112 amply demonstrates that the display clause is not crafted with sufficient precision to withstand First Amendment scrutiny. It may serve an interest in protecting the dignity of foreign missions, but it is not narrowly tailored; a less restrictive alternative is readily available. Cf. *Wygant v. Jackson Bd. of Ed.*, 476 U. S. 267, 280, n. 6 (1986) (plurality opinion). Thus, even assuming for present purposes that the dignity interest is "compelling," we hold that the display clause of § 22-1115 is inconsistent with the First Amendment.

III

Petitioners initially attack the congregation clause by arguing that it confers unbridled discretion upon the police. In addressing such a facial overbreadth challenge, a court's first task is to ascertain whether the enactment reaches a substantial amount of constitutionally protected conduct. *Houston v. Hill*, 482 U. S. 451, 458-459 (1987); *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U. S. 489, 494 (1982). In making this assessment, we consider the actual text of the statute as well as any limiting constructions that have been developed. *Kolender v. Lawson*, 461 U. S. 352, 355 (1983); *Hoffman Estates*, *supra*, at 494, n. 5.

The congregation clause makes it unlawful

"to congregate within 500 feet of any [embassy, legation, or consulate] and refuse to disperse after having been ordered so to do by the police." § 22-1115.

Standing alone, this text is problematic both because it applies to *any* congregation within 500 feet of an embassy for *any* reason and because it appears to place no limits at all on the dispersal authority of the police. The Court of Appeals, however, has provided a narrowing construction that alleviates both of these difficulties.

The Court of Appeals, we must first observe, read the congregation clause as distinct from the display clause, so the constitutional infirmity of the latter need not affect the former. See 255 U. S. App. D. C., at 41, n. 17, 798 F. 2d, at 1472, n. 17. Second, the Court of Appeals followed the lead of several earlier decisions, see, *e. g.*, *United States v. Travers*, 98 Daily Wash. L. Rptr. 1505 (D. C. Ct. Gen. Sess. April 2, 1970), and concluded that the statute permits the dispersal only of congregations that are directed at an embassy; it does not grant "police the power to disperse for reasons having nothing to do with the nearby embassy." 255 U. S. App. D. C., at 41, 798 F. 2d, at 1472. Finally, the Court of Appeals further circumscribed police discretion by holding that the statute permits dispersal "only when the police reasonably believe that a threat to the security or peace of the embassy is present." *Id.*, at 40, 798 F. 2d, at 1471.

Petitioners protest that the Court of Appeals was without authority to narrow the statute. According to petitioners, §22-1115 must be considered to be state legislation, which brings it within the sweep of prior decisions indicating that federal courts are without power to adopt a narrowing construction of a state statute unless such a construction is reasonable and readily apparent. See, *e. g.*, *Grayned v. Rockford*, 408 U. S. 104, 110 (1972); *Gooding v. Wilson*, 405 U. S. 518, 520-521 (1972). Even assuming that the District of Columbia could be considered a State for this purpose, the argument overlooks the fact that §22-1115 was enacted by Congress, not by the District of Columbia Council. Cf. *Whalen v. United States*, 445 U. S. 684, 687-688 (1980). It is well settled that federal courts have the power to adopt

narrowing constructions of federal legislation. See, *e. g.*, *New York v. Ferber*, 458 U. S. 747, 769, n. 24 (1982); *United States v. Thirty-seven Photographs*, 402 U. S. 363, 368-370 (1971). Indeed, the federal courts have the duty to avoid constitutional difficulties by doing so if such a construction is fairly possible. See, *e. g.*, *Ferber*, *supra*, at 769, n. 24; *Thirty-seven Photographs*, *supra*, at 369; *Schneider v. Smith*, 390 U. S. 17, 26-27 (1968). While the original congressional resolution is now part of the District of Columbia Code, this administrative transfer did not diminish the national interest in the congregation clause. As counsel for respondents indicated at oral argument, there "is no independent District of Columbia interest here." Tr. of Oral Arg. 28. Accordingly, we see no barrier to the Court of Appeals' adoption of a narrowing construction.

So narrowed, the congregation clause withstands First Amendment overbreadth scrutiny. It does not reach a substantial amount of constitutionally protected conduct; it merely regulates the place and manner of certain demonstrations. Unlike a general breach of the peace statute, see, *e. g.*, *Cox v. Louisiana*, 379 U. S. 536 (1965), the congregation clause is site specific; it applies only within 500 feet of foreign embassies. Cf. *Cox v. Louisiana*, 379 U. S. 559, 568, n. 1 (1965) (ordinance prohibiting certain picketing "near" a courthouse upheld; §22-1115 cited with approval as being less vague due to specification of 500 feet); *Grayned*, *supra*, at 112, 120-121 (upholding ban on picketing near a school; special nature of place relevant in judging reasonableness of restraint). Moreover, the congregation clause does not prohibit peaceful congregations; its reach is limited to groups posing a security threat. As we have noted, "where demonstrations turn violent, they lose their protected quality as expression under the First Amendment." *Grayned*, *supra*, at 116. These two limitations prevent the congregation clause from reaching a substantial amount of constitu-

tionally protected conduct and make the clause consistent with the First Amendment.

Petitioners argue that even as narrowed by the Court of Appeals, the congregation clause is invalid because it is impermissibly vague. In particular, petitioners focus on the word "peace," which is not further defined or limited. We rejected an identical argument in *Grayned, supra*. That case concerned an ordinance that prohibited persons near schools from "disturb[ing] the peace" of the schools. 408 U. S., at 107-108. We held that given the "particular context" of the ordinance it gave fair notice of its scope: "Although the prohibited quantum of disturbance is not specified in the ordinance, it is apparent from the statute's announced purpose that the measure is whether normal school activity has been or is about to be disrupted." *Id.*, at 112. Section 22-1115 presents the same situation. It is crafted for a particular context and given that context, it is apparent that the "prohibited quantum of disturbance" is whether normal embassy activities have been or are about to be disrupted. The statute communicates its reach in words of common understanding, *ibid.*; *Cameron v. Johnson*, 390 U. S. 611, 616 (1968), and it accordingly withstands petitioners' vagueness challenge.

IV

In addition to their First Amendment challenges to the display clause and the congregation clause, petitioners raise an equal protection argument. Relying on *Police Department of Chicago v. Mosley*, 408 U. S. 92 (1972), and *Carey v. Brown*, 447 U. S. 455 (1980), petitioners contend that both the display clause and the congregation clause violate equal protection by virtue of § 22-1116, which excludes labor picketing from the general prohibitions of § 22-1115:

"[N]othing contained in [§ 22-1115] shall be construed to prohibit picketing, as a result of bona fide labor disputes regarding the alteration, repair, or construction of either buildings or premises occupied, for business pur-

poses, wholly or in part, by representatives of foreign governments."

No doubt the primary intent of § 22-1116 was to ensure that the display clause did not prohibit labor picketing, since "picketing" is most directly implicated in the display clause. Even if § 22-1116 were to exempt the display of labor signs that offended the dignity of foreign officials from the display clause's general ban on such signs, and thereby raise equal protection concerns, we have already concluded that the display clause is contrary to the First Amendment. Accordingly, the only provision to which § 22-1116 conceivably could apply is the congregation clause. And the Court of Appeals has already construed that provision to apply only to congregations that threaten the security or peace of an embassy. Therefore, peaceful congregations, including peaceful labor congregations, are not prohibited.

Accordingly, only if § 22-1116 is construed to protect *violent* labor congregations, will there be any unequal treatment of nonlabor and labor picketing which could run afoul of the Equal Protection Clause. In our view, § 22-1116 should not be interpreted in this manner. First, it is well established that statutes should be construed to avoid constitutional questions if such a construction is fairly possible. See, *e. g.*, *New York v. Ferber*, *supra*, at 769, n. 24; *United States v. Thirty-seven Photographs*, *supra*. Second, the face of the statute admonishes only that nothing shall "prohibit picketing." As narrowed by the Court of Appeals, the congregation clause does not "prohibit picketing" at all, it merely regulates the place and manner of certain demonstrations. The labor proviso is thus completely consistent with the congregation clause. Third, § 22-1116 evinces an intent to protect only "bona fide" labor disputes. We think it safe to conclude that an intent to protect such "good faith" disagreements falls short of an intent to insulate violent conduct. Indeed, it would be unreasonable to construe this statute in such a way

that the sole purpose of § 22-1116 would be to protect violent labor congregations.

The intended function of § 22-1116 is largely pre-empted by our conclusion that the display clause is invalid. Viewing the section in this way eliminates any potential unequal treatment of nonlabor and labor congregations. Accordingly, in our view, § 22-1116 does not violate the Equal Protection Clause.

V

We conclude that the display clause of § 22-1115 is unconstitutional on its face. It is a content-based restriction on political speech in a public forum, and it is not narrowly tailored to serve a compelling state interest. We also conclude that the congregation clause, as narrowed by the Court of Appeals, is not facially unconstitutional. Accordingly, the judgment of the Court of Appeals is reversed in part and affirmed in part.

It is so ordered.

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

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

I join all but Part II-A of JUSTICE O'CONNOR's opinion. I also join Part II-A to the extent it concludes that even under the analysis set forth in *Renton v. Playtime Theatres, Inc.*, 475 U. S. 41 (1986), the display clause constitutes a content-based restriction on speech that merits strict scrutiny. Whatever "secondary effects" means, I agree that it cannot include listeners' reactions to speech. Cf. *Hustler Magazine, Inc. v. Falwell*, ante, p. 46. I write separately, however, to register my continued disagreement with the proposition that an otherwise content-based restriction on speech can be recast as "content neutral" if the restriction "aims" at "secondary effects" of the speech, see *Renton*, supra, at 55 (BRENNAN, J., joined by MARSHALL, J., dissent-

ing), and to object to JUSTICE O'CONNOR's assumption that the *Renton* analysis applies not only outside the context of businesses purveying sexually explicit materials but even to political speech.

The dangers and difficulties posed by the *Renton* analysis are extensive. Although in this case it is easy enough to determine that the display clause does not aim at a "secondary effect" of speech, future litigants are unlikely to be so bold or so forthright as to defend a restriction on speech with the argument that the restriction aims to protect listeners from the indignity of hearing speech that criticizes them. Rather, they are likely to defend content-based restrictions by pointing, as JUSTICE O'CONNOR suggests, to secondary effects like "congestion, . . . visual clutter, or . . . security" *Ante*, at 321. But such secondary effects offer countless excuses for content-based suppression of political speech. No doubt a plausible argument could be made that the political gatherings of some parties are more likely than others to attract large crowds causing congestion, that picketing for certain causes is more likely than other picketing to cause visual clutter, or that speakers delivering a particular message are more likely than others to attract an unruly audience. Our traditional analysis rejects such *a priori* categorical judgments based on the content of speech, *Police Department of Chicago v. Mosley*, 408 U. S. 92, 100-101 (1972), requiring governments to regulate based on actual congestion, visual clutter, or violence rather than based on predictions that speech with a certain content will induce those effects. The *Renton* analysis, however, creates a possible avenue for governmental censorship whenever censors can concoct "secondary" rationalizations for regulating the content of political speech.

Moreover, the *Renton* analysis provides none of the clear lines or sanctuaries the First Amendment demands. The traditional approach sets forth a bright-line rule: any restriction on speech, the application of which turns on the content

of the speech, is a content-based restriction regardless of the motivation that lies behind it. That, to my mind, has always been implicit in the fact that we term the test a "content-based" test rather than a "motivation-based" test. The traditional rule thus provides clear guidance. Governments can ascertain the scope of impermissible regulation. Individuals can ascertain the scope of their constitutional protection. The *Renton* analysis, in contrast, plunges courts into the morass of legislative motive, a notoriously hazardous and indeterminate inquiry, particularly where, as under the *Renton* approach, the posited purpose flies in the face of plain statutory language. See, e. g., *United States v. O'Brien*, 391 U. S. 367, 383-384 (1968). And even where the motivational inquiry can be resolved, the *Renton* approach saddles courts with a fuzzy distinction between the secondary and direct effects of speech, a distinction that is likely to prove just as unworkable as other direct/indirect distinctions in constitutional jurisprudence have proved. Compare, e. g., *Complete Auto Transit, Inc. v. Brady*, 430 U. S. 274 (1977) (criticizing and wisely rejecting the distinction between direct and indirect taxation of interstate commerce); L. Tribe, *American Constitutional Law* § 6-4, p. 408 (2d ed. 1988) (noting that the Court abandoned a similar distinction between direct and indirect regulation of interstate commerce).

This indeterminacy is hardly *Renton's* worst flaw, for the root problem with the *Renton* analysis is that it relies on the dubious proposition that a statute which on its face discriminates based on the content of speech aims not at content but at some secondary effect that does not itself affect the operation of the statute. But the inherently ill-defined nature of the *Renton* analysis certainly exacerbates the risk that many laws designed to suppress disfavored speech will go undetected. Although an inquiry into motive is sometimes a useful supplement, the best protection against governmental attempts to squelch opposition has never lain in our ability to assess the purity of legislative motive but rather in the re-

quirement that the government act through content-neutral means that restrict expression the government favors as well as expression it disfavors. In Justice Jackson's felicitous words of nearly 40 years ago: "Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation." *Railway Express Agency, Inc. v. New York*, 336 U. S. 106, 113 (1949) (concurring opinion). Moreover, even if we could be confident about our ability to determine that a content-based law was intended to aim at the "secondary effects" of certain types of speech, such a law would still offend fundamental free speech interests by denying speakers the equal right to engage in speech and by denying listeners the right to an undistorted debate. These rights are all the more precious when the speech subject to unequal treatment is political speech and the debate being distorted is a political debate. And the dangers, the uncertainties, and the damage to free and equal debate caused by the *Renton* analysis are all the more regrettable given the unlikelihood of any legitimate governmental interest in a content-based restriction on speech (especially political speech) and the ample alternatives governments have for advancing content-neutral goals through content-neutral regulation. At least in *Renton* there was a plausible argument that the secondary effect sought to be regulated—the social decay of neighborhoods—could not be directly regulated in the way that congestion, visual clutter, or violence can be. But absent a demonstrable showing of that type of necessity, it is hard to see how a convincing argument could ever be made that a content-based regulation does not aim at content. Nor can I conceive of any situation where a plausible argument could be made that regulating the content of political speech is necessary to regulate content-neutral secondary effects.

Until today, the *Renton* analysis, however unwise, had at least never been applied to political speech. *Renton* itself seemed to confine its application to "businesses that purvey

sexually explicit materials.” 475 U. S., at 49, and n. 2. Indeed, the same day that we decided *Renton*, three of the Justices who joined it reiterated the traditional test in *Pacific Gas & Electric Co. v. Public Utilities Comm’n*, 475 U. S. 1, 20 (1986) (plurality opinion of Powell, J.) (“For a time, place, or manner regulation to be valid, it must be neutral as to the content of the speech to be regulated”). See also *Widmar v. Vincent*, 454 U. S. 263 (1981) (evaluating a prohibition on the religious use of university buildings under the strict scrutiny applicable to content-based regulations even though the prohibition was aimed at avoiding perceived Establishment Clause problems, a secondary effect of the speech).^{*} True, today’s application of the *Renton* analysis to political speech is dictum: the challenged statute would be treated as content based under either *Renton* or the traditional approach, and the opinion could easily have stated simply that we need not reach the issue whether *Renton* applies to political speech because even under *Renton* the law constitutes a content-based restriction. It is nonetheless ominous dictum, for it could set the Court on a road that will lead to the evisceration of First Amendment freedoms. I can only hope that, when the Court is actually presented with a case involving a content-based regulation of political speech that allegedly aims at so-called secondary effects of that speech, the Court will recognize and avoid the pitfalls of the *Renton* approach.

CHIEF JUSTICE REHNQUIST, with whom JUSTICES WHITE and BLACKMUN join, concurring in part and dissenting in part.

For the reasons stated by Judge Bork in his majority opinion below, I would uphold that portion of § 22-1115 of the District of Columbia Code that prohibits the display of any sign within 500 feet of a foreign embassy if that sign tends to

^{*}And, as suggested above, strong arguments exist for, at a minimum, confining the *Renton* analysis to situations where the secondary effects sought to be regulated are not amenable to direct regulation.

bring that foreign government into "public odium" or "public disrepute." However, I agree with JUSTICE O'CONNOR that § 22-1115's congregation clause is not unconstitutional and that the exemption for labor picketing does not violate the Equal Protection Clause, so I join in Parts III and IV of the majority opinion.

COMMISSIONER OF INTERNAL REVENUE *v.*
BOLLINGER ET AL.

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

No. 86-1672. Argued January 13, 1988—Decided March 22, 1988

Because Kentucky's usury law limited the annual interest rate for non-corporate borrowers, lenders willing to provide money only at higher rates required such borrowers to use a corporate nominee as the nominal debtor and record titleholder of mortgaged property. Accordingly, respondents, who formed a series of partnerships to develop Kentucky apartment complexes, in each instance entered into an agreement with a corporation wholly owned by respondent Bollinger, which provided that the corporation would hold title to the property as the partnership's nominee and agent solely to secure financing, that the partnership would have sole control of and responsibility for the complex, and that the partnership was the principal and owner of the property during financing, construction, and operation. All parties who had contact with the complexes, including lenders, contractors, managers, employees, and tenants, regarded the partnerships as the owners and knew that the corporation was merely the partnerships' agent, if they were aware of the corporation at all. Income and losses from the complexes were reported on the partnerships' tax returns, and respondents reported their distributive share of the income and losses on their individual returns. Although the Commissioner of Internal Revenue disallowed respondents' losses on the ground that they were attributable to the corporation as the owner of the property, the Tax Court held that the corporation was the partnerships' agent and should therefore be disregarded for tax purposes, and the Court of Appeals affirmed.

Held: The partnerships were the owners of the complexes for federal income tax purposes, since in each instance the relationship between them and the corporation was, in both form and substance, an agency with the partnership as principal. It is reasonable for the Commissioner to demand unequivocal evidence of an agency relationship's genuineness in the corporation-shareholder context in order to prevent tax evasion. However, there is no merit to the Commissioner's contention that *National Carbide Corp. v. Commissioner*, 336 U. S. 422, requires such evidence to include arm's-length dealing between principal and agent and the payment of an agency fee. The genuineness of an agency is adequately assured, where, as here, the fact that the corporation is acting as

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its shareholders' agent with respect to a particular asset is set forth in a written agreement at the time the asset is acquired, the corporation functions as agent and not principal with respect to the asset for all purposes, and the corporation is held out as the agent and not the principal in all dealings with third parties relating to the asset. Pp. 344-349.

807 F. 2d 65, affirmed.

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

Alan I. Horowitz argued the cause for petitioner. With him on the briefs were *Solicitor General Fried, Acting Assistant Attorney General Durney, Deputy Solicitor General Lauber, Richard Farber, and Teresa E. McLaughlin.*

Charles R. Hembree argued the cause for respondents. With him on the brief was *Philip E. Wilson.**

JUSTICE SCALIA delivered the opinion of the Court.

Petitioner, the Commissioner of Internal Revenue, challenges a decision by the United States Court of Appeals for the Sixth Circuit holding that a corporation which held record title to real property as agent for the corporation's shareholders was not the owner of the property for purposes of federal income taxation. 807 F. 2d 65 (1986). We granted certiorari, 482 U. S. 913 (1987), to resolve a conflict in the Courts of Appeals over the tax treatment of corporations purporting to be agents for their shareholders. Compare *George v. Commissioner*, 803 F. 2d 144, 148-149 (CA5 1986), cert. pending, No. 86-1152, with *Frink v. Commissioner*, 798 F. 2d 106, 109-110 (CA4 1986), cert. pending, No. 86-1151.

I

Respondent Jesse C. Bollinger, Jr., developed, either individually or in partnership with some or all of the other respondents, eight apartment complexes in Lexington, Ken-

**F. Kelleher Riess* filed a brief for Gary R. Frink et al. as *amici curiae* urging affirmance.

tucky. (For convenience we will refer to all the ventures as "partnerships.") Bollinger initiated development of the first apartment complex, Creekside North Apartments, in 1968. The Massachusetts Mutual Life Insurance Company agreed to provide permanent financing by lending \$1,075,000 to "the corporate nominee of Jesse C. Bollinger, Jr." at an annual interest rate of eight percent, secured by a mortgage on the property and a personal guarantee from Bollinger. The loan commitment was structured in this fashion because Kentucky's usury law at the time limited the annual interest rate for noncorporate borrowers to seven percent. Ky. Rev. Stat. §§ 360.010, 360.025 (1972). Lenders willing to provide money only at higher rates required the nominal debtor and record titleholder of mortgaged property to be a corporate nominee of the true owner and borrower. On October 14, 1968, Bollinger incorporated Creekside, Inc., under the laws of Kentucky; he was the only stockholder. The next day, Bollinger and Creekside, Inc., entered into a written agreement which provided that the corporation would hold title to the apartment complex as Bollinger's agent for the sole purpose of securing financing, and would convey, assign, or encumber the property and disburse the proceeds thereof only as directed by Bollinger; that Creekside, Inc., had no obligation to maintain the property or assume any liability by reason of the execution of promissory notes or otherwise; and that Bollinger would indemnify and hold the corporation harmless from any liability it might sustain as his agent and nominee.

Having secured the commitment for permanent financing, Bollinger, acting through Creekside, Inc., borrowed the construction funds for the apartment complex from Citizens Fidelity Bank and Trust Company. Creekside, Inc., executed all necessary loan documents including the promissory note and mortgage, and transferred all loan proceeds to Bollinger's individual construction account. Bollinger acted as general contractor for the construction, hired the neces-

sary employees, and paid the expenses out of the construction account. When construction was completed, Bollinger obtained, again through Creekside, Inc., permanent financing from Massachusetts Mutual Life in accordance with the earlier loan commitment. These loan proceeds were used to pay off the Citizens Fidelity construction loan. Bollinger hired a resident manager to rent the apartments, execute leases with tenants, collect and deposit the rents, and maintain operating records. The manager deposited all rental receipts into, and paid all operating expenses from, an operating account, which was first opened in the name of Creekside, Inc., but was later changed to "Creekside Apartments, a partnership." The operation of Creekside North Apartments generated losses for the taxable years 1969, 1971, 1972, 1973, and 1974, and ordinary income for the years 1970, 1975, 1976, and 1977. Throughout, the income and losses were reported by Bollinger on his individual income tax returns.

Following a substantially identical pattern, seven other apartment complexes were developed by respondents through seven separate partnerships. For each venture, a partnership executed a nominee agreement with Creekside, Inc., to obtain financing. (For one of the ventures, a different Kentucky corporation, Cloisters, Inc., in which Bollinger had a 50 percent interest, acted as the borrower and titleholder. For convenience, we will refer to both Creekside and Cloisters as "the corporation.") The corporation transferred the construction loan proceeds to the partnership's construction account, and the partnership hired a construction supervisor who oversaw construction. Upon completion of construction, each partnership actively managed its apartment complex, depositing all rental receipts into, and paying all expenses from, a separate partnership account for each apartment complex. The corporation had no assets, liabilities, employees, or bank accounts. In every case, the lenders regarded the partnership as the owner of the apartments

and were aware that the corporation was acting as agent of the partnership in holding record title. The partnerships reported the income and losses generated by the apartment complexes on their partnership tax returns, and respondents reported their distributive share of the partnership income and losses on their individual tax returns.

The Commissioner of Internal Revenue disallowed the losses reported by respondents, on the ground that the standards set out in *National Carbide Corp. v. Commissioner*, 336 U. S. 422 (1949), were not met. The Commissioner contended that *National Carbide* required a corporation to have an arm's-length relationship with its shareholders before it could be recognized as their agent. Although not all respondents were shareholders of the corporation, the Commissioner took the position that the funds the partnerships disbursed to pay expenses should be deemed contributions to the corporation's capital, thereby making all respondents constructive stockholders. Since, in the Commissioner's view, the corporation rather than its shareholders owned the real estate, any losses sustained by the ventures were attributable to the corporation and not respondents. Respondents sought a redetermination in the United States Tax Court. The Tax Court held that the corporation was the agent of the partnerships and should be disregarded for tax purposes. 48 TCM 1443 (1984), ¶84, 560 P-H Memo TC. On appeal, the United States Court of Appeals for the Sixth Circuit affirmed. 807 F. 2d 65 (1986). We granted the Commissioner's petition for certiorari.

II

For federal income tax purposes, gain or loss from the sale or use of property is attributable to the owner of the property. See *Helvering v. Horst*, 311 U. S. 112, 116-117 (1940); *Blair v. Commissioner*, 300 U. S. 5, 12 (1937); see also *Commissioner v. Sunnen*, 333 U. S. 591, 604 (1948). The prob-

lem we face here is that two different taxpayers can plausibly be regarded as the owner. Neither the Internal Revenue Code nor the regulations promulgated by the Secretary of the Treasury provide significant guidance as to which should be selected. It is common ground between the parties, however, that if a corporation holds title to property as agent for a partnership, then for tax purposes the partnership and not the corporation is the owner. Given agreement on that premise, one would suppose that there would be agreement upon the conclusion as well. For each of respondents' apartment complexes, an agency agreement expressly provided that the corporation would "hold such property as nominee and agent for" the partnership, App. to Pet. for Cert. 21a, n. 4, and that the partnership would have sole control of and responsibility for the apartment complex. The partnership in each instance was identified as the principal and owner of the property during financing, construction, and operation. The lenders, contractors, managers, employees, and tenants—all who had contact with the development—knew that the corporation was merely the agent of the partnership, if they knew of the existence of the corporation at all. In each instance the relationship between the corporation and the partnership was, in both form and substance, an agency with the partnership as principal.

The Commissioner contends, however, that the normal indicia of agency cannot suffice for tax purposes when, as here, the alleged principals are the controlling shareholders of the alleged agent corporation. That, it asserts, would undermine the principle of *Moline Properties v. Commissioner*, 319 U. S. 436 (1943), which held that a corporation is a separate taxable entity even if it has only one shareholder who exercises total control over its affairs. Obviously, *Moline's* separate-entity principle would be significantly compromised if shareholders of closely held corporations could, by clothing the corporation with some attributes of agency with respect

to particular assets, leave themselves free at the end of the tax year to make a claim—perhaps even a good-faith claim—of either agent or owner status, depending upon which choice turns out to minimize their tax liability. The Commissioner does not have the resources to audit and litigate the many cases in which agency status could be thought debatable. Hence, the Commissioner argues, in this shareholder context he can reasonably demand that the taxpayer meet a prophylactically clear test of agency.

We agree with that principle, but the question remains whether the test the Commissioner proposes is appropriate. The parties have debated at length the significance of our opinion in *National Carbide Corp. v. Commissioner*, *supra*. In that case, three corporations that were wholly owned subsidiaries of another corporation agreed to operate their production plants as “agents” for the parent, transferring to it all profits except for a nominal sum. The subsidiaries reported as gross income only this sum, but the Commissioner concluded that they should be taxed on the entirety of the profits because they were not really agents. We agreed, reasoning first, that the mere fact of the parent’s control over the subsidiaries did not establish the existence of an agency, since such control is typical of all shareholder-corporation relationships, *id.*, at 429–434; and second, that the agreements to pay the parent all profits above a nominal amount were not determinative since income must be taxed to those who actually earn it without regard to anticipatory assignment, *id.*, at 435–436. We acknowledged, however, that there was such a thing as “a true corporate agent . . . of [an] owner-principal,” *id.*, at 437, and proceeded to set forth four indicia and two requirements of such status, the sum of which has become known in the lore of federal income tax law as the “six *National Carbide* factors”:

“[1] Whether the corporation operates in the name and for the account of the principal, [2] binds the principal by

its actions, [3] transmits money received to the principal, and [4] whether receipt of income is attributable to the services of employees of the principal and to assets belonging to the principal are some of the relevant considerations in determining whether a true agency exists. [5] If the corporation is a true agent, its relations with its principal must not be dependent upon the fact that it is owned by the principal, if such is the case. [6] Its business purpose must be the carrying on of the normal duties of an agent." *Ibid.* (footnotes omitted).

We readily discerned that these factors led to a conclusion of nonagency in *National Carbide* itself. There each subsidiary had represented to its customers that it (not the parent) was the company manufacturing and selling its products; each had sought to shield the parent from service of legal process; and the operations had used thousands of the subsidiaries' employees and nearly \$20 million worth of property and equipment listed as assets on the subsidiaries' books. *Id.*, at 425, 434, 438, and n. 21.

The Commissioner contends that the last two *National Carbide* factors are not satisfied in the present case. To take the last first: The Commissioner argues that here the corporation's business purpose with respect to the property at issue was not "the carrying on of the normal duties of an agent," since it was acting not as the agent but rather as the owner of the property for purposes of Kentucky's usury law. We do not agree. It assuredly was not acting as the owner in fact, since respondents represented themselves as the principals to all parties concerned with the loans. Indeed, it was the lenders themselves who required the use of a corporate nominee. Nor does it make any sense to adopt a contrary-to-fact legal presumption that the corporation was the principal, imposing a federal tax sanction for the apparent evasion of Kentucky's usury law. To begin with, the Commissioner has not established that these transactions

were an evasion. Respondents assert without contradiction that use of agency arrangements in order to permit higher interest was common practice, and it is by no means clear that the practice violated the spirit of the Kentucky law, much less its letter. It might well be thought that the borrower does not generally require usury protection in a transaction sophisticated enough to employ a corporate agent—assuredly not the normal *modus operandi* of the loan shark. That the statute positively envisioned corporate nominees is suggested by a provision which forbids charging the higher corporate interest rates “to a corporation, the principal asset of which shall be the ownership of a one (1) or two (2) family dwelling,” Ky. Rev. Stat. § 360.025(2) (1987)—which would seem to prevent use of the nominee device for ordinary home-mortgage loans. In any event, even if the transaction did run afoul of the usury law, Kentucky, like most States, regards only the lender as the usurer, and the borrower as the victim. See Ky. Rev. Stat. § 360.020 (1987) (lender liable to borrower for civil penalty), § 360.990 (lender guilty of misdemeanor). Since the Kentucky statute imposed no penalties upon the borrower for allowing himself to be victimized, nor treated him as *in pari delicto*, but to the contrary enabled him to pay back the principal without any interest, and to sue for double the amount of interest already paid (plus attorney’s fees), see Ky. Rev. Stat. § 360.020 (1972), the United States would hardly be vindicating Kentucky law by depriving the usury victim of tax advantages he would otherwise enjoy. In sum, we see no basis in either fact or policy for holding that the corporation was the principal because of the nature of its participation in the loans.

Of more general importance is the Commissioner’s contention that the arrangements here violate the fifth *National Carbide* factor—that the corporate agent’s “relations with its principal must not be dependent upon the fact that it is owned by the principal.” The Commissioner asserts that

this cannot be satisfied unless the corporate agent and its shareholder principal have an "arm's-length relationship" that includes the payment of a fee for agency services. The meaning of *National Carbide's* fifth factor is, at the risk of understatement, not entirely clear. Ultimately, the relations between a corporate agent and its owner-principal are *always* dependent upon the fact of ownership, in that the owner can cause the relations to be altered or terminated at any time. Plainly that is not what was meant, since on that interpretation all subsidiary-parent agencies would be invalid for tax purposes, a position which the *National Carbide* opinion specifically disavowed. We think the fifth *National Carbide* factor—so much more abstract than the others—was no more and no less than a generalized statement of the concern, expressed earlier in our own discussion, that the separate-entity doctrine of *Moline* not be subverted.

In any case, we decline to parse the text of *National Carbide* as though that were itself the governing statute. As noted earlier, it is uncontested that the law attributes tax consequences of property held by a genuine agent to the principal; and we agree that it is reasonable for the Commissioner to demand unequivocal evidence of genuineness in the corporation-shareholder context, in order to prevent evasion of *Moline*. We see no basis, however, for holding that unequivocal evidence can only consist of the rigid requirements (arm's-length dealing plus agency fee) that the Commissioner suggests. Neither of those is demanded by the law of agency, which permits agents to be unpaid family members, friends, or associates. See Restatement (Second) of Agency §§ 16, 21, 22 (1958). It seems to us that the genuineness of the agency relationship is adequately assured, and tax-avoiding manipulation adequately avoided, when the fact that the corporation is acting as agent for its shareholders with respect to a particular asset is set forth in a written agreement at the time the asset is acquired, the corporation

functions as agent and not principal with respect to the asset for all purposes, and the corporation is held out as the agent and not principal in all dealings with third parties relating to the asset. Since these requirements were met here, the judgment of the Court of Appeals is

Affirmed.

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

Syllabus

UNITED STATES *v.* WELLS FARGO BANK ET AL.APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA

No. 86-1521. Argued December 8, 1987—Decided March 23, 1988

Under § 5(e) of the Housing Act of 1937, certain state and local public housing agency obligations, commonly termed "Project Notes," are "exempt from all taxation . . . imposed by the United States." It was generally assumed that this exemption applied only to the federal income tax until, in 1984, a Federal District Court ruled that Project Notes were also exempt from federal estate taxes. Shortly thereafter, Congress enacted the Deficit Reduction Act of 1984 (DEFRA), § 641 of which eliminated the purported exemption and foreclosed those who had already paid estate taxes on Project Notes from obtaining a refund thereon. After the Commissioner of Internal Revenue denied appellee executors such refunds, they filed suit in the District Court below, which concluded that their Project Notes were tax exempt when they filed their estate tax returns. The court also held that § 641 of the DEFRA unconstitutionally denied appellees due process and equal protection of the laws under the Fifth Amendment. The United States appealed directly to this Court under 28 U. S. C. § 1252.

Held:

1. Section 5(e) of the Housing Act does not exempt Project Notes from federal estate taxation. The settled presumption against implied tax exemptions applies here, particularly since 26 U. S. C. §§ 2001 and 2002 (1982 ed. and Supp. III), which define the taxable estate for estate tax calculation, by their terms include Project Notes. Moreover, an exemption of property from all taxation, such as that contained in § 5(e), has long been understood to apply only to direct taxes such as the federal income tax, and not to excise taxes such as the estate tax. The various aspects of the legislative history relied on by appellees as indicia of congressional intent are insufficient to demonstrate unambiguously that Project Notes are exempt from estate taxes in contravention of the aforesaid presumption and the understood meaning of § 5(e). Pp. 354-359.

2. Resolution of the estate tax exemption question obviates the need for this Court to consider the constitutionality of § 641 of the DEFRA. P. 359.

86-2 USTC ¶ 13,703, reversed.

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

Deputy Solicitor General Wallace argued the cause for the United States. On the briefs were *Solicitor General Fried*, *Acting Assistant Attorney General Durney*, *Deputy Solicitor General Lauber*, *Alan I. Horowitz*, *Michael L. Paup*, *Ernest J. Brown*, and *David I. Pincus*.

Robert H. Rotstein argued the cause for appellees. With him on the brief for appellees Wells Fargo Bank et al. were *William J. Bird* and *Katherine T. Pratt*. *Mark G. Ancel* and *Erwin N. Griswold* filed a brief for appellees Rosenberg and Rosen.*

JUSTICE BRENNAN delivered the opinion of the Court.

This case, which consists of two actions consolidated below, *Wells Fargo Bank v. United States* and *Rosenberg v. United States*, 86-2 USTC ¶ 13,703 (CD Cal. 1986), presents two issues: first, whether certain state and local public housing agency obligations (Project Notes or Notes) were exempt from federal estate taxation prior to June 19, 1984, and second, if so, whether § 641 of the Deficit Reduction Act of 1984 (DEFRA), 98 Stat. 939, which forecloses any refund for estate taxes paid on such Project Notes, is unconstitutional. Relying on *Haffner v. United States*, 585 F. Supp. 354 (ND Ill. 1984), aff'd, 757 F. 2d 920 (CA7 1985), the District Court for the Central District of California ruled that Project Notes were exempt. It further held § 641 of the DEFRA unconstitutional. The United States appealed that judgment directly to this Court pursuant to 28 U. S. C. § 1252.

*Briefs of *amici curiae* urging affirmance were filed for Herbert K. Cummings et al. by *James J. Carroll*, *Mortimer M. Caplin*, and *Stuart L. Brown*; for Keith D. Graham by *Daniel Joseph* and *Bob C. Griffo*; for the Estate of Dorothy G. Dillon et al. by *Robert I. White*; and for the Estate of Marion du Pont Scott by *James J. Carroll*.

John A. Wallace filed a brief for the American College of Probate Counsel as *amicus curiae*.

We noted probable jurisdiction *sub nom.* *United States v. Crocker National Bank*, 481 U. S. 1047 (1987), and now reverse.

In the late 1930's, the Nation faced a severe housing shortage. To meet that crisis, Congress enacted the Housing Act of 1937, 50 Stat. 888 *et seq.*, which was designed to stimulate local financing of housing projects by empowering state and local housing authorities to issue tax-free obligations, termed "Project Notes." For almost 50 years after the Act's passage, it was generally assumed that this exempted the Notes from federal income tax, but not from federal estate tax. See Committee on Tax Exempt Financing, Section of Taxation, ABA, Report on the Tax Provisions of the United States Housing Act of 1937: Beyond the Looking Glass, 33 Tax Lawyer 71, 105 (1979); Rev. Rul. 81-63, 1981-1 Cum. Bull. 455. However, in 1984, the District Court for the Northern District of Illinois ruled that Project Notes were exempt from estate taxes as well, basing its decision on a variety of statutory construction tools. *Haffner v. United States*, *supra*. The District Court's judgment caused a "rush to market" for Project Notes, and also prompted those who had already paid estate taxes on the Notes to seek refunds. Within months of the District Court's ruling, Congress enacted the DEFRA, § 641 of which, effective June 19, 1984, eliminated the purported estate tax exemption for Project Notes, and also foreclosed those who had already paid estate taxes on Project Notes from obtaining a refund thereon. Against this backdrop, we turn to the facts of the instant appeal.

The *Wells Fargo* appellees are the executors of the estate of Jules C. Stein, who died in April 1981. Included in the estate are Project Notes with an aggregate face value of \$9,550,000. They filed an estate tax return listing these notes as taxable, and paid the tax. In June 1984, following the *Haffner* decision, appellees timely filed an amended estate tax return declaring that the Project Notes were exempt

from taxation and claiming a refund. After the Commissioner of Internal Revenue rejected their claim, they brought suit in the District Court for the Central District of California.

The *Rosenberg* appellees are the coexecutors of the estate of Morris Folb, who died in July 1982. Project Notes with face values totaling \$250,000 are part of the estate. Appellees filed an estate tax return, and, like the *Wells Fargo* appellees, included the Project Notes as taxable assets and paid tax on them. In August 1984, also like the *Wells Fargo* appellees, they filed their amended tax return claiming that the Project Notes were exempt from estate taxation. The Commissioner denied their claim and they too filed suit in the Central District of California, where their case was consolidated with *Wells Fargo*.

On cross-motions for summary judgment the District Court concluded, as mentioned above, that the Project Notes were tax exempt when the returns were filed, relying on the reasoning in *Haffner*. The court also held that § 641 of the DEFRA unconstitutionally denied appellees due process and equal protection of the laws as guaranteed by the Fifth Amendment. Although it is the portion of the judgment declaring an Act of Congress unconstitutional that provides us with appellate jurisdiction, such an appeal brings the entire case before us. *United States v. Locke*, 471 U. S. 84, 92 (1985). Moreover, our established practice is to resolve statutory questions at the outset where to do so might obviate the need to consider a constitutional issue. *Ibid.*; *Ashwander v. TVA*, 297 U. S. 288, 347 (1936) (Brandeis, J., concurring). Therefore, we consider first the question whether the statute exempts Project Notes from estate taxation.

Informing our examination of this issue is the settled principle that exemptions from taxation are not to be implied; they must be unambiguously proved. *E. g.*, *Oklahoma Tax Comm'n v. United States*, 319 U. S. 598, 606 (1943); *United States Trust Co. v. Helvering*, 307 U. S. 57, 60 (1939); *Rapid*

Transit Corp. v. New York, 303 U. S. 573, 592–593 (1938). Appellees do not dispute, however, that 26 U. S. C. §§ 2001 and 2002 (1982 ed. and Supp. III), which define the taxable estate for estate tax calculation, by their terms include the Project Notes. Only by referring outside the Internal Revenue Code, specifically to § 5(e) of the Housing Act of 1937, 50 Stat. 890, as amended, 42 U. S. C. § 1437i(b), do appellees endeavor to establish their exemption.

Of course, we begin our analysis of § 5(e) with the statutory language itself. This section states that “[Project Notes], including interest thereon, . . . shall be exempt from all taxation now or hereafter imposed by the United States.” Well before the Housing Act was passed, an exemption of property from all taxation had an understood meaning: the property was exempt from *direct* taxation, but certain privileges of ownership, such as the right to transfer the property, could be taxed. Underlying this doctrine is the distinction between an excise tax, which is levied upon the use or transfer of property even though it might be measured by the property’s value, and a tax levied upon the property itself. The former has historically been permitted even where the latter has been constitutionally or statutorily forbidden. The estate tax is a form of excise tax. *Greiner v. Lewellyn*, 258 U. S. 384 (1922) (municipal bonds subject to federal estate taxation notwithstanding an intergovernmental tax immunity barring a direct tax on the bond); *Murdock v. Ward*, 178 U. S. 139, 148 (1900) (federal tax exemption on federal bonds did not extend to taxation on the right to transfer the bonds at death); *Plummer v. Coler*, 178 U. S. 115 (1900) (State may calculate estate tax based on total value of property passing through the estate, including federal obligations exempt from direct taxation by the State). See also *United States Trust Co. v. Helvering*, *supra*, at 60 (applying the rule of *Greiner*, *Murdock*, and *Plummer* to hold that property subject to a general exemption from “all taxation” would not exempt it from excise taxes such as the estate tax);

Treas. Reg. § 20.2033-1, 26 CFR § 20.2033-1 (Supp. 1964) (statutes exempting federal obligations from "all taxation" refer only to direct taxation). Cf. *West v. Oklahoma Tax Comm'n*, 334 U. S. 717, 727 (1948) (recognizing the distinction between direct taxes and excise taxes); *Reinecke v. Northern Trust Co.*, 278 U. S. 339, 347 (1929) (same). Consistent with this understanding, on the rare occasions when Congress has exempted property from estate taxation it has generally adverted explicitly to that tax, rather than generically to "all taxation." E. g., Revenue Act of 1934, § 404, 48 Stat. 754, repealed by the Revenue Act of 1962, § 18, 76 Stat. 1052. Placed in context, then, § 5(e) does not stand for appellees' proposition that Project Notes were intended to be exempt from estate taxes; it stands for exactly the opposite.

Appellees attempt to bolster their contrary view with various indicia of an alleged congressional intent. Although these considerations were found compelling in *Haffner*, we conclude, as did the Tax Court in *Estate of Egger v. Commissioner*, 89 T. C. 726 (1987), that the factors appellees rely upon, whether considered alone or in combination, are insufficient to demonstrate that Congress intended to exempt Project Notes from estate taxation in contravention of the understood meaning of § 5(e), a demonstration which must be unambiguous under the principle disfavoring implied tax exemptions.

Appellees' first argument centers on § 20 of the Housing Act of 1937, 50 Stat. 898, later repealed, which gave the newly created United States Housing Authority the power to issue bonds and other obligations. Section 20(b) provided that "[s]uch obligations shall be exempt, both as to principal and interest, from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed" The familiar argument goes that Congress knew how to limit the scope of the exemption when it wanted to do so; its decision not to include limiting language in § 5(e), in light of an

express limitation in § 20(b), demonstrates an intent to exempt Project Notes from estate tax.

This argument does not withstand careful scrutiny. In 1937, when the Housing Act was passed, what is now the income tax comprised two parts: a "normal" tax set at a flat 4 percent, and a graduated "surtax" with rates reaching up to 75 percent. As is plain from the face of § 20(b), Congress intended federal housing obligations to be exempt only from the normal tax. Yet as the normal tax and the surtax were both direct, simply making the federal obligations "exempt from all taxation" would exempt too much. Thus, Congress "excepted" surtaxes from the exemption. But that exception, if left by itself, would have created its own anomaly: the strict application of the rule "*expressio unius est exclusio alterius*"—i. e., the expression of one is the exclusion of others—would have resulted in exempting these obligations from all taxes, direct or indirect, except the surtax. To avoid that particular pitfall, Congress also excepted estate, inheritance, and gift taxes from § 20(b). Such language was commonplace when Congress sought to exempt items from the normal tax, but not the surtax. *E. g.*, Home Owners' Loan Act of 1933, § 4(c), 48 Stat. 130; Farm Credit Act of 1933, § 63, 48 Stat. 267.

In contrast, § 5(e) needed no parenthetical exception. Congress fully intended Project Notes to be exempt from surtaxes as well as normal taxes, and thus exempting them "from all taxation" stated with precision the congressional will. We cannot attribute to Congress an intent to break new ground in tax law by cleverly hiding an estate tax exemption, discernable only by comparing two unrelated provisions of the Housing Act. Nor would it make sense for Congress to legislate in such a bizarre fashion. If Congress really wanted to create an especially broad tax exemption for Project Notes, as appellees assert, one would expect it to do so notoriously enough to attract investors, not surreptitiously enough to evade detection for half a century.

Appellees' second indicator of congressional intent is a statement made by Senator Walsh during the floor debate. In the midst of a lengthy speech, he stated: "Obligations, including interest thereon, issued by public housing agencies, . . . are to be exempt from all taxation now or hereafter imposed by the United States. In other words, the bill gives the public housing agencies the right to issue tax-exempt bonds, which means they are free from income tax, surtax, estate, gift, and inheritance taxes." 81 Cong. Rec. 8085 (1937). If, as appears from the statement's structure, the Senator intended to offer a definition of "tax-exempt bonds," then we must conclude that he misspoke, for as we have already demonstrated, tax-exempt bonds were presumed to be exempt only from direct taxes. Even if, as appellees assert, the Senator intended to refer solely to Project Notes, we do not deem his statement compelling in this case. The relevant passage comes in the middle of a long speech, and no similar expression is to be found in any other legislative debate or document. This short, isolated comment simply cannot overcome the understood meaning of §5(e) and the presumption against implied tax exemptions.

Appellees also assert that Congress' intent can be discerned by reference to a rejected administration housing proposal, which contained in its analogue to §5(e) an express statement that Project Notes would be subject to estate taxes. We are unpersuaded by appellees' contention that the Finance Committee's decision not to include a similar express reference to the estate tax indicates a desire to exempt Project Notes from that tax. Equally plausible is that the Committee omitted the express exception as unnecessary. Further, neither the administration, the Finance Committee, nor even a single Senator considered this difference worthy of comment, although numerous other variations between the two proposals received attention.

Finally, appellees point to a statement Warren J. Vinton, who later became the first Chief Economist of the United

States Housing Authority, made to the American Federation of Housing Authorities shortly after the Housing Act was passed. He stated that Project Notes were "exempt from all Federal taxes, not only normal income taxes but surtax, inheritance tax, and gift tax. Investments of that nature are getting rare in the country." Brief for Appellees Wells Fargo Bank et al. 15 (emphasis added in brief omitted). However, at the time he uttered these words, Vinton was not yet employed by the Housing Authority. We cannot attribute to this isolated comment the aura of a contemporaneous agency interpretation.

The understood meaning of §5(e) and the presumption against implied tax exemptions are too powerful to be overcome by the indicia of congressional intent put forward by appellees. Accordingly, we conclude that the Housing Act of 1937 does not exempt Project Notes from estate taxation. We therefore need not consider the constitutionality of §641 of the DEFRA. The judgment of the District Court is

Reversed.

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

LYNG, SECRETARY OF AGRICULTURE *v.* INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE, & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, ET AL.

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

No. 86-1471. Argued December 7, 1987—Decided March 23, 1988

Under § 109 of the Omnibus Budget Reconciliation Act of 1981 (OBRA), no household may become eligible to participate in the food stamp program while any of its members is on strike, or receive an increase in the allotment of food stamps it is already receiving because the income of the striking member has decreased. Appellee unions and union members brought suit in Federal District Court, contending that § 109 is unconstitutional. The court granted appellees summary judgment and issued a declaratory judgment, holding the statute unconstitutional on the grounds that it interferes with appellees' associational rights and strikers' expressive rights under the First Amendment, and violates the equal protection component of the Due Process Clause of the Fifth Amendment. The Secretary of Agriculture appealed the decision directly to this Court under 28 U. S. C. § 1252.

Held:

1. Section 109 does not violate the First Amendment. Pp. 364-369.

(a) The statute does not infringe the individual appellees' right to associate with their families or the associational rights of the individual appellees and their unions. It does not prohibit individuals from dining together or associating together to conduct a strike, nor in any other way "directly and substantially" interfere with family living arrangements or workers' ability to combine together to assert their lawful rights. Even if isolated instances can be found in which a striking individual may have left the other members of his household in order to increase their allotment of food stamps or left his union for that purpose, in the overwhelming majority of cases it is "exceedingly unlikely" that § 109 will have any effect at all. Cf. *Lyng v. Castillo*, 477 U. S. 635. The Constitution does not require the Government to furnish funds to maximize the exercise of the right of association or to minimize any resulting economic hardship. Pp. 364-368.

(b) The statute does not abridge appellees' right to express themselves about union matters free of coercion by the Government. Rather

than exacting payments from individuals, coercing particular beliefs, or requiring appellees to participate in political activities or support political views with which they disagree, § 109 merely declines to extend additional food stamp assistance to strikers simply because the strike has caused a decline in their income. *Aboud v. Detroit Bd. of Education*, 431 U. S. 209, distinguished. The Constitution does not confer an entitlement to such governmental funds as may be necessary for individuals to realize all the advantages of their right to free expression. P. 369.

2. Section 109 does not violate the equal protection component of the Due Process Clause of the Fifth Amendment, since it is rationally related to the legitimate governmental objective of avoiding undue favoritism in private labor disputes. Although the statute does work at least some discrimination against strikers and their households, this Court must defer to Congress' view that the disbursement of food stamps to such persons damages the program's public integrity and thus endangers its legitimate goals. The fact that § 109 is harder on strikers than on "voluntary quitters" does not render it irrational, since the neutrality concern does not arise with respect to the latter persons. Congress' considered efforts to avoid favoritism are evidenced by § 109's provisos preserving prestrike eligibility and eligibility when a household member has refused to accept employment because of a strike or lockout. OBRA was also enacted for the legitimate purpose of protecting the Government's fiscal integrity by cutting expenditures, and, although this objective cannot be pursued by discriminating against individuals or groups, the Constitution does not permit this Court to disturb the judgment of Congress, the body having discretion as to how best to spend money to improve the general welfare, that passing § 109 along with its provisos was preferable to undertaking other budget cuts in the food stamp program. The contention that § 109 irrationally "strikes at the striker through his family" is without merit, since the food stamp program generally operates against the household of an ineligible person, and the fact that the Act determines benefits on a "household" rather than an individual basis is not constitutionally significant. Pp. 370-374.

648 F. Supp. 1234, reversed.

WHITE, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, O'CONNOR, and SCALIA, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BRENNAN and BLACKMUN, JJ., joined, *post*, p. 374. KENNEDY, J., took no part in the consideration or decision of the case.

Lawrence S. Robbins argued the cause for appellant. With him on the brief were *Solicitor General Fried*, *Assistant Attorney General Willard*, *Deputy Solicitor General Lauber*, *William Kanter*, *John S. Koppel*, and *Mark L. Gross*.

Richard W. McHugh argued the cause for appellees. With him on the brief were *Jordan Rossen*, *Michael Holland*, *Judith A. Scott*, and *Wendy L. Kahn*.*

JUSTICE WHITE delivered the opinion of the Court.

A 1981 amendment to the Food Stamp Act states that no household shall become eligible to participate in the food stamp program during the time that any member of the household is on strike or shall increase the allotment of food stamps that it was receiving already because the income of the striking member has decreased. We must decide whether this provision is valid under the First and the Fifth Amendments.

I

In the Omnibus Budget Reconciliation Act of 1981 (OBRA), Pub. L. 97-35, 95 Stat. 357, Congress enacted a package of budget cuts throughout the Federal Government. Among the measures contained in OBRA were more than a dozen specific changes in the food stamp program, *id.*, §§ 101-117.¹ One of them was the amendment at issue in

**John A. Powell*, *Helen Hershkoff*, *Steven R. Shapiro*, and *C. Edwin Baker* filed a brief for the American Civil Liberties Union Foundation as *amicus curiae* urging affirmance.

¹Included were such fundamental changes as redefining the requirements to constitute a family unit, reducing the gross income eligibility standard (except for the elderly and the disabled), and adjusting the levels of deductions that are allowed to recipients. §§ 101, 104(a), 105, 106, 115. The Committee Reports estimated that these changes in the food stamp program would save several billion dollars in fiscal years 1982, 1983, and 1984. H. R. Rep. No. 97-158, pp. 11-13 (1981) (hereafter H. R. Rep.); S. Rep. No. 97-139, pp. 52-70 (1981) (hereafter S. Rep.).

this case, § 109 of OBRA, which is set out in the margin.² The Committee Reports estimated that this measure alone would save a total of about \$165 million in fiscal years 1982, 1983, and 1984. H. R. Rep., at 12; S. Rep., at 63.

In 1984, two labor unions and several individual union members brought suit against the Secretary of Agriculture in District Court, contending that § 109 is unconstitutional and requesting declaratory and injunctive relief. Plaintiffs moved for a preliminary injunction, and the Secretary moved to dismiss the complaint on the grounds that Congress' action was well within its constitutional prerogatives. After a hearing, the District Court denied both motions. 648 F. Supp. 1234, 1241 (DC 1986) (Appendix).

Both sides conducted discovery and filed cross-motions for summary judgment. On November 14, 1986, the District Court granted plaintiffs' motion for summary judgment and issued a declaratory judgment, holding the statute unconstitutional. 648 F. Supp. 1234. Specifically, the District Court found that the amendment to the Food Stamp Act was unconstitutional on three different grounds. First, it interferes or threatens to interfere with the First Amendment rights of the individual plaintiffs to associate with their families, with their unions, and with fellow union members, as

² "Notwithstanding any other provision of law, a household shall not participate in the food stamp program at any time that any member of the household, not exempt from the work registration requirements . . . is on strike as defined in section 142(2) of title 29, because of a labor dispute (other than a lockout) as defined in section 152(9) of title 29: *Provided*, That a household shall not lose its eligibility to participate in the food stamp program as a result of one of its members going on strike if the household was eligible for food stamps immediately prior to such strike, however, such household shall not receive an increased allotment as the result of a decrease in the income of the striking member or members of the household: *Provided further*, That such ineligibility shall not apply to any household that does not contain a member on strike, if any of its members refuses to accept employment at a plant or site because of a strike or lockout." OBRA, § 109, 95 Stat. 361, 7 U. S. C. § 2015(d)(3).

well as the reciprocal rights under the First Amendment of the union plaintiffs to their members' association with them. Second, it interferes with strikers' First Amendment right to express themselves about union matters free of coercion by the Government. Third, it violates the equal protection component of the Due Process Clause of the Fifth Amendment. As the basis for its conclusion on the equal protection claim, the District Court mentioned several somewhat related deficiencies in the amendment: it betrays an animus against an unpopular political minority, it irrationally treats strikers worse than individuals who quit a job, and it impermissibly directs the onus of the striker's actions against the rest of his family. *Id.*, at 1239-1241. The Secretary appealed the decision directly to this Court under 28 U. S. C. § 1252, and we noted probable jurisdiction. 481 U. S. 1036 (1987). We now reverse.

II

We deal first with the District Court's holding that § 109 violates the associational and expressive rights of appellees under the First Amendment. These claimed constitutional infringements are also pressed as a basis for finding that appellees' rights of "fundamental importance" have been burdened, thus requiring this Court to examine appellees' equal protection claims under a heightened standard of review. *Zablocki v. Redhail*, 434 U. S. 374, 383 (1978). Since we conclude that the statute does not infringe either the associational or expressive rights of appellees, we must reject both parts of this analysis.

A

The challenge to the statute based on the associational rights asserted by appellees is foreclosed by the reasoning this Court adopted in *Lyng v. Castillo*, 477 U. S. 635 (1986). There we considered a constitutional challenge to the definition of "household" in the Food Stamp Act, 7 U. S. C. § 2012(i), which treats parents, siblings, and children who live together, but not more distant relatives or unrelated per-

sons who do so, as a single household for purposes of defining eligibility for food stamps. Although the challenge in that case was brought solely on equal protection grounds, and not under the First Amendment, the Court was obliged to decide whether the statutory classification should be reviewed under a stricter standard than mere rational-basis review because it "'directly and substantially' interfere[s] with family living arrangements and thereby burden[s] a fundamental right." 477 U. S., at 638. The Court held that it did not, explaining that the definition of "household" does not "order or prevent any group of persons from dining together. Indeed, in the overwhelming majority of cases it probably has no effect at all. It is exceedingly unlikely that close relatives would choose to live apart simply to increase their allotment of food stamps, for the costs of separate housing would almost certainly exceed the incremental value of the additional stamps." *Ibid.*; see also *id.*, at 643 (BRENNAN, J., dissenting) (stating that rational-basis review is applicable); *ibid.* (WHITE, J., dissenting) (same).

The same rationale applies in this case. As was true of the provision at issue in *Castillo*, it is "exceedingly unlikely" that § 109 will "prevent any group of persons from dining together." *Id.*, at 638. Even if isolated instances can be found in which a striking individual may have left the other members of the household in order to increase their allotment of food stamps,³ "in the overwhelming majority of cases [the statute] probably has no effect at all." *Ibid.* The statute certainly does not "order" any individuals not to dine to-

³The District Court did not find that any individuals had left their households in order to increase their allotment of food stamps. It found instead only that some individuals "have been told by state agencies or have learned that they can avoid household disqualification by having the striker leave the household." 648 F. Supp. 1234, 1237 (DC 1986). Appellees note that one striker's spouse and children left the household after he was denied food stamps, and that the couple was subsequently divorced. Affidavit of Mark Dyer, ¶¶ 4-8, App. 25-26; Deposition of Mark Dyer, *id.*, at 82-83.

gether; nor does it in any other way “directly and substantially” interfere with family living arrangements.” *Ibid.*

The statute also does not infringe the associational rights of appellee individuals and their unions. We have recognized that “one of the foundations of our society is the right of individuals to combine with other persons in pursuit of a common goal by lawful means,” *NAACP v. Claiborne Hardware Co.*, 458 U. S. 886, 933 (1982), and our recognition of this right encompasses the combination of individual workers together in order better to assert their lawful rights. See, e. g., *Railroad Trainmen v. Virginia*, 377 U. S. 1, 5–6 (1964). But in this case, the statute at issue does not “directly and substantially” interfere with appellees’ ability to associate for this purpose. *Lyng, supra*, at 638.⁴ It does not “order” appellees not to associate together for the purpose of conducting a strike, or for any other purpose, and it does not “prevent” them from associating together or burden their ability to do so in any significant manner. As we have just stated with respect to the effect of this statute on an individual’s decision to remain in or to leave his or her household, it seems “exceedingly unlikely” that this statute will prevent individuals from continuing to associate together in unions to promote their lawful objectives. 477 U. S., at 638.

Prior cases indicate that § 109 has no unconstitutional impact on the right of individuals to associate for various purposes. *Lincoln Union v. Northwestern Iron & Metal Co.*, 335 U. S. 525, 530–531 (1949), for example, held that where a State forbids employers to restrict employment to members of a union, enforcement of that state policy does not abridge

⁴The District Court found that one individual quit his job and abandoned his union membership in order to receive food stamps, and another individual left a picket line to seek other work and lost his union membership. 648 F. Supp., at 1237. Some other strikers have voted to ratify or accept collective-bargaining agreements that were less favorable than they wished, motivated by lack of wages as a result of being out of work and, to a lesser degree, lack of food stamps. *Ibid.*

the associational rights of unions or their members, despite their claim that a closed shop "is 'indispensable to the right of self-organization and the association of workers into unions.'" Similarly, in *Board of Directors of Rotary Int'l v. Rotary Club*, 481 U. S. 537, 548 (1987), we held that requiring Rotary Clubs to admit women "does not require the clubs to abandon or alter" any of their activities or their basic goals and therefore did not abridge the members' associational rights. Both of those cases upheld state laws that exerted a much more direct and substantial threat to associational freedoms than the statute at issue here.⁵

⁵ It is clear from previous decisions that associational rights "are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference," *Bates v. Little Rock*, 361 U. S. 516, 523 (1960), and that these rights can be abridged even by government actions that do not directly restrict individuals' ability to associate freely. See, e. g., *Healy v. James*, 408 U. S. 169, 183 (1972). But none of these cases indicates that the statute challenged here "will affect in any significant way the existing members' ability to carry out their various purposes." *Board of Directors of Rotary Int'l v. Rotary Club*, 481 U. S., at 548. The Court has found, for example, that compulsory disclosure of the membership lists of an organization, which led to harassment, physical threats, and economic reprisals against those individuals, worked "a substantial restraint upon the exercise by petitioner's members of their right to freedom of association." *NAACP v. Alabama ex rel. Patterson*, 357 U. S. 449, 462 (1958). We also have held that the First Amendment "restricts the ability of the State to impose liability on an individual solely because of his association with another" when the individual lacks the specific intent to further any illegal aims that may be promoted by other members of a group. *NAACP v. Claiborne Hardware Co.*, 458 U. S. 886, 919-920 (1982). The facts of this case, however, do not demonstrate any "significant" interference with appellees' associational rights of the magnitude found in decisions like *Patterson* and *Claiborne Hardware*. Exposing the members of an association to physical and economic reprisals or to civil liability merely because of their membership in that group poses a much greater danger to the exercise of associational freedoms than does the withdrawal of a government benefit based not on membership in an organization but merely for the duration of one activity that may be undertaken by that organization.

Any impact on associational rights in this case results from the Government's refusal to extend food stamp benefits to those on strike, who are now without their wage income. Denying such benefits makes it harder for strikers to maintain themselves and their families during the strike and exerts pressure on them to abandon their union. Strikers and their union would be much better off if food stamps were available, but the strikers' right of association does not require the Government to furnish funds to maximize the exercise of that right. "We have held in several contexts [including the First Amendment] that a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right." *Regan v. Taxation with Representation of Washington*, 461 U. S. 540, 549 (1983). Exercising the right to strike inevitably risks economic hardship, but we are not inclined to hold that the right of association requires the Government to minimize that result by qualifying the striker for food stamps.

In *Ohio Bureau of Employment Services v. Hodory*, 431 U. S. 471 (1977), we upheld a statute that denied unemployment compensation benefits to workers who are thrown out of work as a result of a labor dispute other than a lockout, saying that the case "does not involve any discernible fundamental interest." *Id.*, at 489.⁶ Although the complaining worker there was a nonstriking employee of a parent company that found it necessary to close because its subsidiary was on strike, it is clear enough that the same result would have obtained had the striking employees themselves applied for compensation.

⁶The decision in *Hodory* was based on the Equal Protection Clause of the Fourteenth Amendment and not on the First Amendment, but our application of rational-basis review to the constitutional claim raised in that case indicated that fundamental rights guaranteed by the First Amendment were not implicated there.

B

For the same reasons, we cannot agree that § 109 abridges appellees' right to express themselves about union matters free of coercion by the Government. Appellees rely on *Abood v. Detroit Board of Education*, 431 U. S. 209 (1977). But we do not read either *Abood* or the First Amendment as providing support for this claim. In *Abood*, the challenged state law required certain employees to pay a fee to their representative union. We ruled that this law violated the First Amendment insofar as it allowed those funds to be used to promote political and ideological purposes with which the employees disagreed and to which they objected, because by its terms the employees were "compelled to make . . . contributions for political purposes." *Id.*, at 234. We based this conclusion on our observation that "at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State." *Id.*, at 234-235. By contrast, the statute challenged in this case requires no exaction from any individual; it does not "coerce" belief; and it does not require appellees to participate in political activities or support political views with which they disagree. It merely declines to extend additional food stamp assistance to striking individuals simply because the decision to strike inevitably leads to a decline in their income. And this Court has explicitly stated that even where the Constitution prohibits coercive governmental interference with specific individual rights, it "does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom." *Regan, supra*, at 550, quoting *Harris v. McRae*, 448 U. S. 297, 318 (1980).⁷

⁷ Appellees rely heavily on *Sherbert v. Verner*, 374 U. S. 398 (1963), in which we held that a State violated the Free Exercise Clause of the First Amendment when it denied unemployment benefits to a woman whose religious beliefs did not allow her to work on Saturday. That decision, how-

III

Because the statute challenged here has no substantial impact on any fundamental interest and does not "affect with particularity any protected class," *Hodory, supra*, at 489,⁸ we confine our consideration to whether the statutory classification "is rationally related to a legitimate governmental interest." *Department of Agriculture v. Moreno*, 413 U. S. 528, 533 (1973). We have stressed that this standard of review is typically quite deferential; legislative classifications are "presumed to be valid," *Massachusetts Board of Retirement v. Murgia*, 427 U. S. 307, 314 (1976), largely for the reason that "the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one." *Ibid.*; see *Dandridge v. Williams*, 397 U. S. 471, 485 (1970).

Appellant submits that this statute serves three objectives. Most obvious, given its source in OBRA, is to cut federal expenditures. Second, the limited funds available

ever, "was decided in the significantly different context of a constitutionally imposed 'governmental obligation of neutrality' originating in the Establishment and Freedom of Religion Clauses of the First Amendment." *Maher v. Roe*, 432 U. S. 464, 475, n. 8 (1977). The reasoning of *Sherbert* has not been applied in other contexts, and is inapposite here as shown by our decision in *Hodory*, which found no fundamental rights to be infringed by a State's denial of unemployment benefits to a man who was unable to work as a result of a labor dispute.

⁸ We reject the proposition that strikers as a class are entitled to special treatment under the Equal Protection Clause. *City of Charlotte v. Firefighters*, 426 U. S. 283, 286 (1976); *Hodory*, 431 U. S., at 489. *Department of Agriculture v. Moreno*, 413 U. S. 528 (1973), does not counsel otherwise. There we upheld an equal protection challenge to a provision of the Food Stamp Act and concluded that "a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." *Id.*, at 534 (emphasis in original). This statement is merely an application of the usual rational-basis test: if a statute is not rationally related to any legitimate governmental objective, it cannot be saved from constitutional challenge by a defense that relates it to an *illegitimate* governmental interest. Accordingly, in *Moreno* itself we examined the challenged provision under the rational-basis standard of review. *Id.*, at 533.

were to be used when the need was likely to be greatest, an approach which Congress thought did not justify food stamps for strikers. Third was the concern that the food stamp program was being used to provide one-sided support for labor strikes; the Senate Report indicated that the amendment was intended to remove the basis for that perception and criticism. S. Rep., at 62.

We have little trouble in concluding that § 109 is rationally related to the legitimate governmental objective of avoiding undue favoritism to one side or the other in private labor disputes. The Senate Report declared: "Public policy demands an end to the food stamp subsidization of all strikers who become eligible for the program solely through the temporary loss of income during a strike. Union strike funds should be responsible for providing support and benefits to strikers during labor-management disputes." *Ibid.* It was no part of the purposes of the Food Stamp Act to establish a program that would serve as a weapon in labor disputes; the Act was passed to alleviate hunger and malnutrition and to strengthen the agricultural economy. 7 U. S. C. § 2011. The Senate Report stated that "allowing strikers to be eligible for food stamps has damaged the program's public integrity" and thus endangers these other goals served by the program. S. Rep., at 62. Congress acted in response to these problems.

It would be difficult to deny that this statute works at least some discrimination against strikers and their households. For the duration of the strike, those households cannot increase their allotment of food stamps even though the loss of income occasioned by the strike may well be enough to qualify them for food stamps or to increase their allotment if the fact of the strike itself were ignored. Yet Congress was in a difficult position when it sought to address the problems it had identified. Because a striking individual faces an immediate and often total drop in income during a strike, a single controversy pitting an employer against its employees can

lead to a large number of claims for food stamps for as long as the controversy endures. It is the disbursement of food stamps in response to such a controversy that constitutes the source of the concern, and of the dangers to the program, that Congress believed it was important to remedy. We are not free in this instance to reject Congress' views about "what constitutes wise economic or social policy." *Dan-dridge, supra*, at 486.

It is true that in terms of the scope and extent of their ineligibility for food stamps, § 109 is harder on strikers than on "voluntary quitters."⁹ See 648 F. Supp., at 1253-1254 (Appendix A); compare 7 CFR § 273.1(g) (1987) with *id.*, § 273.7(n). But the concern about neutrality in labor disputes does not arise with respect to those who, for one reason or another, simply quit their jobs. As we have stated in a related context, even if the statute "provides only 'rough justice,' its treatment . . . is far from irrational." *Hodory*, 431 U. S., at 491. Congress need not draw a statutory classification to the satisfaction of the most sharp-eyed observers in order to meet the limitations that the Constitution imposes in this setting. And we are not authorized to ignore Congress' considered efforts to avoid favoritism in labor disputes, which are evidenced also by the two significant provisos contained in the statute. The first proviso preserves eligibility for the program of any household that was eligible to receive stamps "immediately prior to such strike." 7 U. S. C. § 2015(d)(3). The second proviso makes clear that the statutory ineligibility for food stamps does not apply "to any household that does not contain a member on strike, if any of its members refuses to accept employment at a plant or site because of a strike or lockout." *Ibid.* In light of all this, the statute is

⁹ For example, one who voluntarily quits a job is disqualified for food stamps for 90 days. Thereafter, he is eligible as long as he registers for work and cannot find a job. 7 CFR § 273.7(n)(1)(v) (1987). The striker, unless he quits his job, is disqualified for as long as he is on strike. § 273.1(g).

rationally related to the stated objective of maintaining neutrality in private labor disputes.

In view of the foregoing, we need not determine whether either of the other two proffered justifications for § 109 would alone suffice. But it is relevant to note that protecting the fiscal integrity of Government programs, and of the Government as a whole, "is a legitimate concern of the State." *Hodory, supra*, at 493. This does not mean that Congress can pursue the objective of saving money by discriminating against individuals or groups. But our review of distinctions that Congress draws in order to make allocations from a finite pool of resources must be deferential, for the discretion about how best to spend money to improve the general welfare is lodged in Congress rather than the courts. *Bowen v. Owens*, 476 U. S. 340, 345 (1986). "Fiscal considerations may compel certain difficult choices in order to improve the protection afforded to the entire benefited class." *Harris v. McRae*, 448 U. S., at 355 (STEVENS, J., dissenting). In OBRA Congress had already found it necessary to restrict eligibility in the food stamp program and to reduce the amount of deductions that were allowed to recipients. Rather than undertaking further budget cuts in these or other areas, and in order to avoid favoritism in labor disputes, Congress judged that it would do better to pass this statute along with its provisos. The Constitution does not permit us to disturb that judgment in this case.

Appellees contend and the District Court held that the legislative classification is irrational because of the "critical" fact that it "impermissibly strikes at the striker through his family." 648 F. Supp., at 1240. This, however, is nothing more than a description of how the food stamp program operates as a general matter, a fact that was acknowledged by the District Court. *Ibid.* Whenever an individual takes any action that hampers his or her ability to meet the program's eligibility requirements, such as quitting a job or failing to comply with the work-registration requirements, the entire house-

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hold suffers accordingly. We have never questioned the constitutionality of the entire Act on this basis, and we just recently upheld the validity of the Act's definition of "household" even though that definition embodies the basic fact that the Act determines benefits "on a 'household' rather than an individual basis." *Lyng*, 477 U. S., at 636. That aspect of the program does not violate the Constitution any more so today.

The decision of the District Court is therefore

Reversed.

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

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

The Court today declares that it has "little trouble" in concluding that Congress' denial of food stamps to the households of striking workers is rationally related to a legitimate governmental objective. *Ante*, at 371. The ease with which the Court reaches this conclusion is reflected in the brevity of its Fifth Amendment analysis: the Court gives short shrift to appellees' equal protection challenge to the striker amendment even though this argument was the centerpiece of appellees' case in their briefs and at oral argument. I believe that the Court's dismissive approach has caused it to fail to register the full force of appellees' claim. After canvassing the many absurdities that afflict the striker amendment, I conclude that it fails to pass constitutional muster under even the most deferential scrutiny. I therefore would affirm the judgment below.

I

The thrust of appellees' equal protection challenge is that the striker amendment to the Food Stamp Act—§ 109 of the Omnibus Budget Reconciliation Act of 1981, codified at 7 U. S. C. § 2015(d)(3)—singles them out for special punitive

treatment without reasonable justification. As the Court observes, this Fifth Amendment challenge to an allegedly arbitrary legislative classification implicates our least intrusive standard of review—the so-called “rational basis” test, which requires that legislative classifications be “‘rationally related to a legitimate governmental interest.’”¹ *Ante*, at 370, quoting *Department of Agriculture v. Moreno*, 413 U. S. 528, 533 (1973). The Court fails to note, however, that this standard of review, although deferential, “‘is not a toothless one.’” *Mathews v. De Castro*, 429 U. S. 181, 185 (1976), quoting *Mathews v. Lucas*, 427 U. S. 495, 510 (1976). The rational-basis test contains two substantive limitations on legislative choice: legislative enactments must implicate legitimate goals, and the means chosen by the legislature must bear a rational relationship to those goals. In an alternative formulation, the Court has explained that these limitations amount to a prescription that “all persons similarly situated should be treated alike.” *Cleburne v. Cleburne Living Center, Inc.*, 473 U. S. 432, 439 (1985); see *Plyler v. Doe*, 457 U. S. 202, 216 (1982); *Reed v. Reed*, 404 U. S. 71, 76 (1971).

In recent years, the Court has struck down a variety of legislative enactments using the rational-basis test. In some cases, the Court found that the legislature’s goal was not legitimate. See, e. g., *Hooper v. Bernalillo County Assessor*, 472 U. S. 612 (1985); *Zobel v. Williams*, 457 U. S. 55 (1982). In other cases, the Court found that the classification employed by the legislature did not rationally further the legislature’s goal. See, e. g., *Lindsey v. Normet*, 405 U. S. 56 (1972); *Reed v. Reed*, *supra*, at 76–77. In addition, the Court on occasion has combined these two approaches, in essence concluding that the lack of a rational relationship be-

¹Because I conclude that the striker amendment fails the deferential rational-basis test, I see no need to address whether stricter scrutiny should apply to protect the First Amendment interests asserted by appellees, although I am unconvinced by the Court’s treatment of that issue as well.

tween the legislative classification and the purported legislative goal suggests that the true goal is illegitimate. See, e. g., *Cleburne v. Cleburne Living Center, Inc.*, *supra*, at 450; *Department of Agriculture v. Moreno*, *supra*, at 534. The Court's failure today to take seriously appellees' challenge or to address systematically the irrationalities they identify in the striker amendment is difficult to reconcile with these precedents.

The Secretary asserts that the striker amendment is rationally related to three legitimate governmental goals. First, the Secretary points out that denying food stamps to households containing a striker will reduce federal expenditures. Second, the Secretary contends that the striker amendment channels limited public funds to the most needy. Finally, the Secretary maintains that the striker amendment fosters governmental neutrality in private labor disputes. Although the asserted goals are legitimate, it is difficult to discern a rational relationship between them and the striker amendment. The arguments of the Secretary and the Court seeking to establish such a relationship are fraught with pervasive inconsistencies.

A

The Secretary's argument that the striker amendment will save money proves far too much. According to the Secretary's reasoning, the exclusion of any unpopular group from a public benefit program would survive rational-basis scrutiny, because exclusion always would result in a decrease in governmental expenditures. Although it is true, as the Court observes, that preserving the fiscal integrity of the Government "is a legitimate concern of the State," *ante*, at 373, quoting *Ohio Bureau of Employment Services v. Hodory*, 431 U. S. 471, 493 (1977), this Court expressly has noted that "a concern for the preservation of resources standing alone can hardly justify the classification used in allocating those resources." *Plyler v. Doe*, *supra*, at 227. We have insisted that such classifications *themselves* be rational rather than

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arbitrary. See *Reed v. Reed*, *supra*, at 76; *Shapiro v. Thompson*, 394 U. S. 618, 633 (1968). Our cases thus make clear that something more than an invocation of the public fisc is necessary to demonstrate the rationality of selecting strikers, rather than some other group, to suffer the burden of cost-cutting legislation.²

B

Perhaps recognizing this necessity, the Secretary defends the singling out of strikers and their households as rationally related to the goal of channeling resources to those persons most “genuinely in need.” Brief for Appellant 17, quoting 119 Cong. Rec. 24929 (1973) (remarks of Rep. Young). As a threshold matter, however, households denied food stamps because of the presence of a striker are as “needy” in terms of financial resources as households that qualify for food stamps: the former are denied food stamps *despite* the fact that they meet the financial eligibility requirements of 7 U. S. C. § 2014 (1982 ed. and Supp. IV), even after strike-fund payments are counted as household income. This point has particular poignancy for the infants and children of a striking worker. Their need for nourishment is in no logical way diminished by the striker’s action. The denial to these chil-

²In addition, there is substantial reason to question the invocation of the public fisc in this case. Statistics available to Congress at the time of the enactment of the striker amendment indicated that strikers rarely met the financial eligibility requirements of the food stamp program and thus rarely participated in the program. A Government Accounting Office study found that in four out of five periods studied, 89 to 96 percent of strikers did not participate in the food stamp program. In the fifth period, which included the 1978 coal strike, 64 percent of strikers did not participate. 127 Cong. Rec. 12157 (1981) (remarks of Sen. Levin). The strikers who do participate in the food stamp program apparently account for only a very small percentage of total program outlays. Statistical information collected by the House Committee on Agriculture in 1975 indicated that households containing strikers accounted for only 0.2 to 0.3 percent of non-public-assistance households participating in the food stamp program. H. R. Rep. No. 95-464, p. 128 (1977).

dren of what is often the only buffer between them and malnourishment and disease cannot be justified as a targeting of the most needy: they *are* the most needy. The record below bears witness to this point in a heartbreaking fashion.³

The Secretary argues, however, that the striker amendment is related to need at least in the sense of willingness to work, if not in the strict sense of financial eligibility. Because the Food Stamp Act generally excludes persons unwilling to work—and their households—the Secretary argues that it is consistent to exclude strikers and their households as well, on the ground that strikers remain “unwilling to work,” at least at the struck business, for the duration of the strike. In the Secretary’s eyes, a striker is akin to an unemployed worker who day after day refuses to accept available work. One flaw in this argument is its false factual premise. It is simply not true, as the Secretary argues, that a striker always has a job that “remains available to him.” Reply Memorandum for Appellant 4. Many strikes result in the complete cessation of a business’ operations, so that the decision of an individual striker to return to work would be unavailing. Moreover, many of the businesses that continue to operate during a strike hire permanent replacements for the striking workers. In this situation as well, a striker no longer has the option of returning to work. In fact, the record in this case reveals that a number of appellees were

³ See Declaration of Donald A. Bivens, App. 8 (“My two younger children were sick a great deal during the period of the strike and I believe it was, in part, due to a lack of nourishment”); Declaration of Johnie B. Blake, *id.*, at 11 (finding it “nearly impossible to get adequate food for [household of] seven people” during strike); Affidavit of Barm Combs, *id.*, at 20 (“My daughter Jennifer Ann, who has serious kidney problems, was missing needed medical treatment and medication”); Declaration of Robert J. Shorb, Jr., *id.*, at 47 (“[O]ur children were in danger of not having enough to eat. Therefore, we had to send them to live with their grandparents in New York State so that they would get enough nourishment”).

denied food stamps even though they had been permanently replaced by their employers.⁴

But even if it were true that strikers always can return to their jobs, the Secretary's "willingness to work" rationale falls apart in light of the glaring disparity between the treatment of strikers and the treatment of those who are unwilling to work for other reasons. People who voluntarily quit their jobs are not disqualified from receiving food stamps if, after notice and a hearing, they can demonstrate that they quit with "good cause." 7 CFR §§ 273.7(n)(1)(i), (vi) (1987).⁵ Moreover, even if the state agency determines that the quit was without good cause, the voluntary quitter is disqualified only for a period of 90 days, and the quitter's household is disqualified only if the quitter was the "head of household." § 273.7(n)(1)(v). In contrast, a striker is given no opportunity to demonstrate that the strike was for "good cause," even though strikers frequently allege that unfair labor practices by their employer precipitated the strike.⁶ In addition, strikers and their entire households, no matter how minimal the striker's contribution to the household's income may have been, are disqualified for the duration of the strike, even if the striker is permanently replaced or business operations temporarily cease.

⁴ See Declaration of Ray Westfall, *id.*, at 51; Supplemental Declaration of Johnie B. Blake, *id.*, at 14-15; Affidavit of Donald Gibson, *id.*, at 34; Affidavit of Zola Higgins, *id.*, at 37.

⁵ "Good cause" as defined in the applicable regulations includes, *inter alia*, "[d]iscrimination by an employer based on age, race, sex, color, handicap, religious beliefs, national origin or political beliefs," 7 CFR § 273.7(n)(3)(i) (1987), "[w]ork demands or conditions that render continued employment unreasonable, such as working without being paid on schedule," § 273.7(n)(3)(ii), or work conditions under which "[t]he degree of risk to health and safety is unreasonable," § 273.7(i)(2)(i), incorporated by reference in § 273.7(n)(3)(vi).

⁶ See, *e. g.*, Affidavit of Zola Higgins, App. 36-37; Affidavit of Paul David Michel, *id.*, at 39-40; Declaration of Ray Westfall, *id.*, at 51-52.

In a similar vein, the striker amendment expressly distinguishes between strikers and nonstrikers in conditioning eligibility for food stamps on willingness to accept struck work. Unemployed workers may refuse to accept otherwise appropriate employment at a business involved in a strike or a lockout and still remain eligible to receive food stamps—as long as they are not themselves on strike. Only strikers, though they may be as “willing to work” in every salient respect, must give up their eligibility for food stamps if they refuse to cross a picket line.⁷ The Secretary’s “willingness to work” argument provides no justification for this especially harsh treatment of strikers and their households.

C

Unable to explain completely the striker amendment by the “willingness to work” rationale, the Secretary relies most heavily on yet a third rationale: the promotion of governmental neutrality in labor disputes. Indeed, the Court relies solely on this explanation in rejecting appellees’ equal protection challenge to the amendment. According to the Secretary and the Court, this last goal rationalizes the discrepancies in the treatment of strikers and voluntary quitters, and of strikers and nonstrikers unwilling to cross a picket line. As the Court explains it, excluding strikers from participation in the food stamp program avoids “undue favoritism to one side or the other in private labor disputes” by preventing

⁷ In addition, strikers may not become eligible for food stamps even if they demonstrate their “willingness to work” by registering for and accepting alternative interim employment. Indeed, the fact that strikers had been subject to the same work registration and acceptance requirements as all other food stamp applicants prior to the enactment of the striker amendment casts considerable doubt on the Secretary’s argument that the amendment’s purpose was to ensure that food stamp recipients are “willing to work.” Cf. *Department of Agriculture v. Moreno*, 413 U. S. 528, 537 (1973) (existence of fraud provisions prior to the amendment denying food stamps to households containing unrelated persons “necessarily casts considerable doubt upon the proposition that the 1971 amendment could rationally have been intended to prevent those very same abuses”).

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governmental "subsidization" of strikes. *Ante*, at 371, quoting S. Rep. No. 97-139, p. 62 (1981). The Court notes that we accepted a version of this governmental neutrality argument "in a related context" in *Ohio Bureau of Employment Services v. Hodory*, 431 U. S. 471 (1977). See *ante*, at 372.

As a threshold matter, the Court's reliance on *Hodory* to support the Secretary's argument is misplaced. In *Hodory*, we upheld a statute that denied unemployment compensation benefits to workers who became unemployed as a result of a labor dispute other than a lockout. The Court reasoned that the denial was rationally related to the goal of maintaining governmental neutrality in labor disputes because the unemployment compensation at issue was partially funded by employer contributions. We recognized that "[t]he employer's costs go up with every laid-off worker who is qualified to collect unemployment. The only way for the employer to stop these rising costs is to settle the strike so as to return the employees to work. Qualification for unemployment compensation thus acts as a lever increasing the pressures on an employer to settle a strike." 431 U. S., at 492. The reasoning of *Hodory* is completely inapplicable to the food stamp context. Employer contributions form no part of food stamp benefits, which are funded instead by general public revenues; receipt of food stamps by strikers therefore places no special or coercive burden on the strikers' employer.

More important, the "neutrality" argument on its merits is both deceptive and deeply flawed. Even on the most superficial level, the striker amendment does not treat the parties to a labor dispute evenhandedly: forepersons and other management employees who may become temporarily unemployed when a business ceases to operate during a strike remain eligible for food stamps. Management's burden during the course of the dispute is thus lessened by the receipt of public funds, whereas labor must struggle unaided. This disparity cannot be justified by the argument that the strike is labor's "fault," because strikes are often a direct response

to illegal practices by management, such as failure to abide by the terms of a collective-bargaining agreement or refusal to bargain in good faith.

On a deeper level, the "neutrality" argument reflects a profoundly inaccurate view of the relationship of the modern Federal Government to the various parties to a labor dispute. Both individuals and businesses are connected to the Government by a complex web of supports and incentives. On the one hand, individuals may be eligible to receive a wide variety of health, education, and welfare-related benefits. On the other hand, businesses may be eligible to receive a myriad of tax subsidies through deductions, depreciation, and credits, or direct subsidies in the form of Government loans through the Small Business Administration (SBA). Businesses also may receive lucrative Government contracts and invoke the protections of the Bankruptcy Act against their creditors. None of these governmental subsidies to businesses is made contingent on the businesses' abstention from labor disputes, even if a labor dispute is the direct cause of the claim to a subsidy. For example, a small business in need of financial support because of labor troubles may seek a loan from the SBA. See 15 U. S. C. § 661 *et seq.* And a business that claims a net operating loss as a result of a strike or a lockout presumably may carry the loss back three years and forward five years in order to maximize its tax advantage. See 26 U. S. C. §§ 172, 381, 382. In addition, it appears that businesses may be eligible for special tax credits for hiring replacement workers during a strike under the Targeted Jobs Tax Credit program. See BNA Daily Labor Report No. 68, p. A-6 (April 10, 1987). When viewed against the network of governmental support of both labor and management, the withdrawal of the single support of food stamps—a support critical to the continued life and health of an individual worker and his or her family—cannot be seen as a "neutral" act. Altering the backdrop of gov-

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ernmental support in this one-sided and devastating way amounts to a penalty on strikers, not neutrality.

D

In *Cleburne v. Cleburne Living Center, Inc.*, 473 U. S. 432 (1985), we concluded that the insubstantiality of each of the city's asserted justifications for the ordinance at issue suggested that the ordinance in fact rested "on an irrational prejudice against the mentally retarded." *Id.*, at 450. The successive failure of each of the Secretary's purported rationales for the striker amendment likewise suggests that the enactment at issue here rests on public animus toward strikers. This conclusion draws substantial support from the legislative history of the precursors of the 1981 amendment. Beginning in 1968, four years after the enactment of the Food Stamp Act, Congress considered at regular intervals proposals similar or identical to the striker amendment eventually passed in 1981. Such proposals were considered and rejected in 1968, 1970, 1971, 1972, 1973, 1974, and 1977. Each time a proposal was discussed on the floor of the House, Representatives decried the "antiunion" and "antistrike" animus that motivated it.⁸ In 1977, the House

⁸See, e. g., 116 Cong. Rec. 42019 (1970) (decrying "the apparent anti-strike aspect" of the proposed amendment) (remarks of Rep. Conyers); 117 Cong. Rec. 21675 (1971) ("This amendment cannot be justified by any public good that could come of it; none can. It is at its base mean-spirited, vindictive and vengeful") (remarks of Rep. Foley); 118 Cong. Rec. 23376 (1972) ("Those seeking to pass this amendment are simply opposed to strikes . . . and hope to assist the employer in breaking a strike with this cruel amendment") (remarks of Rep. Koch); 119 Cong. Rec. 24931 (1973) ("This amendment is punitive, antilabor, antiunion, unfair, and discriminatory") (remarks of Rep. Foley); *id.*, at 24934 ("I think it would be unconstitutional . . . for us to say that we can cut out a segment of our society just because they are doing something that some other segment of our society does not like") (remarks of Rep. Casey); 120 Cong. Rec. 20614 (1974) (noting that voluntary quitters, convicted felons, and alcoholics may receive food stamps and that the striker amendment "only draws the line against one small group of people") (remarks of Rep. O'Hara).

Committee on Agriculture reviewed the history of such proposals and rejected the most recent one, explaining its decision as follows:

"The real purpose of the amendment . . . was not to restore some government neutrality allegedly lost because strikers are eligible for food stamps but, on the contrary, to use a denial of food stamps as a pressure on the worker—or more accurately on his family—to help break a strike. . . .

"The amendment was an effort to increase the power of management over workers, using food as a weapon in collective bargaining." H. R. Rep. No. 95-464, p. 129 (1977).

I am mindful that the views expressed on the floor of the House and in the 1977 Committee Report were from those opposed to the striker amendment. But the evidence of animus is not limited to statements by the amendment's opponents. Rather, supporters of the striker amendment likened strikers to "hippies" and "commune residents"—groups whose exclusion from the food stamp program this Court struck down 15 years ago in *Department of Agriculture v. Moreno*, 413 U. S. 528 (1973).⁹ The exhortation by the sponsor of the 1971 version of the striker amendment to his colleagues to "say to strikers what we have said . . . to hippies," 117 Cong. Rec. 21673 (1971) (remarks of Rep. Michel), strongly suggests that the same sort of hostility informed the two amendments, although the striker amendment was not

⁹See 117 Cong. Rec. 21673 (1971) (We should "say to strikers what we have said to students, to hippies, and others—'. . . if you are one of the voluntarily poor, you must look to your own resources for help'") (remarks of Rep. Michel); 119 Cong. Rec. 24931 (1973) ("[I]n the early history of the program, food stamps for strikers, college students, hippies, and commune residents never entered into the minds of food stamp proponents") (remarks of Rep. Goodling).

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enacted into law until 1981.¹⁰ Our warning in *Moreno* that "a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest," 413 U. S., at 534, would seem directly applicable to the instant case. I find the Court's refusal to heed that warning both inexplicable and ill considered.

II

I agree with the Court that "[i]t was no part of the purposes of the Food Stamp Act to establish a program that would serve as a weapon in labor disputes." *Ante*, at 371. The striker amendment under consideration today, however, seems to have precisely that purpose—one admittedly irreconcilable with the legitimate goals of the food stamp program. No other purpose can adequately explain the especially harsh treatment reserved for strikers and their families by the 1981 enactment. Because I conclude that the striker amendment cannot survive even rational-basis scrutiny, I would affirm the District Court's invalidation of the amendment. I dissent.

¹⁰ The remarks of Representatives over the years admittedly express the views of different Congresses from the one that eventually passed the 1981 striker amendment. Nonetheless, the length of time over which the same proposal was considered and the frequent references over the years by Representatives to former colloquies on the matter, see, e. g., 117 Cong. Rec. 21672 (1971) (remarks of Rep. Michel) (referring to 1970 debate); 119 Cong. Rec. 24933 (1973) (remarks of Rep. Casey) (referring to 1971 debate); H. R. Rep. No. 95-464, pp. 122-127 (1977) (canvassing the amendment's legislative history from 1968 to 1977), strongly suggest that these earlier discussions informed the 1981 decision.

BOWEN, SECRETARY OF HEALTH AND HUMAN
SERVICES *v.* KIZER, DIRECTOR OF CALIFORNIA
DEPARTMENT OF HEALTH SERVICES, ET AL.

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

No. 86-863. Argued November 10, 1987—Decided March 23, 1988

Held: Petitioner's compliance with § 4106 of the Omnibus Budget Reconciliation Act of 1987, which required that he retroactively approve a California Medicaid plan amendment, petitioner's rejection of which is the subject of this action, has rendered the controversy moot. The Court of Appeals' judgment is vacated; and the case is remanded for dismissal of the cause.

781 F. 2d 1421, vacated and remanded.

Deputy Solicitor General Merrill argued the cause for petitioner. With him on the briefs were *Solicitor General Fried*, *Assistant Attorney General Willard*, *Deputy Solicitor General Lauber*, *Jerrold J. Ganzfried*, and *Richard Olderman*.

Ralph Johnson, Deputy Attorney General of California, argued the cause for respondents. With him on the brief were *John K. Van de Kamp*, Attorney General, and *Evelyn R. Frank*.*

PER CURIAM.

We granted the Secretary of Health and Human Services' petition for certiorari, 479 U. S. 1083 (1987), in order to review the judgment of the Court of Appeals for the Ninth Cir-

*Briefs of *amici curiae* urging affirmance were filed for the State of Maryland et al. by *Lacy H. Thornburg*, Attorney General of North Carolina, and *Henry T. Rosser*, Assistant Attorney General, joined by the Attorneys General for their respective States as follows: *W. J. Michael Cody* of Tennessee, *Nicholas J. Spaeth* of North Dakota, *Jeffrey L. Amestoy* of Vermont, *Hubert H. Humphrey III* of Minnesota, *J. Joseph Curran, Jr.*, of Maryland, *Robert M. Spire* of Nebraska, and *Ken Eikenberry* of Washington; and for the California Association of Public Hospitals et al. by *Mark S. Windisch*.

cuit that the Secretary unlawfully rejected a California Medicaid plan amendment because an internal agency manual stating approval of the type of provision in question was a binding regulation, and because acceptance of the amendment was required by § 2373(c) of the Deficit Reduction Act of 1984, Pub. L. 98-369, 98 Stat. 1112, note following 42 U. S. C. § 1396a (1982 ed., Supp. III). *Cubanski v. Heckler*, 781 F. 2d 1421 (1986). After the case had been briefed and argued, Congress enacted § 4106 of the Omnibus Budget Reconciliation Act of 1987, Pub. L. 100-203, 101 Stat. 1330, which required the Secretary to approve the proposed California amendment, retroactively to the date of its proposal. The Secretary has complied with that requirement.

The parties agree that these developments have rendered the controversy moot. In accordance with our established practice, we vacate the judgment of the Ninth Circuit and remand with instructions to dismiss the suit. See *Deakins v. Monaghan*, 484 U. S. 193, 200, 204 (1988); *United States v. Munsingwear, Inc.*, 340 U. S. 36, 39-40 (1950).

It is so ordered.

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

Per Curiam

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TEXAS *v.* NEW MEXICO

ON BILL OF COMPLAINT

No. 65, Orig. Decided May 19, 1980 and June 17, 1983—Order entered June 11, 1984—Decided and decree entered June 8, 1987—Decided and amended decree and order entered March 28, 1988

In this dispute between Texas and New Mexico over the extent of New Mexico's obligation to deliver water to Texas under the terms of the Pecos River Compact, New Mexico's exceptions to the Special Master's report are overruled, the report is approved, and an amended decree and order appointing a River Master are entered.

Exceptions overruled; amended decree and order entered.

Opinions reported: 446 U. S. 540, 462 U. S. 554; order reported: 467 U. S. 1238; opinion and decree reported: 482 U. S. 124.

PER CURIAM.

Last Term we issued a decree in this case which enjoined the State of New Mexico "to comply with its Article III(a) obligation under the Pecos River Compact and to determine the extent of its obligation in accordance with the formula approved by the decisions of this Court." *Texas v. New Mexico*, 482 U. S. 124, 133 (1987). We retained jurisdiction for the purpose of any order, direction, or modification of the decree as might be deemed proper. In particular, we approved the Special Master's recommendation that a River Master be appointed in this case, and requested that on remand the Special Master "recommend an amendment to the decree, specifying as he deems necessary the duties of the River Master and the consequences of his determinations. Any other suggestions for amendments should also be called to our attention." *Id.*, at 135.

The Special Master has now submitted a report, which includes a proposed amended decree. New Mexico's motion for leave to file a reply brief is granted. New Mexico's exceptions to the report are overruled. The report is approved and an amended decree will issue forthwith. The Special

Master has also recommended a person to serve as River Master. We accept that recommendation.

AMENDED DECREE

IT IS ORDERED, ADJUDGED, AND DECREED THAT:

I

DEFINITIONS

A. For purposes of this Decree:

1. "Accounting year" is the calendar year during which the River Master makes the calculations required by Article III.B.1. below; "water year" is the calendar year immediately preceding the accounting year.

2. "Manual" is the Pecos River Master's Manual admitted into evidence as Texas Exhibit 108, which is an integral part of this Decree. The Manual may be modified from time to time in accordance with the terms of this Decree.

3. "Overage" is the amount of water delivered by New Mexico in any water year which exceeded the Article III(a) obligation for that year.

4. "Shortfall" is the amount by which the water delivered by New Mexico in any water year fell short of the Article III(a) obligation for that year.

II

INJUNCTION

A. The State of New Mexico, its officers, attorneys, agents, and employees are hereby enjoined:

1. To comply with Article III(a) of the Pecos River Compact and to meet the obligation thereof by delivering water to Texas at state line as prescribed in this Decree.

2. Within thirty (30) days of receipt of a final Report of the River Master identifying a shortfall, to submit to

the River Master a proposed plan providing for verifiable action by New Mexico that will increase the amount of water at state line prior to March 31 of the year following the accounting year by the amount of the shortfall. In order to identify the incremental amount of water being delivered to Texas to satisfy a prior shortfall, the plan shall:

(a) Identify the specific actions to be taken by New Mexico to increase the amount of water flowing to Texas, including, if applicable, the points at which water will enter the river or diversions will be curtailed;

(b) Specify the dates and times the actions will be taken;

(c) Provide a calculation under the procedures and equations set forth in the Manual of the amount of water that can be presumed to arrive at state line as a result of the actions;

(d) Identify the means by which the actions can be verified and provide assurances that documents and data necessary for verification will be submitted to the River Master within thirty (30) days from the date the actions are taken;

(e) Provide guarantees that the water to be delivered pursuant to the plan will not be diverted within New Mexico.

3. To comply prior to March 31 of the year following the accounting year with the terms of an Approved Plan to remedy any shortfall. Compliance with an Approved Plan will be deemed to satisfy the shortfall. Subject to the review provided in Article III.D. of this Decree, the calculations made pursuant to Article II.A.2(c), as approved by the River Master, shall be determinative of the amount of water delivered at state line.

III

RIVER MASTER

A. *Appointment.* The appointment of a River Master is made by the attached Order of Appointment.

B. *Duties.* The River Master shall perform the following duties:

1. Calculate in accounting year 1988, beginning with water year 1987, and continuing every year thereafter, pursuant to the methodology set forth in the Manual:

(a) The Article III(a) obligation;

(b) Any shortfall or overage, which calculation shall disregard deliveries of water pursuant to an Approved Plan;

(c) The net shortfall, if any, after subtracting any overages accumulated in previous years, beginning with water year 1987.

2. Deliver to the parties a Preliminary Report setting forth the tentative results of the calculations required by Section III.B.1. of this Decree by May 15 of the accounting year;

3. Consider any written objections to the Preliminary Report submitted by the parties prior to June 15 of the accounting year;

4. Deliver to the parties a Final Report setting forth the final results of the calculations required by Section III.B.1. of this Decree by July 1 of the accounting year;

5. Review any plan proposed by New Mexico pursuant to Article II.A.2. of this Decree for its efficacy in satisfying any shortfall and consider any written objections to the plan which are submitted by Texas by September 1 of the accounting year.

6. Modify the proposed plan as is deemed necessary to ensure satisfaction of the shortfall and deliver to the parties such Approved Plan by October 1 of the accounting year;

7. Deliver to the parties and file with this Court a Compliance Report by June 1 of the year following any accounting year in which there is an Approved Plan, which report shall include a finding of New Mexico's compliance or noncompliance with the terms of the Approved Plan and the reasons for such finding.

C. Modification of Manual.

1. The River Master shall modify the Manual in accordance with any written agreement of the parties. Such written agreement shall state the effective date of the modification and whether it is to be retroactive. If retroactive, the agreement shall specify the procedures for making the retroactive adjustments.

2. Absent written agreement of the parties, upon motion by either party and for good cause shown, the River Master may modify the Manual. Opposition to any such motion shall be submitted to the River Master in writing within thirty (30) days after service of the motion or within such extended time as may be allowed by the River Master. Additional written submissions and any oral presentation will be at the River Master's discretion. The River Master may adopt, reject, or amend the proposed modification and shall serve upon the parties his or her written Modification Determination and the grounds therefor. The River Master may also defer decision on a proposed modification, but if no action is taken within one (1) year of its submission, the motion shall be deemed denied.

3. A modification of the Manual by motion shall be first applicable to the water year in which the modification becomes effective.

4. All modifications of the Manual shall be transmitted immediately to the Clerk of this Court and shall be retained in the files for this case.

D. *Effect of River Master's Determination.* Unless stayed by this Court, any Final Report, Approved Plan, Compliance Report, or Modification Determination (hereinafter, collectively, "Final Determination") shall be effective upon its adoption, and shall be subject to review by this Court only on a showing that the Final Determination is clearly erroneous. A party seeking review of a Final Determination must file a motion with the Clerk of this Court within thirty (30) days of its adoption, which motion shall set forth the Final Determination on which review is sought and a concise statement of the basis of the claim that the Final Determination is clearly erroneous.

E. *Authority of Pecos River Commission.* Nothing in this Decree is intended to displace the authority of the Pecos River Commission to administer the Pecos River Compact, and if the Commissioners reach agreement on any matter, the parties shall advise the Court and seek an appropriate amendment to this Decree.

F. *Communication with River Master.* *Ex parte* communications with the River Master are forbidden. Any written communication with the River Master by motion or otherwise shall be simultaneously served by mail on the opposing party. Any oral communication with the River Master shall be made in the presence of the opposing party, whether by telephone conference call or in person.

G. *Distribution of Costs.* The compensation of, and the costs and expenses incurred by, the River Master shall be approved by the Court and borne equally by the State of Texas and the State of New Mexico.

IV

DISMISSAL OF UNITED STATES

A. The United States is dismissed from this proceeding without prejudice.

V

RETENTION OF JURISDICTION

The Court retains jurisdiction of this suit for the purpose of any order, direction, or modification of the Decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy.

ORDER APPOINTING RIVER MASTER

IT IS ORDERED that Neil S. Grigg be and he hereby is appointed River Master of the Pecos River for the purpose of performing the duties set forth in the Amended Decree of March 28, 1988.

IT IS FURTHER ORDERED that the River Master shall have the power and authority to subpoena information or data, compiled in reasonable usable form, which he deems necessary or desirable for the proper and efficient performance of his duties.

IT IS FURTHER ORDERED that the River Master is allowed his necessary expenses and reasonable fees for his services, statements for which shall be submitted quarterly to the Court for its approval. Upon Court approval, such statements will be paid by the State of New Mexico and the State of Texas.

IT IS FURTHER ORDERED that if the position of River Master becomes vacant during a recess of the Court, THE CHIEF JUSTICE shall have authority to make a new designation which shall have the same effect as if originally made by the Court.

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

Syllabus

BENNETT v. ARKANSAS

CERTIORARI TO THE SUPREME COURT OF ARKANSAS

No. 86-6124. Argued March 2, 1988—Decided March 29, 1988

Relying on an Arkansas statute authorizing the State to seize a prisoner's property, including his Social Security benefits, in order to help defray the cost of maintaining its prison system, Arkansas filed suit in state court to attach petitioner's Social Security benefits. The trial court directed that a portion of petitioner's benefits be seized, rejecting his argument that the state law violates the Supremacy Clause of the Federal Constitution because it permits the State to attach funds that are exempt from legal process under 42 U. S. C. § 407(a). The Supreme Court of Arkansas affirmed, holding that there is no conflict between the state and federal statutes because § 407(a) contains an "implied exception to exemption from legal process" when a State provides for a Social Security recipient's care and maintenance.

Held: The Arkansas statute violates the Supremacy Clause. There is no "implied exception" to the express language of § 407(a) and its clear intent that Social Security benefits not be attachable, even though the State provides for all of petitioner's needs. The State is not a statutorily intended beneficiary of petitioner's Social Security benefits. *Rose v. Rose*, 481 U. S. 619, distinguished.

290 Ark. 47, 716 S. W. 2d 755, reversed.

Thomas M. Carpenter, by appointment of the Court, 484 U. S. 921, argued the cause for petitioner. With him on the brief were *Charles L. Carpenter* and *Charles L. Carpenter, Jr.*

Richard J. Lazarus 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 Merrill*, *Charles A. Rothfeld*, *John F. Cordes*, and *John P. Schnitker*.

J. Steven Clark, Attorney General of Arkansas, argued the cause for respondent. With him on the brief was *Clint Miller*, Assistant Attorney General.*

**Michael John Mirra* and *Robert A. Stalker* filed a brief for Lawrence McDowell as *amicus curiae* urging reversal.

PER CURIAM.

This case involves an attempt by the State of Arkansas to attach certain federal benefits paid to individuals who are incarcerated in Arkansas prisons. In 1981, Arkansas adopted the State Prison Inmate Care and Custody Reimbursement Act, Ark. Stat. Ann. § 46-1701 *et seq.* (Supp. 1985), a statute that authorizes the State to seize a prisoner's property or "estate" in order to help defray the cost of maintaining its prison system. The Act specifically defines "estate" to include a prisoner's federal Social Security benefits, as well as other types of pension or retirement benefits. § 46-1702(d).¹ The State filed separate actions in state court seeking to attach Social Security benefits that had been paid to petitioner Bennett and Veterans' Administration (VA) disability pension benefits that were paid to another inmate, Shelton. In relevant part, the inmates responded by arguing that the Arkansas statute violates the Supremacy Clause of the Federal Constitution because it permits the State to attach funds that federal law exempts from legal process. In particular, petitioner pointed to 42 U. S. C. § 407(a) (1982 ed., Supp. III), which provides that "none of the moneys paid or payable . . . under [the Social Security Act] shall be subject to execution, levy, attachment, garnishment, or other legal process." Similarly, Shelton contended that attachment of his VA benefits is inconsistent with 38 U. S. C. § 3101(a), which provides that such benefits "shall be exempt from the claim of creditors, and shall not be liable to attachment, levy, or seizure by or

¹Arkansas Stat. Ann. § 46-1704(a) (Supp. 1985) provides that the estate of a person incarcerated in a penal facility of the Arkansas Department of Correction "may be subjected to the payment to the State of the expenses paid and to be paid by it on behalf of said person as a prisoner." Arkansas Stat. Ann. § 46-1702(b) (Supp. 1985) defines "estate" as "any properties, tangible or intangible, real or personal, belonging to or due an inmate confined to an institution of the Department of Correction, including income or payments to such inmate from Social Security, previously earned salary or wages, bonuses, annuities, pensions or retirement benefits, or from any source whatsoever."

under any legal or equitable process whatever, either before or after receipt by the beneficiary."

The state trial court rejected the inmates' arguments and directed that a portion of each of their benefits be seized. The Supreme Court of Arkansas affirmed, with one justice dissenting. 290 Ark. 47, 716 S. W. 2d 755 (1986). Briefly stated, the court found that there is no conflict between the federal and state statutes because "the federal statutes contain an implied exception to the exemption from legal process when the State provides for the care and maintenance of a beneficiary of social security or veterans' funds." *Id.*, at 49, 716 S. W. 2d, at 756. We granted Bennett's petition for certiorari. 484 U. S. 895 (1987).²

We think—contrary to the conclusion of the Supreme Court of Arkansas—that there is a clear inconsistency between the Arkansas statute and 42 U. S. C. § 407(a) (1982 ed., Supp. III). Section 407(a) unambiguously rules out any attempt to attach Social Security benefits. The Arkansas statute just as unambiguously allows the State to attach those benefits. As we see it, this amounts to a "conflict" under the Supremacy Clause—a conflict that the State cannot win. See *Rose v. Arkansas State Police*, 479 U. S. 1 (1986). We reject the State's attempt to avoid this conclusion by arguing that the federal statute contains an "implied exception" that would allow attachment of otherwise exempted federal payments simply because the State has provided the recipient with "care and maintenance." We declined to find such an exception in *Philpott v. Essex County Welfare Board*, 409 U. S. 413 (1973), where we held that § 407 bars a State from attempting to attach Social Security benefits as reimbursement for state welfare assistance pay-

²Shelton's separate petition for certiorari was not docketed by the Court due to his failure to file an affidavit to accompany his motion to proceed *in forma pauperis*. See this Court's Rule 46.1. Accordingly the only issue directly before us is the propriety of the State's attempt to attach Bennett's Social Security benefits.

Per Curiam

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ments. *Philpott* may be factually distinguishable on the ground that there the State provided for only *part* of the needs of the Social Security recipient while here the State provides for *all* of the prisoners' needs, see *Department of Health and Rehabilitative Services, State of Fla. v. Davis*, 616 F. 2d 828, 830 (CA5 1980) (relying on such a distinction). But we do not think that such a distinction carries the day given the express language of § 407(a) and the clear intent of Congress that Social Security benefits not be attachable.

Nor do we think that the State's "implied exception" argument is supported by our decision last Term in *Rose v. Rose*, 481 U. S. 619 (1987). There we held that 38 U. S.C. § 3101 did not bar a state court from holding a disabled veteran in contempt for failing to pay child support, even though the veteran's only means of paying his obligation was to use his VA disability benefits. But in that case we held that the benefits in question were designed by Congress to support not only the recipient of the benefits, but also his dependents. Accordingly, allowing the state court in that case to enforce a valid child support order was fully consistent with the underlying intent of § 3101, which was in part to "prevent the deprivation and depletion of the means of subsistence" of the beneficiaries of the federal payments. *Id.*, at 630 (quoting S. Rep. No. 94-1243, pp. 147-148 (1976)). Here, in contrast, the State cannot be said to be a "beneficiary" of petitioner's Social Security benefits.

The judgment of the Supreme Court of Arkansas is

Reversed.

Syllabus

BETHESDA HOSPITAL ASSOCIATION ET AL. v.
BOWEN, SECRETARY OF HEALTH AND
HUMAN SERVICESCERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT

No. 86-1764. Argued February 29, 1988—Decided April 4, 1988

Under the Medicare program of the Social Security Act, a qualified provider of health care services, in order to obtain reimbursement from the Secretary of Health and Human Services for its cost of providing covered services to Medicare patients, must submit an annual cost report to a fiscal intermediary, usually a private insurance company acting as the Secretary's agent. The intermediary then audits the cost report and determines the amount of reimbursement due to the provider. The statute, 42 U. S. C. § 139500 (1982 ed. and Supp. III), authorizes the provider to appeal to the Provider Reimbursement Review Board. The Board may affirm, modify, or reverse the intermediary's decision. The Secretary, either on his own motion or at the provider's request, may review the matter further, and a provider that remains dissatisfied with a final decision of the Board or Secretary may seek review in a federal district court. In their cost reports for 1980, petitioner providers, in apportioning malpractice insurance costs, followed a 1979 regulation of the Secretary that disallowed certain claims for malpractice insurance premium costs. Petitioners later filed a request for a hearing before the Board, challenging the validity of the malpractice regulation and seeking reimbursement for malpractice costs in accordance with the pre-1979 methodology. Because the amounts had been "self-disallowed" in the reports filed with the intermediary, however, the Board determined that it was without jurisdiction to hear petitioners' claims. In proceedings challenging the 1979 regulation, the District Court held that the Board should have exercised jurisdiction over the matter. The Court of Appeals reversed.

Held: The Board may not decline to consider a provider's challenge to a regulation of the Secretary on the ground that the provider failed to contest the regulation's validity in the cost report submitted to its fiscal intermediary. The plain language of § 139500(a) demonstrates that the Board had jurisdiction to entertain this action. There is no merit to the Secretary's contention that a provider's right to a hearing before the Board extends only to claims presented to a fiscal intermediary because the provider cannot be "dissatisfied" with the intermediary's decision to

award the amounts requested in the provider's cost report. The submission of a cost report in full compliance with the unambiguous dictates of the Secretary's rules and regulations does not, by itself, bar the provider from claiming dissatisfaction with the amount of reimbursement allowed by those regulations. Providers know that, under the statutory scheme, the intermediary is confined to the mere application of the Secretary's regulations, that the intermediary is without power to award reimbursement except as the regulations provide, and that any attempt to persuade the intermediary to do otherwise would be futile. While the express language of § 1395oo(a) requires the conclusion reached here, that conclusion is also supported by the language and design of the statute as a whole. Neither the intermediary nor the Board has the authority to declare regulations invalid, but, as the predicate to the right of providers to obtain judicial review of an intermediary's action, the Board must first determine that it is without authority to decide the matter because the provider's claim involves a question of law or regulations. Pp. 403-408.

810 F. 2d 558, reversed and remanded.

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

Leonard C. Homer argued the cause for petitioners. With him on the briefs was *Carel T. Hedlund*.

Andrew J. Pincus argued the cause for respondent. With him on the brief were *Acting Solicitor General Wallace*, *Assistant Attorney General Willard*, and *Deputy Solicitor General Merrill*.*

JUSTICE KENNEDY delivered the opinion of the Court.

Under the Medicare program, Title XVIII of the Social Security Act, 79 Stat. 291, 42 U. S. C. § 1395 *et seq.* (1982 ed. and Supp. III), certain qualified providers of health care services are reimbursed by the Secretary of Health and Human Services for the reasonable cost of providing covered services to Medicare beneficiaries. Each such provider submits a cost report at the end of the year to a fiscal intermediary, usually a private insurance company acting as an agent

**Linda A. Tomaselli* and *Stuart M. Gerson* filed a brief for the American Hospital Association as *amicus curiae* urging reversal.

for the Secretary. The fiscal intermediary audits the cost report and issues a Notice of Program Reimbursement specifying the amount of reimbursement due to the provider and explaining any adjustments.

A provider may appeal the intermediary's final determination to the Provider Reimbursement Review Board and, under certain circumstances, may obtain a hearing from the Board. The Board is authorized to affirm, modify, or reverse intermediary decisions. The Secretary, either on his own motion or on request of the provider, may review the matter further, and any provider that remains dissatisfied with a final decision of the Board or Secretary may seek review in a United States district court. §§ 1395oo(a), (d), (f).

This case requires us to decide whether the Board may decline to consider a provider's challenge to one of the Secretary's regulations on the ground that the provider failed to contest the regulation's validity in the cost report submitted to its fiscal intermediary.

I

Petitioners Bethesda Hospital Association and Deaconess Hospital of Cincinnati are Ohio entities that operate hospitals in that State. Bethesda and Deaconess joined with some 27 other hospitals to challenge a 1979 regulation promulgated by the Secretary, which disallowed certain claims for malpractice insurance premium costs. We are not concerned here with the merits of the challenge to the 1979 regulation; rather, we must decide whether the Board had jurisdiction to consider the issue.

In their cost reports for 1980, petitioners followed the 1979 regulation in their apportionment of malpractice insurance costs and thereby effected, in the lexicon of the Medicare program, a "self-disallowance" of malpractice insurance costs in excess of those allowed by the 1979 regulation. Petitioners later filed a timely request for a hearing before the Board, challenging the validity of the malpractice regulation and

seeking reimbursement for malpractice costs in accordance with the pre-1979 methodology. Because the amounts had been self-disallowed in the reports filed with the fiscal intermediary, however, the Board determined that it was without jurisdiction to hear petitioners' claims. The Board held, in essence, that a statutory condition to its jurisdiction had not been met, stating that its authority to grant hearings is limited to cases in which the provider is "dissatisfied with a final determination of the . . . fiscal intermediary," and reasoning that petitioners could not be dissatisfied when they had effected a self-disallowance of the claims. The District Court, in disagreement with the Board's reasoning, held that the Board should have exercised jurisdiction over the matter. *Bethesda Hospital v. Heckler*, 609 F. Supp. 1360, 1368 (SD Ohio 1985).

The Secretary appealed to the United States Court of Appeals for the Sixth Circuit, which reversed the District Court. The Court of Appeals stated that "[w]ere we considering this issue as a matter of first impression, we may well have reached a different conclusion as to the advisability of requiring submission of statutory and/or constitutional challenges to a private insurance company as a condition precedent to further administrative as well as judicial review of the Secretary's regulations." *Bethesda Hospital v. Secretary of Health and Human Services*, 810 F. 2d 558, 562 (1987). The court found itself bound, however, by the decision of a prior panel in *Baptist Hospital East v. Secretary of Health and Human Services*, 802 F. 2d 860 (1986), where it was held that the Board had properly "refused to exercise jurisdiction over those claims by providers who had self-disallowed reimbursement and had failed to challenge the Secretary's regulations before the fiscal intermediary." *Bethesda Hospital v. Secretary of Health and Human Services*, *supra*, at 561. We granted certiorari, 484 U. S. 813 (1987),

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to resolve a conflict among the Courts of Appeals.¹ We now reverse.

II

The plain meaning of the statute decides the issue presented. See *INS v. Cardoza-Fonseca*, 480 U. S. 421, 432, and n. 12 (1987); *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842–843 (1984). The parties agree that § 139500(a) addresses the circumstances in which a provider may invoke the Board's jurisdiction. To the extent pertinent here, § 139500(a) states that a provider may obtain a hearing before the Board with respect to its cost report if

“(1) such provider—

“(A)(i) is dissatisfied with a final determination of . . . its fiscal intermediary . . . as to the amount of total program reimbursement due the provider . . . for the period covered by such report . . .

“(2) the amount in controversy is \$10,000 or more, and

¹ Compare *Bethesda Hospital v. Secretary of Health and Human Services*, 810 F. 2d 558 (CA6 1987) (case below) (finding there is no Board jurisdiction); *North Broward Hospital Dist. v. Bowen*, 808 F. 2d 1405 (CA11 1987) (same), cert. pending, No. 86–1986; *Community Hospital of Roanoke Valley v. Health and Human Services*, 770 F. 2d 1257 (CA4 1985) (same); *Athens Community Hospital, Inc. v. Schweiker*, 222 U. S. App. D. C. 363, 686 F. 2d 989 (1982), modified, 240 U. S. App. D. C. 1, 743 F. 2d 1 (1984) (same), with *Adams House Health Care v. Heckler*, 817 F. 2d 587 (CA9 1987) (finding there is mandatory Board jurisdiction), cert. pending, No. 87–443; *St. Mary of Nazareth Hospital Center v. Department of Health and Human Services*, 698 F. 2d 1337 (CA7 1983) (same), cert. denied *sub nom.* *St. James Hospital v. Heckler*, 464 U. S. 830 (1983), with *St. Luke's Hospital v. Secretary of Health and Human Services*, 810 F. 2d 325 (CA1 1987) (finding there is Board jurisdiction, but that it is discretionary), and with *Tallahassee Memorial Regional Medical Center v. Bowen*, 815 F. 2d 1435 (CA11 1987) (finding there is jurisdiction in the situation at issue here, but not for appeals that do not involve a challenge to a regulation), cert. pending, No. 87–380.

"(3) such provider files a request for a hearing within 180 days" 42 U. S. C. § 139500(a) (1982 ed. and Supp. III).

The Secretary contends that the requirement that a provider be "dissatisfied with a final determination of . . . its fiscal intermediary" necessarily incorporates an exhaustion requirement. In the Secretary's view, a provider's right to a hearing before the Board extends only to claims presented to a fiscal intermediary because the provider cannot be "dissatisfied" with the intermediary's decision to award the amounts requested in the provider's cost report. Petitioners counter that it would have been improper, or at least irregular, to submit a claim for cost reimbursement in a manner prohibited by the regulations, and that it was correct to raise their challenge in the first instance by presenting the matter to the Board.

The strained interpretation offered by the Secretary is inconsistent with the express language of the statute. We agree that, under subsection (a)(1)(A)(i), a provider's dissatisfaction with the amount of its total reimbursement is a condition to the Board's jurisdiction. It is clear, however, that the submission of a cost report in full compliance with the unambiguous dictates of the Secretary's rules and regulations does not, by itself, bar the provider from claiming dissatisfaction with the amount of reimbursement allowed by those regulations. No statute or regulation expressly mandates that a challenge to the validity of a regulation be submitted first to the fiscal intermediary. Providers know that, under the statutory scheme, the fiscal intermediary is confined to the mere application of the Secretary's regulations, that the intermediary is without power to award reimbursement except as the regulations provide, and that any attempt to persuade the intermediary to do otherwise would be futile.² Thus, petitioners stand on different ground

² See 42 CFR § 421.100 (1987) (stating that the intermediary can only pay claims that are "covered under Medicare Part A or Part B"); § 421.120 (directing that the Secretary shall periodically review an intermediary's

than do providers who bypass a clearly prescribed exhaustion requirement or who fail to request from the intermediary reimbursement for all costs to which they are entitled under applicable rules. While such defaults might well establish that a provider was satisfied with the amounts requested in its cost report and awarded by the fiscal intermediary, those circumstances are not presented here. We conclude that petitioners could claim dissatisfaction, within the meaning of the statute, without incorporating their challenge in the cost reports filed with their fiscal intermediaries.

While the express language of subsection (a) requires the result we reach in the present case, our conclusion is also supported by the language and design of the statute as a whole. Cf. *Offshore Logistics, Inc. v. Tallentire*, 477 U. S. 207, 220-221 (1986). Section 1395oo(d), which sets forth the powers and duties of the Board once its jurisdiction has been invoked,³ explicitly provides that in making its decision whether to affirm, modify, or reverse the intermediary's decision, the Board can "make any other revisions on matters covered by such cost report . . . even though such matters were not considered by the intermediary in making such final

audit procedures to ensure it is making "[c]orrect coverage and payment determinations" and is guarding the "proper management of administrative funds"); 42 CFR § 405.460(a)(2) (1985) ("Reimbursable provider costs may not exceed the costs estimated by HCFA [Health Care Financing Administration] to be necessary for the efficient delivery of needed health services. HCFA may establish estimated cost limits for direct or indirect overall costs or for costs of specific items or services or groups of items or services").

³Subsection (d) provides:

"A decision by the Board shall be based upon the record made at such hearing, which shall include the evidence considered by the intermediary and such other evidence as may be obtained or received by the Board, and shall be supported by substantial evidence when the record is viewed as a whole. The Board shall have the power to affirm, modify, or reverse a final determination of the fiscal intermediary with respect to a cost report and to make any other revisions on matters covered by such cost report (including revisions adverse to the provider of services) even though such matters were not considered by the intermediary in making such final determination."

determination." This language allows the Board, once it obtains jurisdiction pursuant to subsection (a), to review and revise a cost report with respect to matters not contested before the fiscal intermediary. The only limitation prescribed by Congress is that the matter must have been "covered by such cost report," that is, a cost or expense that was incurred within the period for which the cost report was filed, even if such cost or expense was not expressly claimed.

Neither the fiscal intermediary nor the Board has the authority to declare regulations invalid.⁴ It does not follow, however, that the statute treats the two entities alike or that it requires the provider to announce its regulatory challenge at each level; for the Board has a statutory function that the fiscal intermediary does not have. Subsection (f)(1) grants providers the right to obtain judicial review of an action of the fiscal intermediary, but the predicate is that the Board must first make a determination that it is without authority to decide the matter because the provider's claim involves a question of law or regulations.⁵ It is this determination of

⁴Section 1395oo(d) only allows the Board to "affirm, modify, or reverse a final determination of the fiscal intermediary" Subsection (f)(1) recognizes that this limitation does not allow Board decisions with regard to the validity of rules or regulations. The subsection provides for *judicial* review of a challenged regulation when the Board determines it is "without authority to decide the question." See also n. 3, *supra*.

⁵Subsection (f)(1) provides:

"A decision of the Board shall be final unless the Secretary, on his own motion, and within 60 days after the provider of services is notified of the Board's decision, reverses, affirms, or modifies the Board's decision. Providers shall have the right to obtain judicial review of any final decision of the Board, or of any reversal, affirmance, or modification by the Secretary, by a civil action commenced within 60 days of the date on which notice of any final decision by the Board or of any reversal, affirmance, or modification by the Secretary is received. Providers shall also have the right to obtain judicial review of any action of the fiscal intermediary which involves a question of law or regulations relevant to the matters in controversy whenever the Board determines (on its own motion or at the request of a provider of services as described in the following sentence) that it is without authority to decide the question, by a civil action commenced

the Board, or alternatively the Board's failure to act, that triggers the right of judicial review.

The Secretary notes that subsection (f)(1) posits review of an "action of the fiscal intermediary," and argues that without presenting the intermediary with the challenge to the regulation there can be no action to review. The statute provides, however, that the intermediary has no authority to deviate from the rules and regulations and that the Board, not the fiscal intermediary, is to make the determination that it lacks the requisite authority to consider the validity of the regulation. Under this statutory scheme, requiring submission of the regulatory challenge to the fiscal intermediary is quite unnecessary. The Board has a role in shaping the controversy that is subject to judicial review; the fiscal intermediary does not.

within sixty days of the date on which notification of such determination is received. If a provider of services may obtain a hearing under subsection (a) of this section and has filed a request for such a hearing, such provider may file a request for a determination by the Board of its authority to decide the question of law or regulations relevant to the matters in controversy (accompanied by such documents and materials as the Board shall require for purposes of rendering such determination). The Board shall render such determination in writing within thirty days after the Board receives the request and such accompanying documents and materials, and the determination shall be considered a final decision and not subject to review by the Secretary. If the Board fails to render such determination within such period, the provider may bring a civil action (within sixty days of the end of such period) with respect to the matter in controversy contained in such request for a hearing. Such action shall be brought in the district court of the United States for the judicial district in which the provider is located (or, in an action brought jointly by several providers, the judicial district in which the greatest number of such providers are located) or in the District Court for the District of Columbia and shall be tried pursuant to the applicable provisions under chapter 7 of title 5 notwithstanding any other provisions in section 405 of this title. Any appeal to the Board or action for judicial review by providers which are under common ownership or control or which have obtained a hearing under subsection (b) of this section must be brought by such providers as a group with respect to any matter involving an issue common to such providers."

Finally, the Secretary's proffered requirement of notice to the fiscal intermediary is internally inconsistent. The Secretary cannot maintain, on the one hand, that it is of vital importance to present challenges to the Secretary's regulations in the first instance to the fiscal intermediary and, on the other, acknowledge that a mere cover letter would suffice because the fiscal intermediary lacks authority to rule on the challenge. By objecting to the regulation in the first instance in proceedings before the Board, the petitioners protected their right to judicial review.

We hold that the plain language of the statute demonstrates that the Provider Reimbursement Review Board had jurisdiction to entertain this action. 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.

Syllabus

FEDERAL LABOR RELATIONS AUTHORITY v. ABERDEEN PROVING GROUND, DEPARTMENT OF THE ARMY

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

No. 86-1715. Argued February 23, 1988—Decided April 4, 1988

Title VII of the Civil Service Reform Act of 1978 generally requires that federal agencies and labor unions bargain in good faith concerning terms and conditions of employment. A statutory exemption provides that an agency has a duty to bargain when an agency rule or regulation is involved “only if the [Federal Labor Relations Authority (Authority)] has determined . . . that no compelling need . . . exists for the rule or regulation,” 5 U. S. C. § 7117(a)(2), and details procedures for making that determination. § 7117(b). When respondent Aberdeen Proving Ground refused to negotiate an administrative leave proposal by its employees’ union because the proposal conflicted with agency regulations, the union filed an unfair labor practice charge with the Authority. An Administrative Law Judge held in respondent’s favor, finding that the proposal was inconsistent with agency regulations and was not subject to negotiations because the Authority had not previously determined under § 7117(b) that there was no compelling need for the regulations. The Authority reversed, holding, *inter alia*, that a compelling need determination may be unified with an unfair labor practice proceeding. The Court of Appeals reversed on the ground that a § 7117(b) negotiability appeal is the sole means of determining a compelling need question.

Held: Section 7117(b) provides the exclusive procedure for determining whether there is a compelling need for an agency regulation. The plain language of Title VII unambiguously provides that the procedure specified in § 7117(b) is exclusive rather than one of multiple options. This reading of Title VII is consistent with the statute’s legislative history and asserted purpose of achieving a balance between the rights of federal employees to bargain collectively and the public interest in effective government.

Affirmed.

Ruth E. Peters argued the cause for petitioner. With her on the briefs were *William E. Persina* and *Arthur A. Horowitz*.

Per Curiam

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Lawrence S. Robbins argued the cause for respondent. With him on the brief were *Solicitor General Fried*, *Assistant Attorney General Willard*, *Deputy Solicitor General Cohen*, and *William Kanter*.

PER CURIAM.

The Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978, 5 U. S. C. § 7101 *et seq.*, protects the right of federal employees "to form, join, or assist any labor organization, or to refrain from any such activity," § 7102, and requires that federal agencies and labor organizations bargain in good faith concerning the terms and conditions of employment, §§ 7102, 7114, 7116(a)(5), and (b)(5). Recognizing "the special requirements and needs of the Government," § 7101(b), Title VII exempts certain matters from the duty to negotiate. One such exemption provides that an agency's duty to bargain extends "to matters which are the subject of any agency rule or regulation . . . only if the [Federal Labor Relations Authority (Authority)] has determined under subsection (b) of this section that no compelling need . . . exists for the rule or regulation." § 7117(a)(2). Subsection (b) specifies detailed procedures for determining whether there is a "compelling need" for the agency regulation. We granted certiorari to resolve a conflict between Circuits as to whether § 7117(b) provides the exclusive procedure for determining whether there is a compelling need for an agency regulation or whether the Authority alternatively may make a compelling need determination in connection with an unfair labor practice (ULP) proceeding. 484 U. S. 813 (1987).*

*Compare *Defense Logistics Agency v. FLRA*, 244 U. S. App. D. C. 22, 754 F. 2d 1003 (1985) (permissible for Authority to resolve compelling need in either § 7117(b) negotiability appeal or ULP forum in unilateral change cases), with *U. S. Army Engineer Center v. FLRA*, 762 F. 2d 409 (CA4 1985) (§ 7117(b) negotiability appeal exclusive procedure to resolve compelling need).

In September 1981, the respondent, Aberdeen Proving Ground, notified its employees' union representatives that Aberdeen intended to curtail operations for the three days after Thanksgiving, November 27-29, 1981, and that, as a result, Aberdeen employees would be placed on forced annual leave for Friday, November 27. Thereafter, Aberdeen met with union representatives to discuss leave procedures. Union representatives requested that the employees instead be granted administrative leave; management replied that administrative leave was not permitted by the relevant rules and regulations and that the issue "verges on nonnegotiability." 21 F. L. R. A. 826, 829 (1982).

The union then filed an ULP charge with the Authority, and the Authority's General Counsel issued a complaint alleging that Aberdeen's refusal to negotiate concerning the union's administrative leave proposal was a failure to negotiate in good faith. The Administrative Law Judge held in Aberdeen's favor, concluding that the union's proposal was inconsistent with agency regulations and thus not subject to negotiations because the Authority had not previously determined under § 7117(b) that there was no compelling need for the regulations. *Id.*, at 834. The Authority reversed, holding that an ULP charge is properly filed where the Government employer undertakes a unilateral change in conditions of employment, even though the union's proposal may conflict with an agency regulation and there has been no compelling need determination. In the Authority's view, in such cases the compelling need determination may be properly unified with the ULP proceeding. 21 F. L. R. A. 814, 816-820 (1986). Finding that the regulation was not justified by a compelling need, the Authority held that Aberdeen had violated its duty to negotiate in good faith. See §§ 7116(a)(1) and (a)(5).

The Court of Appeals summarily reversed on the authority of its prior decision in *U. S. Army Engineer Center v. FLRA*, 762 F. 2d 409 (CA4 1985). In *U. S. Army Engineer Center* the Court of Appeals wrote that "an examination

of the history, policies, and, above all, the language of the Federal Labor-Management Relations Act persuades us that Congress meant the § 7117(b) negotiability appeal to be the sole means of determining a compelling need question under the statute.” 762 F. 2d, at 417. We agree with both the analysis and conclusion of the Court of Appeals.

The plain language of Title VII unambiguously provides that where a matter is covered by regulation, no duty to bargain arises until the Authority has first determined that no compelling need justifies adherence to the regulation. Section 7117(a)(2) states unequivocally that “[t]he duty to bargain in good faith shall . . . extend to matters which are the subject of any agency rule or regulation . . . *only if* the Authority *has determined under subsection (b) of this section* that no compelling need . . . exists for the rule or regulation.” (Emphasis supplied.) As the Court of Appeals noted, the language of the statute is that of a condition precedent. 762 F. 2d, at 413. The phrase “only if” denotes exclusivity; it does not suggest one of multiple options. Moreover, the words “has determined under subsection (b) of this section” clearly refer to an event that has come to pass. Thus, the duty to bargain does not arise until the § 7117(b) determination has occurred. Section 7117(b) further confirms this reading of the statute. Here, the statute again speaks in exclusive and mandatory terms: “In *any case* of collective bargaining in which an exclusive representative alleges that no compelling need exists for any rule or regulation . . . which is then in effect and which governs any matter at issue in such collective bargaining, the Authority *shall determine under paragraph (2) of this subsection* . . . whether such a compelling need exists.” (Emphasis supplied.)

This plain reading of Title VII is fully consistent with—if not compelled by—the legislative history and asserted purpose of the statute. Title VII strives to achieve a balance between the rights of federal employees to bargain collectively and “the paramount public interest in the effective con-

duct of the public's business." Message from the President Transmitting A Draft of Proposed Legislation to Reform the Civil Service Laws 4 (1978), Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978 (Committee Print compiled for the House Committee on Post Office and Civil Service) Print No. 96-7, p. 626 (1979) (Leg. Hist.); see also 124 Cong. Rec. 25600-25601, 25613-25614 (1978) (remarks of Rep. Clay), Leg. Hist. 842-845.

Section 7117(b) is carefully constructed to strike such a balance. Under § 7117(b) employees are provided with a means to clarify the scope of the agency's duty to bargain; if the agency then refuses to bargain, the union may seek relief through an ULP proceeding. At the same time, § 7117(b) provides special procedures designed to promote effective government. For instance, under a § 7117(b) negotiability appeal, but not in the ULP forum, the agency that issued the relevant regulation is a necessary party, § 7117(b)(4); the Authority's General Counsel is not a party, § 7117(b)(3); and the negotiability appeal is presented directly to the Authority, rather than first to an administrative law judge, 5 CFR pt. 2424 (1987). Moreover, a § 7117(b) hearing is an expedited proceeding, § 7117(b)(3), thus resolving doubt as to whether a regulation is controlling as promptly as practicable. Most importantly, requiring that compelling need be resolved exclusively through a § 7117(b) appeal allows agencies to act in accordance with their regulations without an overriding apprehension that their adherence to the regulations might result in sanctions under an ULP proceeding. See § 7118(a)(7). To allow compelling need to be adjudicated in the context of an ULP proceeding, without any prior § 7117(b) negotiability appeal, would frustrate this careful balance and would disregard Congress' direction that Title VII "be interpreted in a manner consistent with the requirement of an effective and efficient Government." § 7101(b).

Per Curiam

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Although "reviewing courts should uphold reasonable and defensible constructions of an agency's enabling Act, . . . they must not 'rubber-stamp . . . administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.'" *Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 464 U. S. 89, 97 (1983), quoting *NLRB v. Brown*, 380 U. S. 278, 291-292 (1965). The Court of Appeals properly concluded that the Authority acted inconsistently with the language and purpose of Title VII in permitting resolution of the compelling need issue in the ULP forum.

The judgment of the Court of Appeals is accordingly

Affirmed.

Syllabus

GARDEBRING, COMMISSIONER OF THE MINNESOTA DEPARTMENT OF HUMAN SERVICES
v. JENKINSCERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT

No. 86-978. Argued January 13, 1988—Decided April 19, 1988

In 1981, the federal statute authorizing the Aid to Families with Dependent Children (AFDC) program was amended to provide that a family receiving nonrecurring lump-sum income is ineligible for benefits for the number of months that the income would satisfy the family's standard of need. In 1983, respondent's husband received a lump-sum Social Security disability payment, which was expended within two days to pay family bills. Respondent reported the receipt and expenditure of the lump-sum payment to her Minnesota Department of Human Services (Department) caseworker and was advised that under the 1981 amendment her family would be ineligible for benefits for the next several months. The family continued to receive benefits while respondent's administrative appeal was pending, but the Department ultimately concluded that the federal statute must be enforced even though respondent had not received advance notice of the new lump-sum rule. Respondent then intervened in a pending class action in Federal District Court; the court held that the Department's implementation of the new lump-sum rule without adequate notice to AFDC applicants and recipients violated a federal notice regulation that, as promulgated by the Secretary of Health and Human Services (Secretary) before the 1981 amendment was enacted, requires that individuals be given "information in written form, and orally as appropriate, about . . . conditions of eligibility." The Court of Appeals affirmed the District Court's judgment in pertinent part.

Held: The federal notice regulation was not violated by the Department. Pursuant to the regulation, the Department has distributed two printed brochures that generally describe the AFDC program and the recipient's duty to report all household income monthly. When the 1981 amendment was enacted, the Department sent a letter to all AFDC recipients advising them of the major changes in the program and alerting them to the new lump-sum rule. The plain language of the federal regulation does not require that information be disseminated regarding every specific change in eligibility requirements. Moreover, the plain language of the notice provision and of other provisions in the same section of the

regulations establishes that only applicants, and not recipients, are addressed by the requirement that individuals be given information about the program. Further, even as to applicants, the notice provision requires only that printed information about access to AFDC benefits be available, and that such information may be transmitted orally as well. Finally, the Secretary believes it appropriate to rely on an oral explanation of the consequences of receiving a lump-sum payment when the recipient reports it to the family's caseworker. In sum, the notice regulation simply requires the State to publish a general description of the basic structure of the AFDC program and its availability. Pp. 423-432. 801 F. 2d 288, reversed.

STEVENS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, BLACKMUN, and SCALIA, JJ., joined. O'CONNOR, J., filed an opinion concurring in the judgment in part and dissenting in part, in which BRENNAN, J., joined, and in which MARSHALL, J., joined as to the last paragraph, *post*, p. 432. KENNEDY, J., took no part in the consideration or decision of the case.

John L. Kirwin, Assistant Attorney General of Minnesota, argued the cause for petitioner. With him on the briefs were *Hubert H. Humphrey III*, Attorney General, and *Beverly Jones Heydinger*, Assistant Attorney General.

Paul J. Larkin, 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*, Deputy Solicitor General *Wallace*, and *John F. Cordes*.

Laurie N. Davison argued the cause for respondent. With her on the brief was *Alan B. Morrison*.*

*A brief of *amici curiae* urging reversal was filed for the State of Alabama et al. by *Warren Price III*, Attorney General of Hawaii, *Thomas D. Farrell*, Deputy Attorney General, *Don Siegelman*, Attorney General of Alabama, *Steve Clark*, Attorney General of Arkansas, *Duane Woodard*, Attorney General of Colorado, *Joseph I. Lieberman*, Attorney General of Connecticut, *John S. Miller*, *Michael J. Bowers*, Attorney General of Georgia, *James T. Jones*, Attorney General of Idaho, *Neil F. Hartigan*, Attorney General of Illinois, *Thomas J. Miller*, Attorney General of Iowa, *Robert T. Stephan*, Attorney General of Kansas, *David L. Armstrong*, Attorney General of Kentucky, *William J. Guste, Jr.*, Attorney General of Louisiana, *James E. Tierney*, Attorney General of Maine, *J. Joseph Cur-*

JUSTICE STEVENS delivered the opinion of the Court.

In 1981 Congress amended the statute authorizing the Aid to Families with Dependent Children (AFDC) program to provide that a family receiving nonrecurring lump-sum income is ineligible for benefits for the number of months that the income would satisfy the family's standard of need. §2304 of the Omnibus Budget Reconciliation Act of 1981, 95 Stat. 845, as amended,¹ 42 U. S. C. § 602(a)(17) (1982 ed. and Supp. III); see generally *Lukhard v. Reed*, 481 U. S. 368, 371-373 (1987) (plurality opinion); see also *id.*, at 384-386 (Powell, J., dissenting).² In this case the United

ran, Jr., Attorney General of Maryland, *Frank J. Kelley*, Attorney General of Michigan, *Brian McKay*, Attorney General of Nevada, *Lacy H. Thornburg*, Attorney General of North Carolina, *Nicholas Spaeth*, Attorney General of North Dakota, *Anthony J. Celebrezze, Jr.*, Attorney General of Ohio, *Dave Frohnmayer*, Attorney General of Oregon, *T. Travis Medlock*, Attorney General of South Carolina, *Roger A. Tellinghuisen*, Attorney General of South Dakota, *David L. Wilkinson*, Attorney General of Utah, *Jeffrey Amestoy*, Attorney General of Vermont, *Mary Sue Terry*, Attorney General of Virginia, *Donald J. Hanaway*, Attorney General of Wisconsin, and *Joseph B. Meyer*, Attorney General of Wyoming.

Evelyn R. Frank filed a brief for the Economic Rights Task Force, National Lawyers Guild, as *amicus curiae* urging affirmance.

¹ The statute was amended again in § 2632 of the Deficit Reduction Act of 1984, 98 Stat. 1141, to give States the option of recalculating the period of ineligibility caused by receipt of a lump sum in three situations not relevant here.

² Examples of "lump-sum income" are provided in the federal regulation that implements Congress' directive:

"When the AFDC assistance unit's income, after applying applicable disregards, exceeds the State need standard for the family because of receipt of nonrecurring earned or unearned lump sum income (including for AFDC, title II and other retroactive monthly benefits, and payments in the nature of a windfall, e. g., inheritances or lottery winnings, personal injury and worker compensation awards, to the extent it is not earmarked and used for the purpose for which it is paid, i. e., monies for back medical bills resulting from accidents or injury, funeral and burial costs, replacement or repair of resources, etc.), the family will be ineligible for aid for the full number of months derived by dividing the sum of the lump sum income and

States Court of Appeals for the Eighth Circuit held that the Minnesota Department of Human Services (the Department) could not enforce that amendment against respondent, and the class she represents, because it had not given them the notice required by a regulation promulgated by the Secretary of Health and Human Services (the Secretary), 45 CFR § 206.10(a)(2)(i) (1987). We granted certiorari to review the Court of Appeals' interpretation of the Secretary's regulation as well as its remedial decision in favor of an injunction barring the Department from recouping payments made to respondent during her period of ineligibility. Because we conclude that the regulation was not violated, we do not reach the remedy question.

I

On October 31, 1983, respondent's husband received a retroactive Social Security disability payment of \$5,752. Respondent used the entire lump sum to pay a \$3,863.75 arrearage on the family's home mortgage, an overdue car repair bill of \$1,366, and a legal fee of \$150, and the remainder to purchase clothing for her children and to pay other bills. Within two days, the entire sum had been expended.³

On November 2, 1983, respondent reported the receipt (and the expenditure) of the Social Security payment to her caseworker and was advised that under the 1981 amendment her family would be ineligible for benefits for the next several months.⁴ She immediately filed an administrative appeal

other income by the monthly need standard for a family of that size. . . ." 45 CFR § 233.20(a)(3)(ii)(F) (1987).

³ Under the lump-sum rule that had been in effect prior to 1981, the family had an incentive to spend the entire amount in October to avoid having any unspent amount treated as a "resource" in future months because excessive resources, like excessive income, would make the family ineligible for AFDC benefits. See *Lukhard v. Reed*, 481 U. S. 368, 371-373 (1987) (plurality opinion).

⁴ As the Appeals Referee later stated in his findings of fact (which were adopted on appeal by the Deputy Commissioner, see App. 73):

"The need standard for the [Jenkins] family unit is \$724 per month. Because of recoupment of a past overpayment, it did not actually receive that

and her family continued to receive benefits while the appeal was pending. See 45 CFR § 205.10(a)(6)(i) (1987). The Appeals Referee decided that the benefits should not be terminated because the Jenkinses had not received any advance notice of the new lump-sum rule, App. 69-73, but the Department's Deputy Commissioner reversed. *Id.*, at 73-76. While expressing disagreement with the policy implemented by the 1981 amendment, he concluded that the federal statute must be enforced even though the lack of advance notice had produced a "harsh result."⁵

When the administrative review proceedings terminated in August, the Jenkins family was again eligible for benefits. The Department's decision, however, meant that benefits had been improperly paid for the period between October 1983 and May 1984. Accordingly, as required by the federal statute, see 42 U. S. C. § 602(a)(22) (1982 ed. and Supp. III); see also 45 CFR § 233.20(a)(13) (1987), in due course the De-

amount each month. It received \$688 each month. The County Agency considered that through its error, overpayments were made in the amount of \$724 monthly for the months of October and November, 1983. It determined that eligibility would not exist through the month of March, 1984, and that if eligibility existed for April, 1984, it would not be for a full grant." *Id.*, at 71.

⁵He stated, in part:

"While the County Agency should have advised the Petitioner of the lump sum rule and how any Worker's Compensation or Disability payments would be treated, the question does arise regarding whether the recipients could have acted any differently if they *had* known.

"The Federal policy regarding the treatment of lump sum payments is punitive and ignores the basic purposes of the AFDC Program. We do not like the Order in this case and would do anything to avoid the harsh result. The State Agency must comply with Federal Regulations as those regulations have been interpreted by legal counsel. Neither our legal counsel nor State Agency staff believes this is a good policy, but we have verified our interpretation with the Federal Agency on numerous occasions. The effect of the Federal policy is to deprive children of the minimum support available in an already insufficient AFDC grant. It does not please us to affirm the termination of the Petitioner's grant, but we see no alternative within current Federal policy." *Id.*, at 75 (emphasis in original).

partment ordered recoupment of the wrongfully paid benefits by deducting 1% from each future AFDC monthly payment, in accordance with state law, see Minn. Stat. § 256.73, subd. 6 (1986).

Shortly after the conclusion of the state administrative proceedings, respondent intervened in an action already pending in Federal District Court challenging the Department's lump-sum policy on various grounds.⁶ In her complaint in intervention, App. 14, 20, respondent added an allegation that the Department's implementation of the new lump-sum rule without adequate notice to AFDC applicants and recipients violated the Secretary's regulation. The District Court cer-

⁶The original plaintiffs contended that the policy (1) violates the Social Security Act because it fails to take into account the actual availability of lump-sum funds in determining AFDC eligibility, (2) violates the Act because it is improperly applied to those members of the class who cannot, despite good-faith efforts, make their lump sums last for the entire period of ineligibility, (3) creates an irrational, irrebuttable presumption that the lump-sum payment would be available for use by the family during the entire period of ineligibility, (4) violates due process because it applies without advance notice, (5) results in the "punishment" of needy children for their parents' improvidence, and (6) violates equal protection principles by treating an AFDC recipient more harshly than a family that received, and spent, a lump sum immediately before applying for an AFDC grant. See Complaint, 1 Record A-12-A-15. The District Court rejected each of these arguments, except (4), which it did not reach due to its holding that advance notice was required by the Secretary's regulation. *Slaughter v. Levine*, 598 F. Supp. 1035, 1045-1049, 1052-1055 (Minn. 1984). The Department had also filed a third-party complaint against the Secretary, claiming that 42 U. S. C. § 602(a)(17) (1982 ed. and Supp. III) does not apply to unavailable lump sums, and that HHS' lump-sum regulations are invalid to the extent that they require States to consider unavailable lump sums; these claims were rejected. 598 F. Supp., at 1045-1049. The Department also asked for, and was granted, a District Court order that the Secretary pay the federal share of any benefits paid to class members as a result of the court's decision. *Slaughter v. Levine*, 605 F. Supp. 1242, 1249-1250 (Minn. 1985). The Secretary filed an appeal from this order, but subsequently withdrew it. See *Slaughter v. Levine*, 801 F. 2d 288, 294, n. 8 (CA8 1986) (case below).

tified a class⁷ and entered summary judgment in its favor on the notice issue. *Slaughter v. Levine*, 598 F. Supp. 1035, 1049-1052 (Minn. 1984).

The District Court awarded two forms of relief. First, it required the Department to prepare a written notice that adequately explained the lump-sum policy and to distribute it to all current AFDC recipients and all future applicants. *Id.*, at 1055. Second, it ordered the Department to notify all class members who had been injured by the Department's violation that they might apply for corrective payments from their local welfare agencies. *Ibid.* The court concluded that the Eleventh Amendment prevented it from ordering any repayment of benefits that had been improperly denied, *ibid.*, or from enjoining the Department from recouping overpayments to families like the Jenkinses. *Slaughter v. Levine*, 621 F. Supp. 509, 513-514 (Minn. 1985). For the purposes of relief, the District Court determined that members of the class who did not expend any portion of their lump-sum payments before they received notice of the current lump-sum policy had not been injured by the Department's violation of the federal notice regulation. 598 F. Supp., at 1055.⁸

⁷ It defined the class as follows:

"[T]hose individuals in the State of Minnesota who are otherwise eligible for AFDC benefits and who have been, or will be, found ineligible for AFDC benefits for a predetermined number of months as a consequence of receipt of lump sum income by one of the members of an AFDC assistance unit of which they have been a member, and whose lump sum has or will become unavailable to them in whole or in part prior to their re-eligibility for benefits." 598 F. Supp., at 1041.

⁸ Because the remaining named plaintiff from the initial complaint had not spent any of her lump-sum funds prior to receipt of notice of the Department's policy, plaintiffs' counsel conceded that she was not an adequate representative of the class. For that reason, although respondent was an intervenor, she became the class representative. See 605 F. Supp., at 1245-1247, and n. 3.

A divided panel of the Court of Appeals affirmed the District Court's judgment insofar as it found a violation of the notice regulation and denied monetary relief to members of the class. *Slaughter v. Levine*, 801 F. 2d 288 (CA8 1986) (case below). It concluded, however, that the District Court should have enjoined the Department from recouping any amounts that were treated as "overpayments" under the post-1981 policy if they would have been proper under the pre-1981 lump-sum rule. In explaining its basic holding, the Court of Appeals pointed out that advance notice to lump-sum recipients was necessary to achieve the purposes of the 1981 amendment,⁹ and that to impose the new rule on a family that assumed that the old rule was still in effect "would be truly Kafkaesque."¹⁰ The dissenting judge did not believe

⁹"[A] lump-sum recipient without notice of the new rule is very likely to spend most or all of a lump sum before learning of the rule's strict budgeting requirements, particularly when the recipient is familiar with the prior policy. Consequently, the net result of failing to give adequate advance notice of the new lump-sum rule is to frustrate the very goal Congress sought to further in enacting the rule: encouraging recipients to budget lump sums so that they serve to replace the family's monthly AFDC check." 801 F. 2d, at 295-296 (footnote omitted).

¹⁰"The importance of advance notice is heightened by the fact that the effects of the lump-sum rule on an AFDC recipient can be peculiarly drastic. In general, the AFDC program's income-and-asset-related eligibility requirements reduce or cut off eligibility only if the resource is actually available to the recipient. However, the new lump-sum rule diverges from the norm, cutting off eligibility without regard, except in very limited circumstances, to whether the lump sum is actually available. Thus, under the operation of most eligibility requirements, there is no point at which a family will not have either the basic support provided by the AFDC program or other financial resources that equal or surpass the AFDC standard of need. In contrast, under the lump-sum rule, where a family exhausts its lump sum before its ineligibility period expires, the family may well be left for months with insufficient resources to provide for basic necessities. To impose this situation on a family that had no advance notice of the new lump-sum rule and operated on the altogether reasonable assumption that the old policy still governed would be truly Kafkaesque." *Id.*, at 296 (footnotes omitted).

that either the statute or the notice regulation conditioned the implementation of the new rule on advance notice to the small percentage of AFDC beneficiaries affected by it. He construed the regulation as simply requiring "the state to publicize generally in written form, and orally as appropriate, the AFDC program and its availability." *Id.*, at 303 (Fagg, J., dissenting). Because of the significance of the Court of Appeals' holding for States' administration of welfare laws, we granted certiorari, 482 U. S. 926 (1987).

II

The Secretary's notice regulation, which was first adopted in 1971 and later amended in 1978 and 1979, now provides:

"Applicants shall be informed about the eligibility requirements and their rights and obligations under the program. Under this requirement individuals are given information in written form, and orally as appropriate, about coverage, conditions of eligibility, scope of the program, and related services available, and the rights and responsibilities of applicants for and recipients of assistance. Specifically developed bulletins or pamphlets explaining the rules regarding eligibility and appeals in simple, understandable terms are publicized and available in quantity." 45 CFR § 206.10(a)(2)(i) (1987).

Pursuant to this regulation, the Department has prepared and distributed two brief printed brochures. The first contains four pages and generally describes the AFDC program, the application process, the benefit levels, and the applicant's basic procedural rights. The pamphlet states that the "information in this brochure will help you decide if you wish to apply for AFDC, but it is not intended to cover all program rules. . . . You are urged to contact your welfare office for specific information as to the eligibility rules and limitations for AFDC. Since these can and do change from time to

time, you should inquire with your welfare office for up-to-date information." App. 29.

The second brochure is a six-page booklet entitled "Monthly Reporting: What AFDC Households Must Know"; it explains the recipient's duty to report all of the household income each month. Although some of the intricacies of the AFDC program are explained, it does not comment specifically on the lump-sum rule. In addition to using pamphlets such as these, the Department relies on its caseworkers to provide applicants and recipients with oral advice about the aspects of the program that are relevant to specific situations.

When the 1981 amendment was enacted, the Department did not prepare a new pamphlet. It did, however, on September 18, 1981, send a letter to all AFDC recipients advising them that there had been 19 major changes in the AFDC program. The paragraph commenting on the new lump-sum rule was not a model of clarity,¹¹ but presumably it at least alerted the reader to the existence of the new rule. Since the letter was just mailed to those already receiving AFDC benefits, however, it did not provide any notice to a family that did not apply for benefits until a later date. Such a family might not learn about the operation of the lump-sum rule until it reported the receipt of a payment to a caseworker; if, as was true in the Jenkins' case, the money had already been

¹¹ The first change described in the letter was the new lump-sum rule. The letter stated:

"Lump Sum Money: When a family receives lump-sum money such as an inheritance, a Social Security back payment, insurance settlement, gift, etc., the money will be deducted from the AFDC grant, whether or not it has already been spent. If the lump sum added to other family income totals more than the AFDC maximum for that size family, the family will be ineligible for the month in which the lump sum was received (and possibly for a number of following months), whether or not the money is spent before the period of ineligibility has gone by. If the family already received an AFDC grant that month, the grant would be 'recouped' by the welfare agency." App. to Pet. for Cert. 97-98.

spent, it would obviously be too late for the family to budget the use of that money to replace its normal AFDC checks.

The question for us to decide is not whether advance written notice is desirable, or, indeed, whether such notice is necessary to accomplish the purposes of the 1981 statute. The question is whether the pre-existing regulation was intended to forestall the implementation of a congressionally mandated program change until the state agencies provided all AFDC recipients with notice of the change. Although such a rule might well represent sound policy, we do not believe that a fair reading of the text of § 206.10(a)(2)(i) conveys that message.

It is true that the regulation requires that individuals be given "information in written form, and orally as appropriate, about . . . conditions of eligibility," but that is hardly how one would write a command stating that every such condition must be identified and explained before it may be enforced. The reference to "information" in both written and oral form "about" various aspects of the program seems to require instead merely a general descriptive statement regarding AFDC benefits. Thus, the plain language of the regulation does not require that information be disseminated regarding every specific change in eligibility requirements.

Indeed, it is doubtful whether the notice requirement even applies to AFDC *recipients*.¹² The notice provision appears

¹² Respondent objects that the Department did not raise this contention below. Although it did not elaborate on the point, the Department did, though, comment that "[b]asically, [the regulation] is *directed toward new applicants*, requiring that the state publicize the availability of the AFDC program through the use of pamphlets." Brief for Appellant in No. 85-5143-MN (CA8), p. 24 (emphasis added). Moreover, the Department raised the argument in the petition for a writ of certiorari, see Pet. for Cert. 11, and respondent did not object, in her brief in opposition, that the Department had not raised the claim below. Thus, in accordance with our rule that "[n]onjurisdictional defects of this sort should be brought to our attention *no later* than in respondent's brief in opposition to the petition for certiorari," *Oklahoma City v. Tuttle*, 471 U. S. 808, 816 (1985) (emphasis in original), "we consider it within our discretion to deem the defect

in a section that contains various rules regarding “[a]pplication, determination of eligibility and furnishing of assistance,” 45 CFR §206.10 (1987). The section speaks to how one may apply for benefits, general conditions of eligibility, the time frame within which States must determine eligibility, basic rules about the furnishing of assistance to recipients, and general procedures for redetermining eligibility due to changed circumstances. The regulation in question in this case, §206.10(a)(2)(i), both on its face and in context of the section as a whole, quite plainly speaks to how general information about the program must be provided to individuals seeking assistance, that is, to program applicants. See §206.10(b)(1) (defining “applicant”). The very next provision in the section, in fact, states that “[p]rocedures shall be adopted which are designed to assure that *recipients* make timely and accurate reports of any change in circumstances which may affect their eligibility or the amount of assistance.” §206.10(a)(2)(ii) (emphasis added). In other words, the drafters of this regulation wrote separately about two types of information that must be communicated: in §206.10(a)(2)(i) about providing applicants with program information, and in §206.10(a)(2)(ii) about developing procedures for recipients themselves to provide information about changed circumstances that might affect their benefits. The requirement of §206.10(a)(2)(i) that information be given to applicants in “written form, and orally as appropriate,” seems in fact to require no mailing of information at all, but rather simply explains that printed information about access to AFDC benefits, such as pamphlets, booklets, and flyers, be

waived.” *Ibid.* Finally, the issue in this case, as raised by respondent’s complaint, is the meaning of the notice provision of the federal regulations. Whether or not the provision covers recipients as well as applicants is germane to that interpretive quest, regardless of whether one of the parties points us in that direction.

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available, and that such information may be transmitted orally as well.¹³

Respondent contends that the notice provision applies to recipients of AFDC benefits as well as applicants. She points to § 206.10(a)(1)(iii), which provides that "[a]n applicant may be assisted, if he so desires, by an individual(s) of his choice (who need not be a lawyer) in the various aspects of the application process and the redetermination of eligibility and may be accompanied by such individual(s) in contacts with the agency and when so accompanied may also be represented by them." Since "redetermination of eligibility" involves "a review of factors affecting AFDC eligibility and payment amount," § 206.10(b)(4), and thus clearly applies to recipients, respondent contends that "applicant" is used in § 206.10(a)(1)(iii) to include recipients as well, and therefore must have the same inclusive meaning throughout § 206.10, including the notice provision.

¹³ Petitioner also points out that although the notice provision originally referred simply to "applicants," see 36 Fed. Reg. 3860, 3864 (1971), in 1978 it underwent a temporary metamorphosis. The Secretary published a notice of proposed rulemaking, 41 Fed. Reg. 56832 (1976), to respond to "reports from recipient group representatives that some State and local agencies have not made printed or oral information about the public assistance programs available to persons seeking information unless they are applicants." 43 Fed. Reg. 6949 (1978). Accordingly, the notice provision was "revised to specify that information concerning the program shall be provided to any person who requests it, and applicants and all persons who inquire about the programs shall be informed of the eligibility requirements and the rights and obligations of individuals under the programs." *Id.*, at 6950. The next year, without explanation, the notice provision was shifted back to its original, and current, form. See 44 Fed. Reg. 17940, 17943 (1979). We agree with petitioner that this history provides strong support for the conclusion that the current provision does not extend beyond applicants. It also tends to buttress our reasoning in the text that the notice provision was intended simply as a requirement that general program information be made available to applicants upon request, and not as a mandate to States to provide specific, unrequested information about particular changes in eligibility requirements to current benefits recipients, or, as we also discuss in the text, to applicants.

We are unpersuaded. The term "recipients" is used in various other provisions in the section, and appears simply to have been inadvertently omitted at this juncture. The definition of the term "applicant," understood in the context of eligibility "redetermination," makes this omission apparent. An "applicant" is "a person who has, directly, or through his authorized representative, or where incompetent or incapacitated, through someone acting responsibly for him, made application for public assistance from the agency administering the program, and whose application has not been terminated." § 206.10(b)(1). Since redetermination of benefits affects only those who have already been "determined to be eligible," § 206.10(a)(9), and an "applicant," by definition, has not yet been determined to be eligible, it would therefore be impossible for an applicant's case to be redetermined. Thus, it is plain that § 206.10(a)(1)(iii) omitted the word "recipient" when referring to redetermination.¹⁴

Thus, a reading of the plain language of the notice provision and other provisions in the same section reveals that

¹⁴The Secretary's comments accompanying the regulations as originally promulgated strongly support this conclusion. As originally proposed in 1970, the redetermination provision read "[a]n applicant or recipient may be assisted if he so desires by other individuals of his choice in the various aspects of the application process and the redetermination of eligibility" 35 Fed. Reg. 18402 (1970) (emphasis added). When the provision was adopted several months later, the reference to "recipients" was eliminated, even though the reference to "redetermination of eligibility" was retained. 36 Fed. Reg. 3860, 3864 (1971). The Secretary's explanatory comments continued to acknowledge the distinction between applicants and recipients, but did not explain the deletion of the term "recipients" from the text of the rule itself: "[N]otice of proposed rule making was published . . . to provide that applicants for and recipients of public assistance may be accompanied by other individuals in their contacts with the agency, if they so wish." *Id.*, at 3860. Thus, the history of these regulations supports the conclusion in the text that the word "recipient" was inadvertently omitted when referring to redetermination, and, accordingly, that "applicant," as used in the notice provision, means simply "applicant," and nothing more.

only applicants, and not recipients, are addressed by the requirement that individuals be given information about the program. Further, even as to applicants, the notice provision requires only that general program information be available, in "written form" and "orally as appropriate."¹⁵

The Secretary, who is responsible for enforcing the regulation, does not agree with the strict interpretation adopted by the District Court. Rather, he believes that it is generally appropriate to rely on an oral explanation of the consequences of receiving a lump-sum payment when the recipient reports it to the family's caseworker.¹⁶ We recognize that

¹⁵ The lump-sum rule is only one of many conditions of eligibility for AFDC benefits that are meticulously described in 40 pages of the Code of Federal Regulations and in 66 pages of Minnesota's recently revised AFDC rules and regulations. See 45 CFR pt. 233 (1987); Minn. Rules, ch. 9500.2000 *et seq.* (1987). The conditions are subject to frequent alteration, with many changes such as the new lump-sum rule affecting only a small minority of AFDC recipients. Unquestionably it would be wise (assuming that it were feasible and not too expensive) to precede every such change with adequate advance notice, but the regulation itself does not unambiguously impose any such requirement on state welfare agencies.

¹⁶ In rebutting the argument that the Secretary's views are due deference from us, respondent points to the Secretary's response to an interrogatory put to him by petitioner's predecessor as third-party plaintiff, a response upon which the Court of Appeals relied:

"Federal regulations at 45 CFR § 206.10(a)(2)(i) and (ii) require a State agency to inform AFDC applicants and recipients about eligibility requirements and their rights and obligations under the AFDC Program. Under these requirements, States are fully expected to establish policies to ensure that individuals are provided information in written form, and orally as appropriate, about coverage, conditions of eligibility, scope of the program and related services available. *This would include generally advising applicants and recipients of their obligation to report receipt of lump sum income, the operation of the lump sum rule, and the effect on eligibility for assistance.*" App. 89 (emphasis added).

While the highlighted sentence indeed indicates that individuals must be advised to report receipt of lump-sum income, it does not specify whether such advisement must be made in specific mailings—*i. e.*, a letter to recipients telling them to report receipt of lump-sum income as soon as it is re-

the Secretary had not taken a position on this question until this litigation. However, when it is the Secretary's regulation that we are construing, and when there is no claim in this Court that the regulation violates any constitutional or statutory mandate, we are properly hesitant to substitute an alternative reading for the Secretary's unless that alternative reading is compelled by the regulation's plain language or by other indications of the Secretary's intent at the time of the regulation's promulgation.

Finally, respondent's emphasis on the harsh result in this particular case¹⁷ is actually, in large part, a criticism of the

ceived and before the normal monthly reporting, if necessary—or whether such advisement could be satisfied through the general notice telling individuals to report all of their income, including lump-sum income, on a usual, monthly basis. In fact, in response to a separate interrogatory, the Secretary explained:

"A State has considerable latitude in the development of procedures it shall adopt to ensure effective administration of the AFDC program. *Provisions at 45 CFR §206.10(a)(2)(i) do not require a State to publicize the lump sum rule or any other eligibility requirements in specifically developed pamphlets or bulletins.*" *Id.*, at 90–91 (emphasis added).

This second answer tends to support our reading of the first answer, namely, that it is inconclusive on the question whether States must notify individuals in advance to report lump-sum income immediately upon its receipt, or, for that matter, whether States must notify individuals in advance about the effect of the new lump-sum rule.

¹⁷ Respondent deems this case particularly harsh because of an earlier incident involving her family. When the Department sent its September 1981 letter explaining the new lump-sum rule, the Jenkinsons were receiving AFDC benefits, and received a lump-sum payment later that year. However, because of obligations incurred in other litigation, the Department had not yet implemented the new lump-sum rule, and respondent's lump-sum payment was treated under the old rule. Accordingly, respondent contends, she had every reason to believe that the old lump-sum rule was still in effect when her husband received the October 1983 Social Security payment. However, respondent fails to note during this argument that she swore to an affidavit that stated: "The welfare department apparently says that I got a letter in September of 1981 explaining the new lump sum rule. I have been shown a copy of the letter, and don't remember

lump-sum rule itself. The record indicates that even if respondent had known about the rule, she would have been hard pressed not to use most of the \$5,752 payment to avoid a foreclosure of the mortgage on the family home and to make promised payments to other creditors. Further, even though the rule, combined with the absence of advance notice, may have produced a "Kafkaesque" result for the Jenkins family, it is not irrational to assume that most needy families will realize that the receipt of a large lump sum may affect their future eligibility for benefits, and that it would be prudent to inform their caseworkers of the development before spending the money. Moreover, the harshness of the result is somewhat mitigated by the fact that the family's benefits continued during the administrative appeal and that the recoupment process only subtracts 1% of each monthly AFDC check, and the further fact that if AFDC benefits are actually terminated, a family may be immediately eligible for another form of public assistance, albeit a less generous one. In all

receiving it." *Id.*, at 111. Respondent cannot have it both ways: Either she received the letter and can argue that, because the new lump-sum rule was not applied to her late 1981 lump-sum payment, she had good cause to believe the new rule was not going to go into effect; or, she did not receive the letter and cannot invoke this equitable argument. Respondent's affidavit admission forecloses the former argument.

The latter argument—that respondent did not receive the 1981 letter (or that she received it but did not understand it) and that therefore she acted in 1983 under the general assumption that, absent notice of the new lump-sum rule, the old lump-sum rule was still in effect—carried some weight with both the District Court and the Court of Appeals. See *Slaughter v. Levine*, 598 F. Supp., at 1050–1051; *Slaughter v. Levine*, 801 F. 2d, at 295–296. We are sympathetic with the plight of those AFDC recipients in this situation, and can only reiterate that our decision today is an endorsement of neither the new lump-sum rule nor the absence of notice thereof. Instead, our authority is merely to determine whether the pertinent provision of the regulations requires advance written notice to individuals explaining the workings of the new lump-sum rule. As we have explained, 45 CFR § 206.10(a)(2)(i) (1987) simply does not provide the specific mandate that respondent seeks.

events, since the regulation was written long before the lump-sum rule was enacted, it clearly was not designed to forestall the harsh consequences suffered by the Jenkinses.

In the final analysis, our decision rests on our agreement with the Secretary and the dissenting judge in the Court of Appeals that the regulation simply requires the State to publish a general description of the basic structure of the AFDC program and its availability. We would require a much more precise mandate to the States to permit courts to interfere with the workings of governmental benefits programs by ordering the taking of certain affirmative steps.¹⁸

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

It is so ordered.

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

JUSTICE O'CONNOR, with whom JUSTICE BRENNAN joins, and with whom JUSTICE MARSHALL joins as to the last paragraph, concurring in the judgment in part and dissenting in part.

The Court's approach to this case is summarized in its statement that "when it is the Secretary's regulation that we are construing, and when there is no claim in this Court that the regulation violates any constitutional or statutory mandate, we are properly hesitant to substitute an alternative reading for the Secretary's unless that alternative reading is compelled by the regulation's plain language or by other indications of the Secretary's intent at the time of the regulation's promulgation." *Ante*, at 430. I agree with this proposition, but I disagree with the Court's application of it here. In the course of this litigation, the Secretary took what I be-

¹⁸ Our decision, of course, means that the Department may recoup the overpayment made to respondent.

lieve are two inconsistent positions. Because I regard the Secretary's later position as far less reasonable than his earlier position, I would hold him to his earlier and better interpretation.

In November 1982, respondent Kathryn Jenkins applied for AFDC benefits. Mrs. Jenkins' husband is disabled, they have five minor children, and the family was found eligible for benefits. In October 1983, Mr. Jenkins received a retroactive Social Security disability payment. The family immediately used the bulk of this lump-sum payment to pay their overdue bills. Under the provisions of a federal statute adopted in 1981, using the lump-sum payment in this way rendered the family ineligible for any AFDC benefits during the next several months. Mrs. Jenkins promptly reported receipt of the lump sum, and its expenditure, to her caseworker. The caseworker informed her of the ineligibility rule, and a written notice followed the next day. Mrs. Jenkins took an administrative appeal of the decision to suspend her benefits, and monthly payments continued while the appeal was pending. The Minnesota Department of Human Services (the Department) ultimately upheld the ineligibility determination and ordered recoupment of payments the Jenkins family had received during the appeal process.

The federal regulation at issue in this case provides that applicants for AFDC benefits "shall be informed about the eligibility requirements and their rights and obligations under the program." 45 CFR § 206.10(a)(2)(i) (1987). The regulation goes on to specify that applicants are to be given information, "in written form, and orally as appropriate," about certain aspects of the program, including "the rights and responsibilities of applicants for and recipients of assistance." *Ibid.* A natural reading of this language suggests that applicants should be provided with information sufficient to enable them to exercise their rights and fulfill their responsibilities under the program. Thus, at the very least, the regulation suggests that applicants should be given enough written in-

formation to warn them of the circumstances under which they should seek further oral explanations of the program's operation and requirements. A reasonable person would be unlikely to suspect that a lump-sum payment should not be used to pay off the family's outstanding debts. For that reason, the Department's failure to notify applicants for AFDC benefits of the new rule was sure to affect some persons in a manner that the Court of Appeals called "truly Kafkaesque." *Slaughter v. Levine*, 801 F. 2d 288, 296 (CA8 1986) (opinion below).

The Secretary contends that the notice regulation at issue does not require any warning about the effects of the lump-sum rule until after an AFDC recipient reports receipt of a lump sum to the appropriate state agency. By that time, as the incident with the Jenkins family suggests, it may well be too late for warnings to be of any use. As the Court emphasizes, however, the language of the regulation is so general that one could hardly conclude that the Secretary's interpretation is strictly incompatible with that language. Thus, if all we had before us was the regulation itself and the Secretary's interpretation of it, I might have to agree that we should defer to the Secretary's construction of his own regulation. In answer to an interrogatory filed in this very case, however, the Secretary took a different position than the one he now maintains:

"Federal regulations at 45 CFR §206.10(a)(2)(i) and (ii) require a State agency to inform AFDC applicants and recipients about eligibility requirements and their rights and obligations under the AFDC Program. Under these requirements, States are fully expected to establish policies to ensure that individuals are provided information in written form, and orally as appropriate, about coverage, conditions of eligibility, scope of the program and related services available. *This would include generally advising applicants and recipients of their obligation to report receipt of lump sum income, the operation*

of the lump sum rule, and the effect on eligibility for assistance." App. 89 (emphasis added).*

Unlike the majority, see *ante*, at 429–430, n. 16, I cannot reconcile the highlighted sentence with the Secretary's current position. I read that sentence to imply that individuals who may be affected by the lump-sum rule should be given enough information, in advance, to warn them against using lump-sum income in the normal way, viz., to pay one's outstanding debts. That is a far more reasonable position than the one the Secretary later adopted, and I would hold him to his earlier and better interpretation. Cf. *Bowen v. American Hospital Assn.*, 476 U. S. 610, 646, n. 34 (1986) (plural-ity opinion): "The fact that the agency's interpretation 'has been neither consistent nor longstanding . . . substantially diminishes the deference to be given to [the agency's] present interpretation of the statute.' *Southeastern Community College v. Davis*, 442 U. S. [397,] 412, n. 11 [1979] (citing *General Electric Co. v. Gilbert*, 429 U. S. 125, 143 (1976))." Accordingly, I would affirm the Court of Appeals to the extent that it found a violation of the federal notice regulation.

The relief granted in this case, however, was too broad. The District Court ordered the Department "to forthwith

*The regulation at 45 CFR § 206.10(a)(2)(i) (1987) refers only to "applicants," not to "recipients." The regulation at 45 CFR § 206.10(a)(2)(ii) (1987) says: "Procedures shall be adopted which are designed to assure that recipients make timely and accurate reports of any change in circumstances which may affect their eligibility or the amount of assistance." In the answer quoted in the text, the Secretary seems to have read the two provisions to require that applicants be informed about the lump-sum rule, and to require that recipients who were not informed about the rule when they were applicants also be informed. While this is not the only possible interpretation of the regulations, it is not unreasonable: if new applicants need to be informed about the new lump-sum rule, certainly current recipients would have an even greater need to be alerted to the fact that the old rule was being changed. In any event, just before the new lump-sum rule was to take effect, the Department did in fact notify all AFDC recipients about the new rule.

prepare a notice explaining the lump sum policy." *Slaughter v. Levine*, 598 F. Supp. 1035, 1055 (Minn. 1984). Not only was this notice to be provided to all applicants, it was also to be mailed to all current AFDC recipients and provided again to all recipients each six months. *Ibid.* The District Court also specified that the notice "should provide a thorough explanation of the mechanics of the [lump-sum] rule." *Ibid.*

The Secretary has never suggested an interpretation of the notice regulation that would justify such elaborate procedures. First, although I believe that the Secretary did conclude that affected persons should be notified of the lump-sum rule, he never suggested that *repeated* notifications were called for. The Department in fact mailed a letter about the new rule to all then-current AFDC recipients shortly before the rule went into effect. That letter was sufficient notice to the individuals who received it. Furthermore, the Secretary answered an interrogatory in this case with the following statement:

"A State has considerable latitude in the development of procedures it shall adopt to ensure effective administration of the AFDC program. Provisions at 45 CFR § 206.10(a)(2)(i) do not require a State to publicize the lump sum rule or any other eligibility requirements in specifically developed pamphlets or bulletins." App. 90-91.

Reading this statement in light of the regulation and the other answer quoted above, I conclude that the Secretary interpreted his regulation to require, as to future applicants, only that the Department add a general statement about the new lump-sum rule to its informational materials as soon as reasonably practicable. Because the Department failed to advise applicants about the lump-sum rule for several years after it came into effect, the District Court could also have required the Department to cure that error by informing the affected recipients about the rule. To the extent that the

District Court required the Department to go further, however, by giving repeated written notice and by distributing "specifically developed pamphlets or bulletins," that court unduly infringed the discretion that the regulation was intended to leave in the responsible state agencies.

The District Court was also mistaken in ordering the Department to provide, in writing, a "thorough explanation of the mechanics" of the lump-sum rule. The Secretary quite reasonably argues that such a requirement could easily prove counterproductive because of the complexity of the mechanics involved. Indeed, the detailed explanation given in the Department's letter of September 1981, quoted *ante*, at 424, n. 11, which might not be immediately intelligible even to a trained lawyer, suggests that oral explanations of the rule's operation would be the best way to provide effective notice. Had the Department taken reasonable steps to inform all AFDC applicants of the need to seek an oral explanation at the appropriate time, the purpose of the regulation would have been satisfied. In my view, a simple statement like the following would suffice: "Anytime you receive a lump-sum payment (such as an inheritance, a Social Security back payment, an insurance settlement, a gift, etc.) you should inform your caseworker *before* you spend the money or use it to pay off your debts."

The Court of Appeals also concluded that the Department could be enjoined from recouping the payments that were made to respondent Jenkins during the period that her family was ineligible under the provisions of the new lump-sum rule. The court reasoned that, "[b]y failing to comply with the notice regulation, [the Department] failed to institute a legal change in its eligibility rules." 801 F. 2d, at 301-302. This conclusion was clearly inconsistent with federal law. In adopting the new lump-sum rule, Congress provided that it "shall become effective on October 1, 1981," or that if conforming changes in state law were necessary, then it "will become effective" as of the first month after the first state legis-

lative session ending on or after October 1, 1981. Omnibus Budget Reconciliation Act of 1981, Pub. L. 97-35, § 2321, 95 Stat. 859-860. For Minnesota, the result was an effective date of February 1, 1982. See 801 F. 2d, at 303 (dissenting opinion below). Congress gave no indication whatsoever that the effective date for the new lump-sum rule could be delayed by the action or inaction of state agencies. Whether or not Jenkins received notice in accord with the Secretary's regulation, therefore, the lump-sum rule applied to her when her husband received the retroactive disability payment in 1983. The Department was accordingly required by federal law to recoup the overpayments that she received during her appeal of the Department's decision to apply the new lump-sum rule in her case. See 42 U. S. C. § 602(a)(22) (1982 ed., Supp. III); 45 CFR § 233.20 (a)(13)(i) (1987).

In sum, my disagreement with the Court's decision is relatively narrow. I would hold that the federal notice regulation, as interpreted by the Secretary, requires the Department to give applicants for AFDC benefits written notice at least of the existence of the lump-sum rule and of the need for recipients to consult with a social worker before spending any lump sum they might receive. I therefore think that the District Court could properly have ordered the Department to take reasonable steps to include this information in its standard bulletins or pamphlets, and to take reasonable steps to provide the same information to AFDC recipients who were improperly deprived of this information when they applied for benefits. To the extent that the Court of Appeals approved additional relief in this case, I agree that its judgment must be reversed.

Syllabus

LYNG, SECRETARY OF AGRICULTURE, ET AL. v.
NORTHWEST INDIAN CEMETERY PRO-
TECTIVE ASSOCIATION ET AL.

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

No. 86-1013. Argued November 30, 1987—Decided April 19, 1988

In 1982, the United States Forest Service prepared a final environmental impact statement for constructing a paved road through federal land, including the Chimney Rock area of the Six Rivers National Forest. This area, as reported in a study commissioned by the Service, has historically been used by certain American Indians for religious rituals that depend upon privacy, silence, and an undisturbed natural setting. Rejecting the study's recommendation that the road not be completed through the Chimney Rock area because it would irreparably damage the sacred areas, and also rejecting alternative routes outside the National Forest, the Service selected a route through the Chimney Rock area that avoided archeological sites and was removed as far as possible from the sites used by the Indians for specific spiritual activities. At about the same time, the Service also adopted a management plan allowing for timber harvesting in the same area, but providing for protective zones around all the religious sites identified in the study. After exhausting administrative remedies, respondents—an Indian organization, individual Indians, nature organizations and members thereof, and the State of California—filed suit in Federal District Court challenging both the road-building and timber-harvesting decisions. The court issued a permanent injunction that prohibited the Government from constructing the Chimney Rock section of the road or putting the timber-harvesting plan into effect, holding, *inter alia*, that such actions would violate respondent Indians' rights under the Free Exercise Clause of the First Amendment and would violate certain federal statutes. The Court of Appeals affirmed in pertinent part.

Held:

1. The courts below did not clearly explain whether—in keeping with the principle requiring that courts reach constitutional questions only when necessary—they determined that a decision on the First Amendment issue was necessary because it might entitle respondents to relief beyond that to which they were entitled on their statutory claims. The structure and wording of the District Court's injunction, however, suggest that the statutory holding would not have supported all the relief

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granted, and the Court of Appeals' silence as to the necessity of reaching the First Amendment issue may have reflected its understanding that the District Court's injunction necessarily rested in part on constitutional grounds. Because it appears reasonably likely that the First Amendment issue was necessary to the decisions below, and because the Government is confident that it can cure the statutory defects identified below, it would be inadvisable for this Court to vacate and remand without addressing the constitutional question on the merits. Pp. 445-447.

2. The Free Exercise Clause does not prohibit the Government from permitting timber harvesting in the Chimney Rock area or constructing the proposed road. Pp. 447-458.

(a) In *Bowen v. Roy*, 476 U. S. 693—which held that a federal statute requiring States to use Social Security numbers in administering certain welfare programs did not violate Indian religious rights under the Free Exercise Clause—this Court rejected the same kind of challenge that respondents assert. Just as in *Roy*, the affected individuals here would not be coerced by the Government's action into violating their religious beliefs; nor would the governmental action penalize the exercise of religious rights by denying religious adherents an equal share of the rights, benefits, and privileges enjoyed by other citizens. Incidental effects of government programs, which may interfere with the practice of certain religions, but which have no tendency to coerce individuals into acting contrary to their religious beliefs, do not require government to bring forward a compelling justification for its otherwise lawful actions. The Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government. Even assuming that the Government's actions here will virtually destroy the Indians' ability to practice their religion, the Constitution simply does not provide a principle that could justify upholding respondents' legal claims. Pp. 447-453.

(b) The Government's right to the use of its own lands need not and should not discourage it from accommodating religious practices like those engaged in by the Indian respondents. The Government has taken numerous steps to minimize the impact that construction of the road will have on the Indians' religious activities—such as choosing the route that best protects sites of specific rituals from adverse audible intrusions, and planning steps to reduce the visual impact of the road on the surrounding country. Such solicitude accords with the policy and requirements of the American Indian Religious Freedom Act. Contrary to respondents' contention, however, that Act does not create any enforceable legal right that could authorize the District Court's injunction. Pp. 453-455.

795 F. 2d 688, reversed and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, STEVENS, and SCALIA, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL and BLACKMUN, JJ., joined, *post*, p. 458. KENNEDY, J., took no part in the consideration or decision of the case.

Andrew J. Pincus argued the cause for petitioners. With him on the briefs were *Solicitor General Fried*, *Acting Assistant Attorney General Marzulla*, *Deputy Solicitor General Ayer*, *Robert L. Klarquist*, and *Jacques B. Gelin*.

Marilyn B. Miles argued the cause for respondents. With her on the brief for the Indian respondents was *Stephen V. Quesenberry*. *John K. Van de Kamp*, Attorney General, *R. H. Connett*, Assistant Attorney General, and *Edna Walz*, Deputy Attorney General filed a brief for respondent State of California.*

JUSTICE O'CONNOR delivered the opinion of the Court.

This case requires us to consider whether the First Amendment's Free Exercise Clause prohibits the Government from permitting timber harvesting in, or constructing a road through, a portion of a National Forest that has tradi-

*Briefs of *amici curiae* urging reversal were filed for the State of Hawaii et al. by *Kenneth O. Eikenberry*, Attorney General of Washington, *Timothy R. Malone*, *Nixon Handy*, and *Mark S. Green*, Assistant Attorneys General, *Warren Price III*, Attorney General of Hawaii, *Roger A. Tellinghuisen*, Attorney General of South Dakota, and *David Wilkinson*, Attorney General of Utah; for the Colorado Mining Association et al. by *Lawrence E. Stevens* and *Patrick J. Garver*; for the Howonquet Community Association et al. by *Ronald A. Zumbun* and *Robin L. Rivett*; and for the city of Williams, Arizona, by *Gary Verburg*.

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union Foundation et al. by *John A. Powell*, *Steven R. Shapiro*, *Paul L. Hoffman*, *Mark D. Rosenbaum*, *Alan L. Schlosser*, *Edward M. Chen*, *Matthew A. Coles*, and *Stephen L. Pevar*; for the American Jewish Congress et al. by *Marc D. Stern*, *Lois C. Waldman*, and *Amy Adelson*; and for the Christian Legal Society et al. by *Michael J. Woodruff*, *Samuel Rabinove*, *Richard T. Foltin*, and *Jordan Lorence*.

Steven C. Moore filed a brief for the National Congress of American Indians et al. as *amici curiae*.

tionally been used for religious purposes by members of three American Indian tribes in northwestern California. We conclude that it does not.

I

As part of a project to create a paved 75-mile road linking two California towns, Gasquet and Orleans, the United States Forest Service has upgraded 49 miles of previously unpaved roads on federal land. In order to complete this project (the G-O road), the Forest Service must build a 6-mile paved segment through the Chimney Rock section of the Six Rivers National Forest. That section of the forest is situated between two other portions of the road that are already complete.

In 1977, the Forest Service issued a draft environmental impact statement that discussed proposals for upgrading an existing unpaved road that runs through the Chimney Rock area. In response to comments on the draft statement, the Forest Service commissioned a study of American Indian cultural and religious sites in the area. The Hoopa Valley Indian Reservation adjoins the Six Rivers National Forest, and the Chimney Rock area has historically been used for religious purposes by Yurok, Karok, and Tolowa Indians. The commissioned study, which was completed in 1979, found that the entire area "is significant as an integral and indispensable part of Indian religious conceptualization and practice." App. 181. Specific sites are used for certain rituals, and "successful use of the [area] is dependent upon and facilitated by certain qualities of the physical environment, the most important of which are privacy, silence, and an undisturbed natural setting." *Ibid.* (footnote omitted). The study concluded that constructing a road along any of the available routes "would cause serious and irreparable damage to the sacred areas which are an integral and necessary part of the belief systems and lifeway of Northwest California Indian peoples." *Id.*, at 182. Accordingly, the report recommended that the G-O road not be completed.

In 1982, the Forest Service decided not to adopt this recommendation, and it prepared a final environmental impact statement for construction of the road. The Regional Forester selected a route that avoided archeological sites and was removed as far as possible from the sites used by contemporary Indians for specific spiritual activities. Alternative routes that would have avoided the Chimney Rock area altogether were rejected because they would have required the acquisition of private land, had serious soil stability problems, and would in any event have traversed areas having ritualistic value to American Indians. See *id.*, at 217–218. At about the same time, the Forest Service adopted a management plan allowing for the harvesting of significant amounts of timber in this area of the forest. The management plan provided for one-half mile protective zones around all the religious sites identified in the report that had been commissioned in connection with the G-O road.

After exhausting their administrative remedies, respondents—an Indian organization, individual Indians, nature organizations and individual members of those organizations, and the State of California—challenged both the road-building and timber-harvesting decisions in the United States District Court for the Northern District of California. Respondents claimed that the Forest Service's decisions violated the Free Exercise Clause, the Federal Water Pollution Control Act (FWPCA), 86 Stat. 896, as amended, 33 U. S. C. § 1251 *et seq.*, the National Environmental Policy Act of 1969 (NEPA), 83 Stat. 852, 42 U. S. C. § 4321 *et seq.*, several other federal statutes, and governmental trust responsibilities to Indians living on the Hoopa Valley Reservation.

After a trial, the District Court issued a permanent injunction prohibiting the Government from constructing the Chimney Rock section of the G-O road or putting the timber-harvesting management plan into effect. See *Northwest Indian Cemetery Protective Assn. v. Peterson*, 565 F. Supp. 586 (1983). The court found that both actions would violate

the Free Exercise Clause because they "would seriously damage the salient visual, aural, and environmental qualities of the high country." *Id.*, at 594-595. The court also found that both proposed actions would violate the FWPCA, and that the environmental impact statements for construction of the road were deficient under the NEPA. Finally, the court concluded that both projects would breach the Government's trust responsibilities to protect water and fishing rights reserved to the Hoopa Valley Indians.

While an appeal was pending before the United States Court of Appeals for the Ninth Circuit, Congress enacted the California Wilderness Act of 1984, Pub. L. 98-425, 98 Stat. 1619. Under that statute, much of the property covered by the Forest Service's management plan is now designated a wilderness area, which means that commercial activities such as timber harvesting are forbidden. The statute exempts a narrow strip of land, coinciding with the Forest Service's proposed route for the remaining segment of the G-O road, from the wilderness designation. The legislative history indicates that this exemption was adopted "to enable the completion of the Gasquet-Orleans Road project if the responsible authorities so decide." S. Rep. No. 98-582, p. 29 (1984). The existing unpaved section of road, however, lies within the wilderness area and is therefore now closed to general traffic.

A panel of the Ninth Circuit affirmed in part. *Northwest Indian Cemetery Protective Assn. v. Peterson*, 795 F. 2d 688 (1986). The panel unanimously rejected the District Court's conclusion that the Government's proposed actions would breach its trust responsibilities to Indians on the Hoopa Valley Reservation. The panel also vacated the injunction to the extent that it had been rendered moot by the California Wilderness Act, which now prevents timber harvesting in certain areas covered by the District Court's order. The District Court's decision, to the extent that it rested on statutory grounds, was otherwise unanimously affirmed.

By a divided decision, the District Court's constitutional ruling was also affirmed. Relying primarily on the Forest Service's own commissioned study, the majority found that construction of the Chimney Rock section of the G-O road would have significant, though largely indirect, adverse effects on Indian religious practices. The majority concluded that the Government had failed to demonstrate a compelling interest in the completion of the road, and that it could have abandoned the road without thereby creating "a religious preserve for a single group in violation of the establishment clause." *Id.*, at 694. The majority apparently applied the same analysis to logging operations that might be carried out in portions of the Chimney Rock area not covered by the California Wilderness Act. See *id.*, at 692-693 ("Because most of the high country has now been designated by Congress as a wilderness area, the issue of logging becomes less significant, although it does not disappear").

The dissenting judge argued that certain of the adverse effects on the Indian respondents' religious practices could be eliminated by less drastic measures than a ban on building the road, and that other actual or suggested adverse effects did not pose a serious threat to the Indians' religious practices. He also concluded that the injunction against timber harvesting needed to be reconsidered in light of the California Wilderness Act: "It is not clear whether the district court would have issued an injunction based upon the development of the remaining small parcels. Accordingly, I would remand to allow the district court to reevaluate its injunction in light of the Act." *Id.*, at 704.

II

We begin by noting that the courts below did not articulate the bases of their decisions with perfect clarity. A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them. See *Three*

Affiliated Tribes of Ft. Berthold Reservation v. Wold Engineering, P. C., 467 U. S. 138, 157–158 (1984); see also, *e. g.*, *Jean v. Nelson*, 472 U. S. 846, 854 (1985); *Gulf Oil Co. v. Bernard*, 452 U. S. 89, 99 (1981); *Ashwander v. TVA*, 297 U. S. 288, 346–348 (1936) (Brandeis, J., concurring). This principle required the courts below to determine, before addressing the constitutional issue, whether a decision on that question could have entitled respondents to relief beyond that to which they were entitled on their statutory claims. If no additional relief would have been warranted, a constitutional decision would have been unnecessary and therefore inappropriate.

Neither the District Court nor the Court of Appeals explained or expressly articulated the necessity for their constitutional holdings. Were we persuaded that those holdings were unnecessary, we could simply vacate the relevant portions of the judgment below without discussing the merits of the constitutional issue. The structure and wording of the District Court's injunctive order, however, suggest that the statutory holdings would not have supported all the relief granted. The order is divided into four sections. Two of those sections deal with a 31,100-acre tract referred to as the Blue Creek Roadless Area. The injunction prohibits the Forest Service from engaging in timber harvesting or road building anywhere on the tract "unless and until" compliance with the NEPA and the FWPCA have been demonstrated. 565 F. Supp., at 606–607. The sections of the injunction dealing with the smaller Chimney Rock area (*i. e.*, the area affected by the First Amendment challenge) are worded differently. The Forest Service is permanently enjoined, without any qualifying language, from constructing the proposed portion of the G-O road "and/or *any alternative route*" through that area; similarly, the injunction forbids timber harvesting or the construction of logging roads in the Chimney Rock area pursuant to the Forest Service's proposed management plan "or *any other land management plan.*"

Id., at 606 (emphasis added). These differences in wording suggest, without absolutely implying, that an injunction covering the Chimney Rock area would in some way have been conditional, or narrower in scope, if the District Court had not decided the First Amendment issue as it did. Similarly, the silence of the Court of Appeals as to the necessity of reaching the First Amendment issue may have reflected its understanding that the District Court's injunction necessarily rested in part on constitutional grounds.

Because it appears reasonably likely that the First Amendment issue was necessary to the decisions below, we believe that it would be inadvisable to vacate and remand without addressing that issue on the merits. This conclusion is strengthened by considerations of judicial economy. The Government, which petitioned for certiorari on the constitutional issue alone, has informed us that it believes it can cure the statutory defects identified below, intends to do so, and will not challenge the adverse statutory rulings. Tr. of Oral Arg. 9-10. In this circumstance, it is difficult to see what principle would be vindicated by sending this case on what would almost certainly be a brief round trip to the courts below.

III

A

The Free Exercise Clause of the First Amendment provides that "Congress shall make no law . . . prohibiting the free exercise [of religion]." It is undisputed that the Indian respondents' beliefs are sincere and that the Government's proposed actions will have severe adverse effects on the practice of their religion. Those respondents contend that the burden on their religious practices is heavy enough to violate the Free Exercise Clause unless the Government can demonstrate a compelling need to complete the G-O road or to engage in timber harvesting in the Chimney Rock area. We disagree.

In *Bowen v. Roy*, 476 U. S. 693 (1986), we considered a challenge to a federal statute that required the States to use Social Security numbers in administering certain welfare programs. Two applicants for benefits under these programs contended that their religious beliefs prevented them from acceding to the use of a Social Security number for their 2-year-old daughter because the use of a numerical identifier would “‘rob the spirit’ of [their] daughter and prevent her from attaining greater spiritual power.” *Id.*, at 696. Similarly, in this case, it is said that disruption of the natural environment caused by the G-O road will diminish the sacredness of the area in question and create distractions that will interfere with “training and ongoing religious experience of individuals using [sites within] the area for personal medicine and growth . . . and as integrated parts of a system of religious belief and practice which correlates ascending degrees of personal power with a geographic hierarchy of power.” App. 181. Cf. *id.*, at 178 (“Scarred hills and mountains, and disturbed rocks destroy the purity of the sacred areas, and [Indian] consultants repeatedly stressed the need of a training doctor to be undistracted by such disturbance”). The Court rejected this kind of challenge in *Roy*:

“The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens. Just as the Government may not insist that [the Roys] engage in any set form of religious observance, so [they] may not demand that the Government join in their chosen religious practices by refraining from using a number to identify their daughter. . . .

“ . . . The Free Exercise Clause affords an individual protection from certain forms of governmental compulsion; it does not afford an individual a right to dictate the conduct of the Government’s internal procedures.” 476 U. S., at 699–700.

The building of a road or the harvesting of timber on publicly owned land cannot meaningfully be distinguished from the use of a Social Security number in *Roy*. In both cases, the challenged Government action would interfere significantly with private persons' ability to pursue spiritual fulfillment according to their own religious beliefs. In neither case, however, would the affected individuals be coerced by the Government's action into violating their religious beliefs; nor would either governmental action penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens.

We are asked to distinguish this case from *Roy* on the ground that the infringement on religious liberty here is "significantly greater," or on the ground that the Government practice in *Roy* was "purely mechanical" whereas this case involves "a case-by-case substantive determination as to how a particular unit of land will be managed." Brief for Indian Respondents 33-34. Similarly, we are told that this case can be distinguished from *Roy* because "the government action is not at some physically removed location where it places no restriction on what a practitioner may do." Brief for Respondent State of California 18. The State suggests that the Social Security number in *Roy* "could be characterized as interfering with Roy's religious tenets from a subjective point of view, where the government's conduct of 'its own internal affairs' was known to him only secondhand and did not interfere with his ability to practice his religion." *Id.*, at 19 (footnote omitted; internal citation omitted). In this case, however, it is said that the proposed road will "physically destroy the environmental conditions and the privacy without which the [religious] practices cannot be conducted." *Ibid.*

These efforts to distinguish *Roy* are unavailing. This Court cannot determine the truth of the underlying beliefs that led to the religious objections here or in *Roy*, see *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U. S. 136, 144, n. 9 (1987), and accordingly cannot weigh the adverse ef-

fects on the appellees in *Roy* and compare them with the adverse effects on the Indian respondents. Without the ability to make such comparisons, we cannot say that the one form of incidental interference with an individual's spiritual activities should be subjected to a different constitutional analysis than the other.

Respondents insist, nonetheless, that the courts below properly relied on a factual inquiry into the degree to which the Indians' spiritual practices would become ineffectual if the G-O road were built. They rely on several cases in which this Court has sustained free exercise challenges to government programs that interfered with individuals' ability to practice their religion. See *Wisconsin v. Yoder*, 406 U. S. 205 (1972) (compulsory school-attendance law); *Sherbert v. Verner*, 374 U. S. 398 (1963) (denial of unemployment benefits to applicant who refused to accept work requiring her to violate the Sabbath); *Thomas v. Review Board, Indiana Employment Security Div.*, 450 U. S. 707 (1981) (denial of unemployment benefits to applicant whose religion forbade him to fabricate weapons); *Hobbie, supra* (denial of unemployment benefits to religious convert who resigned position that required her to work on the Sabbath).

Even apart from the inconsistency between *Roy* and respondents' reading of these cases, their interpretation will not withstand analysis. It is true that this Court has repeatedly held that indirect coercion or penalties on the free exercise of religion, not just outright prohibitions, are subject to scrutiny under the First Amendment. Thus, for example, ineligibility for unemployment benefits, based solely on a refusal to violate the Sabbath, has been analogized to a fine imposed on Sabbath worship. *Sherbert, supra*, at 404. This does not and cannot imply that incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs, require government to bring forward a compelling justifica-

tion for its otherwise lawful actions. The crucial word in the constitutional text is "prohibit": "For the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government." *Sherbert, supra*, at 412 (Douglas, J., concurring).

Whatever may be the exact line between unconstitutional prohibitions on the free exercise of religion and the legitimate conduct by government of its own affairs, the location of the line cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development. The Government does not dispute, and we have no reason to doubt, that the logging and road-building projects at issue in this case could have devastating effects on traditional Indian religious practices. Those practices are intimately and inextricably bound up with the unique features of the Chimney Rock area, which is known to the Indians as the "high country." Individual practitioners use this area for personal spiritual development; some of their activities are believed to be critically important in advancing the welfare of the Tribe, and indeed, of mankind itself. The Indians use this area, as they have used it for a very long time, to conduct a wide variety of specific rituals that aim to accomplish their religious goals. According to their beliefs, the rituals would not be efficacious if conducted at other sites than the ones traditionally used, and too much disturbance of the area's natural state would clearly render any meaningful continuation of traditional practices impossible. To be sure, the Indians themselves were far from unanimous in opposing the G-O road, see App. 180, and it seems less than certain that construction of the road will be so disruptive that it will doom their religion. Nevertheless, we can assume that the threat to the efficacy of at least some religious practices is extremely grave.

Even if we assume that we should accept the Ninth Circuit's prediction, according to which the G-O road will "virtually destroy the . . . Indians' ability to practice their religion,"

795 F. 2d, at 693 (opinion below), the Constitution simply does not provide a principle that could justify upholding respondents' legal claims. However much we might wish that it were otherwise, government simply could not operate if it were required to satisfy every citizen's religious needs and desires. A broad range of government activities—from social welfare programs to foreign aid to conservation projects—will always be considered essential to the spiritual well-being of some citizens, often on the basis of sincerely held religious beliefs. Others will find the very same activities deeply offensive, and perhaps incompatible with their own search for spiritual fulfillment and with the tenets of their religion. The First Amendment must apply to all citizens alike, and it can give to none of them a veto over public programs that do not prohibit the free exercise of religion. The Constitution does not, and courts cannot, offer to reconcile the various competing demands on government, many of them rooted in sincere religious belief, that inevitably arise in so diverse a society as ours. That task, to the extent that it is feasible, is for the legislatures and other institutions. Cf. *The Federalist* No. 10 (suggesting that the effects of religious factionalism are best restrained through competition among a multiplicity of religious sects).

One need not look far beyond the present case to see why the analysis in *Roy*, but not respondents' proposed extension of *Sherbert* and its progeny, offers a sound reading of the Constitution. Respondents attempt to stress the limits of the religious servitude that they are now seeking to impose on the Chimney Rock area of the Six Rivers National Forest. While defending an injunction against logging operations and the construction of a road, they apparently do not *at present* object to the area's being used by recreational visitors, other Indians, or forest rangers. Nothing in the principle for which they contend, however, would distinguish this case from another lawsuit in which they (or similarly situated religious objectors) might seek to exclude all human activity but

their own from sacred areas of the public lands. The Indian respondents insist that "[p]rivacy during the power quests is required for the practitioners to maintain the purity needed for a successful journey." Brief for Indian Respondents 8 (emphasis added; citation to record omitted). Similarly: "The practices conducted in the high country entail intense meditation and require the practitioner to achieve a profound awareness of the natural environment. Prayer seats are oriented so there is an unobstructed view, and the practitioner must be surrounded by *undisturbed* naturalness." *Id.*, at 8, n. 4 (emphasis added; citations to record omitted). No disrespect for these practices is implied when one notes that such beliefs could easily require *de facto* beneficial ownership of some rather spacious tracts of public property. Even without anticipating future cases, the diminution of the Government's property rights, and the concomitant subsidy of the Indian religion, would in this case be far from trivial: the District Court's order permanently forbade commercial timber harvesting, or the construction of a two-lane road, anywhere within an area covering a full 27 sections (*i. e.* more than 17,000 acres) of public land.

The Constitution does not permit government to discriminate against religions that treat particular physical sites as sacred, and a law prohibiting the Indian respondents from visiting the Chimney Rock area would raise a different set of constitutional questions. Whatever rights the Indians may have to the use of the area, however, those rights do not divest the Government of its right to use what is, after all, *its* land. Cf. *Bowen v. Roy*, 476 U. S., at 724-727 (O'CONNOR, J., concurring in part and dissenting in part) (distinguishing between the Government's use of information in its possession and the Government's requiring an individual to provide such information).

B

Nothing in our opinion should be read to encourage governmental insensitivity to the religious needs of any citizen.

The Government's rights to the use of its own land, for example, need not and should not discourage it from accommodating religious practices like those engaged in by the Indian respondents. Cf. *Sherbert*, 374 U. S., at 422-423 (Harlan, J., dissenting). It is worth emphasizing, therefore, that the Government has taken numerous steps in this very case to minimize the impact that construction of the G-O road will have on the Indians' religious activities. First, the Forest Service commissioned a comprehensive study of the effects that the project would have on the cultural and religious value of the Chimney Rock area. The resulting 423-page report was so sympathetic to the Indians' interests that it has constituted the principal piece of evidence relied on by respondents throughout this litigation.

Although the Forest Service did not in the end adopt the report's recommendation that the project be abandoned, many other ameliorative measures were planned. No sites where specific rituals take place were to be disturbed. In fact, a major factor in choosing among alternative routes for the road was the relation of the various routes to religious sites: the route selected by the Regional Forester is, he noted, "the farthest removed from contemporary spiritual sites; thus, the adverse audible intrusions associated with the road would be less than all other alternatives." App. 102. Nor were the Forest Service's concerns limited to "audible intrusions." As the dissenting judge below observed, 10 specific steps were planned to reduce the visual impact of the road on the surrounding country. See 795 F. 2d, at 703 (Beezer, J., dissenting in part).

Except for abandoning its project entirely, and thereby leaving the two existing segments of road to dead-end in the middle of a National Forest, it is difficult to see how the Government could have been more solicitous. Such solicitude accords with "the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional re-

ligions of the American Indian . . . including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.” American Indian Religious Freedom Act (AIRFA), Pub. L. 95-341, 92 Stat. 469, 42 U. S. C. § 1996.

Respondents, however, suggest that AIRFA goes further and in effect enacts their interpretation of the First Amendment into statutory law. Although this contention was rejected by the District Court, they seek to defend the judgment below by arguing that AIRFA authorizes the injunction against completion of the G-O road. This argument is without merit. After reciting several legislative findings, AIRFA “resolves” upon the policy quoted above. A second section of the statute, 92 Stat. 470, required an evaluation of federal policies and procedures, in consultation with native religious leaders, of changes necessary to protect and preserve the rights and practices in question. The required report dealing with this evaluation was completed and released in 1979. Reply Brief for Petitioners 2, n. 3. Nowhere in the law is there so much as a hint of any intent to create a cause of action or any judicially enforceable individual rights.

What is obvious from the face of the statute is confirmed by numerous indications in the legislative history. The sponsor of the bill that became AIRFA, Representative Udall, called it “a sense of Congress joint resolution,” aimed at ensuring that “the basic right of the Indian people to exercise their traditional religious practices is not infringed without a clear decision on the part of the Congress or the administrators that such religious practices must yield to some higher consideration.” 124 Cong. Rec. 21444 (1978). Representative Udall emphasized that the bill would not “confer special religious rights on Indians,” would “not change any existing State or Federal law,” and in fact “has no teeth in it.” *Id.*, at 21444-21445.

C

The dissent proposes an approach to the First Amendment that is fundamentally inconsistent with the principles on which our decision rests. Notwithstanding the sympathy that we all must feel for the plight of the Indian respondents, it is plain that the approach taken by the dissent cannot withstand analysis. On the contrary, the path towards which it points us is incompatible with the text of the Constitution, with the precedents of this Court, and with a responsible sense of our own institutional role.

The dissent begins by asserting that the "constitutional guarantee we interpret today . . . is directed against *any* form of government action that frustrates or inhibits religious practice." *Post*, at 459 (emphasis added). The Constitution, however, says no such thing. Rather, it states: "Congress shall make no law . . . *prohibiting* the free exercise [of religion]." U. S. Const., Amdt. 1 (emphasis added).

As we explained above, *Bowen v. Roy* rejected a First Amendment challenge to Government activities that the religious objectors sincerely believed would "'rob the spirit" of [their] daughter and prevent her from attaining greater spiritual power.'" See *supra*, at 448 (quoting *Roy*, 476 U. S., at 696). The dissent now offers to distinguish that case by saying that the Government was acting there "in a purely internal manner," whereas land-use decisions "are likely to have substantial external effects." *Post*, at 470. Whatever the source or meaning of the dissent's distinction, it has no basis in *Roy*. Robbing the spirit of a child, and preventing her from attaining greater spiritual power, is both a "substantial external effect" and one that is remarkably similar to the injury claimed by respondents in the case before us today. The dissent's reading of *Roy* would effectively overrule that decision, without providing any compelling justification for doing so.

The dissent also misreads *Wisconsin v. Yoder*, 406 U. S. 205 (1972). The statute at issue in that case prohibited the

Amish parents, on pain of criminal prosecution, from providing their children with the kind of education required by the Amish religion. *Id.*, at 207-209, 223. The statute directly compelled the Amish to send their children to public high schools "contrary to the Amish religion and way of life." *Id.*, at 209. The Court acknowledged that the statute might be constitutional, *despite* its coercive nature, if the State could show with sufficient "particularity how its admittedly strong interest in compulsory education would be adversely affected by granting an exemption to the Amish." *Id.*, at 236 (citation omitted). The dissent's out-of-context quotations notwithstanding, there is nothing whatsoever in the *Yoder* opinion to support the proposition that the "impact" on the Amish religion would have been constitutionally problematic if the statute at issue had not been coercive in nature. Cf. *post*, at 466.

Perceiving a "stress point in the longstanding conflict between two disparate cultures," the dissent attacks us for declining to "balanc[e] these competing and potentially irreconcilable interests, choosing instead to turn this difficult task over to the Federal Legislature." *Post*, at 473. Seeing the Court as the arbiter, the dissent proposes a legal test under which it would decide which public lands are "central" or "indispensable" to which religions, and by implication which are "dispensable" or "peripheral," and would then decide which government programs are "compelling" enough to justify "infringement of those practices." *Post*, at 475. We would accordingly be required to weigh the value of every religious belief and practice that is said to be threatened by any government program. Unless a "showing of 'centrality,'" *post*, at 474, is nothing but an assertion of centrality, see *post*, at 475, the dissent thus offers us the prospect of this Court's holding that some sincerely held religious beliefs and practices are not "central" to certain religions, despite protestations to the contrary from the religious objectors who brought the lawsuit. In other words, the dissent's approach would

require us to rule that some religious adherents misunderstand their own religious beliefs. We think such an approach cannot be squared with the Constitution or with our precedents, and that it would cast the Judiciary in a role that we were never intended to play.

IV

The decision of the court below, according to which the First Amendment precludes the Government from completing the G-O road or from permitting timber harvesting in the Chimney Rock area, is reversed. In order that the District Court's injunction may be reconsidered in light of this holding, and in the light of any other relevant events that may have intervened since the injunction issued, the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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

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

"[T]he Free Exercise Clause," the Court explains today, "is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government." *Ante*, at 451 (quoting *Sherbert v. Verner*, 374 U. S. 398, 412 (1963) (Douglas, J., concurring)). Pledging fidelity to this unremarkable constitutional principle, the Court nevertheless concludes that even where the Government uses federal land in a manner that threatens the very existence of a Native American religion, the Government is simply not "*doing*" anything to the practitioners of that faith. Instead, the Court believes that Native Americans who request that the Government refrain from destroying their religion effectively seek to exact from the Government *de facto* beneficial ownership of federal property. These two astonishing conclusions follow naturally from the Court's deter-

mination that federal land-use decisions that render the practice of a given religion impossible do not burden that religion in a manner cognizable under the Free Exercise Clause, because such decisions neither coerce conduct inconsistent with religious belief nor penalize religious activity. The constitutional guarantee we interpret today, however, draws no such fine distinctions between types of restraints on religious exercise, but rather is directed against any form of governmental action that frustrates or inhibits religious practice. Because the Court today refuses even to acknowledge the constitutional injury respondents will suffer, and because this refusal essentially leaves Native Americans with absolutely no constitutional protection against perhaps the gravest threat to their religious practices, I dissent.

I

For at least 200 years and probably much longer, the Yurok, Karok, and Tolowa Indians have held sacred an approximately 25-square-mile area of land situated in what is today the Blue Creek Unit of Six Rivers National Forest in northwestern California. As the Government readily concedes, regular visits to this area, known to respondent Indians as the "high country," have played and continue to play a "critical" role in the religious practices and rituals of these Tribes. Brief for Petitioners 3. Those beliefs, only briefly described in the Court's opinion, are crucial to a proper understanding of respondents' claims.

As the Forest Service's commissioned study, the Theodoratus Report, explains, for Native Americans religion is not a discrete sphere of activity separate from all others, and any attempt to isolate the religious aspects of Indian life "is in reality an exercise which forces Indian concepts into non-Indian categories." App. 110; D. Theodoratus, *Cultural Resources of the Chimney Rock Section, Gasquet-Orleans Road, Six Rivers National Forest* (1979). Thus, for most Native Americans, "[t]he area of worship cannot be delineated from

social, political, cultur[al], and other areas o[f] Indian lifestyle." American Indian Religious Freedom, Hearings on S. J. Res. 102 before the Senate Select Committee on Indian Affairs, 95th Cong., 2d Sess., 86 (1978) (statement of Barney Old Coyote, Crow Tribe). A pervasive feature of this lifestyle is the individual's relationship with the natural world; this relationship, which can accurately though somewhat incompletely be characterized as one of stewardship, forms the core of what might be called, for want of a better nomenclature, the Indian religious experience. While traditional Western religions view creation as the work of a deity "who institutes natural laws which then govern the operation of physical nature," tribal religions regard creation as an ongoing process in which they are morally and religiously obligated to participate. U. S. Federal Agencies Task Force, American Indian Religious Freedom Act Report 11 (1979) (Task Force Report). Native Americans fulfill this duty through ceremonies and rituals designed to preserve and stabilize the earth and to protect humankind from disease and other catastrophes. Failure to conduct these ceremonies in the manner and place specified, adherents believe, will result in great harm to the earth and to the people whose welfare depends upon it. *Id.*, at 10.

In marked contrast to traditional Western religions, the belief systems of Native Americans do not rely on doctrines, creeds, or dogmas. Established or universal truths—the mainstay of Western religions—play no part in Indian faith. Ceremonies are communal efforts undertaken for specific purposes in accordance with instructions handed down from generation to generation. Commentaries on or interpretations of the rituals themselves are deemed absolute violations of the ceremonies, whose value lies not in their ability to explain the natural world or to enlighten individual believers but in their efficacy as protectors and enhancers of tribal existence. *Ibid.* Where dogma lies at the heart of Western religions, Native American faith is inextricably

bound to the use of land. The site-specific nature of Indian religious practice derives from the Native American perception that land is itself a sacred, living being. See Suagee, *American Indian Religious Freedom and Cultural Resources Management: Protecting Mother Earth's Caretakers*, 10 Am. Ind. L. Rev. 1, 10 (1982). Rituals are performed in prescribed locations not merely as a matter of traditional orthodoxy, but because land, like all other living things, is unique, and specific sites possess different spiritual properties and significance. Within this belief system, therefore, land is not fungible; indeed, at the time of the Spanish colonization of the American Southwest, "all . . . Indians held in some form a belief in a sacred and indissoluble bond between themselves and the land in which their settlements were located." E. Spicer, *Cycles of Conquest: The Impact of Spain, Mexico, and the United States on the Indians of the Southwest, 1533-1960*, p. 576 (1962).

For respondent Indians, the most sacred of lands is the high country where, they believe, prehuman spirits moved with the coming of humans to the Earth. Because these spirits are seen as the source of religious power, or "medicine," many of the tribes' rituals and practices require frequent journeys to the area. Thus, for example, religious leaders preparing for the complex of ceremonies that underlie the Tribes' World Renewal efforts must travel to specific sites in the high country in order to attain the medicine necessary for successful renewal. Similarly, individual tribe members may seek curative powers for the healing of the sick, or personal medicine for particular purposes such as good luck in singing, hunting, or love. A period of preparation generally precedes such visits, and individuals must select trails in the sacred area according to the medicine they seek and their abilities, gradually moving to increasingly more powerful sites, which are typically located at higher altitudes. Among the most powerful of sites are Chimney Rock, Doctor Rock, and Peak 8, all of which are elevated rock outcroppings.

According to the Theodoratus Report, the qualities "of silence, the aesthetic perspective, and the physical attributes, are an extension of the sacredness of [each] particular site." App. 148. The act of medicine making is akin to meditation: the individual must integrate physical, mental, and vocal actions in order to communicate with the prehuman spirits. As a result, "successful use of the high country is dependent upon and facilitated by certain qualities of the physical environment, the most important of which are privacy, silence, and an undisturbed natural setting." *Id.*, at 181. Although few Tribe members actually make medicine at the most powerful sites, the entire Tribe's welfare hinges on the success of the individual practitioners.

Beginning in 1972, the Forest Service began preparing a multiple-use management plan for the Blue Creek Unit. The plan's principal features included the harvesting of 733 million board feet of Douglas fir over an 80-year period and the completion of a 6-mile segment of paved road running between two northern California towns, Gasquet and Orleans (the G-O road). The road's primary purpose was to provide a route for hauling the timber harvested under the management plan; in addition, it would enhance public access to the Six Rivers and other national forests, and allow for more efficient maintenance and fire control by the Forest Service itself. In the mid-1970's, the Forest Service circulated draft environmental impact statements evaluating the effects of several proposed routes for the final segment of the G-O road, including at least two that circumnavigated the high country altogether. Ultimately, however, the Service settled on a route running along the Chimney Rock Corridor, which traverses the Indians' sacred lands.

Respondent Indians brought suit to enjoin implementation of the plan, alleging that the road construction and timber harvesting would impermissibly interfere with their religious practices in violation of the Free Exercise Clause of the First

Amendment.¹ Following a trial, the District Court granted the requested injunctive relief. The court found that "use of the high country is essential to [respondents'] 'World Renewal' ceremonies . . . which constitute the heart of the Northwest Indian religious belief system," and that "[i]ntrusions on the sanctity of the Blue Creek high country are . . . potentially destructive of the very core of Northwest [Indian] religious beliefs and practices.'" *Northwest Indian Cemetery Protective Assn. v. Peterson*, 565 F. Supp. 586, 594-595 (ND Cal. 1983) (quoting the Theodoratus Report, at 420). Concluding that these burdens on respondents' religious practices were sufficient to trigger the protections of the Free Exercise Clause, the court found that the interests served by the G-O road and the management plan were insufficient to justify those burdens. In particular, the court found that the road would not improve access to timber resources in the Blue Creek Unit and indeed was unnecessary to the harvesting of that timber; that it would not significantly improve the administration of the Six Rivers National Forest; and that it would increase recreational access only marginally, and at the expense of the very pristine environment that makes the area suitable for primitive recreational use in the first place. 565 F. Supp., at 595-596. The court further found that the unconnected segments of the road had independent utility,² and that although completion of the

¹ Respondent Indians were joined in this suit by the State of California as well as various environmental groups. For the sake of simplicity, I use the term "respondents" to refer exclusively to the affected Native American religious practitioners.

² The Court overlooks this finding when it suggests that the only protective measure the Service did not take was the untenable one of "abandoning its project entirely, and thereby leaving the two existing segments of road to dead-end in the middle of a National Forest." *Ante*, at 454. Far from finding that option untenable, the District Court expressly concluded that the segments had independent economic and administrative utility, and thus that past investments in the paved sections did not justify construction of the Chimney Rock segment. See 565 F. Supp., at 596.

Chimney Rock segment would reduce timber-hauling costs, it would not generate new jobs but would instead merely shift work from one area of the region to another. *Id.*, at 596. Finally, in enjoining the proposed harvesting activities, the court found that the Blue Creek Unit's timber resources were but a small fraction of those located in the entire National Forest and that the local timber industry would not suffer seriously if access to this fraction were foreclosed. *Ibid.*

While the case was pending on appeal before the Court of Appeals for the Ninth Circuit, Congress passed the California Wilderness Act of 1984, Pub. L. 98-425, 98 Stat. 1619, which designates most of the the Blue Creek Unit a wilderness area, and thus precludes logging and all other commercial activities in most of the area covered by the Forest Service's management plan. Thereafter, the Court of Appeals affirmed the District Court's determination that the proposed harvesting and construction activities violated respondents' constitutional rights. Recognizing that the high country is "indispensable" to the religious lives of the approximately 5,000 Tribe members who reside in the area, *Northwest Indian Cemetery Protective Assn. v. Peterson*, 795 F. 2d 688, 692 (1986), the court concluded "that the proposed government operations would *virtually destroy the . . . Indians' ability to practice their religion.*" *Id.*, at 693 (emphasis added).³ Like the lower court, the Court of Appeals found

³ Remarkably, the Court treats this factual determination as nothing more than an assumption or "prediction," *ante*, at 451, and suggests that it is "less than certain that construction of the road will be so disruptive that it will doom [respondents'] religion." *Ibid.* Such speculation flies in the face of the most basic principles of appellate review, see Fed. Rule Civ. Proc. 52(a) ("Findings of fact . . . shall not be set aside unless clearly erroneous"), and is wholly at odds with the well-settled rule that this Court will not disturb findings of facts agreed upon by both lower courts unless those findings are clearly in error. *United States v. Ceccolini*, 435 U. S. 268, 273 (1978). Even if our review were not governed by such rules, however, the mere fact that a handful of the Native Americans who reside in the

the Government's interests in building the road and permitting limited timber harvesting—interests which of course were considerably undermined by passage of the California Wilderness Act—did not justify the destruction of respondents' religion. *Id.*, at 695.

II

The Court does not for a moment suggest that the interests served by the G-O road are in any way compelling, or that they outweigh the destructive effect construction of the road will have on respondents' religious practices. Instead, the Court embraces the Government's contention that its prerogative as landowner should always take precedence over a claim that a particular use of federal property infringes religious practices. Attempting to justify this rule, the Court argues that the First Amendment bars only outright prohibitions, indirect coercion, and penalties on the free exercise of religion. All other "incidental effects of government programs," it concludes, even those "which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs," simply do not give rise to constitutional concerns. See *ante*, at 450. Since our recognition nearly half a century ago that restraints on religious conduct implicate the concerns of the Free Exercise Clause, see *Prince v. Massachusetts*, 321 U. S. 158 (1944), we have never suggested that the protections of the guarantee are limited to so narrow a range of governmental burdens. The land-use decision challenged here will restrain respondents from practicing their religion as surely and as completely as any of the governmental actions we have struck down in the past, and the Court's efforts simply to define away respondents' in-

affected area do not oppose the road in no way casts doubt upon the validity of the lower courts' amply supported factual findings, particularly where the members of this minority did not indicate whether their lack of objection reflected their assessment of the religious significance of the high country, or their own apathy towards religious matters generally.

jury as nonconstitutional are both unjustified and ultimately unpersuasive.

A

The Court ostensibly finds support for its narrow formulation of religious burdens in our decisions in *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U. S. 136 (1987), *Thomas v. Review Bd., Indiana Employment Security Division*, 450 U. S. 707 (1981), and *Sherbert v. Verner*, 374 U. S. 398 (1963). In those cases, the laws at issue forced individuals to choose between adhering to specific religious tenets and forfeiting unemployment benefits on the one hand, and accepting work repugnant to their religious beliefs on the other. The religions involved, therefore, lent themselves to the coercion analysis the Court espouses today, for they proscribed certain conduct such as munitions work (*Thomas*) or working on Saturdays (*Sherbert*, *Hobbie*) that the unemployment benefits laws effectively compelled. In sustaining the challenges to these laws, however, we nowhere suggested that such coercive compulsion exhausted the range of religious burdens recognized under the Free Exercise Clause.

Indeed, in *Wisconsin v. Yoder*, 406 U. S. 205 (1972), we struck down a state compulsory school attendance law on free exercise grounds not so much because of the affirmative coercion the law exerted on individual religious practitioners, but because of "the *impact* that compulsory high school attendance could have on the continued survival of Amish communities." *Id.*, at 209 (emphasis added). Like respondents here, the Amish view life as pervasively religious and their faith accordingly dictates their entire lifestyle. See *id.*, at 210. Detailed as their religious rules are, however, the parents in *Yoder* did not argue that their religion expressly proscribed public education beyond the eighth grade; rather, they objected to the law because "the *values . . .* of the modern secondary school are in sharp conflict with the fundamental *mode of life* mandated by the Amish religion." *Id.*, at 217 (emphasis added). By exposing Amish children "to a

'worldly' influence in conflict with their beliefs," and by removing those children "from their community, physically and emotionally, during the crucial and formative adolescent period of life" when Amish beliefs are inculcated, *id.*, at 211, the compulsory school law posed "a very real threat of undermining the Amish community and religious practice." *Id.*, at 218. Admittedly, this threat arose from the compulsory nature of the law at issue, but it was the "impact" on religious practice itself, not the source of that impact, that led us to invalidate the law.

I thus cannot accept the Court's premise that the form of the government's restraint on religious practice, rather than its effect, controls our constitutional analysis. Respondents here have demonstrated that construction of the G-O road will completely frustrate the practice of their religion, for as the lower courts found, the proposed logging and construction activities will virtually destroy respondents' religion, and will therefore necessarily force them into abandoning those practices altogether. Indeed, the Government's proposed activities will restrain religious practice to a far greater degree here than in any of the cases cited by the Court today. None of the religious adherents in *Hobbie*, *Thomas*, and *Sherbert*, for example, claimed or could have claimed that the denial of unemployment benefits rendered the practice of their religions impossible; at most, the challenged laws made those practices more expensive. Here, in stark contrast, respondents have claimed—and proved—that the desecration of the high country will prevent religious leaders from attaining the religious power or medicine indispensable to the success of virtually all their rituals and ceremonies. Similarly, in *Yoder* the compulsory school law threatened to "undermin[e] the Amish community and religious practice," and thus to force adherents to "abandon belief . . . or . . . to migrate to some other and more tolerant region." 406 U. S., at 218. Here the threat posed by the desecration of sacred lands that are indisputably essential to

respondents' religious practices is both more direct and more substantial than that raised by a compulsory school law that simply exposed Amish children to an alien value system. And of course respondents here do not even have the option, however unattractive it might be, of migrating to more hospitable locales; the site-specific nature of their belief system renders it nontransportable.

Ultimately, the Court's coercion test turns on a distinction between governmental actions that compel affirmative conduct inconsistent with religious belief, and those governmental actions that prevent conduct consistent with religious belief. In my view, such a distinction is without constitutional significance. The crucial word in the constitutional text, as the Court itself acknowledges, is "prohibit," see *ante*, at 451, a comprehensive term that in no way suggests that the intended protection is aimed only at governmental actions that coerce affirmative conduct.⁴ Nor does the Court's distinction comport with the principles animating the constitutional guarantee: religious freedom is threatened no less by governmental action that makes the practice of one's chosen faith impossible than by governmental programs that pressure one to engage in conduct inconsistent with religious beliefs. The Court attempts to explain the line it draws by arguing that the protections of the Free Exercise Clause "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development," *ibid.*,

⁴The Court is apparently of the view that the term "prohibit" in the Free Exercise Clause somehow limits the constitutional protection such that it cannot possibly be understood to reach "*any* form of government action that frustrates or inhibits religious practice." *Ante*, at 456 (quoting *supra*, at 459) (emphasis added by majority). Although the dictionary is hardly the final word on the meaning of constitutional language, it is noteworthy that Webster's includes, as one of the two accepted definitions of "prohibit," "to prevent from doing something." Webster's Ninth New Collegiate Dictionary 940 (1983). Government action that frustrates or inhibits religious practice fits far more comfortably within this definition than does the Court's affirmative compulsion test.

for in a society as diverse as ours, the Government cannot help but offend the "religious needs and desires" of some citizens. *Ante*, at 452. While I agree that governmental action that simply offends religious sensibilities may not be challenged under the Clause, we have recognized that laws that affect spiritual development by impeding the integration of children into the religious community or by increasing the expense of adherence to religious principles—in short, laws that frustrate or inhibit religious *practice*—trigger the protections of the constitutional guarantee. Both common sense and our prior cases teach us, therefore, that governmental action that makes the practice of a given faith more difficult necessarily penalizes that practice and thereby tends to prevent adherence to religious belief. The harm to the practitioners is the same regardless of the manner in which the government restrains their religious expression, and the Court's fear that an "effects" test will permit religious adherents to challenge governmental actions they merely find "offensive" in no way justifies its refusal to recognize the constitutional injury citizens suffer when governmental action not only offends but actually restrains their religious practices. Here, respondents have demonstrated that the Government's proposed activities will completely prevent them from practicing their religion, and such a showing, no less than those made out in *Hobbie*, *Thomas*, *Sherbert*, and *Yoder*, entitles them to the protections of the Free Exercise Clause.

B

Nor can I agree with the Court's assertion that respondents' constitutional claim is foreclosed by our decision in *Bowen v. Roy*, 476 U. S. 693 (1986). There, applicants for certain welfare benefits objected to the use of a Social Security number in connection with the administration of their 2-year-old daughter's application for benefits, contending that such use would "rob the [child's] spirit" and thus interfere with her spiritual development. In rejecting that chal-

lenge, we stated that "[t]he Free Exercise Clause simply cannot be understood to require the Government to conduct its own *internal affairs* in ways that comport with the religious beliefs of particular citizens." *Id.*, at 699 (emphasis added); see also *id.*, at 716-717 (STEVENS, J., concurring in part) ("[T]he Free Exercise Clause does not give an individual the right to dictate the Government's method of recordkeeping"). Accordingly, we explained that Roy could

"no more prevail on his religious objection to the Government's use of a Social Security number for his daughter than he could on a sincere religious objection to the size or color of the Government's filing cabinets. The Free Exercise Clause affords an individual protection from certain forms of governmental compulsion; it does not afford an individual a right to dictate the conduct of the Government's *internal procedures*." *Id.*, at 700 (emphasis added).

Today the Court professes an inability to differentiate *Roy* from the present case, suggesting that "[t]he building of a road or the harvesting of timber on publicly owned land cannot meaningfully be distinguished from the use of a Social Security number." *Ante*, at 449. I find this inability altogether remarkable. In *Roy*, we repeatedly stressed the "internal" nature of the Government practice at issue: noting that Roy objected to "the widespread use of the social security number by the federal or state governments *in their computer systems*," 476 U. S., at 697 (citation omitted; internal quotation marks omitted; emphasis added), we likened the use of such recordkeeping numbers to decisions concerning the purchase of office equipment. When the Government processes information, of course, it acts in a purely internal manner, and any free exercise challenge to such internal recordkeeping in effect seeks to dictate how the Government conducts its own affairs.

Federal land-use decisions, by contrast, are likely to have substantial external effects that government decisions con-

cerning office furniture and information storage obviously will not, and they are correspondingly subject to public scrutiny and public challenge in a host of ways that office equipment purchases are not.⁵ Indeed, in the American Indian Religious Freedom Act (AIRFA), 42 U. S. C. § 1996, Congress expressly recognized the adverse impact land-use decisions and other governmental actions frequently have on the site-specific religious practices of Native Americans, and the Act accordingly directs agencies to consult with Native American religious leaders before taking actions that might impair those practices. Although I agree that the Act does not create any judicially enforceable rights, see *ante*, at 455, the absence of any private right of action in no way undermines the statute's significance as an express congressional determination that federal land management decisions are not "internal" Government "procedures," but are instead governmental actions that can and indeed are likely to burden Native American religious practices. That such decisions should be subject to constitutional challenge, and potential constitutional limitations, should hardly come as a surprise.

The Court today, however, ignores *Roy's* emphasis on the internal nature of the Government practice at issue there,

⁵ Thus, for example, agencies proposing to use or permit activities on federal lands must comply with various public notice, consultation, and impact evaluation requirements imposed by the National Historic Preservation Act, 16 U. S. C. §§ 470f, 470h-2(f); the Archaeological Resources Protection Act, 16 U. S. C. § 470aa *et seq.*; the National Environmental Policy Act of 1969, 42 U. S. C. § 4321 *et seq.*; the Wilderness Act, 16 U. S. C. § 1131 *et seq.*; and the Federal Water Pollution Control Act, 33 U. S. C. § 1251 *et seq.* Concededly, these statutes protect interests in addition to the religious interests Native Americans may have in a pristine environment, and of course the constitutional protection afforded those religious interests is not dependent upon these congressional enactments. Nevertheless, the laws stand as evidence, if indeed any were needed, that federal land-use decisions are fundamentally different from government decisions concerning information management, and that, under *Roy*, this difference in external effects is of constitutional magnitude.

and instead construes that case as further support for the proposition that governmental action that does not coerce conduct inconsistent with religious faith simply does not implicate the concerns of the Free Exercise Clause. That such a reading is wholly untenable, however, is demonstrated by the cruelly surreal result it produces here: governmental action that will virtually destroy a religion is nevertheless deemed not to "burden" that religion. Moreover, in AIRFA Congress explicitly acknowledged that federal "policies and regulations" could and often did "intrud[e] upon [and] interfer[e] with" site-specific Native American religious ceremonies, Pub. L. 95-341, 92 Stat. 469, and in *Roy* we recognized that this Act—"with its emphasis on protecting the freedom to believe, express, and exercise a religion—accurately identifies the mission of the Free Exercise Clause itself." 476 U. S., at 700. Ultimately, in *Roy* we concluded that, however much the Government's recordkeeping system may have offended Roy's sincere religious sensibilities, he could not challenge that system under the Free Exercise Clause because the Government's practice did not "in any degree impair Roy's 'freedom to believe, express, and *exercise*' his religion." *Id.*, at 700-701 (quoting AIRFA, 42 U. S. C. § 1996) (emphasis added). That determination distinguishes the injury at issue here, which the Court finds so "remarkably similar" to Roy's, *ante*, at 456, for respondents have made an uncontroverted showing that the proposed construction and logging activities will impair their freedom to exercise their religion in the greatest degree imaginable, and Congress has "accurately identifie[d]" such injuries as falling within the scope of the Free Exercise Clause. The Court's reading of *Roy*, therefore, simply cannot be squared with our endorsement—in that very same case—of this congressional determination. More important, it lends no support to the Court's efforts to narrow both the reach and promise of the Free Exercise Clause itself.

C

In the final analysis, the Court's refusal to recognize the constitutional dimension of respondents' injuries stems from its concern that acceptance of respondents' claim could potentially strip the Government of its ability to manage and use vast tracts of federal property. See *ante*, at 452-453. In addition, the nature of respondents' site-specific religious practices raises the specter of future suits in which Native Americans seek to exclude all human activity from such areas. *Ibid.* These concededly legitimate concerns lie at the very heart of this case, which represents yet another stress point in the longstanding conflict between two disparate cultures—the dominant Western culture, which views land in terms of ownership and use, and that of Native Americans, in which concepts of private property are not only alien, but contrary to a belief system that holds land sacred. Rather than address this conflict in any meaningful fashion, however, the Court disclaims all responsibility for balancing these competing and potentially irreconcilable interests, choosing instead to turn this difficult task over to the Federal Legislature. Such an abdication is more than merely indefensible as an institutional matter: by defining respondents' injury as "nonconstitutional," the Court has effectively bestowed on one party to this conflict the unilateral authority to resolve all future disputes in its favor, subject only to the Court's toothless exhortation to be "sensitive" to affected religions. In my view, however, Native Americans deserve—and the Constitution demands—more than this.

Prior to today's decision, several Courts of Appeals had attempted to fashion a test that accommodates the competing "demands" placed on federal property by the two cultures. Recognizing that the Government normally enjoys plenary authority over federal lands, the Courts of Appeals required Native Americans to demonstrate that any land-use decisions they challenged involved lands that were "central" or "indispensable" to their religious practices. See, e. g., *Northwest*

Indian Cemetery Protective Assn. v. Peterson, 795 F. 2d 688 (CA9 1986) (case below); *Wilson v. Block*, 228 U. S. App. D. C. 166, 708 F. 2d 735, cert. denied, 464 U. S. 956 (1983); *Badoni v. Higginson*, 638 F. 2d 172 (CA10 1980), cert. denied, 452 U. S. 954 (1981); *Sequoyah v. TVA*, 620 F. 2d 1159 (CA6), cert. denied, 449 U. S. 953 (1980); *Crow v. Gullet*, 541 F. Supp. 785 (SD 1982), aff'd, 706 F. 2d 856 (CA8), cert. denied, 464 U. S. 977 (1983). Although this requirement limits the potential number of free exercise claims that might be brought to federal land management decisions, and thus forestalls the possibility that the Government will find itself ensnared in a host of Lilliputian lawsuits, it has been criticized as inherently ethnocentric, for it incorrectly assumes that Native American belief systems ascribe religious significance to land in a traditionally Western hierarchical manner. See Michaelsen, American Indian Religious Freedom Litigation: Promise and Perils, 3 J. Law & Rel. 47 (1985); Pepper, Conundrum of the Free Exercise Clause—Some Reflections on Recent Cases, 9 N. Ky. L. Rev. 265, 283–284 (1982). It is frequently the case in constitutional litigation, however, that courts are called upon to balance interests that are not readily translated into rough equivalents. At their most absolute, the competing claims that both the Government and Native Americans assert in federal land are fundamentally incompatible, and unless they are tempered by compromise, mutual accommodation will remain impossible.

I believe it appropriate, therefore, to require some showing of “centrality” before the Government can be required either to come forward with a compelling justification for its proposed use of federal land or to forgo that use altogether. “Centrality,” however, should not be equated with the survival or extinction of the religion itself. In *Yoder*, for example, we treated the objection to the compulsory school attendance of adolescents as “central” to the Amish faith even though such attendance did not prevent or otherwise render the practice of that religion impossible, and instead simply

threatened to "undermine" that faith. Because of their perceptions of and relationship with the natural world, Native Americans consider all land sacred. Nevertheless, the Theodoratus Report reveals that respondents here deemed certain lands more powerful and more directly related to their religious practices than others. Thus, in my view, while Native Americans need not demonstrate, as respondents did here, that the Government's land-use decision will assuredly eradicate their faith, I do not think it is enough to allege simply that the land in question is held sacred. Rather, adherents challenging a proposed use of federal land should be required to show that the decision poses a substantial and realistic threat of frustrating their religious practices. Once such a showing is made, the burden should shift to the Government to come forward with a compelling state interest sufficient to justify the infringement of those practices.

The Court today suggests that such an approach would place courts in the untenable position of deciding which practices and beliefs are "central" to a given faith and which are not, and invites the prospect of judges advising some religious adherents that they "misunderstand their own religious beliefs." *Ante*, at 458. In fact, however, courts need not undertake any such inquiries: like all other religious adherents, Native Americans would be the arbiters of which practices are central to their faith, subject only to the normal requirement that their claims be genuine and sincere. The question for the courts, then, is not whether the Native American claimants understand their own religion, but rather whether they have discharged their burden of demonstrating, as the Amish did with respect to the compulsory school law in *Yoder*, that the land-use decision poses a substantial and realistic threat of undermining or frustrating their religious practices. Ironically, the Court's apparent solicitude for the integrity of religious belief and its desire to forestall the possibility that courts might second-guess the

claims of religious adherents leads to far greater inequities than those the Court postulates: today's ruling sacrifices a religion at least as old as the Nation itself, along with the spiritual well-being of its approximately 5,000 adherents, so that the Forest Service can build a 6-mile segment of road that two lower courts found had only the most marginal and speculative utility, both to the Government itself and to the private lumber interests that might conceivably use it.

Similarly, the Court's concern that the claims of Native Americans will place "religious servitudes" upon vast tracts of federal property cannot justify its refusal to recognize the constitutional injury respondents will suffer here. It is true, as the Court notes, that respondents' religious use of the high country requires privacy and solitude. The fact remains, however, that respondents have never asked the Forest Service to exclude others from the area. Should respondents or any other group seek to force the Government to protect their religious practices from the interference of private parties, such a demand would implicate not only the concerns of the Free Exercise Clause, but also those of the Establishment Clause as well. That case, however, is most assuredly not before us today, and in any event cannot justify the Court's refusal to acknowledge that the injuries respondents will suffer as a result of the Government's proposed activities are sufficient to state a constitutional cause of action.

III

Today, the Court holds that a federal land-use decision that promises to destroy an entire religion does not burden the practice of that faith in a manner recognized by the Free Exercise Clause. Having thus stripped respondents and all other Native Americans of any constitutional protection against perhaps the most serious threat to their age-old religious practices, and indeed to their entire way of life, the Court assures us that nothing in its decision "should be read to encourage governmental insensitivity to the religious

needs of any citizen." *Ante*, at 453. I find it difficult, however, to imagine conduct more insensitive to religious needs than the Government's determination to build a marginally useful road in the face of uncontradicted evidence that the road will render the practice of respondents' religion impossible. Nor do I believe that respondents will derive any solace from the knowledge that although the practice of their religion will become "more difficult" as a result of the Government's actions, they remain free to maintain their religious beliefs. Given today's ruling, that freedom amounts to nothing more than the right to believe that their religion will be destroyed. The safeguarding of such a hollow freedom not only makes a mockery of the "policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the[ir] traditional religions," *ante*, at 454 (quoting AIRFA), it fails utterly to accord with the dictates of the First Amendment.

I dissent.

TULSA PROFESSIONAL COLLECTION SERVICES,
INC. *v.* POPE, EXECUTRIX OF THE
ESTATE OF POPE

APPEAL FROM THE SUPREME COURT OF OKLAHOMA

No. 86-1961. Argued March 2, 1988—Decided April 19, 1988

Under the nonclaim provision of Oklahoma's Probate Code, creditors' claims against an estate are generally barred unless they are presented to the executor or executrix within two months of the publication of notice of the commencement of probate proceedings. Appellee executrix published the required notice in compliance with the terms of the nonclaim statute and a probate court order, but appellant, the assignee of a hospital's claim for expenses connected with the decedent's final illness, failed to file a timely claim. For this reason, the probate court denied appellant's application for payment, and both the State Court of Appeals and Supreme Court affirmed, rejecting appellant's contention that, in failing to require more than publication notice, the nonclaim statute violated due process. That contention was based upon *Mullane v. Central Hanover Bank & Trust Co.*, 339 U. S. 306, which held that state action that adversely affects property interests must be accompanied by such notice as is reasonable under the particular circumstances, balancing the State's interest and the due process interests of individuals, and *Mennonite Board of Missions v. Adams*, 462 U. S. 791, which generally requires actual notice to an affected party whose name and address are "reasonably ascertainable."

Held: If appellant's identity as a creditor was known or "reasonably ascertainable" by appellee (a fact which cannot be determined from the present record), the Due Process Clause of the Fourteenth Amendment, as interpreted by *Mullane* and *Mennonite*, requires that appellant be given notice by mail or such other means as is certain to ensure actual notice. Appellant's claim is properly considered a property interest protected by the Clause. Moreover, the nonclaim statute is not simply a self-executing statute of limitations. *Texaco, Inc. v. Short*, 454 U. S. 516, distinguished. Rather, the probate court's intimate involvement throughout the probate proceedings—particularly the court's activation of the statute's time bar by the appointment of an executor or executrix—is so pervasive and substantial that it must be considered state action. Nor can there be any doubt that the statute may "adversely affect" protected property interests, since untimely claims such as appellant's are completely extinguished. On balance, satisfying creditors'

substantial, practical need for actual notice in the probate setting is not so cumbersome or impracticable as to unduly burden the State's undeniably legitimate interest in the expeditious resolution of the proceedings, since mail service (which is already routinely provided at several points in the probate process) is inexpensive, efficient, and reasonably calculated to provide actual notice, and since publication notice will suffice for creditors whose identities are not ascertainable by reasonably diligent efforts or whose claims are merely conjectural. Pp. 484-491.

733 P. 2d 396, reversed and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, STEVENS, SCALIA, and KENNEDY, JJ., joined. BLACKMUN, J., concurred in the result. REHNQUIST, C. J., filed a dissenting opinion, *post*, p. 492.

Randall E. Rose argued the cause and filed briefs for appellant.

Phillip K. Smith argued the cause and filed a brief for appellee.

JUSTICE O'CONNOR delivered the opinion of the Court.

This case involves a provision of Oklahoma's probate laws requiring claims "arising upon a contract" generally to be presented to the executor or executrix of the estate within two months of the publication of a notice advising creditors of the commencement of probate proceedings. Okla. Stat., Tit. 58, § 333 (1981). The question presented is whether this provision of notice solely by publication satisfies the Due Process Clause.

I

Oklahoma's Probate Code requires creditors to file claims against an estate within a specified time period, and generally bars untimely claims. *Ibid.* Such "nonclaim statutes" are almost universally included in state probate codes. See Uniform Probate Code § 3-801, 8 U. L. A. 351 (1983); Falender, Notice to Creditors in Estate Proceedings: What Process is Due?, 63 N. C. L. Rev. 659, 667-668 (1985). Giving creditors a limited time in which to file claims against the estate serves the State's interest in facilitating the adminis-

tration and expeditious closing of estates. See, *e. g.*, *State ex rel. Central State Griffin Memorial Hospital v. Reed*, 493 P. 2d 815, 818 (Okla. 1972). Nonclaim statutes come in two basic forms. Some provide a relatively short time period, generally two to six months, that begins to run after the commencement of probate proceedings. Others call for a longer period, generally one to five years, that runs from the decedent's death. See Falender, *supra*, at 664-672. Most States include both types of nonclaim statutes in their probate codes, typically providing that if probate proceedings are not commenced and the shorter period therefore never is triggered, then claims nonetheless may be barred by the longer period. See, *e. g.*, Ark. Code Ann. §§ 28-50-101(a), (d) (1987) (three months if probate proceedings commenced; five years if not); Idaho Code § 15-3-803(a)(1)(2) (1979) (four months; three years); Mo. Rev. Stat. §§ 473.360(1), (3) (1986) (six months; three years). Most States also provide that creditors are to be notified of the requirement to file claims imposed by the nonclaim statutes solely by publication. See Uniform Probate Code § 3-801, 8 U. L. A. 351 (1983); Falender, *supra*, at 660, n. 7 (collecting statutes). Indeed, in most jurisdictions it is the publication of notice that triggers the nonclaim statute. The Uniform Probate Code, for example, provides that creditors have four months from publication in which to file claims. Uniform Probate Code § 3-801, 8 U. L. A. 351 (1983). See also, *e. g.*, Ariz. Rev. Stat. Ann. § 14-3801 (1975); Fla. Stat. § 733.701 (1987); Utah Code Ann. § 75-3-801 (1978).

The specific nonclaim statute at issue in this case, Okla. Stat., Tit. 58, § 333 (1981), provides for only a short time period and is best considered in the context of Oklahoma probate proceedings as a whole. Under Oklahoma's Probate Code, any party interested in the estate may initiate probate proceedings by petitioning the court to have the will proved. § 22. The court is then required to set a hearing date on the petition, § 25, and to mail notice of the hearing "to all heirs,

legatees and devisees, at their places of residence," §§ 25, 26. If no person appears at the hearing to contest the will, the court may admit the will to probate on the testimony of one of the subscribing witnesses to the will. § 30. After the will is admitted to probate, the court must order appointment of an executor or executrix, issuing letters testamentary to the named executor or executrix if that person appears, is competent and qualified, and no objections are made. § 101.

Immediately after appointment, the executor or executrix is required to "give notice to the creditors of the deceased." § 331. Proof of compliance with this requirement must be filed with the court. § 332. This notice is to advise creditors that they must present their claims to the executor or executrix within two months of the date of the first publication. As for the method of notice, the statute requires only publication: "[S]uch notice must be published in some newspaper in [the] county once each week for two (2) consecutive weeks." § 331. A creditor's failure to file a claim within the 2-month period generally bars it forever. § 333. The nonclaim statute does provide certain exceptions, however. If the creditor is out of State, then a claim "may be presented at any time before a decree of distribution is entered." § 333. Mortgages and debts not yet due are also excepted from the 2-month time limit.

This shorter type of nonclaim statute is the only one included in Oklahoma's Probate Code. Delays in commencement of probate proceedings are dealt with not through some independent, longer period running from the decedent's death, see, *e. g.*, Ark. Code Ann. § 28-50-101(d) (1987), but by shortening the notice period once proceedings have started. Section 331 provides that if the decedent has been dead for more than five years, then creditors have only one month after notice is published in which to file their claims. A similar 1-month period applies if the decedent was intestate. § 331.

II

H. Everett Pope, Jr., was admitted to St. John Medical Center, a hospital in Tulsa, Oklahoma, in November 1978. On April 2, 1979, while still at the hospital, he died testate. His wife, appellee JoAnne Pope, initiated probate proceedings in the District Court of Tulsa County in accordance with the statutory scheme outlined above. The court entered an order setting a hearing. Record 8. After the hearing the court entered an order admitting the will to probate and, following the designation in the will, *id.*, at 2, named appellee as the executrix of the estate. *Id.*, at 12. Letters testamentary were issued, *id.*, at 13, and the court ordered appellee to fulfill her statutory obligation by directing that she "immediately give notice to creditors." *Id.*, at 14. Appellee published notice in the Tulsa Daily Legal News for two consecutive weeks beginning July 17, 1979. The notice advised creditors that they must file any claim they had against the estate within two months of the first publication of the notice. *Id.*, at 16.

Appellant Tulsa Professional Collection Services, Inc., is a subsidiary of St. John Medical Center and the assignee of a claim for expenses connected with the decedent's long stay at that hospital. Neither appellant, nor its parent company, filed a claim with appellee within the 2-month time period following publication of notice. In October 1983, however, appellant filed an Application for Order Compelling Payment of Expenses of Last Illness. *Id.*, at 28. In making this application, appellant relied on Okla. Stat., Tit. 58, §594 (1981), which indicates that an executrix "must pay . . . the expenses of the last sickness." Appellant argued that this specific statutory command made compliance with the 2-month deadline for filing claims unnecessary. The District Court of Tulsa County rejected this contention, ruling that even claims pursuant to §594 fell within the general requirements of the nonclaim statute. Accordingly, the court denied appellant's application. App. 3.

The District Court's reading of § 594's relationship to the nonclaim statute was affirmed by the Oklahoma Court of Appeals. *Id.*, at 7. Appellant then sought rehearing, arguing for the first time that the nonclaim statute's notice provisions violated due process. In a supplemental opinion on rehearing the Court of Appeals rejected the due process claim on the merits. *Id.*, at 15.

Appellant next sought review in the Supreme Court of Oklahoma. That court granted certiorari and, after review of both the § 594 and due process issues, affirmed the Court of Appeals' judgment. With respect to the federal issue, the court relied on *Estate of Busch v. Ferrell-Duncan Clinic, Inc.*, 700 S. W. 2d 86, 88-89 (Mo. 1985), to reject appellant's contention that our decisions in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U. S. 306 (1950), and *Mennonite Board of Missions v. Adams*, 462 U. S. 791 (1983), required more than publication notice. 733 P. 2d 396 (1987). The Supreme Court reasoned that the function of notice in probate proceedings was not to "make a creditor a party to the proceeding" but merely to "notif[y] him that he may become one if he wishes." *Id.*, at 400 (quoting *Estate of Busch, supra*, at 88). In addition, the court distinguished probate proceedings because they do not directly adjudicate the creditor's claims. 733 P. 2d, at 400-401. Finally, the court agreed with *Estate of Busch* that nonclaim statutes were self-executing statutes of limitations, because they "ac[t] to cut off potential claims against the decedent's estate by the passage of time," and accordingly do not require actual notice. 733 P. 2d, at 401. See also *Gibbs v. Estate of Dolan*, 146 Ill. App. 3d 203, 496 N. E. 2d 1126 (1986) (rejecting due process challenge to nonclaim statute); *Gano Farms, Inc. v. Estate of Kleweno*, 2 Kan. App. 2d 506, 582 P. 2d 742 (1978) (same); *Chalaby v. Driskell*, 237 Ore. 245, 390 P. 2d 632 (1964) (same); *William B. Tanner Co. v. Estate of Fessler*, 100 Wis. 2d 437, 302 N. W. 2d 414 (1981) (same); *New York Merchandise Co. v. Stout*, 43 Wash. 2d 825, 264 P. 2d 863 (1953)

(same). This conclusion conflicted with that reached by the Nevada Supreme Court in *Continental Insurance Co. v. Moseley*, 100 Nev. 337, 683 P. 2d 20 (1984), after our decision remanding the case for reconsideration in light of *Mennonite*, *supra*. 463 U. S. 1202 (1983). In *Moseley*, the Nevada Supreme Court held that in this context due process required "more than service by publication." 100 Nev., at 338, 683 P. 2d, at 21. We noted probable jurisdiction, 484 U. S. 813 (1987), and now reverse and remand.

III

Mullane v. Central Hanover Bank & Trust Co., *supra*, at 314, established that state action affecting property must generally be accompanied by notification of that action: "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." In the years since *Mullane* the Court has adhered to these principles, balancing the "interest of the State" and "the individual interest sought to be protected by the Fourteenth Amendment." *Ibid*. The focus is on the reasonableness of the balance, and, as *Mullane* itself made clear, whether a particular method of notice is reasonable depends on the particular circumstances.

The Court's most recent decision in this area is *Mennonite*, *supra*, which involved the sale of real property for delinquent taxes. State law provided for tax sales in certain circumstances and for a 2-year period following any such sale during which the owner or any lienholder could redeem the property. After expiration of the redemption period, the tax sale purchaser could apply for a deed. The property owner received actual notice of the tax sale and the redemption period. All other interested parties were given notice by publication. 462 U. S., at 792-794. In *Mennonite*, a mortgagee of property that had been sold and on which the re-

demption period had run complained that the State's failure to provide it with actual notice of these proceedings violated due process. The Court agreed, holding that "actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of *any* party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable." *Id.*, at 800 (emphasis in original). Because the tax sale had "immediately and drastically diminishe[d] the value of [the mortgagee's] interest," *id.*, at 798, and because the mortgagee could have been identified through "reasonably diligent efforts," *id.*, at 798, n. 4, the Court concluded that due process required that the mortgagee be given actual notice.

Applying these principles to the case at hand leads to a similar result. Appellant's interest is an unsecured claim, a cause of action against the estate for an unpaid bill. Little doubt remains that such an intangible interest is property protected by the Fourteenth Amendment. As we wrote in *Logan v. Zimmerman Brush Co.*, 455 U. S. 422, 428 (1982), this question "was affirmatively settled by the *Mullane* case itself, where the Court held that a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause." In *Logan*, the Court held that a cause of action under Illinois' Fair Employment Practices Act was a protected property interest, and referred to the numerous other types of claims that the Court had previously recognized as deserving due process protections. See *id.*, at 429-431, and nn. 4-5. Appellant's claim, therefore, is properly considered a protected property interest.

The Fourteenth Amendment protects this interest, however, only from a deprivation by state action. Private use of state-sanctioned private remedies or procedures does not rise to the level of state action. See, e. g., *Flagg Bros., Inc. v. Brooks*, 436 U. S. 149 (1978). Nor is the State's involvement in the mere running of a general statute of limitations

generally sufficient to implicate due process. See *Texaco, Inc. v. Short*, 454 U. S. 516 (1982). See also *Flagg Bros., Inc. v. Brooks*, *supra*, at 166. But when private parties make use of state procedures with the overt, significant assistance of state officials, state action may be found. See, e. g., *Lugar v. Edmondson Oil Co.*, 457 U. S. 922 (1982); *Sniadach v. Family Finance Corp.*, 395 U. S. 337 (1969). The question here is whether the State's involvement with the nonclaim statute is substantial enough to implicate the Due Process Clause.

Appellee argues that it is not, contending that Oklahoma's nonclaim statute is a self-executing statute of limitations. Relying on this characterization, appellee then points to *Short*, *supra*. Appellee's reading of *Short* is correct—due process does not require that potential plaintiffs be given notice of the impending expiration of a period of limitations—but in our view, appellee's premise is not. Oklahoma's nonclaim statute is not a self-executing statute of limitations.

It is true that nonclaim statutes generally possess some attributes of statutes of limitations. They provide a specific time period within which particular types of claims must be filed and they bar claims presented after expiration of that deadline. Many of the state court decisions upholding nonclaim statutes against due process challenges have relied upon these features and concluded that they are properly viewed as statutes of limitations. See, e. g., *Estate of Busch v. Ferrell-Duncan Clinic, Inc.*, 700 S. W. 2d, at 89; *William B. Tanner Co. v. Estate of Fessler*, 100 Wis. 2d 437, 302 N. W. 2d 414 (1981).

As we noted in *Short*, however, it is the "self-executing feature" of a statute of limitations that makes *Mullane* and *Mennonite* inapposite. See 454 U. S., at 533, 536. The State's interest in a self-executing statute of limitations is in providing repose for potential defendants and in avoiding stale claims. The State has no role to play beyond enactment of the limitations period. While this enactment obvi-

ously is state action, the State's limited involvement in the running of the time period generally falls short of constituting the type of state action required to implicate the protections of the Due Process Clause.

Here, in contrast, there is significant state action. The probate court is intimately involved throughout, and without that involvement the time bar is never activated. The nonclaim statute becomes operative only after probate proceedings have been commenced in state court. The court must appoint the executor or executrix before notice, which triggers the time bar, can be given. Only after this court appointment is made does the statute provide for any notice; § 331 directs the executor or executrix to publish notice "immediately" after appointment. Indeed, in this case, the District Court reinforced the statutory command with an order expressly requiring appellee to "immediately give notice to creditors." The form of the order indicates that such orders are routine. Record 14. Finally, copies of the notice and an affidavit of publication must be filed with the court. § 332. It is only after all of these actions take place that the time period begins to run, and in every one of these actions, the court is intimately involved. This involvement is so pervasive and substantial that it must be considered state action subject to the restrictions of the Fourteenth Amendment.

Where the legal proceedings themselves trigger the time bar, even if those proceedings do not necessarily resolve the claim on its merits, the time bar lacks the self-executing feature that *Short* indicated was necessary to remove any due process problem. Rather, in such circumstances, due process is directly implicated and actual notice generally is required. Cf. *Mennonite*, 462 U. S., at 793-794 (tax sale proceedings trigger 2-year redemption period); *Logan v. Zimmerman Brush Co.*, *supra*, at 433, 437 (claim barred if no hearing held 120 days after action commenced); *City of New York v. New York, N. H. & H. R. Co.*, 344 U. S. 293, 294 (1953) (bankruptcy proceedings trigger specific time pe-

riod in which creditors' claims must be filed). Our conclusion that the Oklahoma nonclaim statute is not a self-executing statute of limitations makes it unnecessary to consider appellant's argument that a 2-month period is somehow unconstitutional short. See Tr. of Oral Arg. 22 (advocating constitutional requirement that the States provide at least one year). We also have no occasion to consider the proper characterization of nonclaim statutes that run from the date of death, and which generally provide for longer time periods, ranging from one to five years. See Falender, 63 N. C. L. Rev., at 667-669. In sum, the substantial involvement of the probate court throughout the process leaves little doubt that the running of Oklahoma's nonclaim statute is accompanied by sufficient government action to implicate the Due Process Clause.

Nor can there be any doubt that the nonclaim statute may "adversely affect" a protected property interest. In appellant's case, such an adverse effect is all too clear. The entire purpose and effect of the nonclaim statute is to regulate the timeliness of such claims and to forever bar untimely claims, and by virtue of the statute, the probate proceedings themselves have completely extinguished appellant's claim. Thus, it is irrelevant that the notice seeks only to advise creditors that they may become parties rather than that they are parties, for if they do not participate in the probate proceedings, the nonclaim statute terminates their property interests. It is not necessary for a proceeding to directly adjudicate the merits of a claim in order to "adversely affect" that interest. In *Mennonite* itself, the tax sale proceedings did not address the merits of the mortgagee's claim. Indeed, the tax sale did not even completely extinguish that claim, it merely "diminish[ed] the value" of the interest. 462 U. S., at 798. Yet the Court held that due process required that the mortgagee be given actual notice of the tax sale. See also *Memphis Light, Gas & Water Div. v. Craft*, 436 U. S. 1 (1978) (termination of utility service); *Schroeder v. City of New York*, 371 U. S. 208 (1962) (condemnation proceeding); *City of New*

York v. New York, N. H. & H. R. Co., *supra* (Bankruptcy Code's requirement of "reasonable notice" requires actual notice of deadline for filing claims).

In assessing the propriety of actual notice in this context consideration should be given to the practicalities of the situation and the effect that requiring actual notice may have on important state interests. *Mennonite*, *supra*, at 798-799; *Mullane*, 339 U. S., at 313-314. As the Court noted in *Mullane*, "[c]hance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper." *Id.*, at 315. Creditors, who have a strong interest in maintaining the integrity of their relationship with their debtors, are particularly unlikely to benefit from publication notice. As a class, creditors may not be aware of a debtor's death or of the institution of probate proceedings. Moreover, the executor or executrix will often be, as is the case here, a party with a beneficial interest in the estate. This could diminish an executor's or executrix's inclination to call attention to the potential expiration of a creditor's claim. There is thus a substantial practical need for actual notice in this setting.

At the same time, the State undeniably has a legitimate interest in the expeditious resolution of probate proceedings. Death transforms the decedent's legal relationships and a State could reasonably conclude that swift settlement of estates is so important that it calls for very short time deadlines for filing claims. As noted, the almost uniform practice is to establish such short deadlines, and to provide only publication notice. See, *e. g.*, Ariz. Rev. Stat. Ann. § 14-3801 (1975); Ark. Code Ann. § 28-50-101(a) (1987); Fla. Stat. § 733.701 (1987); Idaho Code § 15-3-803(a) (1979); Mo. Rev. Stat. § 473.360(1) (1986); Utah Code Ann. § 75-3-801 (1978). See also Uniform Probate Code § 3-801, 8 U. L. A. 351 (1983); Falender, at 660, n. 7 (collecting statutes). Providing actual notice to known or reasonably ascertainable creditors, however, is not inconsistent with the goals reflected in nonclaim statutes. Actual notice need not be inefficient or

burdensome. We have repeatedly recognized that mail service is an inexpensive and efficient mechanism that is reasonably calculated to provide actual notice. See, *e. g.*, *Mennonite*, 462 U. S., at 799, 800; *Greene v. Lindsey*, 456 U. S. 444, 455 (1982); *Mullane*, *supra*, at 319. In addition, *Mullane* disavowed any intent to require "impracticable and extended searches . . . in the name of due process." 339 U. S., at 317-318. As the Court indicated in *Mennonite*, all that the executor or executrix need do is make "reasonably diligent efforts," 462 U. S., at 798, n. 4, to uncover the identities of creditors. For creditors who are not "reasonably ascertainable," publication notice can suffice. Nor is everyone who may conceivably have a claim properly considered a creditor entitled to actual notice. Here, as in *Mullane*, it is reasonable to dispense with actual notice to those with mere "conjectural" claims. 339 U. S., at 317.

On balance then, a requirement of actual notice to known or reasonably ascertainable creditors is not so cumbersome as to unduly hinder the dispatch with which probate proceedings are conducted. Notice by mail is already routinely provided at several points in the probate process. In Oklahoma, for example, §26 requires that "heirs, legatees, and devisees" be mailed notice of the initial hearing on the will. Accord, Uniform Probate Code §3-403, 8 U. L. A. 274 (1983). Indeed, a few States already provide for actual notice in connection with short nonclaim statutes. See, *e. g.*, Calif. Prob. Code Ann. §§9050, 9100 (West Supp. 1988); Nev. Rev. Stat. §§147.010, 155.010, 155.020 (1987); W. Va. Code §§44-2-2, 44-2-4 (1982). We do not believe that requiring adherence to such a standard will be so burdensome or impracticable as to warrant reliance on publication notice alone.

In analogous situations we have rejected similar arguments that a pressing need to proceed expeditiously justifies less than actual notice. For example, while we have recognized that in the bankruptcy context there is a need for prompt administration of claims, *United Savings Assn. of Texas v. Timbers of Inwood Forest Assoc., Ltd.*, 484 U. S.

365, 375–376 (1988), we also have required actual notice in bankruptcy proceedings. *Bank of Marin v. England*, 385 U. S. 99 (1966); *City of New York v. New York, N. H. & H. R. Co.*, 344 U. S. 293 (1953). See also *Mullane v. Central Hanover Bank & Trust Co.*, *supra*, at 318–319 (trust proceedings). Probate proceedings are not so different in kind that a different result is required here.

Whether appellant's identity as a creditor was known or reasonably ascertainable by appellee cannot be answered on this record. Neither the Oklahoma Supreme Court nor the Court of Appeals nor the District Court considered the question. Appellee of course was aware that her husband endured a long stay at St. John Medical Center, but it is not clear that this awareness translates into a knowledge of appellant's claim. We therefore must remand the case for further proceedings to determine whether "reasonably diligent efforts," *Mennonite*, *supra*, at 798, n. 4, would have identified appellant and uncovered its claim. If appellant's identity was known or "reasonably ascertainable," then termination of appellant's claim without actual notice violated due process.

IV

We hold that Oklahoma's nonclaim statute is not a self-executing statute of limitations. Rather, the statute operates in connection with Oklahoma's probate proceedings to "adversely affect" appellant's property interest. Thus, if appellant's identity as a creditor was known or "reasonably ascertainable," then the Due Process Clause requires that appellant be given "[n]otice by mail or other means as certain to ensure actual notice." *Mennonite*, *supra*, at 800. Accordingly, the judgment of the Oklahoma Supreme Court is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE BLACKMUN concurs in the result.

REHNQUIST, C. J., dissenting

485 U. S.

CHIEF JUSTICE REHNQUIST, dissenting.

In *Texaco, Inc. v. Short*, 454 U. S. 516 (1982), the Court upheld against challenge under the Due Process Clause an Indiana statute providing that severed mineral interests which had not been used for a period of 20 years lapsed and reverted to the surface owner unless the mineral owner filed a statement of claim in the appropriate county office. In the present case Oklahoma has enacted a statute providing that a contractual claim against a decedent's estate is barred if not presented as a claim within two months of the publication of notice advising creditors of the commencement of probate proceedings. The Court holds the Oklahoma statute unconstitutional.

Obviously there is a great difference between the 20-year time limit in the Indiana statute and the 2-month time limit in the Oklahoma statute, but the Court does not rest the constitutional distinction between the cases on this fact. Instead, the constitutional distinction is premised on the absence in *Texaco, Inc.*, of the "significant state action" present in this case. In the words of the Court:

"The nonclaim statute becomes operative only after probate proceedings have been commenced in state court. The court must appoint the executor or executrix before notice, which triggers the time bar, can be given. Only after this court appointment is made does the statute provide for any notice; § 331 directs the executor or executrix to publish notice 'immediately' after appointment." *Ante*, at 487.

Just why the due process implications of these two cases should turn upon the "activity" of the Oklahoma probate court is not made clear. Surely from the point of view of the claimant—for whom, after all, the Due Process Clause is designed to benefit—the difference between having the time bar to his claim activated by a notice published by a court-appointed executor, as it was here, and having the time bar

activated by acquisition of the mineral interest, as it was in Indiana, makes little if any difference.

The owner of a mineral interest in Indiana who neither made any use of it for 20 years nor filed a statement of claim, would lose a quiet title action brought in the Indiana courts against him by the surface owner because those courts would apply the 20-year statute of limitations. The appellant in the present case lost a suit in the Oklahoma courts because those courts applied the 2-month statute of limitations contained in the Oklahoma probate statute. Why there is "state action" in the latter case, but not in the former, remains a mystery which is in no way elucidated by the Court's opinion. The factual differences which the Court points out, showing that the probate court is "intimately involved" in the application of the Oklahoma nonclaim statute, seem to me trivial.

Probate proceedings have been traditionally uncontested and administrative, designed to transfer assets from someone who has died to his successors. Before making these transfers, probate codes universally require that the estate settle the debts of the decedent, and to do this it is necessary that claims against the estate be marshaled and proved. *Ante*, at 479-480. Once the debts of the estate are paid, the necessary steps can be taken to distribute the remainder of the property.

Occasionally there may be a disputed claim against the estate, which is then in most jurisdictions tried like any other civil suit. Occasionally there may be a dispute over the validity of the will, with a resultant will contest. Occasionally there may be objections to the account of the executor or the administrator, which are then in most jurisdictions heard and decided by the probate court. But by and large, the typical probate proceeding—and the one involved in the instant case seems to have followed that pattern—is uncontested, and the publication of notice to creditors simply shortens the otherwise applicable statute of limitations.

The “intimate involvement” of the probate court in the present case was entirely of an administrative nature.

Would this Court have struck down the Indiana mineral lapse statute involved in *Texaco, Inc.*, if that statute had provided—as an *additional* protection to mineral owners—that a state official should publish notice to all mineral owners of the effect of the operation of the lapse statute? I find it difficult to believe that would be the case, and yet the thrust of the Court’s reasoning today points in that direction. Virtually meaningless state involvement, or lack of it, rather than the effect of the statute in question on the rights of the party whose claim is cut off, is held dispositive.

The Court observes that in Oklahoma, it is the court-ordered publication of notice that triggers the running of the statute of limitations. This judicial involvement, the Court concludes, is inconsistent with the “self-executing feature,” of the time bar in *Texaco, Inc. Ante*, at 487. This reading of the term “self-executing” is, I believe, out of context and contrary to common sense. That term refers only to the absence of a judicial or other determination that *itself* extinguishes the claimant’s rights. This is made clear by the *Texaco, Inc.*, Court’s juxtaposition of “the self-executing feature of the [Indiana] statute and a subsequent judicial determination that a particular lapse did in fact occur.” 454 U. S., at 533. Certainly the Oklahoma provision is more like the former than the latter, and there is no reason to conclude that the perfunctory administrative involvement of the Oklahoma probate court triggers a greater level of due process protection.

Appellant also claims that the 2-month period provided by Oklahoma law, even if deemed to be a statute of limitations, is too short to afford due process. The Court does not reach that question, and neither do I.

Syllabus

PUERTO RICO DEPARTMENT OF CONSUMER AFFAIRS ET AL. *v.* ISLA PETROLEUM CORP. ET AL.

CERTIORARI TO THE UNITED STATES TEMPORARY EMERGENCY COURT OF APPEALS

No. 86-1406. Argued February 29, 1988—Decided April 19, 1988

In 1973, Congress passed the Emergency Petroleum Allocation Act (EPAA), which required the President to promulgate regulations governing allocation and pricing of petroleum products, and expressly pre-empted state and local regulation of allocation and pricing that conflicted with those regulations. Under the EPAA, the President's regulatory authority was to terminate in 1975, but subsequent amendments (including an amendment by the Energy Policy and Conservation Act (EPCA) in 1975) extended his authority until September 30, 1981, when it expired. In 1986, Puerto Rico, which had suspended its regulation of petroleum products when the EPAA was passed, imposed an excise tax on oil refiners, and petitioner Puerto Rico Department of Consumer Affairs issued regulations requiring that advance notice of price increases be given to the Department's Secretary, prohibiting wholesalers from passing on the cost of the tax to retailers, and imposing maximum profit margins on sales by wholesalers to retailers. Respondent oil companies brought actions, which were consolidated by the District Court, alleging that the Department's regulations were unconstitutional on pre-emption grounds. The court enjoined enforcement of the regulations, holding that the Department's authority was pre-empted by the decision of Congress to decontrol petroleum prices. The Temporary Emergency Court of Appeals affirmed.

Held: The Department's regulations are not pre-empted. The test for federal pre-emption of Puerto Rico law is the same as the test under the Supremacy Clause for pre-emption of the law of a State. There is no merit to respondents' contention that the EPAA evinced a federal intent to enter the field of petroleum allocation and price regulation, and that the EPCA never countermanded that intent, but merely changed the nature of the federally imposed regime from one of federal hands-on regulation to one of federally mandated free-market control. Although the Constitution permits congressional creation of such a regime, it is to be assumed that the historic police powers of the States are not superseded by a federal statute unless that is the clear and manifest purpose of Congress. *Transcontinental Pipe Line Corp. v. State Oil and Gas Bd. of Miss.*, 474 U. S. 409, does not announce a new rule of burden-shifting

whenever the Federal Government terminates or reduces its regulation of a field of commerce, replacing the normal need for finding a federal intent to pre-empt with a need to find a federal intent to retransfer authority to the States. Since Congress has withdrawn from all substantial involvement in petroleum allocation and price regulation, there is no extant action that can create an inference of pre-emption in an unregulated segment of an otherwise regulated field, and pre-emption, if it is intended, must be explicitly stated. Pp. 499-504.

811 F. 2d 1511, reversed.

SCALIA, J., delivered the opinion of the Court, in which all other Members joined, except O'CONNOR, J., who took no part in the consideration or decision of the case.

Lynn R. Coleman argued the cause for petitioners. With him on the briefs were *Douglas G. Robinson*, *Matthew W. S. Estes*, *Dennis A. Simonpietri Monefeldt*, *Hector Rivera Cruz*, Secretary of Justice, and *Rafael Ortiz Carrion*, Solicitor General.

John Harrison 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*, *Deputy Solicitor General Cohen*, *Deputy Assistant Attorney General Spears*, *John F. Cordes*, and *Bruce G. Forrest*.

Mark L. Evans argued the cause for respondents. With him on the brief for respondents *Esso Standard Oil Co. et al.* were *Donald B. Craven*, *James P. Tuite*, and *Mario L. Paniagua*. *Rafael Pérez-Bachs*, *Néstor M. Méndez-Gómez*, *Ana Matilde Nin*, *Celso E. López*, *Igor Domínguez*, and *Alvaro R. Calderón, Jr.*, filed a brief for respondents *Shell Co., Ltd., et al.**

*Briefs of *amici curiae* urging reversal were filed for the State of New York et al. by *Robert Abrams*, Attorney General of New York, *O. Peter Sherwood*, Solicitor General, *Peter H. Schiff*, Deputy Solicitor General, and *Frank K. Walsh*, Assistant Attorney General, *Joseph I. Lieberman*, Attorney General of Connecticut, *James E. Tierney*, Attorney General of Maine, *J. Joseph Curran, Jr.*, Attorney General of Maryland, and *Michael F. Brockmeyer*, Assistant Attorney General, *Edwin Lloyd Pittman*, Attorney General of Mississippi, *W. Cary Edwards*, Attorney General of

JUSTICE SCALIA delivered the opinion of the Court.

In this case we must determine whether federal legislation providing for controls over the allocation and pricing of petroleum products, passed in response to the oil crisis of the early 1970's, or the legislation subsequently eliminating those controls, pre-empts gasoline price regulation by the Commonwealth of Puerto Rico.

I

In 1973, Congress passed the Emergency Petroleum Allocation Act (EPAA), Pub. L. 93-159, 87 Stat. 627, 15 U. S. C. § 751 *et seq.*, in reaction to severe market disruptions caused by an embargo on oil exports to the United States. The central provision of the legislation, upon which all the rest depended, was § 4, 15 U. S. C. § 753, which required the President to promulgate regulations governing allocation and pricing of petroleum products. The Act also contained an express pre-emption provision, § 6(b), 15 U. S. C. § 755(b), precluding state and local regulation of allocation and pricing in conflict with a regulation or order under § 4.* As origi-

New Jersey, *Dave Frohnmayer*, Attorney General of Oregon, and *LeRoy S. Zimmerman*, Attorney General of Pennsylvania; and for the National Governors' Association et al. by *Benna Ruth Solomon* and *Amy Loeserman Klein*.

Briefs of *amici curiae* urging affirmance were filed for the American Petroleum Institute by *Arnold S. Block* and *G. William Frick*; for the New England Fuel Institute by *David Ginsburg*, *John H. Zentay*, *Gary J. Klein*, and *Ira T. Kasdan*; and for the Petroleum Marketers Association of America by *Peter L. de la Cruz*.

*Specifically, § 6(b), as codified, 15 U. S. C. § 755(b), read as follows:

"The regulation under [§ 4] of this title and any order issued thereunder shall preempt any provision of any program for the allocation of crude oil, residual fuel oil, or any refined petroleum product established by any State or local government if such provision is in conflict with such regulation or any such order."

This text permits the argument that the federal pre-emption excluded state and local price regulation only in connection with a state or local allocation program. That argument has not been made here, and would in any event only reinforce the conclusion that we reach. We shall assume, for

nally enacted, the EPAA provided for termination of the President's regulatory authority early in 1975, but during that year Congress provided for temporary extensions, and then enacted the Energy Policy and Conservation Act (EPCA), Pub. L. 94-163, 89 Stat. 871 (codified in scattered Titles and sections of United States Code), which amended the EPAA to provide for gradual decontrol. The EPCA extended the President's EPAA regulatory obligations for 40 months, and thereafter granted him discretionary regulatory authority until September 30, 1981; on that date, the statute prescribed that "[t]he authority to promulgate and amend any regulation or to issue any order under [the EPAA] shall expire." § 461, 89 Stat. 955, 15 U. S. C. § 760g.

Before enactment of the EPAA, Puerto Rico had regulated the prices of gasoline and other petroleum products sold in the Commonwealth. The Puerto Rico Department of Consumer Affairs (referred to in this litigation as DACO, apparently the acronym of its Spanish title, Departamento de Asuntos del Consumidor) was charged with regulating these and other commodities, but suspended its regulation of petroleum products when the EPAA was passed in 1973. In 1975, anticipating the expiration of the EPAA, DACO issued a regulation to restore its regulatory authority, but after the EPCA was passed it modified this regulation to make it effective only after federal price controls were lifted. Then in the spring of 1986 (4½ years after the President's regulatory authority was terminated), the Legislature of Puerto Rico imposed an excise tax on oil refiners, and DACO issued the regulations that are the subject of the challenge here. DACO Orders of March 26, April 23, and May 20, 1986 (App. to Pet. for Cert. 42a-45a, App. 7-12, 21-29). Among other requirements, these regulations prescribed that the Secretary of DACO be given 15 days' notice of price increases, pro-

purposes of our analysis, that the federal pre-emption of conflicting price regulation was complete.

hibited wholesalers from passing on the cost of the excise tax to retailers, and imposed maximum profit margins on sales by wholesalers to retailers.

Respondents, several oil companies, brought actions that were consolidated in the United States District Court for the District of Puerto Rico alleging, *inter alia*, that DACO's orders were unconstitutional on pre-emption grounds, and requesting declaratory and injunctive relief. The District Court enjoined DACO from enforcing its regulations, in part on the grounds that DACO's authority was pre-empted by Congress' decision to decontrol petroleum prices, and petitioners appealed this determination to the Temporary Emergency Court of Appeals (TECA). (Petitioners also challenged certain other aspects of the District Court's decision in an appeal to the United States Court of Appeals for the First Circuit, which has stayed its proceedings.) A divided panel of the TECA affirmed. 811 F. 2d 1511 (1986). Because of the importance of the issue presented, we granted the petition for certiorari. 484 U. S. 814 (1987).

II

Although Puerto Rico has a unique status in our federal system, see, *e. g.*, *Examining Board v. Flores de Otero*, 426 U. S. 572, 596 (1976), the parties have assumed, and we agree, that the test for federal pre-emption of the law of Puerto Rico at issue here is the same as the test under the Supremacy Clause, U. S. Const., Art. VI, cl. 2, for pre-emption of the law of a State. See 48 U. S. C. § 734 (statutory laws of the United States generally "have the same force and effect in Puerto Rico as in the United States"); Helfeld, *How Much of the United States Constitution and Statutes Are Applicable to the Commonwealth of Puerto Rico?*, 110 F. R. D. 452, 469 (1985) (Supremacy Clause applies to Puerto Rico). Cf. *Examining Board*, *supra*, at 597; *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U. S. 663, 675 (1974). Our Supremacy Clause cases typically involve analysis of the

scope of pre-emptive intent underlying statutory provisions that impose federal regulation. See, e. g., *Louisiana Public Service Comm'n v. FCC*, 476 U. S. 355, 368–370 (1986); *Shaw v. Delta Air Lines, Inc.*, 463 U. S. 85, 95–96 (1983); *Hines v. Davidowitz*, 312 U. S. 52, 67, 69–70 (1941). While the EPAA was operative, that typical question posed relatively little difficulty, since § 6(b) explicitly pre-empted state regulation “in conflict” with an EPAA regulation or order. Here, however, we are presented with the decidedly untypical claim that federal pre-emption exists despite, not only the absence of a statutory provision specifically announcing it, but the absence of any extant federal regulatory program with which the state regulation might conflict and which might therefore be thought to imply pre-emption. Respondents’ contention, in a nutshell, is that the EPAA evinced a federal intent to enter the field of petroleum allocation and price regulation, and that the EPCA never countermanded that intent, but merely changed the nature of the federally imposed regime from one of federal hands-on regulation to one of federally mandated free-market control.

We have suggested elsewhere that the Constitution permits congressional creation of such a regime. See, e. g., *Arkansas Electric Cooperative Corp. v. Arkansas Public Service Comm'n*, 461 U. S. 375, 384 (1983). But to say that it can be created is not to say it can be created subtly. As we have repeatedly stated, ““we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.”” *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U. S. 707, 715 (1985), quoting *Jones v. Rath Packing Co.*, 430 U. S. 519, 525 (1977), in turn quoting *Rice v. Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947). We do not find that clarity and manifestness in the statutory scheme respondents rely upon here, which consists of no more than (1) provisions for detailed Presidential regulation, which remain in the current

version of the United States Code, but whose effect has, by subsequent statute, specifically been decreed to expire, and (2) a provision pre-empting state laws that conflict with any Presidential regulation or order under this expired authority.

In the last analysis, what respondents rely upon consists of nothing more than excerpts from the legislative history of the EPCA which in their view (though not in the view of petitioners) evidence a congressional intent that there be a free market in petroleum products. While we have frequently said that pre-emption analysis requires ascertaining congressional intent, see, *e. g.*, *Louisiana Public Service Comm'n*, *supra*, at 369, we have never meant that to signify congressional intent in a vacuum, unrelated to the giving of meaning to an enacted statutory text. There is no text here—neither §6(b), which only pre-empts conflicts with actual federal regulation, nor any extant federal regulation that might plausibly be thought to imply exclusivity—to which expressions of pre-emptive intent in legislative history might attach. Respondents have brought to our attention statements that may reflect general congressional approval of a free market in petroleum products, or general congressional belief that such a market would result from enactment of the EPCA, or even general congressional desire that it result. But unenacted approvals, beliefs, and desires are not laws. Without a text that can, in light of those statements, plausibly be interpreted as *prescribing* federal pre-emption it is impossible to find that a free market was mandated by federal law.

Today's conclusion that the DACO regulations are not pre-empted was plainly foreshadowed by our decision in *Tully v. Mobil Oil Corp.*, 455 U. S. 245 (1982) (*per curiam*). In that case, the TECA had held that the EPAA pre-empted a state provision barring oil companies from passing on to subsequent purchasers the cost of the State's gross-receipts tax. Since, by the time we decided that appeal, the EPCA-imposed expiration date for Presidential authority under the EPAA had already passed, we vacated the judgment, agree-

ing with the TECA's own determination that expiration of the EPAA "will signal the end of federal concern in this area." *Id.*, at 246, quoting 653 F. 2d 497, 502 (1981). Our action was based on the theory that the pre-empting legislation was no more. 455 U. S., at 247, and n. 2.

Instead of following our decision in *Tully*, the TECA relied on language in our subsequent decision in *Transcontinental Pipe Line Corp. v. State Oil and Gas Bd. of Miss.*, 474 U. S. 409 (1986), apparently finding there a modification of our pre-emption doctrine. In *Transcontinental*, we returned to an issue we had previously considered in *Northern Natural Gas Co. v. State Corporation Comm'n of Kansas*, 372 U. S. 84 (1963): whether a state regulation requiring a pipeline company to purchase gas ratably from owners with common interests in a gas source was pre-empted by federal legislation. The affirmative answer in *Northern Natural* had been based on the Court's construction of the Natural Gas Act (NGA), 15 U. S. C. § 717 *et seq.* In *Transcontinental*, the question presented was whether the Natural Gas Policy Act of 1978 (NGPA), 15 U. S. C. § 3301 *et seq.*, "altered those characteristics of the federal regulatory scheme which provided the basis in *Northern Natural* for a finding of pre-emption." 474 U. S., at 417. The strongest evidence of such alteration was the NGPA's withdrawal of the type of gas purchases at issue in *Transcontinental* from the jurisdiction of the Federal Energy Regulatory Commission (FERC). We concluded, however, that the pre-emptive force of the NGA recognized in *Northern Natural* was equalled by the pre-emptive force of the NGPA, because the NGPA did not alter the comprehensive nature of the scheme, *id.*, at 420-421, and did not eliminate the federal interest in consumer protection, *id.*, at 423-424.

At one point in our *Transcontinental* opinion, we phrased the question as "whether Congress, in revising a comprehensive federal regulatory scheme to give market forces a more significant role in determining the supply, the demand, and

the price of natural gas, intended to give the States the power it had denied FERC." *Id.*, at 422. In the decision below, the TECA apparently interpreted this as the enunciation of a new pre-emption test, and proceeded to search the legislative history of the EPCA for evidence of an affirmative intention that the States assume the price-regulating role that the Federal Government was abandoning. Finding none, and further finding the expression of congressional sentiments favoring the free market, it concluded that the States were pre-empted. This mistook our intent. *Transcontinental* was not meant to announce a new rule of burden-shifting whenever the Federal Government terminates or reduces its regulation of a field of commerce, replacing the normal need for finding a federal intent to pre-empt with a need to find a federal intent to retransfer authority to the States. To the contrary, a "clear and manifest purpose" of pre-emption is always required. We demanded an affirmative intent to retransfer authority in *Transcontinental* because only that could have refuted the pre-emptive intent already manifest in the revised, but nonetheless "comprehensive," federal regulatory scheme.

Respondents would draw exaggerated inferences from another statement in *Transcontinental*, to the effect that "[a] federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left *unregulated*, and in that event would have as much pre-emptive force as a decision to regulate.'" *Ibid.*, quoting *Arkansas Electric Cooperative Corp.*, 461 U. S., at 384. That was obviously not meant in an unqualified sense; otherwise, deliberate federal inaction could always imply pre-emption, which cannot be. There is no federal pre-emption *in vacuo*, without a constitutional text or a federal statute to assert it. Where a comprehensive federal scheme intentionally leaves a portion of the regulated field without controls, *then* the pre-emptive inference can be drawn—not from federal inaction alone, but from inaction joined with action.

That is not what we have here. Congress has withdrawn from all substantial involvement in petroleum allocation and price regulation. There being no extant action that can create an inference of pre-emption in an unregulated segment of an otherwise regulated field, pre-emption, if it is intended, must be explicitly stated. To adopt the imaginative analogy set forth in the Solicitor General's *amicus* brief, repeal of EPAA regulation did not leave behind a pre-emptive grin without a statutory cat.

For the reasons stated, the judgment of the TECA is

Reversed.

JUSTICE O'CONNOR took no part in the consideration or decision of this case.

Syllabus

SOUTH CAROLINA v. BAKER, SECRETARY OF THE
TREASURY

ON EXCEPTIONS TO REPORT OF SPECIAL MASTER

No. 94, Orig. Argued December 7, 1987—Decided April 20, 1988

Section 310(b)(1) of the Tax Equity and Fiscal Responsibility Act of 1982 removes the federal income tax exemption for interest earned on publicly offered long-term bonds (hereinafter referred to as bonds) issued by state and local governments (hereinafter referred to collectively as States) unless those bonds are issued in registered (as opposed to bearer) form. South Carolina invoked this Court's original jurisdiction, contending that §310(b)(1) is constitutionally invalid under the Tenth Amendment and the doctrine of intergovernmental tax immunity. A Special Master was appointed. After conducting hearings and taking evidence, he concluded that §310(b)(1) is constitutional and recommended entering judgment for the defendant. South Carolina and the National Governors' Association (NGA), as an intervenor, filed exceptions to various factual findings of the Master and to his legal conclusions concerning their constitutional challenges.

Held:

1. Section 310(b)(1) does not violate the Tenth Amendment or constitutional principles of federalism by effectively compelling States to issue bonds in registered form. Pp. 511-515.

(a) The Tenth Amendment limits on Congress' authority to regulate state activities are structural, not substantive—that is, the States must find their protection from congressional regulation through the national political process, not through judicially defined spheres of unregulable state activity. In this case, South Carolina has not even alleged that it was deprived of any right to participate in the national political process or that it was singled out in a way that left it politically isolated and powerless. The allegations South Carolina does make—that Congress was uninformed and chose an ineffective remedy—do not amount to an allegation that the political process operated in a defective manner. Pp. 512-513.

(b) NGA's contention that §310 is invalid because it commandeers the state legislative and administrative process by coercing States into enacting legislation authorizing bond registration and into administering the registration scheme finds no support in the claim left open by *FERC v. Mississippi*, 456 U. S. 742. Section 310 regulates state activities; it does not, as did the statute in *FERC*, seek to control or influence the

manner in which States regulate private parties. That a State wishing to engage in certain activity must take administrative and sometimes legislative action to comply with federal standards regulating that activity is a commonplace that presents no constitutional defect. Moreover, under NGA's theory, any State could immunize its activities from federal regulation by simply codifying the manner in which it engages in those activities. Pp. 513-515.

2. Section 310(b)(1) does not violate the doctrine of intergovernmental tax immunity by taxing the interest earned on unregistered state bonds. Section 310(b)(1) is inconsistent with this Court's holding in *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, that state bond interest was immune from a nondiscriminatory federal tax, but that decision has been effectively overruled by subsequent case law. Under the intergovernmental tax immunity jurisprudence prevailing at *Pollock's* time, neither the Federal nor the State Governments could tax income that an individual directly derived from *any* contract with the other government. This general rule was based on the rationale that any tax on income a party received under a contract with the government was a tax on the contract and thus a tax "on" the government because it burdened the government's power to enter into the contract. That rationale has been repudiated by modern intergovernmental tax immunity case law, and the government contract immunities have been, one by one, overruled. The owners of state bonds have no constitutional entitlement not to pay taxes on income they earn from the bonds, and States have no constitutional entitlement to issue bonds paying lower interest rates than other issuers. The nondiscriminatory tax under § 310 is imposed on and collected from bondholders, not States, and any increased administrative costs incurred by States in implementing the registration system are not "taxes" within the meaning of the tax immunity doctrine. Moreover, the provisions of § 310 seek to assure that *all* publicly offered long-term bonds are issued in registered form, whether issued by state or local governments, the Federal Government, or private corporations. Pp. 515-527.

Exceptions to Special Master's Report overruled, and judgment entered for defendant.

BRENNAN, J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, and STEVENS, JJ., joined, and in which SCALIA, J., joined except for Part II. STEVENS, J., filed a concurring opinion, *post*, p. 527. SCALIA, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 528. REHNQUIST, C. J., filed an opinion concurring in the judgment, *post*, p. 528. O'CONNOR, J., filed a dissenting opinion, *post*, p. 530. KENNEDY, J., took no part in the consideration or decision of the case.

John P. Linton argued the cause for plaintiff. With him on the brief were *Charlton deSaussure, Jr., T. Travis Medlock*, Attorney General of South Carolina, *Frank K. Sloan*, Chief Deputy Attorney General, and *Grady L. Patterson III.*

Lewis B. Kaden argued the cause for plaintiff-intervention National Governors' Association. With him on the briefs were *James D. Liss, Barry Friedman*, and *Richard B. Geltman.*

Solicitor General Fried argued the cause for defendant. With him on the brief were *Acting Assistant Attorney General Durney, Deputy Solicitor General Lauber, Andrew J. Pincus, Michael L. Paup*, and *Francis M. Allegra.**

JUSTICE BRENNAN delivered the opinion of the Court.

Section 310(b)(1) of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Pub. L. 97-248, 96 Stat. 596, 26 U. S. C. § 103(j)(1), removes the federal income tax exemption for interest earned on publicly offered long-term bonds issued by state and local governments unless those bonds are

*Briefs of *amici curiae* were filed for the Commonwealth of Pennsylvania et al. by *LeRoy S. Zimmerman*, Attorney General of Pennsylvania, *Michael A. Roman*, Deputy Attorney General, and *Suellen M. Wolfe*, Chief Deputy Attorney General, and by the Attorneys General for their respective States as follows: *Grace Berg Schaible* of Alaska, *Robert K. Corbin* of Arizona, *Robert Butterworth* of Florida, *Warren Price III* of Hawaii, *Linley E. Pearson* of Indiana, *Thomas J. Miller* of Iowa, *William J. Guste, Jr.*, of Louisiana, *J. Joseph Curran, Jr.*, of Maryland, *Edwin L. Pittman* of Mississippi, *William L. Webster* of Missouri, *Mike Greely* of Montana, *Stephen E. Merrill* of New Hampshire, *W. Cary Edwards* of New Jersey, *Lacy H. Thornburg* of North Carolina, *Nicholas Spaeth* of North Dakota, *Anthony J. Celebrezze, Jr.*, of Ohio, *Robert Henry* of Oklahoma, *Jeffrey Amestoy* of Vermont, *Mary Sue Terry* of Virginia, *Charlie Brown* of West Virginia, *Donald J. Hanaway* of Wisconsin, and *Joseph B. Meyer* of Wyoming; for the Government Finance Officers Association by *John J. Keohane* and *Donald J. Robinson*; and for the Public Securities Association by *Glenn M. Young, Paul E. Gutermann*, and *Joseph R. Cortese.*

issued in registered form.¹ This original jurisdiction case presents the issues whether § 310(b)(1) of TEFRA either (1) violates the Tenth Amendment and constitutional principles of federalism by compelling States to issue bonds in registered form or (2) violates the doctrine of intergovernmental tax immunity by taxing the interest earned on unregistered state bonds.

I

Historically, bonds have been issued as either registered bonds or bearer bonds. These two types of bonds differ in the mechanisms used for transferring ownership and making payments. Ownership of a registered bond is recorded on a central list, and a transfer of record ownership requires entering the change on that list.² The record owner automatically receives interest payments by check or electronic transfer of funds from the issuer's paying agent. Ownership of a bearer bond, in contrast, is presumed from possession and is transferred by physically handing over the bond. The bondowner obtains interest payments by presenting bond coupons to a bank that in turn presents the coupons to the issuer's paying agent.

In 1982, Congress enacted TEFRA, which contains a variety of provisions, including § 310, designed to reduce the federal deficit by promoting compliance with the tax laws. Congress had become concerned about the growing magnitude of tax evasion; Internal Revenue Service (IRS) studies indicated that unreported income had grown from an estimated range of \$31.1 billion to \$32.2 billion in 1973 to a range of \$93.3 billion to \$97 billion in 1981. Compliance Gap: Hearing before the Subcommittee on Oversight of the Internal

¹ For simplicity, we will refer to state and local governments collectively as "States" and will refer to publicly offered long-term bonds as "bonds."

² The record owner of a registered bond may sometimes differ, however, from the beneficial owner, and sellers can transfer beneficial ownership of most types of registered bonds without entering a change on the central list.

Revenue Service of the Senate Committee on Finance, 97th Cong., 2d Sess., 126 (1982). Unregistered bonds apparently became a focus of attention because they left no paper trail and thus facilitated tax evasion. Then Assistant Secretary of the Treasury for Tax Policy John Chapoton testified before the House Ways and Means Committee that a registration requirement would help prevent tax evasion because bearer bonds often represent unreported and untaxed income that, without a system of recorded ownership, the IRS has difficulty reconstructing. Hearings on H. R. 6300 before the House Committee on Ways and Means, 97th Cong., 2d Sess., 35 (1982). He also expressed concern that bearer bonds were being used to avoid estate and gift taxes and as a medium of exchange in the illegal sector. *Ibid.* In reporting out the bill containing the provision that eventually became § 310 of TEFRA, the Senate Finance Committee Report expressed the same concerns:

“The committee believes that a fair and efficient system of information reporting and withholding cannot be achieved with respect to interest-bearing obligations as long as a significant volume of long-term bearer instruments is issued. A system of book-entry registration will preserve the liquidity of obligations while requiring the creation of ownership records that can produce useful information reports with respect to both the payment of interest and the sale of obligations prior to maturity through brokers. Furthermore, registration will reduce the ability of noncompliant taxpayers to conceal income and property from the reach of the income, estate, and gift taxes. Finally, the registration requirement may reduce the volume of readily negotiable substitutes for cash available to persons engaged in illegal activities.” S. Rep. No. 97-494, Vol. 1, p. 242 (1982).

Section 310 was designed to meet these concerns by providing powerful incentives to issue bonds in registered form.

Because § 310 aims to address the tax evasion concerns posed generally by unregistered bonds, it covers not only state bonds but also bonds issued by the United States and private corporations. Section 310(a) requires the United States to issue publicly offered bonds with a maturity of more than one year in registered form.³ With respect to similar bonds issued by private corporations, §§ 310(b)(2)–(6) impose a series of tax penalties on nonregistration. Corporations declining to issue the covered bonds in registered form lose tax deductions and adjustments for interest paid on the bonds, §§ 310(b)(2) and (3), and must pay a special excise tax on the bond principal, § 310(b)(4). Holders of these unregistered corporate bonds generally cannot deduct capital losses or claim capital-gain treatment for any losses or gains sustained on the bonds. §§ 310(b)(5) and (6). Section 310(b)(1) completes this statutory scheme by denying the federal income tax exemption for interest earned on state bonds to owners of long-term publicly offered state bonds that are not issued in registered form.

South Carolina invoked the original jurisdiction of this Court, contending that § 310(b)(1) is constitutionally invalid under the Tenth Amendment and the doctrine of intergovernmental tax immunity. We granted South Carolina leave to file the instant complaint against the Secretary of the Treasury of the United States, *South Carolina v. Regan*, 465 U. S. 367 (1984), and appointed as Special Master the Honorable Samuel J. Roberts, 466 U. S. 948 (1984). The National Governors' Association (NGA) intervened.⁴ After conducting hearings and taking evidence, the Special Master concluded that § 310(b)(1) was constitutional and recommended

³Section 310 also provides various special exceptions to the registration requirements and incentives provided under subsections (a) and (b) for long-term publicly offered bonds issued by private corporations and Federal and State Governments, but those exceptions are not relevant here.

⁴The Special Master's recommendation to grant the NGA's motion for leave to intervene is hereby adopted.

entering judgment for the defendant. South Carolina and the NGA filed exceptions to various factual findings of the Special Master and to the Master's legal conclusions concerning their constitutional challenges.

II

We address the claim that §310(b)(1) violates the Tenth Amendment first.⁵ South Carolina and the NGA contend, and the Master found, that §310 effectively requires States to issue bonds in registered form, noting that if States issued bonds in unregistered form, competition from other non-exempt bonds would force States to increase the interest paid on state bonds by 28–35%, and that even though almost all state bonds were issued in bearer form before §310 became effective, since then no State has issued a bearer bond. Report of Special Master 2, 23–24. South Carolina and the NGA thus argue that, for purposes of Tenth Amendment analysis, we must treat §310 as if it simply banned bearer bonds altogether without giving States the option to issue nonexempt bearer bonds. The Secretary does not dispute the finding that §310 effectively requires registration, see Brief for Defendant 19 (urging the Court to adopt all the Master's findings), preferring to argue that §310 survives Tenth Amendment scrutiny because a blanket prohibition by Congress on the issuance of bearer bonds can apply to States without violating the Tenth Amendment. For the purposes of Tenth Amendment analysis, then, we treat §310 as if it directly regulated States by prohibiting outright the issuance of bearer bonds.⁶

⁵ We use “the Tenth Amendment” to encompass any implied constitutional limitation on Congress’ authority to regulate state activities, whether grounded in the Tenth Amendment itself or in principles of federalism derived generally from the Constitution.

⁶ Given our holding *infra*, at 524–525, that a federal tax on the interest paid on state bonds does not violate the intergovernmental tax immunity doctrine, one could argue that any law exempting state bond interest from the tax applicable to interest on other bonds is, in effect, a subsidy, and

A

The Tenth Amendment limits on Congress' authority to regulate state activities are set out in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U. S. 528 (1985). *Garcia* holds that the limits are structural, not substantive—*i. e.*, that States must find their protection from congressional regulation through the national political process, not through judicially defined spheres of unregulable state activity. *Id.*, at 537–554. South Carolina contends that the political process failed here because Congress had no concrete evidence quantifying the tax evasion attributable to unregistered state bonds and relied instead on anecdotal evidence that taxpayers have concealed taxable income using bearer bonds. It also argues that Congress chose an ineffective remedy by requiring registration because most bond sales are handled by brokers who must file information reports regardless of the form of the bond and because beneficial ownership of registered bonds need not necessarily be recorded.

Although *Garcia* left open the possibility that some extraordinary defects in the national political process might render congressional regulation of state activities invalid under the Tenth Amendment, the Court in *Garcia* had no occasion to identify or define the defects that might lead to such invalidation. See *id.*, at 556. Nor do we attempt any definitive articulation here. It suffices to observe that South

that Congress' decision to subsidize only registered state bonds must be judged under our Spending Clause cases. See generally *South Dakota v. Dole*, 483 U. S. 203, 210–211 (1987) (stating that “a perceived Tenth Amendment limitation on congressional regulation of state affairs did not concomitantly limit the range of conditions legitimately placed on federal grants,” but that at some point “the financial inducement offered by Congress might be so coercive” as to be unconstitutional). The parties have not, however, chosen to attack or defend § 310(b)(1) based on a Spending Clause theory, and we decline to address the unlitigated issues of whether Spending Clause analysis applies or what its import would be in this case.

Carolina has not even alleged that it was deprived of any right to participate in the national political process or that it was singled out in a way that left it politically isolated and powerless. Cf. *United States v. Carolene Products Co.*, 304 U. S. 144, 152, n. 4 (1938). Rather, South Carolina argues that the political process failed here because § 310(b)(1) was “imposed by the vote of an uninformed Congress relying upon incomplete information.” Brief for Plaintiff 101.⁷ But nothing in *Garcia* or the Tenth Amendment authorizes courts to second-guess the substantive basis for congressional legislation. Cf. *Minnesota v. Clover Leaf Creamery Co.*, 449 U. S. 456, 464 (1981). Where, as here, the national political process did not operate in a defective manner, the Tenth Amendment is not implicated.

B

The NGA argues that § 310 is invalid because it commandeers the state legislative and administrative process by coercing States into enacting legislation authorizing bond registration and into administering the registration scheme. They cite *FERC v. Mississippi*, 456 U. S. 742 (1982), which left open the possibility that the Tenth Amendment might set some limits on Congress’ power to compel States to regulate on behalf of federal interests, *id.*, at 761–764. The extent to which the Tenth Amendment claim left open in *FERC* survives *Garcia* or poses constitutional limitations independent of those discussed in *Garcia* is far from clear. We need not, however, address that issue because we find the claim discussed in *FERC* inapplicable to § 310.

⁷South Carolina also filed a number of exceptions to the Master’s findings that the registration requirement imposed little financial or administrative burden on States and had little effect on States’ ability to raise capital. These exceptions, and the NGA’s exception to the Master’s failure to find an interest rate differential between registered and bearer bonds, raise no issue concerning the operation of the national political process, and we need not address them here.

The federal statute at issue in *FERC* required state utility commissions to do the following: (1) adjudicate and enforce federal standards, (2) either consider adopting certain federal standards or cease regulating public utilities, and (3) follow certain procedures. The Court in *FERC* first distinguished *National League of Cities v. Usery*, 426 U. S. 833 (1976), noting that the statute in *National League of Cities* presented questions concerning "the extent to which state sovereignty shields the States from generally applicable federal regulations," whereas the statute in *FERC* "attempts to use state regulatory machinery to advance federal goals." *FERC*, 456 U. S., at 759. The Court in *FERC* then concluded that, whatever constitutional limitations might exist on the federal power to compel state regulatory activity, Congress had the power to require that state adjudicative bodies adjudicate federal issues and to require that States regulating in a pre-emptible field consider suggested federal standards and follow federally mandated procedures. *Id.*, at 759-767.

Because, by hypothesis, § 310 effectively prohibits issuing unregistered bonds, it presents the very situation *FERC* distinguished from a commandeering of state regulatory machinery: the extent to which the Tenth Amendment "shields the States from generally applicable federal regulations." 456 U. S., at 759. Section 310 regulates state activities; it does not, as did the statute in *FERC*, seek to control or influence the manner in which States regulate private parties. The NGA nonetheless contends that § 310 has commandeered the state legislative and administrative process because many state legislatures had to amend a substantial number of statutes in order to issue bonds in registered form and because state officials had to devote substantial effort to determine how best to implement a registered bond system. Such "commandeering" is, however, an inevitable consequence of regulating a state activity. Any federal regulation demands compliance. That a State wishing to engage in cer-

tain activity must take administrative and sometimes legislative action to comply with federal standards regulating that activity is a commonplace that presents no constitutional defect. After *Garcia*, for example, several States and municipalities had to take administrative and legislative action to alter the employment practices or raise the funds necessary to comply with the wage and overtime provisions of the Federal Labor Standards Act.⁸ Indeed, even the pre-*Garcia* line of Tenth Amendment cases recognized that Congress could constitutionally impose federal requirements on States that States could meet only by amending their statutes. See *EEOC v. Wyoming*, 460 U. S. 226, 253–254, and n. 2 (1983) (Burger, C. J., dissenting) (citing state statutes from over half the States that did not comply with the federal statute upheld by the Court). Under the NGA's theory, moreover, any State could immunize its activities from federal regulation by simply codifying the manner in which it engages in those activities. In short, the NGA's theory of "commandeering" would not only render *Garcia* a nullity, but would also restrict congressional regulation of state activities even more tightly than it was restricted under the now overruled *National League of Cities* line of cases. We find the theory foreclosed by precedent, and uphold the constitutionality of § 310 under the Tenth Amendment.

III

South Carolina contends that even if a statute banning state bearer bonds entirely would be constitutional, § 310 unconstitutionally violates the doctrine of intergovernmental tax immunity because it imposes a tax on the interest earned on a state bond. We agree with South Carolina that § 310 is

⁸ See generally Hearings on S. 1570 before the Subcommittee on Labor of the Senate Committee on Labor and Human Resources, 99th Cong., 1st Sess. (1985); The Impact of the Supreme Court's *Garcia* Decision Upon States and Their Political Subdivisions: Hearing before the Subcommittee on Economic Goals and Intergovernmental Policy of the Joint Economic Committee, Congress of the United States, 99th Cong., 1st Sess. (1985).

inconsistent with *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429 (1895), which held that any interest earned on a state bond was immune from federal taxation.

The Secretary and the Master, however, suggest that we should uphold the constitutionality of § 310 without explicitly overruling *Pollock* because § 310 does not abolish the tax exemption for state bond interest entirely but rather taxes the interest on state bonds only if the bonds are not issued in the form Congress requires. In our view, however, this suggestion implicitly rests on a rather mischievous proposition of law. If, for example, Congress imposed a tax that applied exclusively to South Carolina and levied the tax directly on the South Carolina treasury, we would be obligated to adjudicate the constitutionality of that tax even if Congress allowed South Carolina to escape the tax by restructuring its state government in a way Congress found more to its liking. The United States cannot convert an unconstitutional tax into a constitutional one simply by making the tax conditional. Whether Congress could have imposed the condition by direct regulation is irrelevant; Congress cannot employ unconstitutional means to reach a constitutional end. Under *Pollock*, a tax on the interest income derived from any state bond was considered a direct tax on the State and thus unconstitutional. 157 U. S., at 585–586. If this constitutional rule still applies, Congress cannot threaten to tax the interest on state bonds that do not conform to congressional dictates. We thus decline to follow a suggestion that would force us to embrace implicitly a proposition of law far more controversial than the current validity of *Pollock's* ban on taxing state bond interest, and proceed to address whether *Pollock* should be explicitly overruled.⁹

⁹The Secretary also argues that we need not reach the tax immunity issue on the ground that, because all state bonds have been issued in registered form since § 310 became effective, no federal tax on state bearer bond interest has ever actually been imposed. We see no reason, however, why

Under the intergovernmental tax immunity jurisprudence prevailing at the time, *Pollock* did not represent a unique immunity limited to income derived from state bonds. Rather, *Pollock* merely represented one application of the more general rule that neither the Federal nor the State Governments could tax income an individual directly derived from *any* contract with another government.¹⁰ Not only was it unconstitutional for the Federal Government to tax a bondowner on the interest he or she received on any state bond, but it was also unconstitutional to tax a state employee on the income earned from his employment contract, *Collector v. Day*, 11 Wall. 113 (1871), to tax a lessee on income derived from lands leased from a State, *Burnet v. Coronado Oil*, 285 U. S. 393 (1932), or to impose a sales tax on proceeds a vendor derived from selling a product to a state agency, *Indian Motorcycle Co. v. United States*, 283 U. S. 570 (1931). Income derived from the same kinds of contracts with the Federal Government were likewise immune from taxation by the States. See *Weston v. City Council of Charleston*, 2 Pet. 449 (1829) (federal bond interest immune from state taxation); *Dobbins v. Commissioners of Erie County*, 16 Pet. 435 (1842) (federal employee immune from state tax on salary); *Gillespie v. Oklahoma*, 257 U. S. 501 (1922) (income derived from federal lease immune from state tax); *Panhandle Oil Co. v. Mississippi ex rel. Knox*, 277 U. S. 218 (1928) (vendor immune from sales tax on vendor's proceeds from sale to the United States). Cases concerning the tax immunity of income derived from state contracts freely cited principles established in federal tax immunity cases, and vice versa. See, e. g.,

South Carolina cannot bring a facial challenge to § 310 rather than an as-applied challenge.

¹⁰ Income indirectly derived from a contract with the government was treated differently. See, e. g., *Willcuts v. Bunn*, 282 U. S. 216, 227-230 (1931) (constitutional to tax capital gain on sale of state bond because State not a party to the sale contract); see also *Greiner v. Lewellyn*, 258 U. S. 384 (1922) (constitutional to tax transfer of estate even though state bonds are included in determining the value of the estate).

Coronado Oil, *supra*, at 398; *Indian Motorcycle*, *supra*, at 575–579; *Pollock*, *supra*, at 586. See generally *Indian Motorcycle*, *supra*, at 575 (immunity of States from federal tax equal to immunity of Federal Government from state tax); *Metcalf & Eddy v. Mitchell*, 269 U. S. 514, 521–522 (1926); *Collector v. Day*, *supra*, at 127.

This general rule was based on the rationale that any tax on income a party received under a contract with the government was a tax on the contract and thus a tax “on” the government because it burdened the government’s power to enter into the contract. The Court in *Pollock* borrowed its reasoning directly from the decision in *Weston* exempting federal bond interest from state taxation:

“The right to tax the contract to any extent, when made, must operate upon the power to borrow before it is exercised, and have a sensible influence on the contract. The extent of this influence depends on the will of a distinct government. To any extent, however inconsiderable, it is a burthen on the operations of government. . . . The tax on government stock is thought by this court to be a tax on the contract, a tax on the [government’s] power to borrow money . . . and consequently to be repugnant to the Constitution.” *Pollock*, *supra*, at 586, quoting *Weston*, *supra*, at 467, 468.

Thus, although a tax was collected from an independent private party, the tax was considered to be “on” the government because the tax burden might be passed on to it through the contract. This reasoning was used to define the basic scope of both federal and state tax immunities with respect to all types of government contracts.¹¹ See, e. g., *Coronado Oil*,

¹¹ The sources of the state and federal immunities are, of course, different: the state immunity arises from the constitutional structure and a concern for protecting state sovereignty whereas the federal immunity arises from the Supremacy Clause. The immunities have also differed somewhat in their underlying political theory and in their doctrinal contours. Many of this Court’s opinions have suggested that the Constitution should be in-

supra, at 400–401 (“Here the lease . . . was an instrumentality of the State To tax the income of the lessee arising therefrom would amount to an imposition upon the lease itself”); *Panhandle Oil*, *supra*, at 222 (“It is immaterial that the seller and not the purchaser is required to report and make payment to the State. Sale and purchase constitute a transaction by which the tax is measured and on which the burden rests”); *Gillespie*, *supra*, at 505–506 (“‘A tax upon the leases is a tax upon the power to make them . . .’” (quoting *Indian Territory Illuminating Oil Co. v. Oklahoma*, 240 U. S. 522, 530 (1916))). The commonality of the rationale underlying all these immunities for government contracts

terpreted to confer a greater tax immunity on the Federal Government than on States because all the people of the States are represented in the Federal Government whereas all the people of the Federal Government are not represented in individual States. *Helvering v. Gerhardt*, 304 U. S. 405, 412 (1938); *McCulloch v. Maryland*, 4 Wheat. 316, 435–436 (1819); *New York v. United States*, 326 U. S. 572, 577, and n. 3 (1946) (opinion of Frankfurter, J.). In fact, the federal tax immunity has always been greater than the States’ immunity. The Federal Government, for example, possesses the power to enact statutes immunizing those with whom it deals from state taxation even if intergovernmental tax immunity doctrine would not otherwise confer an immunity. See, e. g., *Graves v. New York ex rel. O’Keefe*, 306 U. S. 466, 478 (1939). The States lack any such power. Also, although the Federal Government has always enjoyed blanket immunity from any state tax considered to be “on” the Government under the prevailing methodology, the States have never enjoyed immunity from all federal taxes considered to be “on” a State. See *infra*, at 523, and n. 14. To some, *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U. S. 528 (1985), may suggest further limitations on state tax immunity. We need not, however, decide here the extent to which the scope of the federal and state immunities differ or the extent, if any, to which States are currently immune from direct nondiscriminatory federal taxation. It is enough for our purposes that federal and state tax immunity cases have always shared the identical methodology for determining whether a tax is “on” a government, and that this identity has persisted even though the methodology for both federal and state immunities has changed as intergovernmental tax immunity doctrine shifted into the modern era. See *Graves*, *supra*, at 485.

was highlighted by *Indian Motocycle*, 283 U. S. 570 (1931). In that case, the Court reviewed the then current status of intergovernmental tax immunity doctrine, observing that a tax on interest earned on a state or federal bond was unconstitutional because it would burden the exercise of the government's power to borrow money and that a tax on the salary of a State or Federal Government employee was unconstitutional because it would burden the government's power to obtain the employee's services. *Id.*, at 576-578. It then concluded that under the same principle a sales tax imposed on a vendor for a sale to a state agency was unconstitutional because it would burden the sale transaction. *Id.*, at 579.

The rationale underlying *Pollock* and the general immunity for government contract income has been thoroughly repudiated by modern intergovernmental immunity case law. In *Graves v. New York ex rel. O'Keefe*, 306 U. S. 466 (1939), the Court announced: "The theory . . . that a tax on income is legally or economically a tax on its source, is no longer tenable." *Id.*, at 480. The Court explained:

"So much of the burden of a non-discriminatory general tax upon the incomes of employees of a government, state or national, as may be passed on economically to that government, through the effect of the tax on the price level of labor or materials, is but the normal incident of the organization within the same territory of two governments, each possessing the taxing power. The burden, so far as it can be said to exist or to affect the government in any indirect or incidental way, is one which the Constitution presupposes" *Id.*, at 487.

See also *James v. Dravo Contracting Co.*, 302 U. S. 134, 160 (1937) (the fact that a tax on a Government contractor "may increase the cost to the Government . . . would not invalidate the tax"); *Helvering v. Gerhardt*, 304 U. S. 405, 424 (1938). The thoroughness with which the Court abandoned the burden theory was demonstrated most emphatically when the Court upheld a state sales tax imposed on a Government

contractor even though the financial burden of the tax was entirely passed on, through a cost-plus contract, to the Federal Government. *Alabama v. King & Boozer*, 314 U. S. 1 (1941). The Court stated:

"The Government, rightly we think, disclaims any contention that the Constitution, unaided by Congressional legislation, prohibits a tax exacted from the contractors merely because it is passed on economically, by the terms of the contract or otherwise, as part of the construction cost to the Government. So far as such a non-discriminatory state tax upon the contractor enters into the cost of the materials to the Government, that is but a normal incident of the organization within the same territory of two independent taxing sovereignties. The asserted right of the one to be free of taxation by the other does not spell immunity from paying the added costs, attributable to the taxation of those who furnish supplies to the Government and who have been granted no tax immunity. So far as a different view has prevailed, we think it no longer tenable." *Id.*, at 8-9 (citations omitted).

King & Boozer thus completely foreclosed any claim that the nondiscriminatory imposition of costs on private entities that pass them on to States or the Federal Government unconstitutionally burdens state or federal functions. Subsequent cases have consistently reaffirmed the principle that a non-discriminatory tax collected from private parties contracting with another government is constitutional even though part or all of the financial burden falls on the other government. See *Washington v. United States*, 460 U. S. 536, 540 (1983); *United States v. New Mexico*, 455 U. S. 720, 734 (1982); *United States v. County of Fresno*, 429 U. S. 452, 460-462, and n. 9 (1977); *United States v. City of Detroit*, 355 U. S. 466, 469 (1958).

With the rationale for conferring a tax immunity on parties dealing with another government rejected, the government

contract immunities recognized under prior doctrine were, one by one, eliminated. Overruling *Burnet v. Coronado Oil*, 285 U. S. 393 (1932), and *Gillespie v. Oklahoma*, 257 U. S. 501 (1922), the Court upheld the constitutionality of a federal tax on net income a corporation derived from a state lease in *Helvering v. Mountain Producers Corp.*, 303 U. S. 376 (1938). See also *Oklahoma Tax Comm'n v. Texas Co.*, 336 U. S. 342 (1949) (upholding constitutionality of state tax on gross income derived from Indian lease). Later, the Court explicitly overruled *Collector v. Day*, 11 Wall. 113 (1871), and upheld the constitutionality of a nondiscriminatory state tax on the salary of a federal employee. *Graves v. New York ex rel. O'Keefe*, *supra*.¹² And in the course of upholding a sales tax on a cost-plus Government contractor, the Court in *King & Boozer overruled Panhandle Oil Co. v. Mississippi ex rel. Knox*, 277 U. S. 218 (1928). See also *James*, *supra* (upholding state tax on gross income independent contractor received from Federal Government). The only premodern tax immunity for parties to government contracts that has so far avoided being explicitly overruled is the immunity for recipients of governmental bond interest.¹³ That this Court

¹² Prior to that the Court had already confined *Collector v. Day* to its facts in *Helvering v. Gerhardt*, 304 U. S. 405 (1938), which upheld the constitutionality of a federal tax on the salaries of state employees involved in state construction projects.

¹³ South Carolina and the Government Finance Officers Association as *amicus curiae* argue that the legislative history of the Sixteenth Amendment, which authorizes Congress to "collect taxes on incomes, from whatever source derived, without apportionment," manifests an intent to freeze into the Constitution the tax immunity for state bond interest that existed in 1913. We disagree. The legislative history merely shows that the words "from whatever source derived" of the Sixteenth Amendment were not affirmatively intended to authorize Congress to tax state bond interest or to have any other effect on which incomes were subject to federal taxation, and that the sole purpose of the Sixteenth Amendment was to remove the apportionment requirement for whichever incomes were otherwise taxable. 45 Cong. Rec. 2245-2246 (1910); *id.*, at 2539; see also *Brushaber v. Union Pacific R. Co.*, 240 U. S. 1, 17-18 (1916). Indeed, if

has yet to overrule *Pollock* explicitly, however, is explained not by any distinction between the income derived from government bonds and the income derived from other government contracts, but by the historical fact that Congress has always exempted state bond interest from taxation by statute, beginning with the very first federal income tax statute. Act of Oct. 3, 1913, ch. 16, § II(B), 38 Stat. 168.

In sum, then, under current intergovernmental tax immunity doctrine the States can never tax the United States directly but can tax any private parties with whom it does business, even though the financial burden falls on the United States, as long as the tax does not discriminate against the United States or those with whom it deals. See *Washington*, *supra*, at 540; *County of Fresno*, *supra*, at 460–463; *City of Detroit*, *supra*, at 473; *Oklahoma Tax Comm'n*, *supra*, at 359–364. A tax is considered to be directly on the Federal Government only “when the levy falls on the United States itself, or on an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities.” *New Mexico*, *supra*, at 735. The rule with respect to state tax immunity is essentially the same, see, *e. g.*, *Graves*, *supra*, at 485; *Mountain Producers Corp.*, *supra*, at 386–387, except that at least some nondiscriminatory federal taxes can be collected directly from the States even though a parallel state tax could not be collected directly from the Federal Government.¹⁴ See generally n. 11, *supra*.

the Sixteenth Amendment had frozen into the Constitution all the tax immunities that existed in 1913, then most of modern intergovernmental tax immunity doctrine would be invalid.

¹⁴All federal activities are immune from direct state taxation, see *Graves*, 306 U. S., at 477, but at least some state activities have always been subject to direct federal taxation. For a time, only the States’ governmental, as opposed to proprietary, activities enjoyed tax immunity, see *e. g.*, *Helvering v. Powers*, 293 U. S. 214, 227 (1934); *South Carolina v. United States*, 199 U. S. 437, 454–463 (1905), but this distinction was subsequently abandoned as untenable by all eight Justices participating in

We thus confirm that subsequent case law has overruled the holding in *Pollock* that state bond interest is immune from a nondiscriminatory federal tax. We see no constitutional reason for treating persons who receive interest on government bonds differently than persons who receive income from other types of contracts with the government, and no tenable rationale for distinguishing the costs imposed on States by a tax on state bond interest from the costs imposed

New York v. United States, 326 U. S. 572 (1946). See *id.*, at 579–581, 583 (opinion of Frankfurter, J., joined by Rutledge, J.); *id.*, at 586 (Stone, C. J., concurring, joined by Reed, Murphy, and Burton, JJ.); *id.*, at 591 (Douglas, J., dissenting, joined by Black, J.). Two Justices reasoned that any nondiscriminatory tax on a State was constitutional, even if directly collected from the State. See *id.*, at 582–584 (Frankfurter, J., joined by Rutledge, J.). Four other Justices declined to hold that every nondiscriminatory tax levied directly on a State would be constitutional because “there may be non-discriminatory taxes which, *when laid on a State*, would nevertheless impair the sovereign status of the State quite as much as a like tax imposed by a State on property or activities of the national government. *Mayo v. United States*, 319 U. S. 441, 447–448 (1943). This is not because the tax can be regarded as discriminatory but *because a sovereign government is the taxpayer*, and the tax, even though non-discriminatory, may be regarded as infringing its sovereignty.” 326 U. S., at 587 (Stone, C. J., concurring, joined by Reed, Murphy, and Burton, JJ.) (emphasis added) (the cited discussion from *Mayo* stressed the difference between levying a tax on a government and on those with whom the government deals); see also 326 U. S., at 588 (“Only when and because the subject of taxation is State property or a State activity must we consider whether such a non-discriminatory tax unduly interferes with the performance of the State’s functions of government”). The four Justices then concluded that the tax at issue was constitutional even though directly levied on the State because recognizing an immunity would “accomplish a withdrawal from the taxing power of the nation a subject of taxation of a nature which has been traditionally within that power from the beginning.” *Ibid.* We need not concern ourselves here, however, with the extent to which, if any, States are currently immune from direct federal taxation. See n. 11, *supra*. For our purposes, the important principle *New York* reaffirms is that the issue whether a nondiscriminatory federal tax might nonetheless violate state tax immunity does not even arise unless the Federal Government seeks to collect the tax directly from a State.

by a tax on the income from any other state contract. We stated in *Graves* that "as applied to the taxation of salaries of the employees of one government, the purpose of the immunity was not to confer benefits on the employees by relieving them from contributing their share of the financial support of the other government, whose benefits they enjoy, or to give an advantage to a government by enabling it to engage employees at salaries lower than those paid for like services by other employers, public or private" 306 U. S., at 483. Likewise, the owners of state bonds have no constitutional entitlement not to pay taxes on income they earn from state bonds, and States have no constitutional entitlement to issue bonds paying lower interest rates than other issuers.¹⁵

¹⁵South Carolina distinguishes the taxes by arguing that the interest paid to a State's bondholders is more essential to the maintenance of a state government than the salaries paid to employees. This strikes us as counterintuitive in fact. More importantly, the essential/nonessential distinction it invokes is exactly the type of distinction we concluded was unworkable in *Garcia*, 469 U. S., at 542-547 (rejecting rules of state immunity turning on whether a governmental function is "essential," "governmental" versus "proprietary," "traditional," "uniquely governmental," "necessary," or "integral").

"There is not, and there cannot be, any unchanging line of demarcation between essential and non-essential governmental functions. Many governmental functions of today have at some time in the past been non-governmental. The genius of our government provides that, within the sphere of constitutional action, the people—acting not through the courts but through their elected legislative representatives—have the power to determine as conditions demand, what services and functions the public welfare requires." *Id.*, at 546, quoting *Gerhardt*, 304 U. S., at 427 (Black, J., concurring).

Similarly, JUSTICE O'CONNOR would have us judge the constitutionality of each tax imposing an indirect burden on state and local governments by determining whether the tax had "substantial" adverse effects on those governments. *Post*, at 531-533. We fail to see how this substantiality test distinguishes taxes on state bond interest from taxes on state employees' salaries. More importantly, we disagree with JUSTICE O'CONNOR's apparent assumption that if this Court does not undertake the open-ended and administratively daunting inquiry required by her test, we leave

Indeed, this Court has in effect acknowledged that a holder of a Government bond could constitutionally be taxed on bond interest in *Memphis Bank & Trust Co. v. Garner*, 459 U. S. 392 (1983), which involved a state tax on federal bond interest. Although that case involved an interpretation of 31 U. S. C. § 742, we premised our statutory interpretation on the observation that “[o]ur decisions have treated § 742 as principally a restatement of the constitutional rule.” 459 U. S., at 397. We then stated: “Where, *as here*, the economic but not the legal incidence of the tax falls upon the Federal Government, such a tax generally does not violate the constitutional immunity if it does not discriminate against holders of federal property or those with whom the Federal Government deals.” *Ibid.* (emphasis added).

TEFRA § 310 thus clearly imposes no direct tax on the States. The tax is imposed on and collected from bondholders, not States, and any increased administrative costs incurred by States in implementing the registration system are not “taxes” within the meaning of the tax immunity doctrine. See generally *United States v. Mississippi Tax Comm’n*, 421 U. S. 599, 606 (1975) (describing tax as an enforced contribution to provide for the support of government). Nor does § 310 discriminate against States. The provisions of § 310 seek to assure that *all* publicly offered long-term bonds are issued in registered form, whether issued by state or local

States at the mercy of a congressional power to destroy them via excessive taxation. *Post*, at 533–534. The nondiscrimination principle at the heart of modern intergovernmental tax immunity case law does not leave States unprotected from excessive federal taxation—it merely recognizes that the best safeguard against excessive taxation (and the most judicially manageable) is the requirement that the government tax in a nondiscriminatory fashion. For where a government imposes a nondiscriminatory tax, judges can term the tax “excessive” only by second-guessing the extent to which the taxing government and its people have taxed themselves, and the threat of destroying another government can be realized only if the taxing government is willing to impose taxes that will also destroy itself or its constituents.

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governments, the Federal Government, or private corporations. See *supra*, at 510. Accordingly, the Federal Government has directly imposed the same registration requirement on itself that it has effectively imposed on States. The incentives States have to switch to registered bonds are necessarily different than those of corporate bond issuers because only state bonds enjoy any exemption from the federal tax on bond interest, but the sanctions for issuing unregistered corporate bonds are comparably severe. See *ibid.* Removing the tax exemption for interest earned on state bonds would not, moreover, create a discrimination between state and corporate bonds since corporate bond interest is already subject to federal tax.

IV

Because the federal imposition of a bond registration requirement on States does not violate the Tenth Amendment and because a nondiscriminatory federal tax on the interest earned on state bonds does not violate the intergovernmental tax immunity doctrine, we uphold the constitutionality of § 310(b)(1),¹⁶ overrule the exceptions to the Special Master's Report, and approve his recommendation to enter judgment for the defendant.

It is so ordered.

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

JUSTICE STEVENS, concurring.

Although the Court properly finds support for its holding in *Garcia v. San Antonio Metropolitan Transit Authority*,

¹⁶ Because we hold that Congress could have prohibited States from issuing any unregistered bonds by direct regulation, we necessarily reject South Carolina's argument that § 310(b)(1) is an impermissible regulatory tax because it imposes a tax on activities not subject to federal regulatory power. That § 310(b) is purely regulatory in purpose and effect and was never intended to raise any federal revenue does not alone render it unconstitutional. See *Minor v. United States*, 396 U. S. 87, 98, n. 13 (1969).

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469 U. S. 528 (1985), the outcome of this case was equally clear well before that case was decided. See *South Carolina v. Regan*, 465 U. S. 367, 403–419 (1984) (STEVENS, J., concurring in part and dissenting in part). It should be emphasized, however, that neither the Court's decision today, nor what I have written in the past, expresses any opinion about the wisdom of taxing the interest on bonds issued by state or local governments.

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

I join in the Court's judgment, and in its opinion except for Part II. I do not join the latter because, as observed by THE CHIEF JUSTICE, *post*, at 529–530, it unnecessarily casts doubt upon *FERC v. Mississippi*, 456 U. S. 742 (1982), and because it misdescribes the holding in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U. S. 528 (1985). I do not read *Garcia* as adopting—in fact I read it as explicitly disclaiming—the proposition attributed to it in today's opinion, *ante*, at 512–513, that the “national political process” is the States' only constitutional protection, and that nothing except the demonstration of “some extraordinary defects” in the operation of that process can justify judicial relief. We said in *Garcia*: “These cases do not require us to identify or define what affirmative limits *the constitutional structure* might impose on federal action affecting the States under the Commerce Clause. See *Coyle v. Oklahoma*, 221 U. S. 559 (1911).” 469 U. S., at 556 (emphasis added). I agree only that that structure does not prohibit what the Federal Government has done here.

CHIEF JUSTICE REHNQUIST, concurring in the judgment.

Today the Court reaches two results regarding § 310(b)(1) of TEFRA that I believe are analytically distinct. First, the Court finds that § 310(b)(1) does not violate the Tenth Amendment by compelling States to issue bonds in registered form. Second, the majority concludes that the statute

also does not contravene the doctrine of intergovernmental tax immunity; in doing so, the majority overrules our decision in *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429 (1895). While I agree that the principles of intergovernmental tax immunity are not threatened in this case, in my view the Court unnecessarily casts doubt on the protective scope of the Tenth Amendment in the course of upholding § 310 (b)(1).

The Special Master appointed by the Court made a number of factual determinations about the impact that the TEFRA registration requirements would have upon the States. Most notably, the Special Master found that the registration requirements have had no substantive effect on the abilities of States to raise debt capital, on the political processes by which States decide to issue debt, or on the power of the States to choose the purpose to which they will dedicate the proceeds of their tax-exempt borrowing. After an exhaustive investigation, the Special Master summarized: "TEFRA has not changed how much the States borrow, for what purposes they borrow, how they decide to borrow, or any other obviously important aspect of the borrowing process." Report of Special Master 118.

This well-supported conclusion that § 310(b)(1) has had a *de minimis* impact on the States should end, rather than begin, the Court's constitutional inquiry. Even the more expansive conception of the Tenth Amendment espoused in *National League of Cities v. Usery*, 426 U. S. 833 (1976), recognized that only congressional action that "operate[s] to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions," runs afoul of the authority granted Congress. *Id.*, at 852. The Special Master determined that no such displacement has occurred through the implementation of the TEFRA requirements; I see no need to go further, as the majority does, to discuss the possibility of defects in the national political process that spawned TEFRA, nor to hypothesize that the Tenth Amend-

ment concerns voiced in *FERC v. Mississippi*, 456 U. S. 742 (1982), may not have survived *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U. S. 528 (1985). Those issues, intriguing as they may be, are of no moment in the present case and are best left unaddressed until clearly presented.

JUSTICE O'CONNOR, dissenting.

The Court today overrules a precedent that it has honored for nearly 100 years and expresses a willingness to cancel the constitutional immunity that traditionally has shielded the interest paid on state and local bonds from federal taxation. Henceforth the ability of state and local governments to finance their activities will depend in part on whether Congress voluntarily abstains from tapping this permissible source of additional income tax revenue. I believe that state autonomy is an important factor to be considered in reviewing the National Government's exercise of its enumerated powers. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U. S. 528, 581 (1985) (O'CONNOR, J., joined by Powell and REHNQUIST, JJ., dissenting). I dissent from the decision to overrule *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429 (1895), and I would invalidate Congress' attempt to regulate the sovereign States by threatening to deprive them of this tax immunity, which would increase their dependence on the National Government.

Section 310(b)(1) of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), 26 U. S. C. § 103(j)(1), provides that the interest paid on state and local bonds will be subject to federal income tax unless the bonds are issued in registered form. The Court readily concludes that Congress could have prohibited outright the issuance of bearer bonds without violating the Tenth Amendment. *Ante*, at 511-513. But regardless of whether Congress could have required registration of the bonds directly under its commerce power, I agree with the Court that Congress may not accomplish the same end by an unconstitutional means. *Ante*, at 515-516.

In my view, the Tenth Amendment and principles of federalism inherent in the Constitution prohibit Congress from taxing or threatening to tax the interest paid on state and municipal bonds. It is also arguable that the States' autonomy is protected from substantial federal incursions by virtue of the Guarantee Clause of the Constitution, Art. IV, §4. See Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1, 70-78 (1988) (arguing that judicial enforcement of the Guarantee Clause is proper).

The Court never expressly considers whether federal taxation of state and local bond interest violates the Constitution. Instead, the majority characterizes the federal tax exemption for state and local bond interest as an aspect of intergovernmental tax immunity, and it describes the decline of the intergovernmental tax immunity doctrine in this century. But constitutional principles do not depend upon the rise or fall of particular legal doctrines. This Court has a continuing responsibility "to oversee the Federal Government's compliance with its duty to respect the legitimate interests of the States." *Garcia, supra*, at 581 (O'CONNOR, J., joined by Powell and REHNQUIST, JJ., dissenting). In my view, the Court shirks its responsibility because it fails to inquire into the substantial adverse effects on state and local governments that would follow from federal taxation of the interest on state and local bonds.

Long-term debt obligations are an essential source of funding for state and local governments. In 1974, state and local governments issued approximately \$23 billion of new municipal bonds; in 1984, they issued \$102 billion of new bonds. Report of Special Master 20. State and local governments rely heavily on borrowed funds to finance education, road construction, and utilities, among other purposes. As the Court recognizes, States will have to increase the interest rates they pay on bonds by 28-35% if the interest is subject to the federal income tax. *Ante*, at 511. Governmental op-

erations will be hindered severely if the cost of capital rises by one-third. If Congress may tax the interest paid on state and local bonds, it may strike at the very heart of state and local government activities.

In the pivotal cases which first set limits to intergovernmental tax immunity, this Court paid close attention to the practical effects of its decisions. The Court limited the government's immunity only after it determined that application of a tax would not substantially affect government operations. Thus in the first case to uphold federal income taxation of revenue earned by a state contractor, this Court observed that "neither government may destroy the other nor curtail in any substantial manner the exercise of its powers." *Metcalf & Eddy v. Mitchell*, 269 U. S. 514, 523-524 (1926). When this Court extended its holding to the case of a state tax on a federal contractor, it expressly noted that the tax "does not interfere in any substantial way with the performance of federal functions." *James v. Dravo Contracting Co.*, 302 U. S. 134, 161 (1937). In upholding the application of the federal income tax to income derived from a state lease, this Court decided that mere theoretical concerns about interference with the functions of government did not justify immunity, but that "[r]egard must be had to substance and direct effects." *Helvering v. Mountain Producers Corp.*, 303 U. S. 376, 386 (1938). In *Helvering v. Gerhardt*, 304 U. S. 405 (1938), this Court upheld the application of the federal income tax to income earned by a state employee, because there is "[no] immunity when the burden on the state is so speculative and uncertain that if allowed it would restrict the federal taxing power without affording any corresponding tangible protection to the state government." *Id.*, at 419-420.

The instant case differs critically from the cases quoted above because the Special Master found that, if the interest on state and local bonds is taxed, the cost of borrowing by state and local governments would rise substantially. This

certainly would affect seriously state and local government operations. The majority is unconcerned with this difference because it is satisfied with the formal test of intergovernmental tax immunity that can be distilled from later cases. Under this test, if a tax is not imposed directly on the government, and does not discriminate against the government, then it does not violate intergovernmental tax immunity. See *ante*, at 523.

I do not think the Court's bipartite test adequately accommodates the constitutional concerns raised by the prospect of applying the federal income tax to the interest paid on state and local bonds. This Court has a duty to inquire into the devastating effects that such an innovation would have on state and local governments. Although Congress has taken a relatively less burdensome step in subjecting only income from bearer bonds to federal taxation, the erosion of state sovereignty is likely to occur a step at a time. "If there is any danger, it lies in the tyranny of small decisions—in the prospect that Congress will nibble away at state sovereignty, bit by bit, until someday essentially nothing is left but a gutted shell." L. Tribe, *American Constitutional Law* 381 (2d ed. 1988).

Federal taxation of state activities is inherently a threat to state sovereignty. As Chief Justice Marshall observed long ago, "the power to tax involves the power to destroy." *McCulloch v. Maryland*, 4 Wheat. 316, 431 (1819). Justice Holmes later qualified this principle, observing that "[t]he power to tax is not the power to destroy while this Court sits." *Panhandle Oil Co. v. Mississippi ex rel. Knox*, 277 U. S. 218, 223 (1928) (Holmes, J., joined by Brandeis and Stone, JJ., dissenting). If this Court is the States' sole protector against the threat of crushing taxation, it must take seriously its responsibility to sit in judgment of federal tax initiatives. I do not think that the Court has lived up to its constitutional role in this case. The Court has failed to enforce the constitutional safeguards of state autonomy and

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self-sufficiency that may be found in the Tenth Amendment and the Guarantee Clause, as well as in the principles of federalism implicit in the Constitution. I respectfully dissent.

Syllabus

TRAYNOR v. TURNAGE, ADMINISTRATOR, VETERANS' ADMINISTRATION, ET AL.

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

No. 86-622. Argued December 7, 1987—Decided April 20, 1988*

Petitioners in these cases are honorably discharged veterans who did not exhaust their "GI Bill" educational assistance benefits within 10 years following their military service, as required by 38 U. S. C. § 1662(a)(1). Under that section, veterans may obtain an extension of the delimiting period if they were prevented from using their benefits earlier by "a physical or mental disorder which was not the result of [their] own willful misconduct." Petitioners sought to continue receiving benefits after the expiration of the 10-year period on the ground that they were disabled by alcoholism during much of that period. The Veterans' Administration (VA) found that, under its regulation defining "primary" alcoholism (that which is unrelated to an underlying psychiatric disorder) as "willful misconduct," petitioners were not entitled to the requested extensions. Petitioners filed separate federal-court actions to review the VA's decisions. In No. 86-622, the District Court held that it was not foreclosed from exercising jurisdiction by 38 U. S. C. § 211(a), which bars judicial review of "the decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans." The court then concluded that alcoholism is a handicap within the meaning of the Rehabilitation Act of 1973, and that the VA therefore violated § 504 of that Act, which requires that federal programs not discriminate against handicapped persons solely because of their handicap. The Court of Appeals for the Second Circuit reversed on the ground that § 211(a) barred judicial review of the Rehabilitation Act claim. In No. 86-737, the District Court held that judicial review was not foreclosed by § 211(a), and then invalidated the VA's alcoholism regulation as being contrary to the Rehabilitation Act. The Court of Appeals for the District of Columbia Circuit agreed that judicial review was not foreclosed by § 211(a), but reversed on the merits, holding that, consistently with the Rehabilitation Act, the VA could reasonably con-

*Together with No. 86-737, *McKelvey v. Turnage, Administrator of Veterans' Affairs, et al.*, on certiorari to the United States Court of Appeals for the District of Columbia Circuit.

clude, pursuant to its regulation, that primary alcoholism is a "willfully caused handicap."

Held:

1. The question whether the VA's alcoholism regulation violates the Rehabilitation Act is not foreclosed from judicial review by § 211(a). The presumption in favor of judicial review of administrative action may be overcome only upon a showing of clear and convincing evidence of a contrary legislative intent. The prohibitions of § 211(a) are aimed at review only of those decisions of law or fact that arise in the administration by the VA of a statute providing benefits for veterans. The text and legislative history of § 211(a) provide no clear and convincing evidence of any congressional intent to preclude a suit claiming that § 504 of the Rehabilitation Act, a statute applicable to all federal agencies, has invalidated an otherwise valid regulation issued by the VA and purporting to have the force of law. The present cases involve the issue whether the law sought to be administered is valid in light of a subsequent statute whose enforcement is not the exclusive domain of the VA. Permitting these cases to go forward will not undermine § 211(a)'s purposes. Pp. 541-545.

2. Section 504 of the Rehabilitation Act is not violated by the VA's characterizing, for purposes of 38 U. S. C. § 1662(a)(1), petitioners' primary alcoholism as "willful misconduct" precluding the allowance of petitioners' requested time extensions. Congress did not use the term "willful misconduct" inadvertently in 1977 when it amended § 1662(a)(1) to create the exception to the delimiting period. The same term had long been used in other veterans' benefits statutes, and the VA had long construed the term as encompassing primary alcoholism. The legislative history confirms that Congress intended that the VA apply the same test of "willful misconduct" in granting extensions of time under § 1662(a)(1). In 1978, when § 504 was amended to extend its discrimination prohibition to programs conducted by federal agencies, Congress did not affirmatively evince any intent to repeal § 1662(a)(1)'s "willful misconduct" provision. Moreover, petitioners have not overcome the cardinal rule that repeals by implication are not favored. The 1978 legislation did not expressly contradict the more narrow and specific 1977 legislation, and is not rendered meaningless, even with respect to those who claim to have been handicapped as a result of alcoholism, if the "willful misconduct" provision of § 1662(a)(1) is allowed to retain the import originally intended by Congress. There is no inconsistency between § 504 and a conclusive presumption that alcoholism not motivated by mental illness is necessarily "willful." Pp. 545-551.

No. 86-622, 791 F. 2d 226, reversed and remanded; No. 86-737, 253 U. S. App. D. C. 126, 792 F. 2d 194, affirmed.

WHITE, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS and O'CONNOR, JJ., joined, and in Parts I and II of which BRENNAN, MARSHALL, and BLACKMUN, JJ., joined. BLACKMUN, J., filed an opinion concurring in part and dissenting in part, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 552. SCALIA and KENNEDY, JJ., took no part in the consideration or decision of the cases.

Keith A. Teel argued the cause for petitioners. With him on the briefs were *Margaret K. Brooks*, *Catherine H. O'Neill*, *John A. Powell*, *Arthur B. Spitzer*, *Elizabeth Symonds*, and *Steven R. Shapiro*.

Jerrold J. Ganzfried argued the cause for respondents. With him on the brief were *Solicitor General Fried*, *Assistant Attorney General Willard*, *Deputy Solicitor General Wallace*, *Anthony J. Steinmeyer*, and *Robert V. Zener*.†

JUSTICE WHITE delivered the opinion of the Court.

These cases arise from the Veterans' Administration's refusal to grant two recovered alcoholics extensions of time in which to use their veterans' educational benefits. We must decide whether the Veterans' Administration's decision is subject to judicial review and, if so, whether that decision violates § 504 of the Rehabilitation Act of 1973, 87 Stat. 394, 29 U. S. C. § 794, which requires that federal programs not discriminate against handicapped individuals solely because of their handicap.¹

†*Elizabeth Bartholet* filed a brief for the National Council on Alcoholism, Inc., as *amicus curiae* urging reversal in both cases.

Briefs of *amici curiae* were filed in both cases for the American Medical Association et al. by *Benjamin W. Heineman, Jr.*, *Carter G. Phillips*, and *Joel I. Klein*; and for Vietnam Veterans of America by *Samuel M. Sipe, Jr.*, and *Barton F. Stichman*.

¹Section 504, 29 U. S. C. § 794, provides, in pertinent part, that "[n]o otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiv-

I

Veterans who have been honorably discharged from the United States Armed Forces are entitled to receive educational assistance benefits under the Veterans' Readjustment Benefit Act of 1966 ("GI Bill") to facilitate their readjustment to civilian life. See 38 U. S. C. § 1661. These benefits generally must be used within 10 years following discharge or release from active duty. § 1662(a)(1). Veterans may obtain an extension of the 10-year delimiting period, however, if they were prevented from using their benefits earlier by "a physical or mental disability which was not the result of [their] own willful misconduct." *Ibid.*

Petitioners are honorably discharged veterans who did not exhaust their educational benefits during the decade following their military service. They sought to continue to receive benefits after the expiration of the 10-year delimiting period on the ground that they had been disabled by alcoholism during much of that period. The Veterans' Administration determined that petitioners' alcoholism constituted "willful misconduct" under 38 CFR § 3.301(c)(2) (1987),² and accordingly denied the requested extensions.

ing Federal financial assistance or under any program or activity conducted by any Executive agency."

²The applicable regulation, 38 CFR § 3.301(c)(2) (1987), provides:

"*Alcoholism*: The simple drinking of alcoholic beverage is not of itself willful misconduct. The deliberate drinking of a known poisonous substance or under conditions which would raise a presumption to that effect will be considered willful misconduct. If, in the drinking of a beverage to enjoy its intoxicating effects, intoxication results proximately and immediately in disability or death, the disability or death will be considered the result of the person's willful misconduct. Organic diseases and disabilities which are a secondary result of the chronic use of alcohol as a beverage, whether out of compulsion or otherwise, will not be considered of willful misconduct origin."

This regulation was intended by the Veterans' Administration to incorporate the principles of a 1964 administrative decision. 37 Fed. Reg. 20335, 20336 (1972) (proposed regulation); 37 Fed. Reg. 24662 (1972) (final regulation). The 1964 decision provided that alcoholism that is "secondary to

Petitioner Traynor sought review of the Veterans' Administration's decision in the United States District Court for the Southern District of New York. The District Court held that it was not foreclosed from exercising jurisdiction over the case by 38 U. S. C. § 211(a), which bars judicial review of "the decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans,"³ because the complaint "requires us to examine constitutional and statutory questions and not merely issues of VA policy." *Traynor v. Walters*, 606 F. Supp. 391, 396 (1985). The court rejected Traynor's claim that the Veterans' Administration's refusal to extend his delimiting period violated the Due Process Clause and the equal protection component of the Fifth Amendment.⁴ However, the court concluded that alcoholism is a handicap within the meaning of the Rehabilitation Act, and that the Veterans' Administration therefore had engaged in the sort of discrimination on the basis of handicap that is forbidden by that Act.

A divided panel of the Court of Appeals for the Second Circuit reversed on the ground that § 211(a) barred judicial re-

and a manifestation of an acquired psychiatric disorder" would not be characterized as willful misconduct. Administrator's Decision, Veterans' Administration No. 988, Interpretation of the Term "Willful Misconduct" as Related to the Residuals of Chronic Alcoholism, Aug. 13, 1964, App. 142-143. The Veterans' Administration refers to this type of alcoholism as "secondary," and to alcoholism unrelated to an underlying psychiatric disorder as "primary." See *ibid.*; Veterans' Administration Manual M21-1, change 149, subch. XI, § 50.32 (Dec. 23, 1979) (hereinafter VA Manual). Petitioners were found to have suffered from primary alcoholism.

³Title 38 U. S. C. § 211(a) provides, in pertinent part:

"[T]he decision 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 or survivors 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 by an action in the nature of mandamus or otherwise."

⁴Petitioners have not raised constitutional claims before this Court.

view of the Rehabilitation Act claim. *Traynor v. Walters*, 791 F. 2d 226 (1986). The court reasoned that, while "many veterans have in the service of our country suffered injuries that qualify them as 'handicapped individual[s]' for purposes of [the Rehabilitation Act]," Congress evinced no intent in enacting that statute "to grant to 'handicapped' veterans the judicial review traditionally denied all other veterans" under § 211(a). *Id.*, at 229.⁵

Meanwhile, petitioner McKelvey sought review of the Veterans' Administration's decision in the District Court for the District of Columbia. The District Court exercised jurisdiction over McKelvey's claims on the ground that § 211 (a) permits judicial review of decisions rejecting claims that Veterans' Administration regulations of general applicability violate a federal statute that is "completely independent of the complex statutory and regulatory scheme for dispersing veterans' benefits." *McKelvey v. Walters*, 596 F. Supp. 1317, 1321 (1984). The court then invalidated 38 CFR § 3.301(c) (2) (1987) as contrary to the Rehabilitation Act. The court ordered the Veterans' Administration to determine without resort to the regulation whether McKelvey had suffered a disability attributable to his own misconduct.

On appeal, the Court of Appeals for the District of Columbia Circuit agreed that judicial review was not foreclosed by § 211(a), which was held to apply only to claims "resolved by an actual 'decision of the Administrator.'" 253 U. S. App. D. C. 126, 130, 792 F. 2d 194, 198 (1986) (*per curiam*) (quoting *Johnson v. Robison*, 415 U. S. 361, 367 (1974)). The court found that no such decision had been rendered by the Veterans' Administration as to the validity of 38 CFR

⁵The dissent maintained that § 211(a) was inapplicable both because the Rehabilitation Act neither provides benefits to veterans nor is administered by the Veterans' Administration and because the Administrator had not issued a decision as to whether the challenged regulation violated that Act. 791 F. 2d, at 232. Neither the majority nor the dissent reached the merits of Traynor's Rehabilitation Act claim.

§ 3.301(c)(2) (1987) under the Rehabilitation Act.⁶ On the merits, however, the Court of Appeals reversed, holding that the Veterans' Administration could consistently with the Rehabilitation Act distinguish between veterans who are at least to some extent responsible for their disabilities and veterans who are not.⁷ With respect to alcoholism, this distinction could be effected by means of § 3.301(c)(2), said the court, because the Veterans' Administration could reasonably conclude that alcoholism is a "willfully caused handicap" unless attributable to an underlying psychiatric disorder. 253 U. S. App. D. C., at 132-133, 792 F. 2d, at 200-201. The court expressed disagreement with *Tinch v. Walters*, 765 F. 2d 599 (CA6 1985), which had invalidated the regulation in light of the Rehabilitation Act. See 253 U. S. App. D. C., at 133, n. 4, 792 F. 2d, at 201, n. 4.

We granted certiorari to resolve the conflicts between the Courts of Appeals as to whether Veterans' Administration decisions challenged under the Rehabilitation Act are subject to judicial review and, if so, whether that Act bars the Veterans' Administration from characterizing petitioners' alcoholism as "willful misconduct" for purposes of 38 U. S. C. § 1662(a)(1). 480 U. S. 916 (1987).

II

We must first consider whether § 211(a)'s bar against judicial review of "the decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans" ex-

⁶The court acknowledged that the Veterans' Administration had decided the Rehabilitation Act issue while the case was on appeal. However, the court held that "Section 211(a)'s application is to be determined firmly and finally as of the date that plaintiff commences litigation." 253 U. S. App. D. C., at 131, 792 F. 2d, at 199. Otherwise, the court reasoned, "[t]he agency could allow a challenge to its action to proceed in the district court secure in the knowledge that if the VA lost there, it could retroactively shield the action from judicial review." *Ibid.*

⁷The panel was divided on both the jurisdictional issue and the merits.

tends to petitioners' claim that the Veterans' Administration regulation defining primary alcoholism as "willful misconduct" discriminates against handicapped persons in violation of the Rehabilitation Act.

We have repeatedly acknowledged "the strong presumption that Congress intends judicial review of administrative action." *Bowen v. Michigan Academy of Family Physicians*, 476 U. S. 667, 670 (1986); see also *Dunlop v. Bachowski*, 421 U. S. 560, 567 (1975); *Barlow v. Collins*, 397 U. S. 159, 166-167 (1970). The presumption in favor of judicial review may be overcome "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent." *Abbott Laboratories v. Gardner*, 387 U. S. 136, 141 (1967) (citations omitted). We look to such evidence as "'specific language or specific legislative history that is a reliable indicator of congressional intent,' or a specific congressional intent to preclude judicial review that is 'fairly discernible in the detail of the legislative scheme.'" *Bowen v. Michigan Academy of Family Physicians*, *supra*, at 673 (quoting *Block v. Community Nutrition Institute*, 467 U. S. 340, 349, 351 (1984)).

In *Johnson v. Robison*, *supra*, we held that the federal courts could entertain constitutional challenges to veterans' benefits legislation. We determined that "neither the text nor the scant legislative history of § 211(a)" provided the requisite "clear and convincing" evidence of congressional intent to foreclose judicial review of challenges to the constitutionality of a law administered by the Veterans' Administration. 415 U. S., at 373-374. In that case, the Veterans' Administration, acting under 38 U. S. C. §§ 101(21), 1652(a)(1), and 1661(a), denied educational benefits to a conscientious objector who had completed the required alternative civilian service. The claimant brought suit in the District Court, challenging those statutory sections on First and Fifth Amendment grounds. The District Court denied a motion to dismiss based on § 211(a) and gave judgment to the plaintiff.

Robison v. Johnson, 352 F. Supp. 848 (Mass. 1973). We agreed that §211(a) did not bar the suit, but reversed the judgment on the merits. On the §211(a) issue, we reasoned that “[t]he prohibitions [of §211(a)] would appear to be aimed at review only of those decisions of law or fact that arise in the *administration* by the Veterans’ Administration of a *statute* providing benefits for veterans.” 415 U. S., at 367. The questions of law presented in that case, however, arose under the Constitution rather than under the veterans’ benefits statute and concerned whether there was a valid law on the subject for the Veterans’ Administration to execute. We went on to conclude that the principal purposes of §211(a)—“(1) to insure that veterans’ benefits claims will not burden the courts and the Veterans’ Administration with expensive and time-consuming litigation, and (2) to insure that the technical and complex determinations and applications of Veterans’ Administration policy connected with veterans’ benefits decisions will be adequately and uniformly made,” *id.*, at 370—would not be frustrated if federal courts were permitted to exercise jurisdiction over constitutional challenges to the very statute that was sought to be enforced. We noted that such challenges “cannot be expected to burden the courts by their volume, nor do they involve technical consideration of Veterans’ Administration policy.” *Id.*, at 373.

The text and legislative history of §211(a) likewise provide no clear and convincing evidence of any congressional intent to preclude a suit claiming that §504 of the Rehabilitation Act, a statute applicable to all federal agencies, has invalidated an otherwise valid regulation issued by the Veterans’ Administration and purporting to have the force of law. Section 211(a) insulates from review decisions of law and fact “under any law administered by the Veterans’ Administration,” that is, decisions made in interpreting or applying a particular provision of that statute to a particular set of facts. *Id.*, at 367. But the cases now before us involve the issue whether the law sought to be administered is valid in light of

a subsequent statute whose enforcement is not the exclusive domain of the Veterans' Administration.⁸ There is no claim that the regulation at issue is inconsistent with the statute under which it was issued; and there is no challenge to the Veterans' Administration's construction of any statute dealing with veterans' benefits, except to the extent that its construction may be affected by the Rehabilitation Act. Nor is there any reason to believe that the Veterans' Administration has any special expertise in assessing the validity of its regulations construing veterans' benefits statutes under a later passed statute of general application. Permitting these cases to go forward will not undermine the purposes of § 211(a) any more than did the result in *Johnson*. It cannot be assumed that the availability of the federal courts to decide whether there is some fundamental inconsistency between the Veterans' Administration's construction of veterans' benefits statutes, as reflected in the regulation at issue here, and the admonitions of the Rehabilitation Act will enmesh the courts in "the technical and complex determinations and applications of Veterans' Administration policy connected with veterans' benefits decisions" or "burden the courts and the Veterans' Administration with expensive and time-consuming litigation." *Id.*, at 370.⁹ Of course, if

⁸The President has designated the Department of Justice as the federal agency responsible for coordinating and enforcing § 504 of the Rehabilitation Act. Exec. Order No. 12250, 3 CFR 298 (1981).

⁹Indeed, petitioners submit that, in the four Circuits that have held that § 211(a) does not bar judicial review of statutory challenges to Veterans' Administration regulations, only eight such challenges have been filed. See Brief for Petitioners 46-47, n. 32 (citing *American Federation of Government Employees, AFL-CIO v. Nimmo*, 711 F. 2d 28 (CA4 1983); *Plato v. Roudebush*, 397 F. Supp. 1295 (Md. 1975); *Tinch v. Walters*, 573 F. Supp. 346 (ED Tenn. 1983), *aff'd*, 765 F. 2d 599 (CA6 1985); *Taylor v. United States*, 385 F. Supp. 1035 (ND Ill. 1974), vacated and remanded, 528 F. 2d 60 (CA7 1976); *Arnolds v. Veterans' Administration*, 507 F. Supp. 128 (ND Ill. 1981); *Burns v. Nimmo*, 545 F. Supp. 544 (Iowa 1982); *Waterman v. Cleland*, No. 4-77-Civ. 70 (Minn., Oct. 24, 1978)).

experience proves otherwise, the Veterans' Administration is fully capable of seeking appropriate relief from Congress.

Accordingly, we conclude that the question whether a Veterans' Administration regulation violates the Rehabilitation Act is not foreclosed from judicial review by §211(a). We therefore turn to the merits of petitioners' Rehabilitation Act claim.

III

Congress historically has imposed time limitations on the use of "GI Bill" educational benefits. Veterans of World War II were required to use their benefits within nine years after their discharge from military service, while Korean Conflict veterans had eight years in which to use their benefits. See S. Rep. No. 93-977, p. 13 (1974) (letter to Hon. Vance Hartke from Veterans' Administrator Johnson). The delimiting period under the current "GI Bill" was raised from 8 years to 10 years in 1974. Pub. L. 93-337, §2(1), 88 Stat. 292, 38 U. S. C. §§1712(b)(1), (2). In 1977, Congress created an exception to this 10-year delimiting period for veterans who delayed their education because of "a physical or mental disability which was not the result of [their] own willful misconduct." Pub. L. 95-202, Tit. II, §203(a)(1), 91 Stat. 1429, 38 U. S. C. §1662(a)(1).

Congress did not use the term "willful misconduct" inadvertently in §1662(a)(1). The same term had long been used in other veterans' benefits statutes. For example, veterans are denied compensation for service-connected disabilities that are "the result of the veteran's own willful misconduct." 38 U. S. C. §310. See also §521 (compensation for disabilities not connected with military service). The Veterans' Administration had long construed the term "willful misconduct" for purposes of these statutes as encompassing primary alcoholism (*i. e.*, alcoholism that is not "secondary to and a manifestation of an acquired psychiatric disorder"). See n. 2, *supra*.

"It is always appropriate to assume that our elected representatives, like other citizens, know the law." *Cannon v. University of Chicago*, 441 U. S. 677, 696-697 (1979). Hence, we must assume that Congress was aware of the Veterans' Administration's interpretation of "willful misconduct" at the time that it enacted § 1662(a)(1), and that Congress intended that the term receive the same meaning for purposes of that statute as it had received for purposes of other veterans' benefits statutes. See *Sedima, S. P. R. L. v. Imrex Co.*, 473 U. S. 479, 489 (1985); *Morrison-Knudsen Construction Co. v. Director, Office of Workers' Compensation Programs*, 461 U. S. 624, 633 (1983); *Bob Jones University v. United States*, 461 U. S. 574, 586-587, and n. 10 (1983). In these cases, however, we need not rely only on such assumptions. The legislative history confirms that Congress intended that the Veterans' Administration apply the same test of "willful misconduct" in granting extensions of time under § 1662(a)(1) as the agency already was applying in granting disability compensation under § 310 and § 521. Specifically, the Report of the Senate Veterans' Affairs Committee on the 1977 legislation states:

"In determining whether the disability sustained was a result of the veteran's own 'willful misconduct,' the Committee intends that the same standards be applied as are utilized in determining eligibility for other VA programs under title 38. In this connection, see 38 CFR, part III, paragraphs 3.1(n) and 3.301, and VA Manual M21-1, section 1404." S. Rep. No. 95-468, pp. 69-70 (1977).

The cited regulations include 38 CFR § 3.301(c)(2) (1987), the regulation that characterizes primary alcoholism as "willful misconduct." The Veterans' Administration Manual provides, *inter alia*, that "[b]asic principles for application in deciding cases involving alcoholism are stated in Administrator's Decision No. 988," the decision on which § 3.301(c)(2) is based. VA Manual M21-1, change 132, subch. I, § 14.04c (Jan. 29, 1976). See n. 2, *supra*. These sources set forth

the criteria for determining whether a veteran's alcoholism is the result of "willful misconduct." These criteria therefore are among the "standards" that, according to the Senate Report, Congress intended to be utilized in determining eligibility for extended educational benefits.

It is thus clear that the 1977 legislation precluded an extension of time to a veteran who had not pursued his education because of primary alcoholism. If Congress had intended instead that primary alcoholism not be deemed "willful misconduct" for purposes of § 1662(a)(1), as it had been deemed for purposes of other veterans' benefits statutes, Congress most certainly would have said so.

It was the same Congress that one year later extended § 504's prohibition against discrimination on the basis of handicap to "any program or activity conducted by any Executive agency." Pub. L. 95-602, Tit. IV, §§ 119, 122(d)(2), 92 Stat. 2982, 2987, 29 U. S. C. § 794. Yet, in enacting the 1978 Rehabilitation Act amendments, Congress did not affirmatively evince any intent to repeal or amend the "willful misconduct" provision of § 1662(a)(1). Nor did Congress anywhere in the language or legislative history of the 1978 amendments expressly disavow its 1977 determination that primary alcoholism is not the sort of disability that warrants an exemption from the time constraints of § 1662(a)(1).

Accordingly, petitioners can prevail under their Rehabilitation Act claim only if the 1978 legislation can be deemed to have implicitly repealed the "willful misconduct" provision of the 1977 legislation or forbade the Veterans' Administration to classify primary alcoholism as willful misconduct. They must thereby overcome the "'cardinal rule . . . that repeals by implication are not favored.'" *Morton v. Mancari*, 417 U. S. 535, 549-550 (1974) (quoting *Posadas v. National City Bank*, 296 U. S. 497, 503 (1936); *Wood v. United States*, 16 Pet. 342, 363 (1842); *Universal Interpretive Shuttle Corp. v. Washington Metropolitan Area Transit Comm'n*, 393 U. S. 186, 193 (1968)). "It is a basic principle of statutory con-

struction that a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum," *Radzanower v. Touche Ross & Co.*, 426 U. S. 148, 153 (1976), unless the later statute "expressly contradict[s] the original act" or unless such a construction "is absolutely necessary . . . in order that [the] words [of the later statute] shall have any meaning at all.'" *Ibid.* (quoting T. Sedgwick, *The Interpretation and Construction of Statutory and Constitutional Law* 98 (2d ed. 1874)). "The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, *supra*, at 551.

As we have noted, the 1978 legislation did not expressly contradict the more "narrow, precise, and specific" 1977 legislation. Moreover, the 1978 legislation is not rendered meaningless, even with respect to those who claim to have been handicapped as a result of alcoholism, if the "willful misconduct" provision of § 1662(a)(1) is allowed to retain the import originally intended by Congress.

First, the "willful misconduct" provision does not undermine the central purpose of § 504, which is to assure that handicapped individuals receive "evenhanded treatment" in relation to nonhandicapped individuals. *Alexander v. Choate*, 469 U. S. 287, 304 (1985); *Southeastern Community College v. Davis*, 442 U. S. 397, 410 (1979). This litigation does not involve a program or activity that is alleged to treat handicapped persons less favorably than nonhandicapped persons. Cf. *School Board of Nassau County v. Arline*, 480 U. S. 273 (1987); *Southeastern Community College*, *supra*. Rather, petitioners challenge a statutory provision that treats disabled veterans more favorably than able-bodied veterans: The former may obtain extensions of time in which to use their educational benefits so long as they did not become

disabled as a result of their own "willful misconduct"; the latter are absolutely precluded from obtaining such extensions regardless of how compelling their reasons for having delayed their schooling might be. In other words, § 1662(a)(1) merely provides a special benefit to disabled veterans who bear no responsibility for their disabilities that is not provided to other disabled veterans or to any able-bodied veterans.

There is nothing in the Rehabilitation Act that requires that any benefit extended to one category of handicapped persons also be extended to all other categories of handicapped persons. Hence, the regulations promulgated by the Department of Health, Education, and Welfare in 1977 with regard to the application of § 504 to federally funded programs provide that "exclusion of a specific class of handicapped persons from a program limited by Federal statute or executive order to a different class of handicapped persons" is not prohibited. 42 Fed. Reg. 22676, 22679 (1977), promulgating 45 CFR § 84.4(c) (1986).¹⁰ It is therefore not inconsistent with the Rehabilitation Act for only those veterans whose disabilities are not attributable to their own "willful misconduct" to be granted extensions of the 10-year delimiting period applicable to all other veterans. Congress is entitled to establish priorities for the allocation of the limited resources available for veterans' benefits, cf. *McDonald v. Board of Election Comm'rs of Chicago*, 394 U. S. 802, 809 (1969), and thereby to conclude that veterans who bear some responsibility for their disabilities have no stronger claim to an extended eligibility period than do able-bodied veterans. Those veterans are not, in the words of § 504, denied benefits

¹⁰ We have previously recognized that the regulations promulgated by the Department of Health, Education, and Welfare (later the Department of Health and Human Services) to implement the Rehabilitation Act "were drafted with the oversight and approval of Congress," *School Board of Nassau County v. Arline*, 480 U. S. 273, 279 (1987), and therefore constitute "an important source of guidance on the meaning of § 504." *Ibid.* (quoting *Alexander v. Choate*, 469 U. S. 287, 304, n. 24 (1985)).

“solely by reason of [their] handicap,” but because they engaged with some degree of willfulness in the conduct that caused them to become disabled.

Furthermore, § 1662(a)(1) does not deny extensions of the delimiting period to all alcoholics but only to those whose drinking was not attributable to an underlying psychiatric disorder. It is estimated by some authorities that mental illness is responsible for 20% to 30% of all alcoholism cases. Brief for American Medical Association as *Amicus Curiae* 7. Each veteran who claims to have been disabled by alcoholism is entitled under § 1662(a)(1) to an individualized assessment of whether his condition was the result of a mental illness.

Petitioners, however, perceive an inconsistency between § 504 and the conclusive presumption that alcoholism not motivated by mental illness is necessarily “willful.” They contend that § 504 mandates an individualized determination of “willfulness” with respect to each veteran who claims to have been disabled by alcoholism. It would arguably be inconsistent with § 504 for Congress to distinguish between categories of disabled veterans according to generalized determinations that lack any substantial basis. If primary alcoholism is not always “willful,” as that term has been defined by Congress and the Veterans’ Administration, some veterans denied benefits may well be excluded solely on the basis of their disability. We are unable to conclude that Congress failed to act in accordance with § 504 in this instance, however, given what the District of Columbia Circuit accurately characterized as “a substantial body of medical literature that even contests the proposition that alcoholism is a disease, much less that it is a disease for which the victim bears no responsibility.” 253 U. S. App. D. C., at 132–133, 792 F. 2d, at 200–201. Indeed, even among many who consider alcoholism a “disease” to which its victims are genetically predisposed, the consumption of alcohol is not regarded as wholly involuntary. See Fingarette, *The Perils of Powell: In Search of a Factual Foundation for the “Disease Concept of*

Alcoholism," 83 Harv. L. Rev. 793, 802-808 (1970). As we see it, § 504 does not demand inquiry into whether factors other than mental illness rendered an individual veteran's drinking so entirely beyond his control as to negate any degree of "willfulness" where Congress and the Veterans' Administration have reasonably determined for purposes of the veterans' benefits statutes that no such factors exist.¹¹

In sum, we hold that a construction of § 1662(a)(1) that reflects the original congressional intent that primary alcoholics not be excused from the 10-year delimiting period for utilizing "GI Bill" benefits is not inconsistent with the prohibition on discrimination against the handicapped contained in § 504 of the Rehabilitation Act.¹² Accordingly, since we "are not at liberty to pick and choose among congressional enactments . . . when two statutes are capable of co-existence," *Morton v. Mancari*, 417 U. S., at 551, we must conclude that the earlier, more specific provisions of § 1662(a)(1) were neither expressly nor implicitly repealed by the later, more general provisions of § 504.

¹¹ Our decision in *School Board of Nassau County v. Arline*, *supra*, is not to the contrary. In *Arline*, we recognized that the district courts should "in most cases" undertake an individualized inquiry into whether a handicapped person has been denied a job for which he is otherwise qualified. 480 U. S., at 287. In contrast to the instant case, *Arline* did not involve a handicapping condition as to which Congress had specifically determined that no individualized inquiry was necessary. We might well have reached a different conclusion in *Arline* had the employer relied on a congressional determination supported by substantial medical evidence that all employees suffering from acute tuberculosis pose a serious health threat to others in the workplace.

¹² If the position urged by the dissent were to prevail, the Veterans' Administration would be hard put to avoid making an individualized determination as to whether a veteran's alcoholism is sufficiently "willful" to disqualify him from disability compensation under §§ 310 and 521. Such a requirement would saddle the Government with additional administrative and financial burdens that Congress could not have contemplated in extending § 504 to federal programs.

IV

This litigation does not require the Court to decide whether alcoholism is a disease whose course its victims cannot control. It is not our role to resolve this medical issue on which the authorities remain sharply divided. Our task is to decide whether Congress intended, in enacting § 504 of the Rehabilitation Act, to reject the position taken on the issue by the Veterans' Administration and by Congress itself only one year earlier. In our view, it is by no means clear that § 504 and the characterization of primary alcoholism as a willfully incurred disability are in irreconcilable conflict. If petitioners and their proponents continue to believe that this position is erroneous, their arguments are better presented to Congress than to the courts.

The judgment of the Court of Appeals for the District of Columbia Circuit in No. 86-737 is affirmed. The judgment of the Court of Appeals for the Second Circuit in No. 86-622 is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE SCALIA and JUSTICE KENNEDY took no part in the consideration or decision of this case.

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

I join Parts I and II of the Court's opinion, for I agree that, under § 504 of the Rehabilitation Act of 1973, 87 Stat. 394, as amended, 29 U. S. C. § 794, the "final and conclusive" language of 38 U. S. C. § 211(a) does not bar judicial review of petitioners' claims. Similarly, I acknowledge the legality (a) of the 10-year delimiting period imposed by 38 U. S. C. § 1662(a) upon veterans' educational assistance, and (b) of that statute's alleviation of the delimiting period in cases of disability except where that disability is the result of a veteran's "own willful misconduct."

My dispute with the Court centers in its upholding of the regulation, 38 CFR § 3.301(c)(2) (1987), whereby the Veterans' Administration (VA) presumes, *irrebuttably*, that primary alcoholism always is the result of the veteran's "own willful misconduct." This is the very kind of broad social generalization that § 504 of the Rehabilitation Act is intended to eliminate. The petitioners in these cases ask only that their situations be given individualized evaluation. Because I think this is what the Rehabilitation Act clearly requires, I dissent from the Court's conclusion to the contrary.¹

I

Petitioner Eugene Traynor began drinking when he was eight or nine years old. He drank with increasing frequency throughout his teenage years, and was suffering alcohol-related seizures by the time he was on active military duty in Vietnam. During the four years following his honorable discharge in 1969, Mr. Traynor was hospitalized repeatedly for alcoholism and related illnesses.

By the end of 1974, however, petitioner Traynor had conquered his drinking problem. He attended college part-time beginning in 1977, and continued working toward his degree until the 10-year period for using his veteran's educational benefits expired for him in 1979. Mr. Traynor applied for the extension of time available under 38 U. S. C. § 1662(a)(1) to one whose disability had prevented him from completing a program of education within the 10-year period. Because he was unable to establish that his alcoholism was due to an underlying psychiatric disorder, his condition was labeled "primary alcoholism." Pursuant to the regulation cited above, Mr. Traynor was presumed to have brought his alcoholism upon himself through "willful misconduct." The requested extension therefore was denied.

¹ It perhaps is worth noting that, despite much comment in the popular press, these cases are not concerned with whether alcoholism, simplistically, is or is not a "disease."

Petitioner James P. McKelvey also started drinking as a child. He was 13 when he began to develop the alcohol dependency that was common among members of his family. His drinking problem plagued him while he was in the Army, and he was hospitalized frequently during the nine years that followed his honorable discharge in 1966. Despite his disability, however, McKelvey managed, between hospital stays, to attend two educational institutions under the veterans' educational-benefits program.

Mr. McKelvey took his last drink in 1975, only a year and a half before his 10-year delimiting period expired. Like Traynor, McKelvey sought an extension under 38 U. S. C. § 1662(a)(1) on the ground that his alcoholism had prevented him from using, within the period, the benefits to which he was entitled. And, like Traynor, McKelvey was denied the extension because his disability, primary alcoholism, was conclusively presumed to have been caused by his "own willful misconduct." The VA's regulation deprived each of these veterans of any opportunity to establish that, in his particular case, disabling alcoholism was not willfully incurred.

II

The VA's reliance on its irrebuttable presumption that all primary alcoholism is attributable to willful misconduct cannot be squared with the mandate against discrimination contained in § 504 of the Rehabilitation Act. Just last year, in *School Bd. of Nassau County v. Arline*, 480 U. S. 273 (1987), this Court explained in no uncertain terms that § 504 bars the generic treatment of any group of individuals with handicaps based on archaic or simplistic stereotypes about attributes associated with their disabling conditions. Instead, § 504 requires an individualized assessment of each person's qualifications, based on "reasoned and medically sound judgments." *Id.*, at 285. In sanctioning the VA's irrebuttable presumption that any veteran suffering from primary alco-

holism brought the ailment upon himself through willful misconduct, the Court ignores the lesson of *Arline*, and the clear dictate of the Rehabilitation Act.

In these cases, the Court is called upon, not to make its own medical judgments about the causes of alcoholism, but to interpret § 504. That statute sets forth a simple rule:

"No otherwise qualified individual with handicaps . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency. . . ."²

It is beyond dispute that petitioners, as alcoholics, were handicapped individuals covered by the Act. See 43 Fed. Reg. 2137 (1978) (guidelines issued by Department of Health, Education, and Welfare (later the Department of Health and Human Services) reflecting the Attorney General's specific conclusion, 43 Op. Atty. Gen. No. 12, p. 2 (1977), that an alcoholic is covered by the Act); see also Brief for Respondents 33. Nor is it disputed that § 504 of the Act prohibits federal agencies, such as the VA, from denying benefits to petitioners solely because they are alcoholics. See, *e. g.*, 38 CFR §§ 18.403(j)(1) and (2)(i)(c) (1987).

In 38 U. S. C. § 1662(a)(1), Congress declared that one whose disability resulted from "willful misconduct" is not entitled to the benefit of the extension-of-time provision. As stated above, the VA, by its regulation, has established an irrebuttable presumption that primary alcoholism is the result of willful misconduct. This presumption appears to be a clear violation of § 504's mandate requiring individualized

² Section 103(d)(2)(B) of the Rehabilitation Act Amendments of 1986, 100 Stat. 1810, struck the words "handicapped individual" wherever they appeared in the 1973 Act and replaced them with the words "individual with handicaps." See H. R. Rep. No. 99-571, p. 17 (1986). Section 504, as quoted in the text above, embraces the change effected by this 1986 amendment.

assessment of each claimant's qualifications. *Arline*, 480 U. S., at 287-289.

Respondents argue, however, that a case-by-case assessment of whether a claimant's alcoholism was the result of willful misconduct is not necessary for two reasons. First, respondents contend that Congress, in enacting the 1977 amendment (the extension-of-time provision, see 91 Stat. 1439) to § 1662(a), mandated a conclusive presumption that primary alcoholism is caused by willful misconduct. Second, respondents contend that the VA's determination that primary alcoholism always is due to willful misconduct is reasonable, and that therefore the presumption is not based on the kind of stereotyping that § 504 forbids. The Court today finds each of these arguments persuasive. In my view, each patently is without merit.

III

The Court explains:

"As we see it, § 504 does not demand inquiry into whether factors other than mental illness rendered an individual veteran's drinking so entirely beyond his control as to negate any degree of 'willfulness' where Congress and the Veterans' Administration have reasonably determined for purposes of the veterans' benefits statutes that no such factors exist." *Ante*, at 551.

As I see it, § 504 demands precisely the inquiry the Court says is unnecessary. While Congress certainly has the authority to determine that primary alcoholism always should be attributed to willful misconduct, I find no support whatever for the Court's conclusion that Congress made that determination when it amended § 1662(a) in 1977.

The Court is correct, of course, see *ante*, at 546, when it says that we must assume that Congress intended the term "willful misconduct" in § 1662(a)(1) to have the same meaning it had been given in other veterans' benefits statutes. Indeed, the legislative history indicates that Congress did

"inten[d] that the same standards be applied as are utilized in determining eligibility for other VA programs under title 38." S. Rep. No. 95-468, pp. 69-70 (1977). If § 504 had not been amended one year later to cover specifically all executive agency programs, including the VA's benefits programs, see Pub. L. 95-602, §§ 119, 122(d)(2), 92 Stat. 2982, 2987, 29 U. S. C. § 794, there would be little reason to question the application of the VA's interpretation of the willful-misconduct regulation to § 1662(a)(1).

But the Court goes further and finds that Congress' reference to the VA's willful-misconduct regulation in amending § 1662(a) is a *congressional adoption* of the VA's rule. The Court transforms Congress' uncontroversial statement that the willful-misconduct regulation should be given the same meaning throughout the statutory scheme into a "specifi[c] determin[ation]" by Congress that primary alcoholics are presumed to have engaged in willful misconduct. See *ante*, at 551, n. 11; see also *ante*, at 547 (Congress' "1977 determination that primary alcoholism is not the sort of disability that warrants an exemption"); *ante*, at 548 (Congress had "'narrow, precise, and specific'" intent to exclude primary alcoholics in enacting § 1662(a)(1)); *ante*, at 551 ("original congressional intent [in amending § 1662(a)] that primary alcoholics not be excused from the 10-year delimiting period"). This magical transformation is the linchpin in the Court's analysis, for unless Congress itself actually took a position in 1977 endorsing the association of primary alcoholism with willful misconduct, the subsequent amendment of § 504 in 1978 to include benefit programs like the VA's would simply be read to impose new constraints on the VA's treatment of alcoholics. There is nothing whatever that is inconsistent about Congress' willingness, in 1977, to allow the VA to apply its own rules in determining which alcoholic veterans were entitled to benefits, and its decision, one year later, to require such determinations to comply with the antidiscrimination provisions of § 504 then being amended.

In order to escape § 504's requirements, the majority must conclude that in 1977 Congress defined a primary alcoholic as not "otherwise qualified," within the meaning of § 504, for the extension of time available under § 1662(a)(1). The language of § 1662(a)(1) itself merely establishes that a willfully incurred disability, as a general matter, does not entitle a veteran to the extension of time. And the Senate Report, upon which the Court exclusively relies, makes only passing reference to the relevant regulations—regulations which encompass the VA's entire policy on the applicability of the willful-misconduct provisions, not just the application of that term to alcoholism. Finally, even those portions of the regulations expressly addressed to alcoholism do not state that primary alcoholism is to be equated with willful misconduct. That interpretation is derived from a 1964 Administrator's Decision, which itself discusses the VA's irrebuttable presumption only briefly. Administrator's Decision, Veterans' Administration No. 988, Interpretation of the Term "Willful Misconduct" as Related to the Residuals of Chronic Alcoholism 1 (1964).³

³ The regulation provides:

"If, in the drinking of a beverage to enjoy its intoxicating effects, intoxication results proximately and immediately in disability or death, the disability or death will be considered the result of the person's willful misconduct. Organic diseases and disabilities which are a secondary result of the chronic use of alcohol as a beverage, whether out of compulsion or otherwise, will not be considered of willful misconduct origin." 38 CFR § 3.301(c)(2) (1987).

On its face, the regulation does not appear to address the condition of alcoholism itself, despite the fact that the paragraph of the regulation, of which the above-quoted material is a part, bears the title "Alcoholism." The condition of alcohol dependency is neither an immediate effect of drinking, nor a secondary organic disability resulting from the chronic use of alcohol. Alcoholism seems to fall between the two categories set out in the regulation; it is the condition of being a chronic alcohol user.

The Administrator's Decision from which the VA's irrebuttable presumption is derived focuses on this same distinction: "The proximate and immediate effects consisting of disabling injuries or death resulting from a state of intoxication" are to be deemed willful misconduct, but the "remote,

See 37 Fed. Reg. 20335, 20336 (1972) (proposing regulation and announcing that it was intended to incorporate principles of the 1964 administrative issue).

Surely something more than two sentences quoted from a Senate Report should be required before we interpret general statutory language to conflict with the most natural reading of subsequent specific legislation. It is only the Court's strained reading of § 1662(a)(1) to embrace a congressional "determination that primary alcoholism is not the sort of disability that warrants an exemption," *ante*, at 547, that leads the Court to reject as a disfavored "implicit repeal" § 504's requirement that qualifications for the exemption be determined on a case-by-case basis. The "basic principle of statutory construction that a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum," *ante*, at 547-548, has no application here, where the earlier enactment is not narrowly or specifically addressed to the matter treated generally in the subsequent enactment: federal agencies' treatment of alcoholics. I have been no more successful than the VA or the Court in turning up evidence that Con-

organic secondary effects of the continued use of alcohol resulting in impairment of body organs or systems leading to disability or death" are not to be so deemed. Administrator's Decision, No. 988, p. 1. The Decision, however, also includes two sentences from which the VA derives its current interpretation of the willful-misconduct regulation:

"In misconduct determinations, however, with respect to mental disorders where the use of alcohol as a beverage has been involved, a distinction has heretofore been recognized between alcoholism as a primary condition (or as secondary to an underlying personality disorder), and alcoholism as secondary to and a manifestation of an acquired psychiatric disorder. If the latter condition is found the resulting disability or death is not to be considered as willful misconduct." *Ibid.*

While the VA's interpretation of its own regulation and its antecedents would have been entitled to deference, see *United States v. Larionoff*, 431 U. S. 864, 872 (1977), Congress cannot be presumed to have codified this less-than-apparent interpretation by a mere reference to the relevant regulations.

gress expressly considered, or intended, in amending § 1662 (a), to adopt legislatively the VA's presumption that primary alcoholism always is attributable to willful misconduct. I therefore see no reason to defer to the VA's rule in interpreting a subsequent and entirely separate congressional enactment that the VA has not been empowered to administrate.

IV

I am reluctant to conclude that anything short of a congressional determination linking all primary alcoholism to willful misconduct could justify the VA's substitution of its generic rule for the individualized assessment generally required under § 504. It is conceivable that an agency legitimately could eschew individualized assessments of disabled individuals' qualifications if it were evident, as a matter of medical fact, that a particular disqualifying characteristic *always* is associated with a particular disability.⁴ But it is not at all evident that an absolute correlation exists between the condition of primary alcoholism and the disqualifying factor of willful misconduct, as defined by the VA. Nor has the VA successfully demonstrated that such an absolute correlation is medically justified. The VA suggests that it is enough that "although the policy may not produce in an individual case the same conclusion another arbiter might reach, the VA policy provides a *reasonable* and *workable* accommodation of modern medico-psychological evidence." Brief for Respondents 35 (emphasis added). This position is unsatisfactory for several reasons.

⁴ For example, a blind person, by definition, cannot see. While the Rehabilitation Act does not expressly recognize the absolute correlation between the qualification of seeing and the condition of blindness, it seems appropriate for an employer to rely on that absolute correlation in making certain hiring decisions. Presumably, an employer subject to § 504 could refuse to hire blind individuals for jobs clearly requiring sighted employees without first conducting an individualized assessment of each blind applicant's qualifications.

A

The VA seems to suggest that generalizations about attributes associated with individuals suffering from a particular disability can be relied upon to assess those individuals' qualifications, as long as the generalizations are shown to be reasonable. But reliance on generalizations, even "reasonable" ones, is clearly prohibited under *Arline*. In that case, the Court ruled that § 504 prevented the Nassau County School Board from generalizing about the contagiousness of tuberculosis. 480 U. S., at 281-286. Acknowledging that in some cases contagiousness would justify altering or perhaps terminating a tuberculosis sufferer's employment in order to avoid infecting others, *id.*, at 287, n. 16, the Court nevertheless found impermissible a generalization built on that less-than-perfect correlation between disability and qualification. The Court explained:

"The fact that *some* persons who have contagious diseases may pose a serious health threat to others under certain circumstances does not justify excluding from the coverage of the Act *all* persons with actual or perceived contagious diseases. Such exclusion would mean that those accused of being contagious would never have the opportunity to have their condition evaluated in light of medical evidence and a determination made as to whether they were 'otherwise qualified.' Rather, they would be vulnerable to discrimination on the basis of mythology—precisely the type of injury Congress sought to prevent." *Id.*, at 285 (emphasis in original).

The myth to which the Court was referring was not that some tuberculosis sufferers were contagious, but that they *all* were. The parallel myth in the present cases, of course, is that *all* primary alcoholics became disabled as a result of their own willful misconduct. Just as § 504 entitles each person suffering from tuberculosis to an individualized determination, based on sound medical evidence, as to whether

that person is contagious and therefore not "otherwise qualified" for a job, 29 U. S. C. § 794, the statute entitles each alcoholic veteran to an individualized determination, based on the medical evidence in his own case, of the causes of his disability. If this individualized assessment leads the adjudicator to conclude that the particular veteran's alcoholism was brought on by willful misconduct, that veteran will have been adjudicated to be not "otherwise qualified" to collect the education benefits. But only after this individualized inquiry has been conducted, can the VA deprive him of benefits available to all whose disabilities were not caused by willful misconduct.

B

The VA's attempt to justify its reliance upon the irrebuttable presumption that primary alcoholism is caused by willful misconduct is further undermined by the meagerness of the medical support it summons. Nothing in the record suggests that the VA based its continuing reliance on the presumption, after § 504 was amended, on any factual findings of the kind found to be required in *Arline*. And its *post hoc* rationalization of that reliance in this litigation consists of a hodgepodge of medical conclusions, some of only marginal relevance. For example, the VA relies upon the comments of a number of "medical writers" who note that "volition plays a significant role" in the *treatment* of alcoholism. See Brief for Respondents 43; see *id.*, at 45-46, and nn. 32 and 33, citing, among others, G. Vaillant, *The Natural History of Alcoholism* 299 (1983), and S. Zimberg, *The Clinical Management of Alcoholism* 67-69, 118 (1982). While cure and cause are likely to be somewhat related, the fact that alcoholism is "highly treatable, but . . . will require great responsibility from the patient," G. Vaillant, *supra*, at 299, provides little assistance in assessing whether the original onset of the disability can always be ascribed to willful misconduct.

In contrast, ample evidence supports petitioners' contrary contention that the degree of willfulness associated with the

onset of alcoholism varies from case to case. Recent medical research indicates that the causes of primary alcoholism⁵ are varied and complex, only some of which conceivably could be attributed to a veteran's will.⁶ Indeed, even the VA acknowledges that "alcoholism is not a unitary condition [but rather] has multiple forms and ranges of severity." Brief for Respondents 34, and nn. 21, 22, citing, among others, Bohman, Sigvardsson, & Cloninger, Maternal Inheritance of Alcohol Abuse: Cross-Fostering Analysis of Adopted Women, 38 Archives Gen. Psychiatry 965, 968 (1981) (describing genetically different types of alcoholism, each producing a different form of the condition); Cloninger, Bohman, & Sigvardsson, Inheritance of Alcohol Abuse: Cross-Fostering Analysis of Adopted Men, 38 Archives Gen. Psychiatry 861, 867 (1981) (identifying two types of alcohol abuse with different genetic and environmental causes); G. Vaillant, *supra*, at 17 ("[A]lcohol abuse reflects a multidetermined continuum of drinking behaviors

⁵The American Medical Association and American Psychiatric Association (AMA/APA) and the National Council on Alcoholism, Inc. (NCA), emphasize in their respective *amicus* briefs that the primary/secondary distinction is a crude one. A diagnosis of alcoholism as primary or secondary may depend as much on the nature of the facility in which the diagnosis is made as it does on the alcoholic's true clinical history. See Brief for NCA as *Amicus Curiae* 18-19, n. 9. The primary/secondary distinction is particularly difficult to apply to an alcoholic who, like petitioners, began drinking as a child before underlying psychiatric disorders could be diagnosed. See Brief for AMA/APA as *Amici Curiae* 7. AMA/APA also emphasizes that the distinction between the two kinds of alcoholism was developed, and is properly used, only for *treatment* purposes and reveals little about the degree of willfulness involved in the onset of the alcoholism. *Id.*, at 5.

⁶Notable among the studies are those that suggest that heredity plays a significant role in the development of primary, but not secondary, alcoholism. See, e. g., Schuckit, Genetic Aspects of Alcoholism, 15 Annals Emergency Medicine 991, 992 (1986). Some evidence suggests that the genetic predisposition to alcoholism can be attributed to a biochemical abnormality that prevents proper metabolism of alcohol. See App. 44 (affidavit of Dr. Anne Geller). From this it would appear that there may be a more purely physiological explanation for the onset of some cases of primary alcoholism than there is for most cases of secondary alcoholism.

whose determinants are differently weighted for different people and include culture, habits, social mores, and genes"). A sensitivity to this case-to-case variation is precisely what § 504 requires of employers and federal agencies in their assessments of the qualifications for employment or benefits of an individual with handicaps. As the medical community's understanding of the causes of alcoholism continues to develop, § 504 requires the VA to take these new developments into account in making "sound medical judgments" about the source of a particular veteran's alcoholism.⁷ Presumably, evidence concerning the circumstances surrounding a veteran's development of alcohol dependence—including his age, home environment, and psychological health⁸—always will be relevant to this assessment.

C

Finally, in asserting that its automatic association of primary alcoholism with willful misconduct is supported by medical evidence, the VA adopts, perhaps for purposes of this litigation alone, a definition of willful misconduct which is inconsistent with the definition articulated in the VA's own regulations and practices. According to the VA, primary alcoholism is appropriately attributed to willful misconduct because medical evidence suggests that "many alcoholics are *not completely helpless*," in controlling their disability. Brief for Respondents 47 (emphasis added). But a "not completely helpless" test is not the standard the VA has estab-

⁷ In light of this Court's emphasis in *School Bd. of Nassau County v. Arline*, 480 U. S. 273 (1987), on the importance of basing assessments of a person's qualifications on sound medical evidence, it is difficult to understand the VA's suggestion that "citations to the medical literature circa 1987" are not of great relevance to an analysis of § 504's application. See Brief for Respondents 26.

⁸ AMA/APA notes that there is often a "psychological component in the development of alcoholism" which may not "rise to the level of psychiatric disorders." Brief for AMA/APA as *Amici Curiae* 6.

lished for determining whether other disabilities are incurred willfully.

The VA defines willful misconduct as "an act involving conscious wrongdoing or known prohibited action," 38 CFR § 3.1(n) (1987), and "the intentional doing of something either with the knowledge that it is likely to result in serious injury or with a wanton and reckless disregard of its probable consequences." VA Manual M21-1, change 239, subch. I, § 14.04a (Aug. 21, 1979).⁹ This definition of willful misconduct is a far cry from a "not completely helpless" standard. While some primary alcoholics may well owe their disability to willful misconduct, as delineated by the regulation, the VA has failed to demonstrate that *all* primary alcoholics had any awareness that their initial drinking was likely to result in serious injury. Nor, in many cases, would it be appropriate to describe one's gradual development of alcohol dependency as evidence of "wanton and reckless disregard of [drinking's] probable consequences." Indeed, I wonder how one meaningfully can ascribe such intent and appreciation of long-range consequences to a 9- or 13-year-old boy who follows the lead of his adult role models in taking his first drinks.¹⁰

The awkwardness of attributing all primary alcoholism to willful misconduct is made apparent in the Administrator's Decision No. 988, which elaborates on the meaning of the term in the context of explaining why the VA does not bar recovery for those suffering organic secondary effects of the continued use of alcohol:

⁹ Outside the alcoholism context, the Board of Veterans Appeals has found willful misconduct when, for example, a veteran "placed [a] gun to his head and pulled the trigger," No. 86-22-350 (Mar. 23, 1987); or intentionally put his arm through window glass, No. 85-31-331 (Feb. 14, 1986); or attempted to ride his motorcycle on one wheel, No. 84-33-060 (May 13, 1985); or engaged in an altercation, No. 81-10-510 (June 12, 1981); or drove about 100 miles per hour in a 25-mile-per-hour zone on a wet road at dusk, No. 80-31-502 (June 5, 1981).

¹⁰ That puzzle, of course, would have to be worked out by the VA when considering petitioners' claims on remand.

"[The] development of the secondary condition does not meet the definition of intentional wrongdoing with knowledge or wanton disregard of its probable consequences. Secondary results are not the usual and probable effects of drinking alcohol as a beverage. By the time there is sufficient awareness of any probable deleterious consequences, the process has developed to a point where it is irreversible without professional help. At such time, the person by himself, may lack the capacity to avoid the continued use of alcohol. While it is proper to hold a person responsible for the direct and immediate results of indulgence in alcohol, it cannot be reasonably said that he expects and *wills* the disease and disabilities which sometimes appear as secondary effects." Decision No. 988, p. 2 (1964) (emphasis in original).

All of this surely can be said of some primary alcoholics, whose drinking begins innocently enough and who feel only much later the effects of a dependency so disabling that it requires repeated hospitalization.

Individuals suffering from a wide range of disabilities, including heart and lung disease and diabetes, usually bear some responsibility for their conditions. And the conduct that can lead to this array of disabilities, particularly dietary and smoking habits, is certainly no less voluntary than the consumption of alcohol. Nevertheless, the VA has expressed an unwillingness to extend the definition of willful misconduct to all voluntary conduct having some relation to the development of a disability. In justifying the exclusion of secondary organic effects of alcoholism, such as cirrhosis of the liver, from the reach of the willful-misconduct presumption, the VA has explained:

"[H]istorically, the question of willful misconduct has never been raised in other related situations where personal habits or neglect are possible factors in the in-currence of disability. For example, the harmful effects of tobacco smoking on circulation and respiration were

known long before tobacco was incriminated as a causative factor in the high incidence of cancer, emphysema and heart disease. Yet smoking has not been considered misconduct. It is unreasonable and illogical to apply one set of rules with respect to alcohol and a different one in a situation closely analogous." *Ibid.*

In deferring to the VA's "reasonable" determination that all primary alcoholism is attributable to willful misconduct, the Court obscures the meaning of "willful misconduct" in a similar fashion. The Court discusses the propriety of denying benefits to those who "bear some responsibility for their disabilities," and suggests that the attribution of all primary alcoholism to willful misconduct is justified because "the consumption of alcohol is not regarded as wholly involuntary." *Ante*, at 549, 550. The degree of personal responsibility for their disability attributed to alcoholics by the VA in its brief and echoed by the Court in its opinion is clearly not of the magnitude contemplated by the VA's general definition of willful misconduct.

V

Section 504 guarantees Eugene Traynor and James P. McKelvey federal benefits absent a demonstration that they, as individuals, fail to satisfy the legitimate qualifications Congress has imposed upon receipt of those benefits. The VA has failed to demonstrate that any legislative or medical determinations justify its conclusive presumption that Mr. Traynor's and Mr. McKelvey's alcoholism was incurred willfully. Both cases therefore should be remanded to the VA for individualized determinations, based on "sound medical judgments" whether these men are "otherwise qualified" to receive veterans' educational benefits beyond the 10-year period.

I dissent.

EDWARD J. DEBARTOLO CORP. *v.* FLORIDA GULF
COAST BUILDING & CONSTRUCTION TRADES
COUNCIL ET AL.

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

No. 86-1461. Argued January 20, 1988—Decided April 20, 1988

Because a construction company building a department store for a tenant at petitioner's shopping mall allegedly paid substandard wages and fringe benefits, respondent union peacefully distributed handbills at the mall's entrances (but did not picket or otherwise patrol), urging customers not to shop at any of the mall's stores until petitioner promised that all mall construction would be done by contractors paying fair wages. A complaint based on petitioner's charge that respondent had committed an unfair labor practice under § 8(b)(4) of the National Labor Relations Act (NLRA) was dismissed by the National Labor Relations Board (Board), which concluded that the handbilling was protected by § 8(b)(4)'s proviso exempting nonpicketing publicity intended to inform the customers of a distributor of goods that the goods were produced by an employer involved in a labor dispute. The Court of Appeals for the Fourth Circuit affirmed. But this Court reversed on the ground that the publicity proviso did not apply since petitioner and the other mall tenants did not distribute the construction company's products, and remanded for a determination whether § 8(b)(4) had been violated, and, if so, whether the handbilling was protected by the First Amendment. *Edward J. DeBartolo Corp. v. NLRB*, 463 U. S. 147. On remand, the Board held that the handbilling violated § 8(b)(4)(ii)(B)—which forbids a union to "threaten, coerce, or restrain" any person to cease doing business with another person—but declined to consider First Amendment questions. Because it had serious doubts about § 8(b)(4)'s constitutionality under the Board's interpretation, the Court of Appeals below applied *NLRB v. Catholic Bishop of Chicago*, 440 U. S. 490, and ruled that neither the statute's language nor its legislative history revealed a clear congressional intent to proscribe such handbilling. Consequently, construing the section as not prohibiting consumer publicity, the court denied enforcement of the Board's order.

Held: The Court of Appeals did not err in construing § 8(b)(4) as not reaching respondent's handbilling. That construction makes it unnecessary to pass upon the serious First Amendment questions that would be raised by the Board's interpretation. Pp. 574-588.

(a) Although the Board's NLRA interpretations are normally entitled to deference, where, as here, an otherwise acceptable construction would raise serious constitutional problems, *Catholic Bishop* requires courts to construe the statute to avoid such problems unless such construction is plainly contrary to Congress' intent. Pp. 574-578.

(b) Section 8(b)(4) does not contain any clear expression of congressional intent to proscribe respondent's handbilling. Contrary to the Board's interpretation, such handbilling need not be held to "coerce" mall customers or secondary employers within the meaning of § 8(b)(4)(ii)(B), since there was no violence, picketing, patrolling, or other intimidating conduct, but only an attempt to persuade customers not to shop in the mall. Cf. *NLRB v. Fruit Packers*, 377 U. S. 58. *NLRB v. Retail Store Employees*, 447 U. S. 607, distinguished. Moreover, the fact that handbilling and other nonpicketing consumer appeals not involving a distributor are outside the publicity proviso's protection does not require the conclusion that such appeals must be considered coercive under § 8(b)(4)(ii). It was this very issue on which this Court earlier remanded this case. The proviso need not be treated as establishing an exception to an otherwise-all-encompassing prohibition on publicity, but may more reasonably be read as providing protection for a type of communication that might otherwise be considered coercive, even though other forms of publicity would not be so considered. Nor does the legislative history contain any clear indication that Congress intended § 8(b)(4)(ii) to proscribe peaceful handbilling, unaccompanied by picketing, urging a consumer boycott of a neutral employer. Pp. 578-588.

796 F. 2d 1328, affirmed.

WHITE, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BRENNAN, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. O'CONNOR and SCALIA, JJ., concurred in the judgment. KENNEDY, J., took no part in the consideration or decision of the case.

Lawrence M. Cohen argued the cause and filed briefs for petitioner.

Deputy Solicitor General Cohen argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Fried*, *Rosemary M. Collyer*, *Norton J. Come*, *Linda Sher*, and *Carmel P. Ebb*.

Laurence Gold argued the cause for respondent Florida Gulf Coast Building and Construction Trades Council. With him on the brief were *Mark F. Kelly*, *Laurence J. Cohen*, *David M. Silberman*, *George Kaufmann*, and *Marsha Berzon*.

Solicitor General Fried and *Rosemary M. Collyer* filed a brief for the National Labor Relations Board, as respondent under this Court's Rule 19.6, in support of petitioner.*

JUSTICE WHITE delivered the opinion of the Court.

This case centers around the respondent union's peaceful handbilling of the businesses operating in a shopping mall in Tampa, Florida, owned by petitioner, the Edward J. DeBartolo Corporation (DeBartolo). The union's primary labor dispute was with H. J. High Construction Company (High) over alleged substandard wages and fringe benefits. High was retained by the H. J. Wilson Company (Wilson) to construct a department store in the mall, and neither DeBartolo nor any of the other 85 or so mall tenants had any contractual right to influence the selection of contractors.

The union, however, sought to obtain their influence upon Wilson and High by distributing handbills asking mall customers not to shop at any of the stores in the mall "until the Mall's owner publicly promises that all construction at the Mall will be done using contractors who pay their employees fair wages and fringe benefits."¹ The handbills'

*Briefs of *amici curiae* urging reversal were filed for the American Retail Federation by *Jack L. Whitacre*; for the Chamber of Commerce of the United States by *Edward B. Miller* and *Stephen A. Bokat*; and for the International Council of Shopping Centers, Inc., by *Edward J. Sack* and *Stephanie McEvily*.

John A. Powell, *Helen Hershkoff*, *Steven R. Shapiro*, *C. Edwin Baker*, *Robert A. Bush*, and *Ira L. Gottlieb* filed a brief for the American Civil Liberties Union Foundation as *amicus curiae* urging affirmance.

¹The Handbill read:

"PLEASE DON'T SHOP AT EAST LAKE SQUARE MALL PLEASE

"The FLA. GULF COAST BUILDING TRADES COUNCIL, AFL-CIO, is requesting that you do not shop at the stores in the East Lake Square Mall because of The Mall ownership's contribution to substandard wages.

"The Wilson's Department Store under construction on these premises is being built by contractors who pay substandard wages and fringe benefits. In the past, the Mall's owner, The Edward J. DeBartolo Corporation, has supported labor and our local economy by insuring that the Mall and its

message was that "[t]he payment of substandard wages not only diminishes the working person's ability to purchase with earned, rather than borrowed, dollars, but it also undercuts the wage standard of the entire community." The handbills made clear that the union was seeking only a consumer boycott against the other mall tenants, not a secondary strike by their employees. At all four entrances to the mall for about three weeks in December 1979, the union peacefully distributed the handbills without any accompanying picketing or patrolling.

After DeBartolo failed to convince the union to alter the language of the handbills to state that its dispute did not involve DeBartolo or the mall lessees other than Wilson and to limit its distribution to the immediate vicinity of Wilson's construction site, it filed a complaint with the National Labor Relations Board (Board), charging the union with engaging in unfair labor practices under § 8(b)(4) of the National

stores be built by contractors who pay fair wages and fringe benefits. Now, however, and for no apparent reason, the Mall owners have taken a giant step backwards by permitting our standards to be torn down. The payment of substandard wages not only diminishes the working person's ability to purchase with earned, rather than borrowed, dollars, but it also undercuts the wage standard of the entire community. Since low construction wages at this time of inflation means decreased purchasing power, do the owners of East Lake Mall intend to compensate for the decreased purchasing power of workers of the community by encouraging the stores in East Lake Mall to cut their prices and lower their profits?

"CUT-RATE WAGES ARE NOT FAIR UNLESS MERCHANDISE PRICES ARE ALSO CUT-RATE.

"We ask for your support in our protest against substandard wages. Please do not patronize the stores in the East Lake Square Mall until the Mall's owner publicly promises that all construction at the Mall will be done using contractors who pay their employees fair wages and fringe benefits.

"IF YOU MUST ENTER THE MALL TO DO BUSINESS, please express to the store managers your concern over substandard wages and your support of our efforts.

"We are appealing only to the public—the consumer. We are not seeking to induce any person to cease work or to refuse to make deliveries."

Labor Relations Act (NLRA), 61 Stat. 141, as amended, 29 U. S. C. § 158(b)(4).² The Board's General Counsel issued a complaint, but the Board eventually dismissed it, concluding that the handbilling was protected by the publicity proviso of § 8(b)(4). *Florida Gulf Coast Bldg. & Constr. Trades Coun-*

² That section provides in pertinent part:

"§ 158. Unfair labor practices

"(b) Unfair labor practices by labor organization

"It shall be an unfair labor practice for a labor organization or its agents—

"(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

"(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

"... *Provided further*, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution."

cil, 252 N. L. R. B. 702 (1980). The Court of Appeals for the Fourth Circuit affirmed the Board, 662 F. 2d 264 (1981), but this Court reversed in *Edward J. DeBartolo Corp. v. NLRB*, 463 U. S. 147 (1983). There, we concluded that the handbilling did not fall within the proviso's limited scope of exempting "publicity intended to inform the public that the primary employer's product is 'distributed by' the secondary employer" because DeBartolo and the other tenants, as opposed to Wilson, did not distribute products of High. *Id.*, at 155-157. Since there had not been a determination below whether the union's handbilling fell within the prohibition of § 8(b)(4), and, if so, whether it was protected by the First Amendment, we remanded the case.

On remand, the Board held that the union's handbilling was proscribed by § 8(b)(4)(ii)(B). 273 N. L. R. B. 1431 (1985). It stated that under its prior cases "handbilling and other activity urging a consumer boycott constituted coercion." *Id.*, at 1432. The Board reasoned that "[a]ppealing to the public not to patronize secondary employers is an attempt to inflict economic harm on the secondary employers by causing them to lose business," and "such appeals constitute 'economic retaliation' and are therefore a form of coercion." *Id.*, at 1432, n. 6. It viewed the object of the handbilling as attempting "to force the mall tenants to cease doing business with DeBartolo in order to force DeBartolo and/or Wilson's not to do business with High." *Id.*, at 1432. The Board observed that it need not inquire whether the prohibition of this handbilling raised serious questions under the First Amendment, for "the statute's literal language and the applicable case law require[d]" a finding of a violation. *Ibid.* Finally, it reiterated its longstanding position that "as a congressionally created administrative agency, we will presume the constitutionality of the Act we administer." *Ibid.*

The Court of Appeals for the Eleventh Circuit denied enforcement of the Board's order. *Florida Gulf Coast Bldg. & Constr. Trades Council v. NLRB*, 796 F. 2d 1328,

1346 (1986). Because there would be serious doubts about whether §8(b)(4) could constitutionally ban peaceful handbilling not involving nonspeech elements, such as patrolling, the court applied our decision in *NLRB v. Catholic Bishop of Chicago*, 440 U. S. 490 (1979), to determine if there was a clear congressional intent to proscribe such handbilling. The language of the section, the court held, revealed no such intent, and the legislative history indicated that Congress, by using the phrase “threaten, coerce, or restrain,” was concerned with secondary picketing and strikes rather than appeals to consumers not involving picketing. 796 F. 2d, at 1336–1340. The court also concluded that the publicity proviso did not manifest congressional intent to ban all speech not coming within its terms because it was “drafted as an interpretive, explanatory section” and not as an exception to an otherwise all-encompassing prohibition on publicity in §8(b)(4). *Id.*, at 1344. The court went on to construe the section as not prohibiting consumer publicity; DeBartolo petitioned for certiorari. Because this case presents important questions of federal constitutional and labor law, we granted the petition, 482 U. S. 913 (1987), and now affirm.

The Board, the agency entrusted by Congress with the authority to administer the NLRA, has the “special function of applying the general provisions of the Act to the complexities of industrial life.” *NLRB v. Erie Resistor Corp.*, 373 U. S. 221, 236 (1963); see *Pattern Makers v. NLRB*, 473 U. S. 95, 114 (1985); *NLRB v. Steelworkers*, 357 U. S. 357, 362–363 (1958). Here, the Board has construed §8(b)(4) of the Act to cover handbilling at a mall entrance urging potential customers not to trade with any retailers in the mall, in order to exert pressure on the proprietor of the mall to influence a particular mall tenant not to do business with a nonunion construction contractor. That statutory interpretation by the Board would normally be entitled to deference unless that construction were clearly contrary to the intent of Congress. *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842–843, and n. 9 (1984).

Another rule of statutory construction, however, is pertinent here: where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress. *Catholic Bishop, supra*, at 499–501, 504. This cardinal principle has its roots in Chief Justice Marshall's opinion for the Court in *Murray v. The Charming Betsy*, 2 Cranch 64, 118 (1804), and has for so long been applied by this Court that it is beyond debate. *E. g.*, *Catholic Bishop, supra*, at 500–501; *Machinists v. Street*, 367 U. S. 740, 749–750 (1961); *Crowell v. Benson*, 285 U. S. 22, 62 (1932); *Lucas v. Alexander*, 279 U. S. 573, 577 (1929); *Panama R. Co. v. Johnson*, 264 U. S. 375, 390 (1924); *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U. S. 366, 407–408 (1909); *Parsons v. Bedford*, 3 Pet. 433, 448–449 (1830) (Story, J.). As was stated in *Hooper v. California*, 155 U. S. 648, 657 (1895), “[t]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.” This approach not only reflects the prudential concern that constitutional issues not be needlessly confronted, but also recognizes that Congress, like this Court, is bound by and swears an oath to uphold the Constitution. The courts will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it. See *Grenada County Supervisors v. Brogden*, 112 U. S. 261, 269 (1884).

We agree with the Court of Appeals and respondents that this case calls for the invocation of the *Catholic Bishop* rule, for the Board's construction of the statute, as applied in this case, poses serious questions of the validity of § 8(b)(4) under the First Amendment. The handbills involved here truthfully revealed the existence of a labor dispute and urged potential customers of the mall to follow a wholly legal course of action, namely, not to patronize the retailers doing business in the mall. The handbilling was peaceful. No picketing or

patrolling was involved. On its face, this was expressive activity arguing that substandard wages should be opposed by abstaining from shopping in a mall where such wages were paid. Had the union simply been leafletting the public generally, including those entering every shopping mall in town, pursuant to an annual educational effort against substandard pay, there is little doubt that legislative proscription of such leaflets would pose a substantial issue of validity under the First Amendment. The same may well be true in this case, although here the handbills called attention to a specific situation in the mall allegedly involving the payment of unacceptably low wages by a construction contractor.

That a labor union is the leafletter and that a labor dispute was involved does not foreclose this analysis. We do not suggest that communications by labor unions are never of the commercial speech variety and thereby entitled to a lesser degree of constitutional protection. The handbills involved here, however, do not appear to be typical commercial speech such as advertising the price of a product or arguing its merits, for they pressed the benefits of unionism to the community and the dangers of inadequate wages to the economy and the standard of living of the populace. Of course, commercial speech itself is protected by the First Amendment, *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 762 (1976), and however these handbills are to be classified, the Court of Appeals was plainly correct in holding that the Board's construction would require deciding serious constitutional issues. See *Consolidated Edison Co. v. Public Service Comm'n of N. Y.*, 447 U. S. 530, 534-535, 537 (1980); *Smith v. Daily Mail Publishing Co.*, 443 U. S. 97, 102-103 (1979); *Organization for a Better Austin v. Keefe*, 402 U. S. 415, 419-420 (1971).

The Board was urged to construe the statute in light of the asserted constitutional considerations, but thought that it was constrained by its own prior authority and cases in the Courts of Appeals, as well as by the express language of

the Act, to hold that §8(b)(4) must be construed to forbid the handbilling involved here. Even if this construction of the Act were thought to be a permissible one, we are quite sure that in light of the traditional rule followed in *Catholic Bishop*, we must independently inquire whether there is another interpretation, not raising these serious constitutional concerns, that may fairly be ascribed to §8(b)(4)(ii)(B). This the Court has done in several cases.

In *NLRB v. Drivers*, 362 U. S. 274, 284 (1960), for example, the Court rejected the Board's interpretation of the phrase "restrain or coerce" to include peaceful recognition picketing and stated:

"In the sensitive area of peaceful picketing Congress has dealt explicitly with isolated evils which experience has established flow from such picketing. Therefore, unless there is the clearest indication in the legislative history of §8(b)(1)(A) supporting the Board's claim of power under that section, we cannot sustain the Board's order here. We now turn to an examination of the legislative history."

That examination of the legislative history failed to yield the requisite "clearest indication." Similarly, in *NLRB v. Fruit Packers*, 377 U. S. 58, 63 (1964) (*Tree Fruits*), we disagreed with the Board's determination that §8(b)(4)(ii)(B) prohibited all consumer picketing at a secondary establishment, no matter the economic consequences of that picketing, because our examination of the legislative history led us to "conclude that it does not reflect with the requisite clarity a congressional plan to proscribe all peaceful consumer picketing at secondary sites, and, particularly, any concern with peaceful picketing when it is limited, as here, to persuading" customers not to purchase a specific product of the secondary establishment. We once more looked for the "isolated evils" that Congress had focused on because "[b]oth the congressional policy and our adherence to this principle of interpretation

reflect concern that a broad ban against peaceful picketing might collide with the guarantees of the First Amendment." *Id.*, at 62-63; see *id.*, at 67, 71. Because there was not the required "clearest indication in the legislative history," we rejected the Board's interpretation that limited expressive activities. Again, in *Catholic Bishop*, we independently determined whether the Board's jurisdiction extended to parochial schools in the face of a substantial First Amendment challenge, although the Board itself had previously considered the First Amendment challenge and presumably interpreted the statute cognizable of those limits. 440 U. S., at 497-499.

We follow this course here and conclude, as did the Court of Appeals, that the section is open to a construction that obviates deciding whether a congressional prohibition of handbilling on the facts of this case would violate the First Amendment.

The case turns on whether handbilling such as involved here must be held to "threaten, coerce, or restrain any person" to cease doing business with another, within the meaning of § 8(b)(4)(ii)(B). We note first that "induc[ing] or encourag[ing]" employees of the secondary employer to strike is proscribed by § 8(b)(4)(i). But more than mere persuasion is necessary to prove a violation of § 8(b)(4)(ii)(B): that section requires a showing of threats, coercion, or restraints. Those words, we have said, are "nonspecific, indeed vague," and should be interpreted with "caution" and not given a "broad sweep," *Drivers, supra*, at 290; and in applying § 8(b)(1)(A) they were not to be construed to reach peaceful recognitional picketing. Neither is there any necessity to construe such language to reach the handbills involved in this case. There is no suggestion that the leaflets had any coercive effect on customers of the mall. There was no violence, picketing, or patrolling and only an attempt to persuade customers not to shop in the mall.

The Board nevertheless found that the handbilling "coerced" mall tenants and explained in a footnote that "[a]p-

pealing to the public not to patronize secondary employers is an attempt to inflict economic harm on the secondary employers by causing them to lose business. As the case law makes clear, such appeals constitute 'economic retaliation' and are therefore a form of coercion." 273 N. L. R. B., at 1432, n. 6.³ Our decision in *Tree Fruits*, however, makes untenable the notion that *any* kind of handbilling, picketing, or other appeals to a secondary employer to cease doing business with the employer involved in the labor dispute is "coercion" within the meaning of § 8(b)(4)(ii)(B) if it has some economic impact on the neutral. In that case, the union picketed a secondary employer, a retailer, asking the public not to buy a product produced by the primary employer. We held that the impact of this picketing was not coercion within the meaning of § 8(b)(4) even though, if the appeal succeeded, the retailer would lose revenue.⁴

NLRB v. Retail Store Employees, 447 U. S. 607 (1980) (*Safeco*), in turn, held that consumer picketing urging a general boycott of a secondary employer aimed at causing him to sever relations with the union's real antagonist was coercive and forbidden by § 8(b)(4). It is urged that *Safeco* rules this

³The Board cited two of its decisions that had been enforced by the Courts of Appeals as authority for its construction of § 8(b)(4)(ii)(B). The court in *Honolulu Typographical Union No. 37 v. NLRB*, 131 U. S. App. D. C. 1, 6, 401 F. 2d 952, 957 (1968), enf'g 167 N. L. R. B. 1030 (1967), upheld the Board's determination that the handbilling there violated § 8(b)(4)(ii)(B), but that handbilling was part and parcel of a consumer picketing campaign in which the handbills were distributed at the edge of a line of picketers who were patrolling the entrance to the mall. The absence of picketing in the present case distinguishes it from *Honolulu Typographical*. In *Great Western Broadcasting Corp. v. NLRB*, 356 F. 2d 434, 436 (CA9), enf'g 150 N. L. R. B. 467 (1964), cert. denied, 384 U. S. 1002 (1966), the court upheld the Board's determination that the handbilling there fell within the publicity proviso and thus was not unlawful, but it stated in dictum that § 8(b)(4)(ii)(B) covered the union activity. The court provided no analysis in support of the brief sentence and we find it unpersuasive.

⁴The Board points out that *Tree Fruits* indicates urging customer boycotts can be coercion within the meaning of § 8(b)(4). See 377 U. S., at 72. But the Court was there talking about picketing and not mere handbilling.

case because the union sought a general boycott of all tenants in the mall. But "picketing is qualitatively 'different from other modes of communication,'" *Babbitt v. Farm Workers*, 442 U. S. 289, 311, n. 17 (1979) (quoting *Hughes v. Superior Court*, 339 U. S. 460, 465 (1950)), and *Safeco* noted that the picketing there actually threatened the neutral with ruin or substantial loss. As JUSTICE STEVENS pointed out in his concurrence in *Safeco*, 447 U. S., at 619, picketing is "a mixture of conduct and communication" and the conduct element "often provides the most persuasive deterrent to third persons about to enter a business establishment." Handbills containing the same message, he observed, are "much less effective than labor picketing" because they "depend entirely on the persuasive force of the idea." *Ibid.* Similarly, the Court stated in *Hughes v. Superior Court*, *supra*, at 465:

"Publication in a newspaper, or by distribution of circulars, may convey the same information or make the same charge as do those patrolling a picket line. But the very purpose of a picket line is to exert influences, and it produces consequences, different from other modes of communication."

In *Tree Fruits*, we could not discern with the "requisite clarity" that Congress intended to proscribe all peaceful consumer picketing at secondary sites. There is even less reason to find in the language of § 8(b)(4)(ii)(B), standing alone, any clear indication that handbilling, without picketing, "coerces" secondary employers. The loss of customers because they read a handbill urging them not to patronize a business, and not because they are intimidated by a line of picketers, is the result of mere persuasion, and the neutral who reacts is doing no more than what its customers honestly want it to do.

The Board argues that our first *DeBartolo* case goes far to dispose of this case because there we said that the only non-picketing publicity "exempted from the prohibition is publicity intended to inform the public that the primary employ-

er's product is 'distributed by' the secondary employer." 463 U. S., at 155. We also indicated that if the handbilling were protected by the proviso, the distribution requirement would be without substantial practical effect. *Id.*, at 157. But we obviously did not there conclude or indicate that the handbills were covered by § 8(b)(4)(ii)(B), for we remanded the case on this very issue. *Id.*, at 157-158.⁵

It is nevertheless argued that the second proviso to § 8(b)(4) makes clear that that section, as amended in 1959, was intended to proscribe nonpicketing appeals such as hand-

⁵ The Board's reliance on pre-1959 cases interpreting the phrase "restrain or coerce" in § 8(b)(1)—and similar wording in § 8(a)(1)—to support its interpretation of the phrase "threaten, coerce, or restrain" in § 8(b)(4)(ii)(B) is misplaced. The Board had interpreted "restrain or coerce" to prohibit peaceful picketing calling attention to a labor dispute, but this Court held in *NLRB v. Drivers*, 362 U. S. 274, 290 (1960), that those words, as used in § 8(b)(1)(A), reached only violent conduct and did not even include peaceful picketing. See *supra*, at 577. Furthermore, the Court of Appeals for the Ninth Circuit had rejected the Board's holding that the circulation of "We Do Not Patronize" lists was coercive. *NLRB v. International Assn. of Machinists*, 263 F. 2d 796 (1959), cert. denied, 362 U. S. 940 (1960). The Board suggests that *NLRB v. United Rubber, Cork, Linoleum & Plastic Workers*, 269 F. 2d 694, 701 (CA4 1959), rev'd, 362 U. S. 329 (1960), is to the contrary, but the opinion in that case focused on handbilling combined with picketing; and it was the Ninth Circuit case that was later referred to on the Senate floor in reference to nonpicketing appeals. See n. 8, *infra*.

Contrary to the Board's view, the cases finding blacklisting of employees to be coercive within the meaning of §§ 8(a)(1) and 8(b)(1)(A) are not particularly helpful here. They do no more than illustrate that the "restrain or coerce" language of those sections has been construed to reach conduct, such as blacklisting, that threatens employees' livelihood and is imposed in retaliation for the exercise of NLRA § 7 rights. Furthermore, when done by the union, blacklisting urges employers to discriminate against prospective employees on the basis of union membership, an unlawful practice under the Act. 29 U. S. C. §§ 157, 158(a)(3). See, e. g., *Pacific American Shipowners Assn.*, 98 N. L. R. B. 582, 586, 639-640 (1952).

Of course, as we have explained in the text, the post-1959 decisions of the Board construing § 8(b)(4)(ii)(B) to reach nonpicketing publicity do not foreclose our independent inquiry into the meaning of that section.

billing urging a consumer boycott of a neutral employer. That proviso reads as follows:

“Provided further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution.”

By its terms, the proviso protects nonpicketing communications directed at customers of a distributor of goods produced by an employer with whom the union has a labor dispute. Because handbilling and other consumer appeals not involving such a distributor are not within the proviso, the argument goes, those appeals must be considered coercive within the meaning of § 8(b)(4)(ii)(B). Otherwise, it is said, the proviso is meaningless, for if handbilling and like communications are never coercive and within the reach of the section, there would have been no need whatsoever for the proviso.

This approach treats the proviso as establishing an exception to a prohibition that would otherwise reach the conduct excepted. But this proviso has a different ring to it. It states that § 8(b)(4) “shall not be construed” to forbid certain described nonpicketing publicity. That language need not be read as an exception. It may indicate only that without the proviso, the particular nonpicketing communication the

proviso protects might have been considered to be coercive, even if other forms of publicity would not be. Section 8(b)(4), with its proviso, may thus be read as not covering nonpicketing publicity, including appeals to customers of a retailer as they approach the store, urging a complete boycott of the retailer because he handles products produced by nonunion shops.⁶

The Board's reading of § 8(b)(4) would make an unfair labor practice out of any kind of publicity or communication to the public urging a consumer boycott of employers other than those the proviso specifically deals with.⁷ On the facts of this case, newspaper, radio, and television appeals not to patronize the mall would be prohibited; and it would be an unfair labor practice for unions in their own meetings to urge their members not to shop in the mall. Nor could a union's handbills simply urge not shopping at a department store because it is using a nonunion contractor, although the union could safely ask the store's customers not to buy there because it is selling mattresses not carrying the union label. It is difficult, to say the least, to fathom why Congress would consider appeals urging a boycott of a distributor of a nonunion product to be more deserving of protection than nonpicketing persuasion of customers of other neutral employers such as that involved in this case.

Neither do we find any clear indication in the relevant legislative history that Congress intended § 8(b)(4)(ii)(B) to pro-

⁶ Consumer picketing against the distributor of a struck manufacturer's product was the paradigm case considered in the debates. 105 Cong. Rec. 17904 (1959), 2 NLRB, Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, p. 1437 (1959) (hereinafter Leg. Hist.) (Sen. Goldwater, discussing Conference agreement); 105 Cong. Rec. 15672-15673, 2 Leg. Hist. 1615 (Rep. Griffin); 105 Cong. Rec. 16591, 2 Leg. Hist. 1708 (analysis prepared by Rep. Thompson and Sen. Kennedy).

⁷ At oral argument of this cause, counsel for DeBartolo and the Board admitted that such publicity would be prohibited under the Board's interpretation of the section. Tr. of Oral Arg. 8-9, 37-38, 40 (counsel for DeBartolo); *id.*, at 17-19 (counsel for the Board).

scribe peaceful handbilling, unaccompanied by picketing, urging a consumer boycott of a neutral employer. That section was one of several amendments to the NLRA enacted in 1959 and aimed at closing what were thought to be loopholes in the protections to which secondary employers were entitled. We recounted the legislative history in *Tree Fruits* and *NLRB v. Servette, Inc.*, 377 U. S. 46 (1964), and the Court of Appeals carefully reexamined it in this case and found "no affirmative intention of Congress clearly expressed to prohibit nonpicketing labor publicity." 796 F. 2d, at 1346. For the following reasons, for the most part expressed by the Court of Appeals, we agree with that conclusion.

First, among the concerns of the proponents of the provision barring threats, coercion, or restraints aimed at secondary employers was consumer boycotts of neutral employers carried out by picketing. At no time did they suggest that merely handbilling the customers of the neutral employer was one of the evils at which their proposals were aimed. Had they wanted to bar any and all nonpicketing appeals, through newspapers, radio, television, handbills, or otherwise, the debates and discussions would surely have reflected this intention. Instead, when asked, Congressman Griffin, cosponsor of the bill that passed the House, stated that the bill covered boycotts carried out by picketing neutrals but would not interfere with the constitutional right of free speech. 105 Cong. Rec. 15673, 2 Leg. Hist. 1615.

Second, the only suggestions that the ban against coercing secondary employers would forbid peaceful persuasion of customers by means other than picketing came from the opponents of any proposals to close the perceived loopholes in § 8(b)(4). Among their arguments in both the House and the Senate was that picketing and handbilling a neutral employer to force him to cease dealing in the products of an employer engaged in labor disputes, appeals which were then said to be legal, would be forbidden by the proposal that became § 8(b)(4)(ii)(B). The prohibition, it was said, "reaches not only

picketing but leaflets, radio broadcasts, and newspaper advertisements, thereby interfering with freedom of speech." 105 Cong. Rec. 15540, 2 Leg. Hist. 1576.⁸ The views of opponents of a bill with respect to its meaning, however, are not persuasive:

"[W]e have often cautioned against the danger, when interpreting a statute, of reliance upon the views of its legislative opponents. In their zeal to defeat a bill, they understandably tend to overstate its reach. 'The fears and doubts of the opposition are no authoritative guide to the construction of legislation. It is the sponsors that we look to when the meaning of the statutory words is in doubt.'" *Tree Fruits*, 377 U. S., at 66 (quoting *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U. S. 384, 394-395 (1951)).

Without more, the interpretation put on the words "threaten, coerce, or restrain" by those opposed to the amendment hardly settles the matter.

Third, § 8(b)(4)(ii)(B) was one of the amendments agreed upon by a House-Senate Conference on the House's Landrum-Griffin bill and the Senate's Kennedy-Ervin bill. An analysis of the Conference bill was presented in the House by Representative Griffin and in the Senate by Senator Goldwater. With respect to appeals to consumers, the summary said that

⁸This statement was made in an analysis of the Landrum-Griffin bill by Representatives Thompson and Udall, two of its opponents. Shortly thereafter but prior to agreement on a Conference bill, this analysis on the secondary boycott provision was adopted almost verbatim in a report issued by Representative Thompson and Senator Kennedy, who also opposed the Landrum-Griffin bill. 105 Cong. Rec. 16591, 2 Leg. Hist. 1708. Other members of the opposition made similar claims, most notably Senator Humphrey, who led the fight against amending § 8(b)(4) and urged that the limit on secondary boycotts proposed by Senator Goldwater would overturn settled law permitting leafletting of secondary businesses. He referred particularly to a decision of the Court of Appeals for the Ninth Circuit, the *Machinists* case discussed in n. 5, *supra*. 105 Cong. Rec. 6232, 2 Leg. Hist. 1037.

the House provision prohibiting secondary consumer picketing was adopted but "with clarification that other forms of publicity are not prohibited." 105 Cong. Rec. 18706, Leg. Hist. 1454 (Sen. Goldwater); 105 Cong. Rec. 18022, Leg. Hist. 1712 (Rep. Griffin).⁹ The clarification referred to was the second proviso to § 8(b)(4). See *supra*, at 581-582. The Court of Appeals held that although the proviso was itself confined to advising the customers of an employer that the latter was distributing a product of another employer with whom the union had a labor dispute, the legislative history did not foreclose understanding the proviso as a clarification of the meaning of § 8(b)(4) rather than an exception to a general ban on consumer publicity. We agree with this view.

In addition to the summary presented by Senator Goldwater and Representative Griffin, Senator Kennedy, the Chairman of the Conference Committee, in presenting the Conference Report on the Senate floor, 105 Cong. Rec. 17898-17899, 2 Leg. Hist. 1431-1432, stated that under the amendments as reported by the Conference Committee, a "union can hand out handbills at the shop, can place advertisements in newspapers, can make announcements over

⁹That summary describes the limits on secondary boycotts as falling within four categories:

"1. Closes loophole which permitted secondary boycott through coercion applied directly against secondary employer (instead of his employees).

"2. Closes loophole which permitted secondary boycott by inducing employees individually (rather than in concert).

"3. Closes loophole which permitted secondary boycotts involving railroads, municipalities, and governmental agencies because their employees were not 'employees' under definition in the act.

"4. Prohibits secondary customer picketing at retail store which happens to sell product produced by manufacturer with whom union has dispute."

As for the fourth category, the report notes that the Conference agreement "[a]dopts House provision with clarification that other forms of publicity are not prohibited; also clarification that picketing at primary site is not secondary boycott." 105 Cong. Rec. 18706, 18022, 2 Leg. Hist. 1454, 1712.

the radio, and can carry on all publicity short of having ambulatory picketing in front of a secondary site." And he assured Senator Goldwater that union buy-American campaigns—that is, publicity requesting that consumers not buy foreign-made products, even though there is no ongoing labor dispute with the actual producer—would not be prohibited by the section.

Senator Kennedy included in his statement, however, the following:

"Under the Landrum-Griffin Bill it would have been impossible for a union to inform the customers of a secondary employer that that employer or store was selling goods which were made under racket conditions or sweatshop conditions, or in a plant where an economic strike was in progress. We were not able to persuade the House conferees to permit picketing in front of that secondary shop, but we were able to persuade them to agree that the union shall be free to conduct informational activity short of picketing." 105 Cong. Rec. 17898-17899, 2 Leg. Hist. 1432.

The Board relies on this part of the Senator's exposition as an authoritative interpretation of the words "threaten, coerce, or restrain" and argues that except as saved by the express language of the proviso, informational appeals to customers not to deal with secondary employers are unfair labor practices. The Senator's remarks about the meaning of § 8(b)(4)(ii) echoed his views, and that of others, expressed in opposing and defeating in the Senate any attempts to give more protection to secondary employers from consumer boycotts, whether carried out by picketing or non-picketing means. See n. 8, *supra*, and accompanying text. And if the proviso added in conference were an exception rather than a clarification, it surely would not follow, as the Senator said, that under the Conference bill, unions would be free to "conduct informational activity short of picketing" and could handbill, advertise in newspapers, and carry out

all publicity short of ambulatory picketing in front of a secondary site. Nor would buy-American appeals be permissible, for they do not fall within the proviso's terms. At the very least, the Kennedy-Goldwater colloquy falls far short of revealing a clear intent that all nonpicketing appeals to customers urging a secondary boycott were unfair practices unless protected by the express words of the proviso. Nor does that exchange together with the other bits of legislative history relied on by the Board rise to that level.

In our view, interpreting § 8(b)(4) as not reaching the hand-billing involved in this case is not foreclosed either by the language of the section or its legislative history. That construction makes unnecessary passing on the serious constitutional questions that would be raised by the Board's understanding of the statute. Accordingly, the judgment of the Court of Appeals is

Affirmed.

JUSTICE O'CONNOR and JUSTICE SCALIA concur in the judgment.

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

Syllabus

REGENTS OF THE UNIVERSITY OF CALIFORNIA
v. PUBLIC EMPLOYMENT RELATIONS
BOARD ET AL.APPEAL FROM THE COURT OF APPEAL OF CALIFORNIA, FIRST
APPELLATE DISTRICT

No. 86-935. Argued January 12, 1988—Decided April 20, 1988

The Private Express Statutes establish the postal monopoly and generally prohibit the private carriage of letters over postal routes without the payment of postage to the United States Postal Service. On the basis of those statutes, the state university (governed by appellant Regents and hereafter referred to as appellant) refused the request of a union to use its internal mail system to carry unstamped letters from the union to certain of its employees whom the union was attempting to organize. Appellee Public Employment Relations Board (PERB) upheld the union's charge that appellant's refusal violated the requirement of the California Higher Education Employer-Employee Relations Act (HEERA) that employers grant unions access to their "means of communication." Agreeing with this holding, but noting that the HEERA right of access was expressly subject to "reasonable regulations," the State Court of Appeal remanded for a determination whether appellant's refusal was reasonable in light of the surrounding circumstances, including the Private Express Statutes. PERB then found that the HEERA requirement was consistent with federal law because the carriage involved fell within the "letters-of-the-carrier" and the "private-hands" exceptions to the Private Express Statutes. The Court of Appeal affirmed, and the State Supreme Court denied review.

Held: Appellant's delivery of the union's unstamped letters would violate the Private Express Statutes. Pp. 594-603.

(a) The letters-of-the-carrier exception, which permits the private carriage of letters that "relate" to the "current business" of the carrier, does not apply. The alleged "business" in this case—the union's efforts to organize appellant's employees—although a subject in which appellant certainly is interested, is not close enough to appellant's own affairs to be the natural subject of letters concerning appellant's "current business." It is a subject more accurately described as the union's own current business. The argument that HEERA makes harmonious labor relations the business of state universities, thereby rendering the union's business appellant's business, is a far too expansive reading of the exception, since that reading would permit a State to define mail delivery as the

"current business" of some state agency and thereby defeat the postal monopoly. Rather, the legislative history confirms that the statutory language is much narrower than appellees contend, which view is consistent with this Court's only previous decision concerning the exception, *United States v. Erie R. Co.*, 235 U. S. 513. Pp. 594-597.

(b) Nor does the private-hands exception apply, since delivery of the union's letters would violate the exception's requirement that carriage be "without compensation." Giving the quoted phrase its normal meaning, it is clear that Congress unambiguously intended that no form of compensation, whether direct or indirect, may flow from the sender to the carrier. An arm's-length business relationship such as the one between the union and the employees on the one side and appellant on the other ordinarily involves an exchange of benefits constituting "compensation" for the carrier. By delivering the union's unstamped letters, appellant would perform a service for its employees that they would otherwise pay for through their union dues, which service would become part of the employees' package of monetary and nonmonetary benefits that appellant provides in exchange for their labor. Thus, the facts that the union would not specifically pay for appellant's carriage of its letters, and that appellant would merely be performing a duty imposed by state law, do not render the carriage "without compensation." Pp. 597-601.

(c) Because this Court's analysis of the letters-of-the-carrier and private-hands exceptions and their legislative history reveals Congress' clear intent, the issue of deference to the Postal Service's regulations construing the exceptions need not be addressed. Pp. 601-602.

182 Cal. App. 3d 71, 227 Cal. Rptr. 57, reversed.

O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BRENNAN, BLACKMUN, and SCALIA, JJ., joined. WHITE, J., filed an opinion concurring in the judgment, *post*, p. 603. STEVENS, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 604. KENNEDY, J., took no part in the consideration or decision of the case.

James N. Odle argued the cause for appellant. With him on the briefs were *James E. Holst*, *Susan M. Thomas*, and *Kingsley R. Browne*.

Christopher J. Wright 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*, *Deputy Solicitor General Lauber*, *Anthony J. Steinmeyer*, and *Charles D. Hawley*.

Andrea L. Biren argued the cause for appellees and filed a brief for appellee California Public Employment Relations Board. *Andrew Thomas Sinclair* filed a brief for appellee Wilson.*

JUSTICE O'CONNOR delivered the opinion of the Court.

This case presents the question whether a state university's delivery of unstamped letters from a labor union to university employees violates the Private Express Statutes, 18 U. S. C. §§ 1693-1699, 39 U. S. C. §§ 601-606. These statutes establish the postal monopoly and generally prohibit the private carriage of letters over postal routes without the payment of postage to the United States Postal Service.

I

Appellant Regents govern a large state-owned university with over 100,000 employees. The university (hereafter referred to as appellant) operates an internal mail system to facilitate the delivery of mail to the various sites on its campuses. Appellant's employees collect mail originating on the campuses from many mail depositories and take it to a central location for sorting. The mail is separated into three groups: (1) mail already bearing United States postage; (2) unstamped internal university mail; and (3) other unstamped mail. Group (1) is delivered to the Postal Service without further handling by appellant. Group (2) is monitored to ensure that it includes only official university mail. Group (3) is examined for any letters addressed to university destinations that come within an exception to the Private Express Statutes and can therefore be delivered by the appellant without postage. Appellant affixes United States postage to

*Briefs of *amici curiae* urging affirmance were filed for the American Federation of State, County, and Municipal Employees, AFL-CIO, by *Richard Kirschner*; for the American Federation of Teachers by *Lawrence A. Poltrock* and *Gregory N. Freerksen*; for the California Faculty Association by *Julius Reich* and *Glenn Rothner*; and for the National Educational Association et al. by *Robert H. Chanin* and *Kirsten Zerger*.

the remainder of mail in group (3) and delivers it to the Postal Service, then charges the senders for the costs involved.

In late 1979, appellee William H. Wilson, president of appellee Local 371 of the American Federation of State, County, and Municipal Employees (Union), attempted to use appellant's internal mail system to send unstamped letters from the Union to certain employees of appellant. The Union represented these employees and had filed a request for recognition of a bargaining unit. A subsequent unit determination, however, placed these employees in a different bargaining unit. Brief for Appellee Wilson 2, n. 2. Appellant refused to carry the letters in its internal mail system on the ground that the Private Express Statutes prohibited such carriage. Believing that this refusal violated a state law, the Higher Education Employer-Employee Relations Act (HEERA), Cal. Govt. Code Ann. §§ 3560-3599 (West 1980), Wilson and the Union filed an unfair labor practice charge with appellee California Public Employment Relations Board (PERB), the state agency charged with interpretation and enforcement of HEERA.

Before PERB, appellant argued that the carriage of the Union letters would violate the Private Express Statutes; it relied on an advisory opinion from the United States Postal Service to that effect. Advisory Op., PES No. 82-9 (July 2, 1982), App. to Juris. Statement A66. Wilson and the Union in turn argued that refusal to carry the letters violated HEERA's requirement that employers grant unions access to their "means of communication." PERB initially declined to consider the federal law issues pressed by appellant and held that HEERA required delivery of the letters. The California Court of Appeal agreed with PERB's determination that denial of access violated HEERA, but noted that the HEERA right of access was expressly subject to "reasonable regulations." 139 Cal. App. 3d 1037, 1041, 189 Cal. Rptr. 298, 300-301 (1983). The court found an unresolved factual issue, namely, whether appellant's denial of

access was a "reasonable regulation" in light of all the surrounding circumstances, including the Private Express Statutes. It therefore remanded the case back to PERB for consideration of this issue. *Id.*, at 1042, 189 Cal. Rptr., at 301. On remand, PERB found this HEERA requirement to be consistent with federal law because it determined that the carriage involved was within two different exceptions to the Private Express Statutes, namely the "letters-of-the-carrier" exception, 18 U. S. C. § 1694; 39 CFR § 310.3(b) (1987), and the "private-hands" exception, 18 U. S. C. § 1696(c); 39 CFR § 310.3(c) (1987).¹

The California Court of Appeal affirmed. 182 Cal. App. 3d 71, 227 Cal. Rptr. 57 (1986). The court concluded that the "letters-of-the-carrier" exception permitted the delivery of the Union's letters through appellant's internal mail system. In light of this conclusion, the court declined to address the "private-hands" exception. *Id.*, at 77, 227 Cal. Rptr., at 60. The California Supreme Court denied appellant's petition for review. App. to Juris. Statement A-13. We noted probable jurisdiction, 483 U. S. 1004 (1987), and now reverse.

II

Congress enacted the Private Express Statutes pursuant to its constitutional authority to establish "Post Offices and post roads," U. S. Const., Art. I, § 8, cl. 7. In general these statutes establish the United States Postal Service as a monopoly by prohibiting others from carrying letters over postal routes.

¹The Postal Service is authorized to suspend the operation of the Private Express Statutes when required by the "public interest," 39 U. S. C. § 601(b). In this case, PERB also found that the Postal Service's "suspension" for letters of "*bona fide* student or faculty organizations," 39 CFR § 320.4 (1987), applied to the letters involved here and therefore permitted their carriage by appellant. The California Court of Appeal did not address this ground and PERB has expressly declined to press it before this Court. Brief for Appellee PERB 16, n. 9. Accordingly, we do not consider the applicability of the suspension.

A postal monopoly has prevailed in this country since the Articles of Confederation, see Act of Oct. 18, 1782, 23 J. Continental Cong. 672-673 (G. Hunt ed. 1914), and Congress embraced the concept in its first postal law, see Act of Feb. 20, 1792, ch. 7, § 14, 1 Stat. 236. Because Congress desires "prompt, reliable, and efficient services to [postal] patrons in *all* areas," 39 U. S. C. § 101(a) (emphasis added), it has enacted the Private Express Statutes and has provided for nationwide delivery of mail at uniform rates.

There is no doubt that the general prohibition would apply to the carriage involved here, see 18 U. S. C. §§ 1693, 1694, so the central issue is whether such carriage is within one of the numerous exceptions to the Private Express Statutes. Appellees urge that both the "letters-of-the-carrier" and "private-hands" exceptions apply. We consider each in turn.

A

The letters-of-the-carrier exception is founded on the portion of 18 U. S. C. § 1694 italicized below:

"Whoever . . . carries, otherwise than in the mail, any letters or packets, *except such as relate . . . to the current business of the carrier . . .* shall, except as otherwise provided by law, be fined not more than \$50." (Emphasis added.)

It is this exception that allows appellant to operate an internal mail system at all. To fall within the exception, the face of the statute requires that the letters "relate" to the "current business" of the carrier. Precisely what constitutes a carrier's "current business" is not further described. The ordinary sweep of the term, however, falls far short of encompassing the letters involved in this case. The letters relate to the Union's efforts to organize certain of appellant's employees into a bargaining unit. This is a subject in which appellant certainly is interested, but it is also a subject which can be accurately described only as the Union's current business, not appellant's. It strains the statutory language to

contend that the phrase "current business" includes such activity.

Appellees argue that California has through HEERA made harmonious labor relations the business of its state universities, and thus in a sense the Union's business *is* the university's business. Cf. Cal. Govt. Code Ann. § 3560(a) (West 1980) ("fundamental interest in the development of harmonious and cooperative labor relations"). To be sure, a State generally is free to define the nature of its institutions and the scope of their activities as it sees fit. But this principle must have some limits in this context for, otherwise, a State could define delivery of mail to all its citizens as the "current business" of some state agency and thereby defeat the postal monopoly. Appellees are urging far too expansive a reading of the statute. We rely on the normal meaning of the language chosen by Congress and conclude that the letters-of-the-carrier exception does not permit appellant to carry the Union's letters.

The legislative history confirms our reading of the statutory language, making clear that the exception is a narrow one. Congress added the letters-of-the-carrier exception to the Private Express Statutes in 1909. Until that time, the prohibition on private carriage was unqualified. The new exception responded to an Opinion of the Attorney General rendered in 1896. 21 Op. Atty. Gen. 394, 397-399. That opinion concerned a Postal Department regulation that allowed railroads to carry their own mail. The Attorney General said that the regulation was valid because two conditions were present. First, the letters were related to the carrier's business. Second, the letters were "letters sent by or addressed to the carrying company, or on its behalf." *Id.*, at 400. The Attorney General concluded that without the second condition, the implied exception would be too broad.

Congress generally approved of the Attorney General's decision, but some Members found the exception difficult to square with the express, unqualified language of the statute.

See 42 Cong. Rec. 1901-1905 (1908). Therefore a movement began to amend the statute to include the present exception for letters that relate to "the current business of the carrier." *Id.*, at 1976. See Act of Mar. 4, 1909, ch. 321, § 184, 35 Stat. 1124. Senator Sutherland, the sponsor of the specific amendment, explained its intent:

"I move that amendment because I think that it puts in express language precisely what the section means as it stands without it I think the opinion of the Attorney-General . . . gives the correct construction to this section. The section is dealing with the carrying of mail for others. It is not dealing with the question of the carrying of the mail for the carrier itself." 42 Cong. Rec. 1976 (1908).

The House Report reflected a similar intent that the amendment put the statute "in exact conformity with the construction placed upon existing law." 43 Cong. Rec. 3790 (1909) (referring to 21 Op. Atty. Gen. 394 (1896)).

This history suggests an intention to codify the Attorney General's construction. That construction includes a requirement that the letters be "sent by or addressed to the carrying company, or on its behalf," to qualify for the letters-of-the-carrier exception. 21 Op. Atty. Gen., at 400. See also 29 Op. Atty. Gen. 418, 419 (1912) ("Congress has imposed two conditions upon the free transportation of letters outside the mail: First, that the letters should be the letters of the carrier itself; and second, that they should relate to its own current business"); 28 Op. Atty. Gen. 537 (1910).

Our only previous decision concerning the letters-of-the-carrier exception, *United States v. Erie R. Co.*, 235 U. S. 513 (1915), is consistent with a narrow view of the statutory language. *Erie* involved carriage by a railroad of letters concerning a joint venture between the railroad and a telegraph company. The Court simply held that the "business of the carrier" included the business of the joint enterprise. *Erie* therefore sheds no light on the proper construction of the

statute in this quite different context. Moreover, the specific letters involved in *Erie* fall within our view of the proper scope of the statute. They were written by an employee of the railroad in his official capacity and addressed to other employees in their capacities as representatives of the railroad.

Particularly in light of the clarifying legislative history, we conclude that the letters-of-the-carrier exception is far narrower than appellees would have it. Cf. *Tanner v. United States*, 483 U. S. 107, 125 (1987); *Dixson v. United States*, 465 U. S. 482, 491-496 (1984). Whether or not it can be read to include a requirement that the letters be written by or addressed to the carrier, a question we need not reach, it is at least limited to "business of the carrier" that is closer to the carrier's own affairs than the letters involved here. The alleged "business" in this case is not close enough to appellant's affairs to be the natural subject of letters concerning appellant's "current business." Accordingly, we hold that the letters-of-the-carrier exception does not permit appellant to carry the Union's letters.

B

The private-hands exception derives from 18 U. S. C. § 1696(c):

"This chapter shall not prohibit the conveyance or transmission of letters or packets by private hands without compensation."

From its inception, the monopoly granted the Postal Service had always been limited to the carriage of mail "for hire." See Act of Oct. 18, 1782, 23 J. Continental Cong. 670, 672-673 (G. Hunt ed. 1914); Act of Feb. 20, 1792, ch. 7, § 14, 1 Stat. 236. The private-hands exception is a reflection of the limited nature of the monopoly; it was designed to ensure that private carriage is not undertaken "for hire or reward." *Ibid.* While the limited nature of the postal monopoly always implied that private, gratuitous carriage was excepted from the prohibitions of the Private Express Statutes, Con-

gress made the exception express in 1845, at a time when it was greatly concerned with the dwindling revenues of the Postal Service. See S. Rep. No. 137, 28th Cong., 1st Sess., 1, 10 (1844); H. R. Rep. No. 477, 28th Cong., 1st Sess., 1 (1844). To increase postal revenues, Congress lowered prices and limited franking privileges. Congress also sought to boost revenues by eliminating competition. Therefore, it strengthened the general prohibition on private carriage, intending to "put an end to all interference with the revenues of the department" from that source. S. Rep. No. 137, *supra*, at 10. Against this backdrop, Congress developed a narrow exception for carriage by "private hands," crafting the exception in such a way as to permit only gratuitous carriage undertaken out of friendship, not pursuant to a business relationship. H. R. Rep. No. 477, *supra*, at 4 ("Penalties are provided . . . with exceptions in favor of the party . . . who conveys the letter out of neighborly kindness, without fee or reward").

Congress used unambiguous language to accomplish its goals. Persons or entities other than the United States Postal Service—*i. e.*, "private hands"—may carry letters without violating the Private Express Statutes only so long as they do not receive any form of benefit from the sender—*i. e.*, "without compensation." While the pivotal term, "compensation," is not further defined, Congress in no way qualified its reach. We therefore give effect to congressional intent by giving the language its normal meaning. A dictionary from the period during which the private-hands exception was enacted illustrates the general nature of the term; it defines compensation to include "that which supplies the place of something else" and "that which is given or received as an equivalent for services, debt, want, loss, or suffering." N. Webster, *An American Dictionary of the English Language* 235 (C. Goodrich ed. 1849). Accordingly, we hold that the private-hands exception is available only when

there is no compensation of any kind flowing from the sender to the carrier.

A business relationship between the two parties may render the exception unavailable, because acts undertaken in the course of such a relationship may involve an exchange of benefits or a *quid pro quo*.² Congress understood this point. Early in the debates on the 1909 amendments to the Private Express Statutes, which added the letters-of-the-carrier exception, Senator Sutherland expressed concern that adding such an exception would permit railroads to agree to carry mail for each other. He was concerned that by undertaking such carriage pursuant to "some common understanding," the railroads "would not be carrying for compensation." Senator McLaurin, one of the supporters of amendment, responded: "[A]n arrangement of that kind . . . would itself be for compensation. It would be a *quid pro quo* and it would violate the law." Senator Sutherland evidently accepted this view for, as noted above, he sponsored the actual amendment that became the letters-of-the-carrier exception. The construction Congress placed on the private-hands exception is perhaps best summarized through Senator McLaurin's statement that an exception for carriage without compensation was intended solely to permit "an innocent man . . . to do a favor to some[one]." 42 Cong. Rec. 1905 (1908). A business relationship ordinarily converts such "favors" at the very least into implicit attempts to further the business relationship.

The private-hands exception consistently has been interpreted as not authorizing carriage pursuant to a business relationship. Thus, "compensation" has been read to encom-

² Contrary to the suggestion in the dissent, *post*, at 611-612, n. 5, this qualified statement obviously does not purport to render the private-hands exception automatically inapplicable whenever a business relationship exists. Rather, it simply indicates that a business relationship *ordinarily* suggests that the carriage is not without compensation. Cf. 39 CFR § 310.3(c) (1987).

pass the nonmonetary consideration that is implicit in a business relationship. *United States v. Thompson*, 28 F. Cas. 97 (No. 16,489) (DC Mass. 1846). *Thompson* involved the prosecution of the proprietor of a delivery service for carrying letters along with other merchandise. The defendant argued that he carried letters only in connection with delivery of other merchandise and that he received no additional compensation for carrying the letters with the merchandise. In essence, the defendant contended that he carried the letters only as a gesture of good will. The court rejected this argument, holding that the statute did not permit the carriage of letters "as a part of his business of a merchandise express, although no charge was made for letters as such." *Id.*, at 98.

The Attorney General took a similar view of the exception's scope when he opined that railroads could not agree to carry each other's mail, because the "express or implied obligation of railroads to carry letters for each other . . . would amount to 'compensation' within the meaning of the statute." 21 Op. Atty. Gen., at 401.

Applying this well-established construction to the situation at hand, we conclude that appellant's carriage of the Union's letters would not be "without compensation." Appellees initially argue that there would be no compensation because the Union would not pay appellant specifically to carry the letters. This obviously gives far too restrictive a reading to the term "compensation." That term includes indirect as well as direct compensation. If we read the exception to include any private carriage so long as no direct payment is made, it quickly would swallow the rule; senders and carriers could manipulate their relationships to avoid direct compensation and thereby evade the Private Express Statutes.

Appellees also argue that compensation would be lacking because appellant merely would perform a mandatory duty imposed by state law. This lack of legal consideration, appellees argue, demonstrates that the carriage is not part of any business relationship. As a matter of general con-

tract law, it may be true that performance of a legal duty cannot constitute legal consideration. Common-law notions of consideration, however, do not control the interpretation of this statute. Congress, after all, used the generic term "compensation," which can include less direct exchanges of benefits.

Here there is an arm's-length business relationship between the Union and the employees on the one side and appellant on the other. By delivering the Union's letters, appellant would perform a service for its employees that they would otherwise pay for themselves, through their union dues. This service would become part of the package of monetary and nonmonetary benefits that appellant provides to its employees in exchange for their services. In our view, carriage of the Union's letters pursuant to such an exchange of benefits necessarily means that the carriage is not "without compensation." Accordingly, it does not fall within the private-hands exception.

C

The parties and the United States as *amicus curiae* have focused their arguments largely on Postal Service regulations construing the letters-of-the-carrier and the private-hands exceptions. With respect to the letters-of-the-carrier exception, the Postal Service has consistently read the statute to require that the letters be written by or addressed to the carrier. Even before the Service issued formal regulations, it espoused this view in periodic pamphlets it published describing the reach of the Private Express Statutes. See, e. g., United States Post Office Dept., *Restrictions on Transportation of Letters* 16-17 (4th ed. 1952). When it issued formal regulations, the Postal Service included the requirement that the letters be the carrier's own:

"The sending or carrying of letters is permissible if they are sent by or addressed to the person carrying them. If the individual actually carrying the letters is

not the person sending the letters or to whom the letters are addressed, then such individual must be an officer or employee of such person (see [39 CFR] § 310.3(b)(2)) and the letters must relate to the current business of such person." 39 CFR § 310.3(b) (1987).

The Postal Service's regulations also read "compensation" for purposes of the private-hands exception in a way consistent with our evaluation of the term. They describe the exception's scope as follows:

"The sending or carrying of letters without compensation is permitted. Compensation generally consists of a monetary payment for services rendered. Compensation may also consist, however, of non-monetary valuable consideration and of good will. Thus, for example, when a business relationship exists or is sought between the carrier and its user, carriage by the carrier of the user's letter will ordinarily not fall under this exception." § 310.3(c).

Appellant and the United States have urged us to defer to these agency constructions of the statute. While they reach a different conclusion as to the proper application, appellees specifically indicated at oral argument that they were not challenging the validity of the regulations. Tr. of Oral Arg. 33. Because we have been able to ascertain Congress' clear intent based on our analysis of the statutes and their legislative history, we need not address the issue of deference to the agency.

III

The California Court of Appeal incorrectly concluded that the carriage of letters involved in this case was within an exception to the Private Express Statutes. Properly construed, neither of the statutory exceptions proffered by appellees—the letters-of-the-carrier exception and the private-hands exception—permits appellant to carry the Union's

letters in its internal mail system. Accordingly, the judgment of the California Court of Appeal is

Reversed.

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

JUSTICE WHITE, concurring in the judgment.

The issue here is the proper interpretation of the letters-of-the-carrier and the private mail exceptions to the Private Express Statutes. In reaching a decision we must deal with the Postal Service regulations construing these exceptions; for those regulations, which the majority sets out in its Part II-C, must be respected unless they are inconsistent with the statute—unless either or both are clearly foreclosed by the language or legislative history of the governing statute. If Congress has expressly spoken on the precise issue at hand, the agency must of course not stray from that legislative intent in enforcing the statute. *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842–843 (1984). But if there is more than one rational construction of the statute, the agency's view should normally be respected.

Here, as I see it, the language of neither exception settles the matter. That should end the inquiry unless the legislative history clearly negates the agency's view expressed in the regulations. Where the statute itself is not determinative and is open to more than one construction, the legislative history must be quite clear if it is to foreclose the agency's construction as expressed in its regulations, which is surely not the case here.

Inquiry into that history may lead a court to conclude that the agency's interpretation is not only permissible but is also the only acceptable construction of the law. But even on the majority's own description of the statutory background, I am unable to conclude that the agency could not have adopted, and could not now adopt, a view of the exceptions that would,

on the facts of this case, have reflected the views urged by appellees, particularly with respect to the private mail exception.

Accordingly, I concur in the judgment.

JUSTICE STEVENS, with whom JUSTICE MARSHALL joins, dissenting.

It is clear to me that the university's compliance with the state-law requirement that it allow the Union free use of its internal mail system to send unstamped letters to its employees would constitute delivery "by private hands without compensation" within the meaning of 18 U. S. C. § 1696(c). I therefore respectfully dissent.

The construction of the Private Express Statutes urged by the Government and adopted by the majority broadens the scope of the federal monopoly beyond that envisioned by the Continental Congress when it passed the first statutes defining the postal monopoly in 1782, and by Congress when it reenacted those statutes in 1792 and amended them in 1825, 1845, and 1909. This broad construction is contrary to the statutory language and hostile to the wisdom of narrowly construing the legislation that created the powerful and far-reaching postal monopoly. There are at least three important reasons to construe the Private Express Statutes narrowly. First, the statutes impose criminal penalties for their violation. Though the sanctions are modest and seldom imposed, the rule of lenity requires a strict construction of the statutes' provisions. Second, the statutes grant an economic monopoly. Even though the Federal Government is the proprietor of the monopoly, this Nation's tradition of opposition to monopolistic privileges supports a policy of strict construction. Third, and of greatest significance, expanding the monopoly beyond the bounds delimited by Congress will inevitably curtail the volume of communication that would otherwise be exchanged in a free society.

It is quite wrong to assume that a private carrier, such as a university, that allows a third party to use its internal mail

delivery system without charge is necessarily depriving the Postal Service of significant revenues. Many messages that can be sent free of charge will simply not be sent at all if the sender is required to pay a user fee in the form of postage for the privilege of communicating in this way. As JUSTICE WHITE has correctly noted, no one can question the fact that this "user fee measurably reduces the ability of various persons or organizations to communicate with others." *United States Postal Service v. Greenburgh Civic Assns.*, 453 U. S. 114, 141 (1981) (concurring in judgment). The facts of the *Greenburgh* case demonstrate that there are many worthwhile civic groups whose ability to communicate with their constituents is seriously impaired when they must pay postage instead of using private methods of distribution. *Id.*, at 119-120. Thus, a broad prohibition against the use of free private facilities imposes a real burden on the First Amendment right to communicate which may well be more significant than the uncertain loss of revenue to the Postal Service. The "First Amendment's guarantee of free speech applies to . . . teacher's mailboxes as surely as it does elsewhere." *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U. S. 37, 44 (1983).

I

The monopoly granted by Congress to the Postal Service is limited to the right to deliver mail for "hire, reward, or other profit or advantage." The delivery of mail without compensation does not infringe this monopolistic grant, and the statutes creating the monopoly have always permitted the private delivery of mail without profit. The first statute granting monopoly privileges to the Postal Service was enacted by the Continental Congress in 1782. It provided:

"[T]he Postmaster General of these United States for the time being, and his deputy and deputies, thereunto by him sufficiently authorised, and his and their agents, post-riders, expresses and messengers respectively, and no other person whatsoever, shall have the receiving,

taking up, ordering, despatching, sending post or with speed, carrying and delivering of any letters, packets or other despatches from any place within these United States *for hire, reward, or other profit or advantage*" Act of Oct. 18, 1782, 23 J. Continental Cong. 670, 672-673 (G. Hunt ed. 1914). (Emphasis added.)

When Congress reenacted the substance of this statute in 1792, Act of Feb. 20, 1792, ch. 7, § 14, 1 Stat. 236, the language it chose again made clear that the monopoly being granted was limited to the right to deliver mail for profit:

"That if any person, other than the Postmaster General, or his deputies, or persons by them employed, shall take up, receive, order, dispatch, convey, carry or deliver any letter or letters, packet or packets, other than newspapers, *for hire or reward*, or shall be concerned in setting up any foot or horse post, wagon or other carriage, by or in which any letter or packet shall be carried *for hire*, on any established post-road, or any packet, or other vessel or boat, or any conveyance whatever, whereby the revenue of the general post-office may be injured, every person, so offending, shall forfeit, for every such offence, the sum of two hundred dollars." *Ibid.* (Emphasis added.)

In 1825 Congress repealed all previous postal statutes in favor of a new postal law. Act of Mar. 3, 1825, ch. 64, 4 Stat. 102. The new statutes continued the monopoly, but substantially weakened the prohibitions against the private carriage of mail. See *id.*, §§ 6, 17, 19, 4 Stat. 104, 106, 107; *United States v. Kimball*, 26 F. Cas. 782 (No. 15,531) (DC Mass. 1844) (holding that 1825 statutes as amended, Act of Mar. 2, 1827, ch. 61, § 3, 4 Stat. 238, did not prohibit the carriage of letters for profit by railroad); Craig & Alvis, *The Postal Monopoly: Two Hundred Years of Covering Commercial as Well as Personal Messages*, 12 U. S. F. L. Rev. 57, 72 (1977). This weakening encouraged the proliferation of private express

companies. In 1845 Congress responded by enacting new legislation "to reduce the rates of postage, to limit the use and correct the abuse of the franking privilege, and for the prevention of frauds on the revenues of the Post Office Department." Act of Mar. 3, 1845, ch. 43, 5 Stat. 732. The 1845 Act was intended to protect the Postal Service from competition, but, at the same time, Congress saw fit to continue to allow the private delivery of mail without charge. Accordingly, the 1845 statute emphasized the distinction between the private delivery of mail for profit—which was prohibited—and private delivery when there was "no compensation being tendered or received therefor in any way"—which was not. *Id.*, at 736.

The Private Express Statutes as they are codified today are not substantially different from those enacted in 1845. Title 18 U. S. C. § 1696(c) provides: "This chapter shall not prohibit the conveyance or transmission of letters or packets by private hands without compensation." The history of this provision makes clear that although articulated as an exception, the exemption for mail delivered by "private hands"¹ without compensation really reflects not merely a desire to excuse certain conduct from criminal sanction but rather an intention to continue to limit the scope of the monopoly granted the Postal Service to the delivery of mail for compensation. The monopoly Congress granted the Postal Service was simply never intended to reach so far as to encompass the delivery of mail by private parties without compensation.

It seems doubtful that Congress envisioned when it created the postal monopoly the development of internal mail

¹ I agree with the majority that the carriage of mail by the university (governed by appellant Regents and hereafter referred to as appellant) would be carriage by "private hands" within the meaning of the statute. As Attorney General Harmon commented in an opinion on the scope of the postal monopoly written in 1896, the term "'private hands' was evidently intended to cover all except common carriers on post routes." 21 Op. Atty. Gen. 394, 401 (1896).

systems, such as those that are now found in large universities or large apartment complexes, and much more doubtful that it intended to impose a burden on the free flow of communication within such places. Since the attention of Congress was focused on the actions of common carriers who were being paid to deliver federal mail and on competing private enterprises that were imposing charges similar to postage for their services, I cannot believe Congress intended to interfere in any way with not-for-profit civic organizations such as schools or universities in their provision of uncompensated delivery services or with any other delivery of mail without anticipation of "reward or other profit or advantage." Act of Oct. 18, 1782, 23 J. Continental Cong., at 672-673.

This interpretation of the scope of the monopoly authorized by the Private Express Statutes is confirmed by the fact that prior to 1979 the applicable postal regulation unambiguously permitted "the sending or carrying of letters . . . if no charge for carriage [was] made by the carrier." 39 CFR § 310.3(c) (1979).² Under the plain language of this regulation it would have been difficult to argue that appellant could not make its internal mail delivery system available to the Union without infringing on the legitimate scope of the federal postal monopoly. In 1979, however, the Service amended the regulation because it thought the regulation suggested too narrow a construction of the word "compensation." The regulation was amended to make clear that compensation could "consist . . . of non-monetary valuable consideration and of good will." 39 CFR § 310.3(c) (1987). Although this "clarification" was not intended to change the law, see 43 Fed. Reg.

² The full text of the regulation provided:

"(c) *Private hands without compensation.* The sending or carrying of letters is permissible if no charge for carriage is made by the carrier. However, a person engaged in the transportation of goods or persons for hire does not fall within the exception merely by carrying letters free of charge for customers whom he does charge for the carriage of goods or persons."

60615, 60618 (1978); Advisory Op., PES 76-4 Reconsidered (Jan. 15, 1982), in this case the Service seeks to parlay the "clarification" into an unprecedented expansion of the postal monopoly.

II

Even as "clarified" the Private Express Statutes and the regulation interpreting the private-hands exception do not support the conclusion that appellant would violate the postal monopoly if it delivered mail to its employees on behalf of the Union. Appellant's delivery of the mail could only violate the postal monopoly if it were somehow compensated for its delivery. The argument that appellant's carriage of letters under the compulsion of state law would generate "compensation" of its own force merely because appellant has a business relationship with the sender and the recipients of the mail must be rejected as contrary to the express language of the Private Express Statutes and to the historical contours of the monopoly given the Postal Service.

Compensation may take many forms; it is not necessarily monetary. It may, as the Postal Service expressed in its Advisory Opinion when appellant asked whether its delivery of the Union's letters would violate the Private Express Statutes, include such intangibles as "good will," "forbearance of demands for benefits," or the "facilitation of a continuing relationship." Advisory Op., PES No. 82-9 (July 2, 1982), App. to Juris. Statement A66, A71. But these intangibles may be recognized as compensation only if they have value to the recipient. Recognition that compensation may take an intangible form does not diminish the requirement that the recipient receive something of value in exchange for the costs it incurs when it undertakes the carriage, that is, that it receive some benefit on account of the carriage. Appellant's delivery of the Union's letters would fall squarely within the private-hands exception unless some benefit would flow directly to it as a result of its carriage of letters for the Union.

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I have been unable to identify any benefit that appellant will acquire if it begins to fulfill its obligation under state law to allow the Union to use its mail system. The state statute that creates the obligation does not mandate, or even appear to contemplate, that appellant will receive compensation for complying with this duty.³ Further, it has not been suggested that the Union intends nonetheless to provide some compensation to appellant. Thus the question becomes whether despite the absence of any requirement that the Union compensate appellant and the lack of any intention on the part of the Union to compensate appellant, some intangible compensation will necessarily flow from the Union or some other source when appellant begins to fulfill its state-law obligations.

There is no reason to suspect that appellant will benefit from any increased good will towards it on the part of the Union. Although such good will might conceivably be generated if appellant were to provide the service out of the kindness of its heart, no good will, at least no good will that qualifies as compensation, can be thought to arise merely because an entity does precisely what state law compels it to do. No business can establish good will—"[s]omething in business which gives reasonable expectancy of preference in race . . . of competition"⁴—merely by broadcasting that it, as all businesses are expected to do, conducts itself in conformance with applicable state law. Similarly, there is no reason to anticipate that appellant will enjoy any forbearance of de-

³The Higher Education Employer-Employee Relations Act (HEERA), Cal. Govt. Code Ann. § 3568 (West 1980), provides:

"Subject to reasonable regulations, employee organizations shall have the right of access at reasonable times to areas in which employees work, the right to use institutional bulletin boards, mailboxes and other means of communication, and the right to use institutional facilities at reasonable times for the purpose of meetings concerned with the exercise of the rights guaranteed by this act."

⁴Black's Law Dictionary 625 (5th ed. 1979) (quoting *In re Witkind's Estate*, 167 Misc. 885, 895, 4 N. Y. S. 2d 933, 947 (1938)).

mands for benefits by the Union. First, the Union is not the collective-bargaining agent of appellant's employees. Second, and more importantly, it is unreasonable to assume that the Union will refrain from seeking some demand because appellant does what state law compels it to do. Nor could appellant reasonably be expected to be able to utilize its compliance with state law as a bargaining chip in disputes with the Union. Appellant has a pre-existing duty to conduct itself in accordance with the law, and it is unreasonable to think that the Union would give appellant anything in return for a promise to continue to obey the law.

I also do not find in the record any evidence that a benefit will flow from appellant's employees to it on account of its delivery to them of mail from the Union. Appellant's employees are currently obligated to provide their services to appellant without regard to whether appellant complies with its state-law obligation to allow the Union access to its mail system. Appellant's compliance will not increase its employees' obligations to it one whit.

Appellant contends that the Postal Service "has consistently taken the position that any business relationship between the carrier and the sender or recipient defeats the gratuitous character of the carriage." Brief for Appellant 35. In fact the Postal Service's concept that compensation is implicit in any business relationship was adopted for the first time in this case.⁵ As the Postal Service admitted in its Ad-

⁵The regulation implementing the private-hands-without-compensation exception discusses the impact of a business relationship on the "without compensation" analysis:

"Compensation may also consist, however, of non-monetary valuable consideration and of good will. Thus, for example, when a business relationship exists or is sought between the carrier and its user, carriage by the carrier of the user's letter will ordinarily not fall under this exception." 39 CFR § 310.3(c) (1987).

Thus the regulation recognizes that in most instances the existence of a business relationship will suggest such an exchange of value for any services performed by one party for another that the private-hands-without-

visory Opinion, this case is distinguishable from those previously considered by the Postal Service in that the Union involved is not the collective-bargaining agent of the carrier and the carriage would not be voluntarily undertaken. Advisory Op., PES No. 82-9 (July 2, 1982), App. to Juris. Statement A66. It is one thing to recognize, as the Postal Service has previously, that in a business setting voluntary gratuitous acts often benefit the actor in a concrete way and quite another to conclude that merely because a business relationship exists between the parties any action, even though compelled by state law, that benefits the other party generates compensation.

The only previous judicial interpretation of the private-hands-without-compensation exception, *United States v. Thompson*, 28 F. Cas. 97 (No. 16, 489) (DC Mass. 1846), provides no support for the concept of "implicit-in-the-relationship compensation" relied on here by appellant and by the majority. In *Thompson* the District Court held that the exception did not permit a private carrier of merchandise to carry letters "in connection with, or as part of his business of a merchandise express, although no charge was made for letters as such." *Id.*, at 98. The court recognized that the mere fact that defendant did not charge a fee for the delivery of letters "as such" did not mean that he was not compensated for the delivery. Indeed, the fact of compensation was obvious from the fact that defendant delivered letters only on behalf of persons who hired him to deliver merchandise. The court's rejection of defendant's argument that his delivery of letters

compensation exception will not apply. The use of the word "ordinarily," however, makes clear that the regulation anticipates that there will be occasions when carriage of mail will be "without compensation" even if there is a business relationship between the carrier and the user. The position taken by the Postal Service and the majority of this Court in this case, however, admits of no such possibility. In their view, once a business relationship is established, the applicability of the exception is foreclosed. This view is contrary to the plain language of the exception, to previous applications of the exception, and to the regulation.

fell within the private-hands exception because he did not charge a distinct fee for the delivery of letters did not rest on the mere existence of a business relationship between the merchandise carrier and the parties on whose behalf he delivered the letters, but rather on the recognition that the provision of that service enhanced the profitability of the merchant's business. This increase in profitability provided compensation to the merchant for the carriage service.⁶

The instant case is clearly distinguishable from *Thompson* and from the other factual settings in which the Postal Service or the Attorney General has considered the scope of the exception.⁷ The very fact that the majority and the Postal

⁶The drafters of 39 CFR § 310.3(c) (1987) no doubt had *Thompson* in mind when they specified in the regulation that "a person engaged in the transportation of goods or persons for hire does not fall within the exception merely by carrying letters free of charge for customers whom he does charge for the carriage of goods or persons."

⁷The opinions of the Attorney General and Postal Service relied on by appellant do not support its assertion that the private-hands exception has consistently been interpreted as not authorizing the delivery of mail if a business relationship exists between the carrier and the sender or the recipient. In 1896 the Attorney General was asked whether it was "proper for a railroad company to carry, outside of the mails, not in Government stamped envelopes, first-class mail matter intended for a connecting line." 21 Op. Atty. Gen., at 397. In explaining that such conduct would violate the Private Express Statutes, the Attorney General opined that the "express or implied obligation" between railroad lines to carry mail for each other was compensation within the meaning of the private-hands exception. *Id.*, at 401. The Attorney General did not express the view that compensation was implicit in the business relationship between the railroad lines but rather found that the exchange of reciprocal obligations was compensation.

In Advisory Opinions PES 76-4 (Mar. 3, 1976) and 76-4 Reconsidered (Jan. 15, 1982), the Postal Service expressed the view that the delivery of mail by the Salem Oregon School District on behalf of the collective-bargaining agent of its employees would not come within the private-hands-without-compensation exception. The School District was providing the service because it had agreed to do so in a collective-bargaining agreement. Since the agreement to perform the service had been reached as part of a bargaining process, it was clear that the District had re-

Service find it necessary to articulate the broad rule that compensation arises solely from the existence of a business relationship between the carrier and the recipient or sender in order to take this case out of the exception proves that this case represents an attempt to expand the scope of the Postal Service monopoly by narrowing the reach of the exception.

The policies behind the Private Express Statutes would not be impaired by recognizing that this case falls within the private-hands exception. The enactment of the private-hands exception itself reflects a decision to forgo whatever revenues might be generated by expanding the scope of the postal monopoly to encompass all deliveries of written messages by private parties. Moreover, the legislative history of the statute does not support the majority's position that the exception for carriage by private hands without compensation was designed "solely to permit 'an innocent man . . . to do a favor to some[one].'" *Ante*, at 599. As discussed *supra*, at 605-608, the concept that the monopoly given the Postal Service did not encompass the delivery of mail by private parties without compensation had its origin with the birth of the monopoly. Nothing in the legislative history of the statutes creating the monopoly explains why the Continental Congress and later Congress decided to so limit the scope of the monopoly.⁸ The language that the majority seeks to

ceived something of value in exchange for its agreement to provide the service. The controlling element of the Postal Service's opinion was not the overall business relationship between the Union and the School District but the fact that the provision of the service was a negotiated element of a collective-bargaining agreement.

There is no suggestion in the instant case that appellant will receive a *quid pro quo* if it undertakes the delivery of the Union's mail or that it will be able to acquire some benefit for the service through bargaining. The reality here is that appellant will get exactly nothing for its delivery of the Union's mail save the satisfaction of finding itself in compliance with a compulsion under state law.

⁸The only time the private-hands-without-compensation exception is referenced in the legislative history of the Private Express Statutes is in a

rely on is actually an excerpt from a debate concerning a proposed, but never passed, amendment to 18 U. S. C. § 1694, which now contains the letters-of-the-carrier exception.

During the Senate's debate on how to amend § 1694 to insure that railroads could carry their own urgent letters without violating the Private Express Statutes, Senator McLaurin and Senator Teller proposed that the words "for hire" or "for compensation" be added to the statute, so that the statute would allow common carriers to carry mail provided that they did not do so "for hire." 42 Cong. Rec. 1902, 1903 (1908). Senator McLaurin spoke in favor of the amendment saying,

"[M]y greatest objection to this provision is that some stage driver who happens to be making regular trips would, if he were, out of the kindness of his heart, to take a letter for some friend and deliver it to another friend on the way, be liable to pay a fine of \$50. . . . I think, therefore, that the amendment offered . . . would accomplish a great deal of good. It will make clear the construction that was given to it by Attorney-General Harmon, and it will not be necessary to construe this section.

"My idea about it is, though, that there ought to be some provision whereby an innocent man, probably one in an humble position and following an humble pursuit, would not stumble into a pitfall when, out of the goodness of his heart, he was trying to do a favor to some friend of his or to somebody, whether he was a friend or not." *Id.*, at 1905.

In further debate the following day, the amendment was rejected in favor of the amendment proposed by Senator Suth-

descriptive comment in a House Report on the 1845 Act: "Penalties are provided . . . with exceptions in favor of the party . . . who conveys the letter out of neighborly kindness, without fee or reward." H. R. Rep. No. 477, 28th Cong., 1st Sess., 4 (1844).

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erland, which we now know as the letters-of-the-carrier exception. *Id.*, at 1976. A brief colloquy over 60 years after the passage of the 1845 Act about a proposed-but-never-adopted amendment is a slender reed on which to base the Court's wholly unnecessary and unwise interpretation of this ancient monopoly.

I respectfully dissent.

Per Curiam

PATTERSON v. MCLEAN CREDIT UNION

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

No. 87-107. Order entered April 25, 1988

Held: In light of the difficulties posed by petitioner's argument for a fundamental extension of liability under 42 U. S. C. § 1981, this case is restored to the calendar for reargument and the parties are requested to brief and argue the question whether the interpretation of § 1981 adopted by this Court in *Runyon v. McCrary*, 427 U. S. 160, should be reconsidered.

Restored to calendar for reargument.

PER CURIAM.

This case is restored to the calendar for reargument. The parties are requested to brief and argue the following question:

“Whether or not the interpretation of 42 U. S. C. § 1981 adopted by this Court in *Runyon v. McCrary*, 427 U. S. 160 (1976), should be reconsidered?”

One might think from the dissents of our colleagues from the above order that our decision to hear argument as to whether the decision in *Runyon v. McCrary*, 427 U. S. 160 (1976), should be reconsidered is a “first” in the history of the Court. One would also think from the language of the dissents that we have decided today to overrule *Runyon v. McCrary*. We have of course done no such thing, but have decided, in light of the difficulties posed by petitioner's argument for a fundamental extension of liability under 42 U. S. C. § 1981, to consider *whether Runyon* should be overruled. It is surely no affront to settled jurisprudence to request argument on whether a particular precedent should be modified or overruled.

Three Terms ago, for example, we requested the parties to reargue the validity of our decision in *National League of Cities v. Usery*, 426 U. S. 833 (1976). *Garcia v. San Anto-*

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nio Metropolitan Transit Authority, 468 U. S. 1213 (1984) (ordering reargument), 469 U. S. 528 (1985) (decision). Two Terms before that we requested the parties to reargue and brief the question whether the Fourth Amendment exclusionary rule should apply where the evidence was obtained reasonably and in good faith. *Illinois v. Gates*, 459 U. S. 1028 (1982) (ordering reargument), 462 U. S. 213 (1983) (decision). In 1975, we ordered the parties in *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 422 U. S. 1005 (1975) (ordering reargument), 425 U. S. 682 (1976) (decision), to address whether we should reconsider our holding in *Banco Nacional de Cuba v. Sabbatino*, 376 U. S. 398, 439 (1964), which had reaffirmed the Court's adherence to the "act of state" doctrine. And in *Benton v. Maryland*, 393 U. S. 994 (1968) (ordering reargument), 395 U. S. 784 (1969) (decision), the Court requested reargument on the question whether the "concurrent sentence doctrine" had continuing validity.

In addition, we have explicitly overruled statutory precedents in a host of cases. See, e. g., *Monell v. New York City Dept. of Social Services*, 436 U. S. 658 (1978), overruling *Monroe v. Pape*, 365 U. S. 167 (1961); *Continental T. V., Inc. v. GTE Sylvania Inc.*, 433 U. S. 36 (1977), overruling *United States v. Arnold, Schwinn & Co.*, 388 U. S. 365 (1967); *Machinists v. Wisconsin Employment Relations Comm'n*, 427 U. S. 132 (1976), overruling *Auto Workers v. Wisconsin Employment Relations Bd.*, 336 U. S. 245 (1949); *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U. S. 484 (1973), overruling *Ahrens v. Clark*, 335 U. S. 188 (1948); *Andrews v. Louisville & Nashville R. Co.*, 406 U. S. 320 (1972), overruling *Moore v. Illinois Central R. Co.*, 312 U. S. 630 (1941); *Boys Markets, Inc. v. Retail Clerks*, 398 U. S. 235 (1970), overruling *Sinclair Refining Co. v. Atkinson*, 370 U. S. 195 (1962); *Peyton v. Rowe*, 391 U. S. 54 (1968), overruling *McNally v. Hill*, 293 U. S. 131 (1934). These actions do not mean that the Court has been insensitive to considerations of *stare decisis*, but only that we recognize it as "a principle of

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policy and not a mechanical formula,” *Boys Markets, supra*, at 241 (quoting *Helvering v. Hallock*, 309 U. S. 106, 119 (1940) (Frankfurter, J.)).

Both of the dissents intimate that the statutory question involved in *Runyon v. McCrary* should not be subject to the same principles of *stare decisis* as other decisions because it benefited civil rights plaintiffs by expanding liability under the statute. We do not believe that the Court may recognize any such exception to the abiding rule that it treat all litigants equally: that is, that the claim of any litigant for the application of a rule to its case should not be influenced by the Court’s view of the worthiness of the litigant in terms of extralegal criteria. We think this is what Congress meant when it required each Justice or judge of the United States to swear to “administer justice without respect to persons, and do equal right to the poor and to the rich” 28 U. S. C. § 453.

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

The Court today asks the parties to rebrief and reargue this case, focusing not on some neglected subtlety of the issues presented for review or on any overlooked jurisdictional detail, but on a question not presented: Whether the Court should reconsider its 7–2 opinion (WHITE and REHNQUIST, JJ., dissenting) in *Runyon v. McCrary*, 427 U. S. 160 (1976). The Court’s determination now to reach out to reconsider that prior decision and everything that has been built upon it, is neither restrained, nor judicious, nor consistent with the accepted doctrine of *stare decisis*. See, e. g., *Vasquez v. Hillery*, 474 U. S. 254, 266 (1986) (“[T]he careful observer will discern that any detours from the straight path of *stare decisis* in our past have occurred for articulable reasons, and only when the Court has felt obliged ‘to bring its opinions into agreement with experience and with facts newly ascertained,’” quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U. S. 393, 412 (1932) (Brandeis, J., dissenting)).

Twelve years ago, consistently with our prior decisions in *Jones v. Alfred H. Mayer Co.*, 392 U. S. 409 (1968); *Tillman v. Wheaton-Haven Recreation Assn., Inc.*, 410 U. S. 431 (1973); and *Johnson v. Railway Express Agency, Inc.*, 421 U. S. 454 (1975), we observed that it is "well established" that 42 U. S. C. § 1981 "prohibits racial discrimination in the making and enforcement of private contracts." *Runyon v. McCrary*, 427 U. S., at 168. We reaffirmed our reading of the legislative history and language of the statute as reaching private acts of racial discrimination, and emphasized that in the years since *Jones*, Congress specifically had considered and rejected legislation to override our interpretation of the Civil Rights Act of 1866, 14 Stat. 27, on which § 1981 is based. 427 U. S., at 174, and n. 11. Writing for the Court, Justice Stewart noted:

"There could hardly be a clearer indication of congressional agreement with the view that § 1981 *does* reach private acts of racial discrimination. . . . In these circumstances there is no basis for deviating from the well-settled principles of *stare decisis* applicable to this Court's construction of federal statutes." *Id.*, at 174-175 (emphasis in original).

See also *id.*, at 186-187 (Powell, J., concurring); *id.*, at 189-192 (STEVENS, J., concurring); *Illinois Brick Co. v. Illinois*, 431 U. S. 720, 736 (1977) ("[W]e must bear in mind that considerations of *stare decisis* weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation" (WHITE, J., writing for the Court)).

We continually have endorsed, in the employment and other contexts, *Runyon's* interpretation that § 1981 reaches private conduct. See, e. g., *Goodman v. Lukens Steel Co.*, 482 U. S. 656 (1987); *Saint Francis College v. Al-Khazraji*, 481 U. S. 604 (1987); *General Building Contractors Assn., Inc. v. Pennsylvania*, 458 U. S. 375 (1982). See also *Mem-*

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phis v. Greene, 451 U. S. 100 (1981). Over 100 lower court opinions cite the relevant portions of *Runyon* and its progeny. The parties in this case have not informed us of anything that suggests Congress has reconsidered its position on this statutory matter in light of *Runyon* and subsequent cases. I see no reason whatsoever for the Court deliberately to reach out in the manner it does today.

Although it is probably true that most racial discrimination in the employment context will continue to be redressable under other statutes, it may be that racial discrimination in certain other contexts is not actionable independently of § 1981. I am at a loss to understand the motivation of five Members of this Court to reconsider an interpretation of a civil rights statute that so clearly reflects our society's earnest commitment to ending racial discrimination, and in which Congress so evidently has acquiesced. I can find no justification for the bare majority's apparent eagerness to consider rewriting well-established law.

I dissent.

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

While I join JUSTICE BLACKMUN's dissenting opinion, I write separately to emphasize those aspects of the Court's action today that I believe render the order particularly ill advised.

The Court's spontaneous decision to reexamine our holding in *Runyon v. McCrary*, 427 U. S. 160 (1976), is certain to engender widespread concern in those segments of our population that must rely on a federal rule of law as a protection against invidious private discrimination. Although the present case involves a claim of discrimination in the workplace, an area of the law where there is substantial overlap between 42 U. S. C. § 1981 and Title VII of the Civil Rights Act of 1964, 78 Stat. 253, 42 U. S. C. § 2000e *et seq.*, a reexamination of the issue of statutory construction decided in *Runyon* implicates a much broader sphere of conduct. *Run-*

yon itself did not involve a claim of employment discrimination, but the question "whether . . . 42 U. S. C. § 1981, prohibits private schools from excluding qualified children solely because they are Negroes." 427 U. S., at 163. The Court's order today will, by itself, have a deleterious effect on the faith reposed by racial minorities in the continuing stability of a rule of law that guarantees them the "same right" as "white citizens."* To recognize an equality right—a right that 12 years ago we thought "well established"—and then to declare unceremoniously that perhaps we were wrong and had better reconsider our prior judgment, is to replace what is ideally a sense of guaranteed right with the uneasiness of unsecured privilege. Time alone will tell whether the erosion in faith is unnecessarily precipitous, but in the meantime, some of the harm that will flow from today's order may never be completely undone.

In addition to the impact of today's decision on the faith of victims of racial discrimination in a stable construction of the civil rights laws, the order must also have a detrimental and enduring impact on the public's perception of the Court as an impartial adjudicator of cases and controversies brought to us for decision by lawyers representing adverse interests in contested litigation. The parties have asked us to decide whether § 1981 encompasses "a claim for racial discrimination in the terms and conditions of employment, including a claim that petitioner was harassed because of her race." Pet. for Cert. i. Neither the parties nor the Solicitor General have argued that *Runyon* should be reconsidered.

*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."

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STEVENS, J., dissenting

As I have said before, "the adversary process functions most effectively when we rely on the initiative of lawyers, rather than the activism of judges, to fashion the questions for review." *New Jersey v. T. L. O.*, 468 U. S. 1214, 1216 (1984) (dissenting from order directing reargument). If the Court decides to cast itself adrift from the constraints imposed by the adversary process and to fashion its own agenda, the consequences for the Nation—and for the future of this Court as an institution—will be even more serious than any temporary encouragement of previously rejected forms of racial discrimination. The Court has inflicted a serious—and unwise—wound upon itself today.

HICKS, DISTRICT ATTORNEY FOR COUNTY OF
ORANGE, CALIFORNIA, ACTING ON BEHALF OF
FEIOCK v. FEIOCK

CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA,
FOURTH APPELLATE DISTRICT, DIVISION THREE

No. 86-787. Argued December 1, 1987—Decided April 27, 1988

After respondent stopped making \$150 monthly child support payments to his ex-wife under a California state-court order, he was served with an order to show cause why he should not be held in contempt on nine counts of failure to make the payments. At the contempt hearing, his defense that he was financially unable to make payments was partially successful, but he was adjudged in contempt on five counts; was sentenced to a 5-day jail term on each count, to be served consecutively; and was placed on probation for three years upon suspension of the sentence. As conditions of his probation, he was ordered to resume the monthly payments and to begin repaying \$50 per month on his accumulated arrearages. During the contempt hearing, the court rejected his contention that the application against him of Cal. Civ. Proc. Ann. § 1209.5 (West 1982), governing the prima facie showing of contempt of a court order to make child support payments, was unconstitutional under the Fourteenth Amendment's Due Process Clause because it shifts to the defendant the burden of proof as to ability to comply with the order, which is an element of the crime of contempt. The California Court of Appeal annulled the contempt order, ruling that § 1209.5 purports to impose "a mandatory presumption compelling a conclusion of guilt without independent proof of an ability to pay," and is therefore unconstitutional because "the mandatory nature of the presumption lessens the prosecution's burden of proof." The court went on to state that for future guidance, however, the statute should be construed as authorizing a permissive inference, not a mandatory presumption. The California Supreme Court denied review.

Held:

1. With regard to the determination of issues necessary to decide this case, the state appellate court ruled that whether the individual is able to comply with a court order is an element of the offense of contempt rather than an affirmative defense to the charge, and that § 1209.5 shifts to the alleged contemnor the burden of persuasion rather than simply the burden of production in showing inability to comply. Since the California Supreme Court denied review, this Court is not free to overturn the

state appellate court's conclusions as to these state-law issues. However, the issue whether the contempt proceeding and the relief given were properly characterized as civil or criminal in nature, for purposes of determining the proper applicability of federal constitutional protections, raises a question of federal law rather than state law. Thus, the state appellate court erred insofar as it sustained respondent's challenge to § 1209.5 under the Due Process Clause simply because it concluded that the contempt proceeding was "quasi-criminal" as a matter of California law. Pp. 629-630.

2. For the purposes of applying the Due Process Clause to a State's proceedings, state law provides strong guidance, but is not dispositive, as to the classification of the proceeding or the relief imposed as civil or criminal. The critical features are the substance of the proceeding and the character of the relief that the proceeding will afford. With regard to contempt cases, the proceeding and remedy are for civil contempt if the punishment is remedial and for the complainant's benefit. But if for criminal contempt the sentence is punitive, to vindicate the court's authority. Thus, if the relief provided is a sentence of imprisonment, it is remedial if the defendant stands committed unless and until he performs the affirmative act required by the court's order, and is punitive if the sentence is limited to unconditional imprisonment for a definite period. If the relief provided is a fine, it is remedial when it is paid to the complainant, and punitive when it is paid to the court, though a fine that is payable to the court is also remedial when the defendant can avoid paying the fine simply by performing the act required by the court's order. These distinctions lead to the fundamental proposition that criminal penalties may not be imposed on someone who has not been afforded the protections that the Constitution requires of criminal proceedings, including the requirement that the offense be proved beyond a reasonable doubt. Pp. 631-635.

3. Although the underlying purposes of particular kinds of relief are germane, they are not controlling in determining the classification of the relief imposed in a State's proceedings. In contempt cases, both civil and criminal relief have aspects that can be seen as either remedial or punitive or both. If classification were to be hinged on the overlapping purposes of civil and criminal contempt proceedings, the States will be unable to ascertain with any degree of assurance how their proceedings will be understood as a matter of federal law, thus creating novel and complex problems. Pp. 635-637.

4. In respondent's contempt proceeding, § 1209.5's burden of persuasion requirement (as interpreted by the state court), if applied in a criminal proceeding, would violate the Due Process Clause because it would undercut the State's burden to prove guilt beyond a reasonable doubt.

If applied in a civil proceeding, however, this particular statute would be constitutionally valid. There were strong indications that the proceeding was intended to be criminal in nature, such as the notice sent to respondent, which labeled the proceeding as "criminal in nature," and the District Attorney's participation in the case. However, if the trial court imposed only civil coercive remedies, it would be improper to invalidate that result merely because the Due Process Clause was not satisfied. The relief afforded—respondent's jail sentence, its suspension, and his fixed term of probation—would be criminal in nature if that were all. However, the trial court did not specify whether payment of the arrearages (which, if timely made, would be completed before expiration of the probation period) would have purged respondent's determinate sentence, thus making the relief civil in nature. Since the state appellate court, because of its erroneous views as to these controlling principles of federal law, did not pass on this issue, it must be determined by that court on remand for its further consideration of § 1209.5. Pp. 637–641. 180 Cal. App. 3d 649, 225 Cal. Rptr. 748, vacated and remanded.

WHITE, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. O'CONNOR, J., filed a dissenting opinion, in which REHNQUIST, C. J., and SCALIA, J., joined, *post*, p. 641. KENNEDY, J., took no part in the consideration or decision of the case.

Michael R. Capizzi argued the cause for petitioner. With him on the briefs was *Cecil Hicks, pro se*.

Richard L. Schwartzberg argued the cause and filed a brief for respondent.*

JUSTICE WHITE delivered the opinion of the Court.

A parent failed to comply with a valid court order to make child support payments, and defended against subsequent contempt charges by claiming that he was financially unable

*Briefs of *amici curiae* urging reversal were filed for the United States by Solicitor General Fried, Assistant Attorney General Willard, Deputy Solicitor General Lauber, Michael K. Kellogg, and Michael Jay Singer; for the State of California by John K. Van de Kamp, Attorney General, Steve White, Chief Assistant Attorney General, and Mark Alan Hart and Andrew D. Amerson, Supervising Deputy Attorneys General; and for the Women's Legal Defense Fund et al. by Carolyn F. Corwin and Susan Deller Ross.

to make the required payments. The trial court ruled that under state law he is presumed to remain able to comply with the terms of the prior order, and judged him to be in contempt. The state appellate court held that the legislative presumptions applied by the trial court violate the Due Process Clause of the Fourteenth Amendment, which forbids a court to employ certain presumptions that affect the determination of guilt or innocence in criminal proceedings. We must decide whether the Due Process Clause was properly applied in this case.

I

On January 19, 1976, a California state court entered an order requiring respondent, Phillip Feiock, to begin making monthly payments to his ex-wife for the support of their three children. Over the next six years, respondent only sporadically complied with the order, and by December 1982 he had discontinued paying child support altogether. His ex-wife sought to enforce the support orders. On June 22, 1984, a hearing was held in California state court on her petition for ongoing support payments and for payment of the arrearage due her. The court examined respondent's financial situation and ordered him to begin paying \$150 per month commencing on July 1, 1984. The court reserved jurisdiction over the matter for the purpose of determining the arrearages and reviewing respondent's financial condition.

Respondent apparently made two monthly payments but paid nothing for the next nine months. He was then served with an order to show cause why he should not be held in contempt on nine counts of failure to make the monthly payments ordered by the court. At a hearing on August 9, 1985, petitioner made out a *prima facie* case of contempt against respondent by establishing the existence of a valid court order, respondent's knowledge of the order, and respondent's failure to comply with the order. Respondent defended by arguing that he was unable to pay support during

the months in question. This argument was partially successful, but respondent was adjudged to be in contempt on five of the nine counts. He was sentenced to 5 days in jail on each count, to be served consecutively, for a total of 25 days. This sentence was suspended, however, and respondent was placed on probation for three years. As one of the conditions of his probation, he was ordered once again to make support payments of \$150 per month. As another condition of his probation, he was ordered, starting the following month, to begin repaying \$50 per month on his accumulated arrearage, which was determined to total \$1,650.

At the hearing, respondent had objected to the application of Cal. Civ. Proc. Code Ann. § 1209.5 (West 1982) against him, claiming that it was unconstitutional under the Due Process Clause of the Fourteenth Amendment because it shifts to the defendant the burden of proving inability to comply with the order, which is an element of the crime of contempt.¹ This objection was rejected, and he renewed it on appeal. The intermediate state appellate court agreed with respondent and annulled the contempt order, ruling that the state statute purports to impose "a mandatory presumption compelling a conclusion of guilt without independent proof of an ability to pay," and is therefore unconstitutional because "the mandatory nature of the presumption lessens the prosecution's burden of proof." 180 Cal. App. 3d 649, 654, 225 Cal. Rptr. 748, 751 (1986).² In light of its holding that the statute as previously interpreted was unconstitutional, the

¹ California Civ. Proc. Code Ann. § 1209.5 (West 1982) states that "[w]hen a court of competent jurisdiction makes an order compelling a parent to furnish support . . . for his child, proof that . . . the parent was present in court at the time the order was pronounced and proof of noncompliance therewith shall be prima facie evidence of a contempt of court."

² Although the court mentioned one state case among the cases it cited in support of this proposition, the court clearly rested on federal constitutional grounds as articulated in this Court's decisions, 180 Cal. App. 3d, at 652-655, 225 Cal. Rptr., at 749-751, as did the other state case it cited. See *People v. Roder*, 33 Cal. 3d 491, 658 P. 2d 1302 (1983).

court went on to adopt a different interpretation of that statute to govern future proceedings: "For future guidance, however, we determine the statute in question should be construed as authorizing a permissive inference, but not a mandatory presumption." *Id.*, at 655, 225 Cal. Rptr., at 751. The court explicitly considered this reinterpretation of the statute to be an exercise of its "obligation to interpret the statute to preserve its constitutionality whenever possible." *Ibid.* The California Supreme Court denied review, but we granted certiorari. 480 U. S. 915 (1987).

II

Three issues must be decided to resolve this case. First is whether the ability to comply with a court order constitutes an element of the offense of contempt or, instead, inability to comply is an affirmative defense to that charge. Second is whether § 1209.5 requires the alleged contemnor to shoulder the burden of persuasion or merely the burden of production in attempting to establish his inability to comply with the order. Third is whether this contempt proceeding was a criminal proceeding or a civil proceeding, *i. e.*, whether the relief imposed upon respondent was criminal or civil in nature.

Petitioner argues that the state appellate court erred in its determinations on the first two points of state law. The court ruled that whether the individual is able to comply with a court order is an element of the offense of contempt rather than an affirmative defense to the charge, and that § 1209.5 shifts to the alleged contemnor the burden of persuasion rather than simply the burden of production in showing inability to comply. We are not at liberty to depart from the state appellate court's resolution of these issues of state law. Although petitioner marshals a number of sources in support of the contention that the state appellate court misapplied state law on these two points, the California Supreme Court

denied review of this case, and we are not free in this situation to overturn the state court's conclusions of state law.³

The third issue, however, is a different matter: the argument is not merely that the state court misapplied state law, but that the characterization of this proceeding and the relief given as civil or criminal in nature, for purposes of determining the proper applicability of federal constitutional protections, raises a question of federal law rather than state law. This proposition is correct as stated. *In re Winship*, 397 U. S. 358, 365–366 (1970); *In re Gault*, 387 U. S. 1, 49–50 (1967); *Shillitani v. United States*, 384 U. S. 364, 368–369 (1966). The fact that this proceeding and the resultant relief were judged to be criminal in nature as a matter of state law is thus not determinative of this issue, and the state appellate court erred insofar as it sustained respondent's challenge to the statute under the Due Process Clause simply because it concluded that this contempt proceeding is "quasi-criminal" as a matter of California law. 180 Cal. App. 3d, at 653, 225 Cal. Rptr., at 750.

³ "Where an intermediate appellate state court rests its considered judgment upon the rule of law which it announces, that is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise. . . . This is the more so where, as in this case, the highest court has refused to review the lower court's decision rendered in one phase of the very litigation which is now prosecuted by the same parties before the federal court. . . . Even though it is arguable that the Supreme Court of [the State] will at some later time modify the rule of [this] case, whether that will ever happen remains a matter of conjecture. In the meantime the state law applicable to these parties and in this case has been authoritatively declared by the highest state court in which a decision could be had. . . . We think that the law thus announced and applied is the law of the state applicable in the same case and to the same parties in the federal court and that the federal court is not free to apply a different rule however desirable it may believe it to be, and even though it may think that the state Supreme Court may establish a different rule in some future litigation." *West v. American Telephone & Telegraph Co.*, 311 U. S. 223, 237–238 (1940).

III

A

The question of how a court determines whether to classify the relief imposed in a given proceeding as civil or criminal in nature, for the purposes of applying the Due Process Clause and other provisions of the Constitution, is one of long standing, and its principles have been settled at least in their broad outlines for many decades. When a State's proceedings are involved, state law provides strong guidance about whether or not the State is exercising its authority "in a nonpunitive, noncriminal manner," and one who challenges the State's classification of the relief imposed as "civil" or "criminal" may be required to show "the clearest proof" that it is not correct as a matter of federal law. *Allen v. Illinois*, 478 U. S. 364, 368-369 (1986). Nonetheless, if such a challenge is substantiated, then the labels affixed either to the proceeding or to the relief imposed under state law are not controlling and will not be allowed to defeat the applicable protections of federal constitutional law. *Ibid.* This is particularly so in the codified laws of contempt, where the "civil" and "criminal" labels of the law have become increasingly blurred.⁴

Instead, the critical features are the substance of the proceeding and the character of the relief that the proceeding will afford. "If it is for civil contempt the punishment is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court." *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 441 (1911). The character of the relief imposed is thus ascertainable by applying a few straightfor-

⁴California is a good example of this modern development, for although it defines civil and criminal contempts in separate statutes, compare Cal. Civ. Proc. Code Ann. § 1209 (West Supp. 1988) with Cal. Penal Code Ann. § 166 (West 1970), it has merged the two kinds of proceedings under the same procedural rules. See Cal. Civ. Proc. Code Ann. §§ 1209-1222 (West 1982 and Supp. 1988).

ward rules. If the relief provided is a sentence of imprisonment, it is remedial if "the defendant stands committed unless and until he performs the affirmative act required by the court's order," and is punitive if "the sentence is limited to imprisonment for a definite period." *Id.*, at 442. If the relief provided is a fine, it is remedial when it is paid to the complainant, and punitive when it is paid to the court, though a fine that would be payable to the court is also remedial when the defendant can avoid paying the fine simply by performing the affirmative act required by the court's order. These distinctions lead up to the fundamental proposition that criminal penalties may not be imposed on someone who has not been afforded the protections that the Constitution requires of such criminal proceedings, including the requirement that the offense be proved beyond a reasonable doubt. See, e. g., *Gompers*, *supra*, at 444; *Michaelson v. United States ex rel. Chicago, St. P., M. & O. R. Co.*, 266 U. S. 42, 66 (1924).⁵

The Court has consistently applied these principles. In *Gompers*, decided early in this century, three men were found guilty of contempt and were sentenced to serve 6, 9, and 12 months respectively. The Court found this relief to be criminal in nature because the sentence was determinate and unconditional. "The distinction between refusing to do an act commanded,—remedied by imprisonment until the party performs the required act; and doing an act forbidden,—punished by imprisonment for a definite term; is sound in principle, and generally, if not universally, affords a test by which to determine the character of the punishment."

⁵ We have recognized that certain specific constitutional protections, such as the right to trial by jury, are not applicable to those criminal contempts that can be classified as petty offenses, as is true of other petty crimes as well. *Bloom v. Illinois*, 391 U. S. 194, 208–210 (1968). This is not true, however, of the proposition that guilt must be proved beyond a reasonable doubt. *Id.*, at 205.

Gompers, 221 U. S., at 443. In the former instance, the conditional nature of the punishment renders the relief civil in nature because the contemnor "can end the sentence and discharge himself at any moment by doing what he had previously refused to do." *Id.*, at 442. In the latter instance, the unconditional nature of the punishment renders the relief criminal in nature because the relief "cannot undo or remedy what has been done nor afford any compensation" and the contemnor "cannot shorten the term by promising not to repeat the offense." *Ibid.*

The distinction between relief that is civil in nature and relief that is criminal in nature has been repeated and followed in many cases. An unconditional penalty is criminal in nature because it is "solely and exclusively punitive in character." *Penfield Co. v. SEC*, 330 U. S. 585, 593 (1947). A conditional penalty, by contrast, is civil because it is specifically designed to compel the doing of some act. "One who is fined, unless by a day certain he [does the act ordered], has it in his power to avoid any penalty. And those who are imprisoned until they obey the order, 'carry the keys of their prison in their own pockets.'" *Id.*, at 590, quoting *In re Nevitt*, 117 F. 448, 461 (CA8 1902). In *Penfield*, a man was found guilty of contempt for refusing to obey a court order to produce documents. This Court ruled that since the man was not tried in a proceeding that afforded him the applicable constitutional protections, he could be given a conditional term of imprisonment but could not be made to pay "a flat, unconditional fine of \$50.00." *Penfield, supra*, at 588.⁶ See

⁶ In *Penfield*, the original court order required a person to produce certain documents. He refused to comply. The District Court then found him guilty of contempt and required him to pay a fine to the court, which he promptly paid. (The court had also ordered him to stand committed until he paid this fine.) The Court of Appeals reversed, finding that the District Court had erred in imposing this relief, which was criminal in nature, and ordered the man instead to stand committed to prison until he complied with the original order by producing the documents. This Court affirmed,

also *United States v. Rylander*, 460 U. S. 752 (1983); *Nye v. United States*, 313 U. S. 33 (1941); *Fox v. Capital Co.*, 299 U. S. 105 (1936); *Lamb v. Cramer*, 285 U. S. 217 (1932); *Oriel v. Russell*, 278 U. S. 358 (1929); *Ex parte Grossman*, 267 U. S. 87 (1925); *Doyle v. London Guarantee Co.*, 204 U. S. 599 (1907); *In re Christensen Engineering Co.*, 194 U. S. 458 (1904); *Bessette v. W. B. Conkey Co.*, 194 U. S. 324 (1904).

Shillitani v. United States, 384 U. S. 364 (1966), adheres to these same principles. There two men were adjudged guilty of contempt for refusing to obey a court order to testify under a grant of immunity. Both were sentenced to two years of imprisonment, with the proviso that if either answered the questions before his sentence ended, he would be released. The penalties were upheld because of their "conditional nature," even though the underlying proceeding lacked certain constitutional protections that are essential in criminal proceedings. *Id.*, at 365. Any sentence "must be viewed as remedial," and hence civil in nature, "if the court conditions release upon the contemnor's willingness to [comply with the order]." *Id.*, at 370. By the same token, in a civil proceeding the court "may also impose a determinate sentence *which includes a purge clause*." *Id.*, at 370, n. 6 (emphasis added). "On the contrary, a criminal contempt proceeding would be characterized by the imposition of an

finding that this relief was civil in nature and was properly imposed, whereas the relief that had been ordered by the District Court was criminal in nature and had not been properly imposed. 330 U. S., at 587-595. The reason that the sanction imposed by the District Court was found to be criminal in nature is because it was determinate: the contemnor could not avoid the sanction by agreeing to comply with the original order to produce the documents. Yet the sanction of confinement imposed by the Court of Appeals was civil in nature because it was conditional, *i. e.*, not determinate: the contemnor would avoid the sanction by agreeing to comply with the original order to produce the documents.

unconditional sentence for punishment or deterrence." *Id.*, at 370, n. 5.⁷

B

In repeatedly stating and following the rules set out above, the Court has eschewed any alternative formulation that would make the classification of the relief imposed in a State's proceedings turn simply on what their underlying purposes are perceived to be. Although the purposes that lie behind particular kinds of relief are germane to understanding their character, this Court has never undertaken to psychoanalyze the subjective intent of a State's laws and its courts, not only because that effort would be unseemly and improper, but also because it would be misguided. In contempt cases, both civil and criminal relief have aspects that can be seen as either remedial or punitive or both: when a court imposes fines and punishments on a contemnor, it is not only vindicating its legal authority to enter the initial court order, but it also is seeking to give effect to the law's purpose of modifying the contemnor's behavior to conform to the terms required in the order. As was noted in *Gompers*:

"It is true that either form of [punishment] has also an incidental effect. For if the case is civil and the punishment is purely remedial, there is also a vindication of the court's authority. On the other hand, if the proceeding is for criminal contempt and the [punishment] is solely

⁷ In these passages from *Shillitani*, the Court clearly indicated that when it spoke of a court's conditioning *release* upon the contemnor's willingness to comply, it did not mean simply release from *physical confinement*, but release from the imposition of any sentence that would otherwise be determinate. The critical feature that determines whether the remedy is civil or criminal in nature is not when or whether the contemnor is physically required to set foot in a jail but whether the contemnor can avoid the sentence imposed on him, or purge himself of it, by complying with the terms of the original order. It follows that the remedy in this case is not rendered civil in nature merely by suspending respondent's sentence and placing him on probation (with its attendant disabilities, see n. 11, *infra*).

punitive, to vindicate the authority of the law, the complainant may also derive some incidental benefit from the fact that such punishment tends to prevent a repetition of the disobedience. But such indirect consequences will not change [punishment] which is merely coercive and remedial, into that which is solely punitive in character, or *vice versa*." 221 U. S., at 443.

For these reasons, this Court has judged that conclusions about the purposes for which relief is imposed are properly drawn from an examination of the character of the relief itself.

There is yet another reason why the overlapping purposes of civil and criminal contempt proceedings have prevented this Court from hinging the classification on this point. If the definition of these proceedings and their resultant relief as civil or criminal is made to depend on the federal courts' views about their underlying purposes, which indeed often are not clearly articulated in any event, then the States will be unable to ascertain with any degree of assurance how their proceedings will be understood as a matter of federal law. The consequences of any such shift in direction would be both serious and unfortunate. Of primary practical importance to the decision in this case is that the States should be given intelligible guidance about how, as a matter of federal constitutional law, they may lawfully employ presumptions and other procedures in their contempt proceedings. It is of great importance to the States that they be able to understand clearly and in advance the tools that are available to them in ensuring swift and certain compliance with valid court orders—not only orders commanding payment of child support, as in this case, but also orders that command compliance in the more general area of domestic relations law, and in all other areas of the law as well.

The States have long been able to plan their own procedures around the traditional distinction between civil and

criminal remedies. The abandonment of this clear dividing line in favor of a general assessment of the manifold and complex purposes that lie behind a court's action would create novel problems where now there are rarely any—novel problems that could infect many different areas of the law. And certainly the fact that a contemnor has his sentence suspended and is placed on probation cannot be decisive in defining the civil or criminal nature of the relief, for many convicted criminals are treated in exactly this manner for the purpose (among others) of influencing their behavior. What is true of the respondent in this case is also true of any such convicted criminal: as long as he meets the conditions of his informal probation, he will never enter the jail. Nonetheless, if the sentence is a determinate one, then the punishment is criminal in nature, and it may not be imposed unless federal constitutional protections are applied in the contempt proceeding.⁸

IV

The proper classification of the relief imposed in respondent's contempt proceeding is dispositive of this case. As interpreted by the state court here, § 1209.5 requires respondent to carry the burden of persuasion on an element of the offense, by showing his inability to comply with the court's order to make the required payments. If applied in a criminal proceeding, such a statute would violate the Due Process Clause because it would undercut the State's burden to prove guilt beyond a reasonable doubt. See, *e. g.*, *Mullaney v.*

⁸This does not even suggest, of course, that the State is unable to suspend the sentence imposed on either a criminal contemnor or a civil contemnor in favor of a term of informal probation. That action may be appropriate and even most desirable in a great many cases, especially when the order that has been disobeyed was one to pay a sum of money. This also accords with the repeated emphasis in our decisions that in wielding its contempt powers, a court "must exercise 'the least possible power adequate to the end proposed.'" *Shillitani v. United States*, 384 U. S. 364, 371 (1966), quoting *Anderson v. Dunn*, 6 Wheat. 204, 231 (1821).

Wilbur, 421 U. S. 684, 701-702 (1975). If applied in a civil proceeding, however, this particular statute would be constitutionally valid, *Maggio v. Zeitz*, 333 U. S. 56, 75-76 (1948); *Oriel*, 278 U. S., at 364-365, and respondent conceded as much at the argument. Tr. of Oral Arg. 37.⁹

The state court found the contempt proceeding to be "quasi-criminal" in nature without discussing the point. 180 Cal. App. 3d, at 653, 225 Cal. Rptr., at 750. There were strong indications that the proceeding was intended to be criminal in nature, such as the notice sent to respondent, which clearly labeled the proceeding as "criminal in nature," Order to Show Cause and Declaration for Contempt (June 12, 1985), App. 21, and the participation of the District Attorney in the case. Though significant, these facts are not dispositive of the issue before us, for if the trial court had imposed only civil coercive remedies, as surely it was authorized to do, then it would be improper to invalidate that result merely because the Due Process Clause, as applied in *criminal* proceedings, was not satisfied.¹⁰ It also bears emphasis that the purposes underlying this proceeding were wholly ambiguous. Respondent was charged with violating nine discrete prior court orders, and the proceeding may have been intended

⁹ Our precedents are clear, however, that punishment may not be imposed in a civil contempt proceeding when it is clearly established that the alleged contemnor is unable to comply with the terms of the order. *United States v. Rylander*, 460 U. S. 752, 757 (1983); *Shillitani*, *supra*, at 371; *Oriel*, 278 U. S., at 366.

¹⁰ This can also be seen by considering the notice given to the alleged contemnor. This Court has stated that one who is charged with a crime is "entitled to be informed of the nature of the charge against him but to know that it is a charge and not a suit." *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 446 (1911). Yet if the relief ultimately given in such a proceeding is wholly civil in nature, then this requirement would not be applicable. It is also true, of course, that if *both* civil and criminal relief are imposed in the same proceeding, then the "'criminal feature of the order is dominant and fixes its character for purposes of review.'" *Nye v. United States*, 313 U. S. 33, 42-43 (1941), quoting *Union Tool Co. v. Wilson*, 259 U. S. 107, 110 (1922).

primarily to vindicate the court's authority in the face of his defiance. On the other hand, as often is true when court orders are violated, these charges were part of an ongoing battle to force respondent to conform his conduct to the terms of those orders, and of future orders as well.

Applying the traditional rules for classifying the relief imposed in a given proceeding requires the further resolution of one factual question about the nature of the relief in this case. Respondent was charged with nine separate counts of contempt, and was convicted on five of those counts, all of which arose from his failure to comply with orders to make payments in past months. He was sentenced to 5 days in jail on each of the five counts, for a total of 25 days, but his jail sentence was suspended and he was placed on probation for three years. If this were all, then the relief afforded would be criminal in nature.¹¹ But this is not all. One of the conditions of respondent's probation was that he begin making payments on his accumulated arrearage, and that he continue making these payments at the rate of \$50 per month. At that rate, all of the arrearage would be paid before respondent completed his probation period. Not only did the order therefore contemplate that respondent would be required to

¹¹ That a determinate sentence is suspended and the contemnor put on probation does not make the remedy civil in nature, for a suspended sentence, without more, remains a determinate sentence, and a fixed term of probation is itself a punishment that is criminal in nature. A suspended sentence with a term of probation is not equivalent to a conditional sentence that would allow the contemnor to avoid or purge these sanctions. A determinate term of probation puts the contemnor under numerous disabilities that he cannot escape by complying with the dictates of the prior orders, such as: any conditions of probation that the court judges to be reasonable and necessary may be imposed; the term of probation may be revoked and the original sentence (including incarceration) may be reimposed at any time for a variety of reasons without all the safeguards that are ordinarily afforded in criminal proceedings; and the contemnor's probationary status could affect other proceedings against him that may arise in the future (for example, this fact might influence the sentencing determination made in a criminal prosecution for some wholly independent offense).

purge himself of his past violations, but it expressly states that "[i]f any two payments are missed, whether consecutive or not, the entire balance shall become due and payable." Order of the California Superior Court for Orange County (Aug. 9, 1985), App. 39. What is unclear is whether the ultimate satisfaction of these accumulated prior payments would have purged the determinate sentence imposed on respondent. Since this aspect of the proceeding will vary as a factual matter from one case to another, depending on the precise disposition entered by the trial court, and since the trial court did not specify this aspect of its disposition in this case, it is not surprising that neither party was able to offer a satisfactory explanation of this point at argument. Tr. of Oral Arg. 42-47.¹² If the relief imposed here is in fact a determinate sentence with a purge clause, then it is civil in nature. *Shillitani*, 384 U. S., at 370, n. 6; *Fox*, 299 U. S., at 106, 108; *Gompers*, 221 U. S., at 442.

The state court did not pass on this issue because of its erroneous view that it was enough simply to aver that this proceeding is considered "quasi-criminal" as a matter of state law. And, as noted earlier, the court's view on this point, coupled with its view of the Federal Constitution, also led it to reinterpret the state statute, thus softening the impact of the presumption, in order to save its constitutionality. Yet the Due Process Clause does not necessarily prohibit the State from employing this presumption as it was construed by the state court, *if* respondent would purge his contempt judgment by paying off his arrearage. In these circumstances, the proper course for this Court is to vacate the judgment below and remand for further consideration of § 1209.5 free from the compulsion of an erroneous view of fed-

¹² It is also perhaps of some significance, though not binding upon us, that the parties reinforce the ambiguity on this point by entitling this contempt order, in the Joint Appendix, as "Order of the Superior Court of the State of California, County of Orange, to Purge Arrearage and Judgment of Contempt." App. i.

eral law. See, e. g., *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P. C.*, 467 U. S. 138, 152 (1984). If on remand it is found that respondent would purge his sentence by paying his arrearage, then this proceeding is civil in nature and there was no need for the state court to reinterpret its statute to avoid conflict with the Due Process Clause.¹³

We therefore vacate the judgment below and remand for further proceedings not inconsistent with this opinion.

It is so ordered.

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

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

This case concerns a contempt proceeding against a parent who repeatedly failed to comply with a valid court order to make child support payments. In my view, the proceeding is civil as a matter of federal law. Therefore, the Due Process Clause of the Fourteenth Amendment does not prevent the trial court from applying a legislative presumption that the parent remained capable of complying with the order until the time of the contempt proceeding.

¹³ Even if this relief is judged on remand to be criminal in nature because it does not allow the contemnor to purge the judgment by satisfying the terms of the prior orders, this result does not impose any real handicap on the States in enforcing the terms of their orders, for it will be clear to the States that the presumption established by § 1209.5 can be imposed, consistent with the Due Process Clause, in any proceeding where the relief afforded is civil in nature as defined by this Court's precedents. In addition, the state courts remain free to decide for themselves the state-law issues we have taken as having been resolved in this case by the court below, and to judge the lawfulness of statutes that impose similar presumptions under the provisions of their own state constitutions.

I

The facts of this case illustrate how difficult it can be to obtain even modest amounts of child support from a noncustodial parent. Alta Sue Adams married respondent Phillip William Feiock in 1968. The couple resided in California and had three children. In 1973, respondent left the family. Mrs. Feiock filed a petition in the Superior Court of California for the County of Orange seeking dissolution of her marriage, legal custody of the children, and child support. In January 1976, the court entered an interlocutory judgment of dissolution of marriage, awarded custody of the children to Mrs. Feiock, and ordered respondent to pay child support beginning February 1, 1976. The court ordered respondent to pay \$35 per child per month for the first four months, and \$75 per child per month starting June 1, 1976. The order has never been modified.

After the court entered a final judgment of dissolution of marriage, Mrs. Feiock and the children moved to Ohio. Respondent made child support payments only sporadically and stopped making any payments by December 1982. Pursuant to Ohio's enactment of the Uniform Reciprocal Enforcement of Support Act (URESA), Mrs. Feiock filed a complaint in the Court of Common Pleas of Stark County, Ohio. See Ohio Rev. Code Ann. § 3115.09(B) (1980). The complaint recited that respondent was obliged to pay \$225 per month in support, and that respondent was \$2,300 in arrears. The Ohio court transmitted the complaint and supporting documents to the Superior Court of California for the County of Orange, which had jurisdiction over respondent. Petitioner, the Orange County District Attorney, prosecuted the case on behalf of Mrs. Feiock in accordance with California's version of URESA. See Cal. Civ. Proc. Code Ann. § 1670 *et seq.* (West 1982).

After obtaining several continuances, respondent finally appeared at a hearing before the California court on June 22, 1984. Respondent explained that he had recently become a

partner in a flower business that had uncertain prospects. The court ordered respondent to pay \$150 per month on a temporary basis, although it did not alter the underlying order. Payments were to begin July 1, 1984.

Respondent made payments only for August and September. Respondent appeared in court three times thereafter, but never asked for a modification of the order. Eventually, the Orange County District Attorney filed Orders to Show Cause and Declarations of Contempt alleging nine counts of contempt based on respondent's failure to make nine of the \$150 support payments. At a hearing held August 9, 1985, the District Attorney invoked Cal. Civ. Proc. Code Ann. § 1209.5 (West 1982), which says:

"When a court of competent jurisdiction makes an order compelling a parent to furnish support . . . for his child, . . . proof that the parent was present in court at the time the order was pronounced and proof of noncompliance therewith shall be prima facie evidence of a contempt of court."

In an effort to overcome this presumption, respondent testified regarding his ability to pay at the time of each alleged act of contempt. The court found that respondent had been able to pay five of the missed payments. Accordingly, the court found respondent in contempt on five of the nine counts and sentenced him to 5 days in jail on each count, to be served consecutively, for a total of 25 days. The court suspended execution of the sentence and placed respondent on three years' informal probation on the conditions that he make monthly support payments of \$150 starting immediately and additional payments of \$50 per month on the arrearage starting October 1, 1985.

Respondent filed a petition for a writ of habeas corpus in the California Court of Appeal, where he prevailed on his argument that § 1209.5 is unconstitutional as a mandatory presumption shifting to the defendant the burden of proof of an element of a criminal offense. That is the argument that the

Court confronts in this case. In my view, no remand is necessary because the judgment below is incorrect as a matter of federal law.

II

The California Court of Appeal has erected a substantial obstacle to the enforcement of child support orders. As petitioner vividly describes it, the judgment turns the child support order into "a worthless piece of scrap." Brief for Petitioner 47. The judgment hampers the enforcement of support orders at a time when strengthened enforcement is needed. "The failure of enforcement efforts in this area has become a national scandal. In 1983, only half of custodial parents received the full amount of child support ordered; approximately 26% received some lesser amount, and 24% received nothing at all." Brief for Women's Legal Defense Fund et al. as *Amici Curiae* 26 (footnote omitted). The facts of this case illustrate how easily a reluctant parent can evade a child support obligation. Congress recognized the serious problem of enforcement of child support orders when it enacted the Child Support Enforcement Amendments of 1984, Pub. L. 98-378, 98 Stat. 1305. S. Rep. No. 98-387, pp. 5-6 (1984); H. R. Rep. No. 98-527, pp. 30, 49 (1983). The California Legislature responded to the problem by enacting the presumption described in § 1209.5. Now, says petitioner, the California Court of Appeal has sabotaged the California Legislature's effort.

Contempt proceedings often will be useless if the parent seeking enforcement of valid support orders must prove that the obligor can comply with the court order. The custodial parent will typically lack access to the financial and employment records needed to sustain the burden imposed by the decision below, especially where the noncustodial parent is self-employed, as is the case here. Serious consequences follow from the California Court of Appeal's decision to invalidate California's statutory presumption that a parent contin-

ues to be able to pay the child support previously determined to be within his or her means.

Petitioner asks us to determine as a matter of California law that inability to comply with a support order is an affirmative defense to a contempt charge, so that the burden of persuasion may be placed on the contemnor under *Martin v. Ohio*, 480 U. S. 228 (1987). Petitioner also contends that the Court of Appeal erred in supposing that § 1209.5 shifts the burden of persuasion rather than merely the burden of production, citing *Lyons v. Municipal Court*, 75 Cal. App. 3d 829, 838, 142 Cal. Rptr. 449, 452 (1977); *Oliver v. Superior Court*, 197 Cal. App. 2d 237, 242, 17 Cal. Rptr. 474, 476-477 (1961); 4A J. Goddard, California Practice: Family Law Practice § 686 (3d ed. 1981); 14 Cal. Jur. 3d, Contempt §§ 32, 71 (1974); and 6 B. Witkin, Summary of California Law, Parent and Child § 137 (8th ed. 1974). But the interpretation of California law is the province of California courts. I agree with the majority that, for purposes of this decision, we should assume that the California Court of Appeal correctly determined these matters of state law. *Martin v. Ohio*, *supra*; *United Gas Public Service Co. v. Texas*, 303 U. S. 123, 139 (1938). If the Court of Appeal was in error, the California courts may correct it in future cases.

The linchpin of the Court of Appeal's opinion is its determination that the contempt proceeding against respondent was criminal in nature. The court applied what it understood are the federal due process standards for mandatory evidentiary presumptions in criminal cases. See *Ulster County Court v. Allen*, 442 U. S. 140, 167 (1979) (mandatory presumptions are impermissible unless "the fact proved is sufficient to support the inference of guilt beyond a reasonable doubt"); *Sandstrom v. Montana*, 442 U. S. 510, 523-524 (1979). This Court has recognized, by contrast, that civil contempt proceedings do not require proof beyond a reasonable doubt and that the rules governing use of presumptions differ accordingly. In the civil contempt context, we have

upheld a rule that shifts to the contemnor the burden of production on ability to comply, *United States v. Rylander*, 460 U. S. 752, 757 (1983), and we have recognized that the contemnor may bear the burden of persuasion on this issue as well, *Maggio v. Zeitz*, 333 U. S. 56, 75-76 (1948). If the contempt proceeding in this case may be characterized as civil in nature, as petitioner urges, then under our precedents the presumption provided in Cal. Civ. Proc. Code Ann. § 1209.5 (West 1982) would not violate the Due Process Clause.

The characterization of a state proceeding as civil or criminal for the purpose of applying the Due Process Clause of the Fourteenth Amendment is itself a question of federal law. *Allen v. Illinois*, 478 U. S. 364 (1986). The substance of particular contempt proceedings determines whether they are civil or criminal, regardless of the label attached by the court conducting the proceedings. See *Shillitani v. United States*, 384 U. S. 364, 368-370 (1966); *Penfield Co. v. SEC*, 330 U. S. 585, 590 (1947); *Nye v. United States*, 313 U. S. 33, 42-43 (1941); *Lamb v. Cramer*, 285 U. S. 217, 220-221 (1932); *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 441-443 (1911). Civil contempt proceedings are primarily coercive; criminal contempt proceedings are punitive. As the Court explained in *Gompers*: "The distinction between refusing to do an act commanded,—remedied by imprisonment until the party performs the required act; and doing an act forbidden,—punished by imprisonment for a definite term; is sound in principle, and generally, if not universally, affords a test by which to determine the character of the punishment." 221 U. S., at 443. Failure to pay alimony is an example of the type of act cognizable in an action for civil contempt. *Id.*, at 442.

Whether a particular contempt proceeding is civil or criminal can be inferred from objective features of the proceeding and the sanction imposed. The most important indication is whether the judgment inures to the benefit of another party to the proceeding. A fine payable to the complaining party

and proportioned to the complainant's loss is compensatory and civil. *United States v. Mine Workers*, 330 U. S. 258, 304 (1947). Because the compensatory purpose limits the amount of the fine, the contemnor is not exposed to a risk of punitive sanctions that would make criminal safeguards necessary. By contrast, a fixed fine payable to the court is punitive and criminal in character.

An analogous distinction can be drawn between types of sentences of incarceration. Commitment to jail or prison for a fixed term usually operates as a punitive sanction because it confers no advantage on the other party. *Gompers, supra*, at 449. But if a contemnor is incarcerated until he or she complies with a court order, the sanction is civil. Although the imprisonment does not compensate the adverse party directly, it is designed to obtain compliance with a court order made in that party's favor. "When the [contemnors] carry 'the keys of their prison in their own pockets,' the action 'is essentially a civil remedy designed for the benefit of other parties and has quite properly been exercised for centuries to secure compliance with judicial decrees.'" *Shillitani, supra*, at 368 (citations omitted).

III

Several peculiar features of California's contempt law make it difficult to determine whether the proceeding in this case was civil or criminal. All contempt proceedings in California courts are governed by the same procedural rules. Cal. Civ. Proc. Code Ann. §§ 1209-1222 (West 1982 and Supp. 1988); *In re Morris*, 194 Cal. 63, 67, 227 P. 914, 915 (1924); Wright, Byrne, Haakh, Westbrook, & Wheat, Civil and Criminal Contempt in the Federal Courts, 17 F. R. D. 167, 180 (1955). Because state law provides that defendants in civil contempt proceedings are entitled to most of the protections guaranteed to ordinary criminal defendants, the California courts have held that civil contempt proceedings are quasi-criminal under state law. See, e. g., *Ross v. Superior Court*, 19 Cal. 3d 899, 913, 569 P. 2d 727, 736 (1977);

Culver City v. Superior Court, 38 Cal. 2d 535, 541-542, 241 P. 2d 258, 261-262 (1952); *In re Martin*, 71 Cal. App. 3d 472, 480, 139 Cal. Rptr. 451, 455-456 (1977). Therefore, indications that the California Superior Court conducted respondent's hearing as a criminal proceeding do not conclusively demonstrate for purposes of federal due process analysis that respondent was tried for criminal contempt.

Certain formal aspects of the proceeding below raise the possibility that it involved criminal contempt. The orders to show cause stated that "[a] contempt proceeding is criminal in nature" and that a violation would subject the respondent to "possible penalties." App. 18, 21. The orders advised respondent of his right to an attorney. *Ibid.* During the hearing, the trial judge told respondent that he had a constitutional right not to testify. *Id.*, at 27. Finally, the judge imposed a determinate sentence of five days in jail for each count of contempt, to be served consecutively. See Cal. Civ. Proc. Code Ann. § 1218 (West 1982) (contempt may be punished by a fine not exceeding \$500, or imprisonment not exceeding five days, or both); cf. Cal. Civ. Proc. Code Ann. § 1219 (West 1982) (contempt may be punished by imprisonment until an act is performed, if the contempt is the omission to perform the act).

Nevertheless, the substance of the proceeding below and the conditions on which the sentence was suspended reveal that the proceeding was civil in nature. Mrs. Feiock initiated the underlying action in order to obtain enforcement of the child support order for the benefit of the Feiock children. The California District Attorney conducted the case under a provision of the URESA that authorizes him to act on Mrs. Feiock's behalf. Cal. Civ. Proc. Code Ann. § 1680 (West 1982). As the very caption of the case in this Court indicates, the District Attorney is acting on behalf of Mrs. Feiock, not as the representative of the State of California in a criminal prosecution. Both of the provisions of California's

enactment of the URESA that authorize contempt proceedings appear in a chapter of the Code of Civil Procedure entitled "Civil Enforcement." *Id.*, §§ 1672, 1685. It appears that most States enforce child and spousal support orders through civil proceedings like this one, in which the burden of persuasion is shifted to the defendant to show inability to comply. J. Atkinson, *Modern Child Custody Practice* 556 (1986); H. Krause, *Child Support in America* 65 (1981); Annot., 53 A. L. R. 2d 591, 607-616 (1957 and Supp. 1987).

These indications that the proceeding was civil are confirmed by the character of the sanction imposed on respondent. The California Superior Court sentenced respondent to a fixed term of 25 days in jail. Without more, this sanction would be punitive and appropriate for a criminal contempt. But the court suspended the determinate sentence and placed respondent on three years' informal probation on the conditions that he comply with the support order in the future and begin to pay on the arrearage that he had accumulated in the past. App. 40. These special conditions aim exclusively at enforcing compliance with the existing child support order.

Our precedents indicate that such a conditional sentence is coercive rather than punitive. Thus in *Gompers*, we observed that civil contempt may be punished by an order that "the defendant stand committed *unless* and until he performs the affirmative act required by the court's order." 221 U. S., at 442 (emphasis added). In *Shillitani*, we decided that civil contempt could be punished by a prison sentence fixed at two years if it included a proviso that the contemnor would be released as soon as he complied with the court order. 384 U. S., at 365. In this case, if respondent performs his obligations under the original court order, he can avoid going to jail at all. Like the sentence in *Shillitani*, respondent's prison sentence is coercive rather than punitive because it effectively "conditions release upon the contemnor's willingness to [comply]." *Id.*, at 370.

It is true that the order imposing the sentence does not expressly provide that, *if* respondent is someday incarcerated and *if* he subsequently complies, he will be released immediately. The parties disagree about what will happen if this contingency arises, Tr. of Oral Arg. 44, 45-47, and there is no need to address today the question whether the failure to grant immediate release would render the sanction criminal. In the case before us respondent carries something even better than the "keys to the prison" in his own pocket: as long as he meets the conditions of his informal probation, he will never enter the jail.

It is critical that the only conditions placed on respondent's probation, apart from the requirement that he conduct himself generally in accordance with the law, are that he cure his past failures to comply with the support order and that he continue to comply in the future.* The sanction imposed on respondent is unlike ordinary criminal probation because it is collateral to a civil proceeding initiated by a private party, and respondent's sentence is suspended on the condition that he comply with a court order entered for the benefit of that party. This distinguishes respondent's sentence from suspended criminal sentences imposed outside the contempt context.

This Court traditionally has inquired into the substance of contempt proceedings to determine whether they are civil or criminal, paying particular attention to whether the sanction

*Unlike the Court, *ante*, at 638-641, I find no ambiguity in the court's sentencing order that hints that respondent can purge his jail sentence by paying off the arrearage alone. The sentencing order suspends execution of the jail sentence and places respondent on probation on the conditions that he *both* make future support payments at \$150 per month *and* pay \$50 per month on the arrearage. App. 40. If respondent pays off the arrearage before the end of his probation period, but then fails to make a current support payment, the suspension will be revoked and he will go to jail. See *People v. Chagolla*, 151 Cal. App. 3d 1045, 199 Cal. Rptr. 181 (1984) (explaining that if a court suspends a sentence on conditions, and any condition is violated, the court *must* reinstate the original sentence).

imposed will benefit another party to the proceeding. In this case, the California Superior Court suspended respondent's sentence on the condition that he bring himself into compliance with a court order providing support for his children, represented in the proceeding by petitioner. I conclude that the proceeding in this case should be characterized as one for civil contempt, and I would reverse the judgment below.

LANDERS *v.* NATIONAL RAILROAD PASSENGER
CORPORATION ET AL.

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

No. 86-2037. Argued March 29, 1988—Decided April 27, 1988

Petitioner, a passenger engineer employed by respondent railroad corporation (Amtrak), belongs to the United Transportation Union (UTU) rather than to respondent Brotherhood of Locomotive Engineers (BLE), the union that represents Amtrak engineers for collective-bargaining purposes. Petitioner's request that the UTU be allowed to represent him at a company-level disciplinary hearing was denied on the ground that, under the BLE-Amtrak collective-bargaining agreement, only the BLE could undertake such representation. Petitioner represented himself at the hearing and received a 30-day suspension for violating company work rules, which he did not appeal to the National Railroad Adjustment Board. He then filed suit in Federal District Court seeking declaratory and injunctive relief against Amtrak and the BLE on the ground that their refusal to allow his representation by the UTU at the hearing violated his rights under the Railway Labor Act (RLA). The court dismissed the complaint after a bench trial, and the Court of Appeals affirmed.

Held: The RLA does not entitle a railroad employee to be represented at company-level grievance or disciplinary proceedings by a union other than his collective-bargaining representative. Petitioner's contention that a right to such representation is implicit in § 2, Eleventh (c), of the RLA, which permits a union-shop requirement to be satisfied by membership in any national union organized in accordance with the Act, is without merit, since that provision was enacted for the single, narrow purpose of preventing compulsory dual unionism or the necessity of an employee's changing unions upon a change in crafts, *Pennsylvania R. Co. v. Rychlik*, 352 U. S. 480, which purpose has been satisfied here since petitioner has not been required to join the BLE. Nor does any other RLA provision expressly address the question of minority union representation at company-level proceedings; in fact, § 3, First (i), provides merely that such proceedings shall be handled in "the usual manner." That Congress, in § 3, First (j), expressly allowed employees the representative of their choice at the Adjustment Board level, but did not do so with regard to the earlier, company-level phase, is persuasive evidence that Congress did not believe that minority union participation at

the company level was necessary to accomplish the RLA's purposes. Petitioner will not suffer appreciable prejudice because of the UTU's inability to represent him at proceedings conducted on company property, since it may be assumed that he will be adequately protected under the BLE's duty of fair representation, and since the UTU may represent him before the Adjustment Board if the company proceedings do not resolve the dispute. Pp. 655-659.

814 F. 2d 41, affirmed.

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

Clinton J. Miller III argued the cause and filed briefs for petitioner.

Harold A. Ross argued the cause for respondents and filed a brief for respondent Brotherhood of Locomotive Engineers. *Joanna L. Moorhead*, *Harold R. Henderson*, and *Harry A. Rissetto* filed a brief for respondent National Railroad Passenger Corporation.*

JUSTICE WHITE delivered the opinion of the Court.

This case presents the question whether a railroad engineer is entitled under the Railway Labor Act, 44 Stat. (part 2) 577, as amended, 45 U. S. C. § 151 *et seq.*, to be represented at company-level grievance or disciplinary proceedings by a union other than his collective-bargaining representative.

I

Petitioner is employed as a passenger engineer by respondent National Railroad Passenger Corporation (Amtrak).¹ Amtrak engineers are represented for purposes of collective bargaining by respondent Brotherhood of Locomotive Engineers (BLE). Petitioner does not belong to the BLE. Instead, he is a member and officer of the rival United Trans-

*George Kaufmann, John O. B. Clarke, Jr., and Laurence Gold filed a brief for the American Federation of Labor and Congress of Industrial Organizations et al. as *amici curiae*.

¹ Amtrak is subject to the federal labor statutes applicable to railroads. 45 U. S. C. § 546(b).

portation Union (UTU), which represents certain other crafts of Amtrak employees.

In February 1984, petitioner was charged with a violation of company work rules. An internal disciplinary hearing was convened pursuant to the BLE-Amtrak collective-bargaining agreement. Petitioner's request that the UTU be allowed to represent him at the disciplinary hearing was denied on the ground that the collective-bargaining agreement provided that only the BLE could represent engineers at company-level hearings.² Petitioner represented himself at the hearing. He received a 30-day suspension, which he has now served. He did not appeal his suspension to the National Railroad Adjustment Board.

Petitioner then filed suit in the United States District Court for the District of Massachusetts seeking declaratory and injunctive relief against both Amtrak and the BLE. He contended that his rights under the Railway Labor Act had been violated because UTU had not been allowed to represent him at the disciplinary hearing.

The District Court dismissed petitioner's complaint following a bench trial, and the Court of Appeals for the First Circuit affirmed. 814 F. 2d 41 (1987). The Court of Appeals concluded that neither the language nor the legislative history of the Railway Labor Act supported petitioner's contention that railroad operating employees have a statutory right to be represented by the union of their choice at company-level grievance and disciplinary proceedings. The court rejected as unpersuasive the contrary decision of the Fifth Circuit in *Taylor v. Missouri Pacific R. Co.*, 794 F. 2d 1082, cert. denied, 479 U. S. 1018 (1986).

We granted certiorari, 484 U. S. 962 (1987), to resolve the conflict between two Courts of Appeals over this question of federal railway labor law. We now affirm.

² Petitioner no longer challenges this construction of the BLE-Amtrak collective-bargaining agreement.

II

Petitioner contends that §2, Eleventh, of the Railway Labor Act, 45 U. S. C. §152, Eleventh, provides railroad operating employees with a right to be represented by a "minority" union (*i. e.*, a union other than their collective-bargaining representative) at company-level grievance or disciplinary proceedings.

Section 2, Eleventh (a), permits a railroad and a union "duly designated and authorized to represent [its] employees" to enter into a union-shop agreement requiring "as a condition of continued employment, that . . . all employees shall become members of the labor organization representing their craft or class." An employee engaged in "engine, train, yard, or hostling service" may satisfy the requirement of membership in a labor organization, however, by "hold[ing] or acquir[ing] membership in any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services." §2, Eleventh (c). It is not disputed in this action that §2, Eleventh (c), permits petitioner to satisfy the union-shop provision of the BLE-Amtrak collective-bargaining agreement by holding membership in the UTU.

Neither §2, Eleventh, nor any other provision of the Railway Labor Act expressly addresses what role, if any, a minority union is entitled to play in company-level grievance and disciplinary proceedings. For example, §3, First (i), of the Act provides merely that disputes "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions . . . shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes." 45 U. S. C. §153, First (i). In contrast, §3, First (j), specifies that, once such disputes reach the Adjustment Board level, "[p]arties may be heard either in per-

son, by counsel, or by other representatives, as they may respectively elect." 45 U. S. C. § 153, First (j).

We are unwilling to read into the Railway Labor Act a right to minority union participation in company-level grievance and disciplinary proceedings that Congress declined to put there. That Congress expressly provided railroad employees with the right to the representative of their choice in Adjustment Board proceedings, but did not do so with regard to any earlier phase of the dispute resolution process, is persuasive evidence that Congress did not believe that the participation of minority unions or other outsiders in company-level proceedings was necessary to accomplish the purposes of the Act.³

Indeed, the statutory purpose of "provid[ing] for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions," 45 U. S. C. § 151a(5), might often be frustrated if employees could demand to be heard through the representative of their choice at grievance and disciplinary proceedings conducted on the employer's property. For example, many disputes might be resolved less expeditiously, or not at all, if employees had a statutory right to be represented at the company level by minority unions, which do not have the same established relationship with the employer as do official bargaining representatives or the same familiarity with how similar disputes have been resolved in the past.

³ We note that Congress declined in 1934 to amend the RLA to provide that a railroad employee could select a representative other than his collective-bargaining representative to pursue his grievance with his employer. Such an amendment had been proposed by Joseph B. Eastman, Federal Coordinator of Transportation, and George M. Harrison, President of the Brotherhood of Railway and Steamship Clerks. See *Railway Labor Act Amendments: Hearings on H. R. 7650 before the House Committee on Interstate and Foreign Commerce*, 73d Cong., 2d Sess., 44, 89 (1934) (H. R. 7650 was the predecessor of H. R. 9861).

In addition, a minority union might use the grievance and disciplinary proceedings to undermine the position of the bargaining representative and thereby destabilize labor-management relations. A majority union's prosecution of employee grievances and defense of employee disciplinary charges "complemen[t] [its] status as exclusive bargaining representative by permitting it to participate actively in the continuing administration of the contract." *Republic Steel Corp. v. Maddox*, 379 U. S. 650, 653 (1965). As Professor Cox has recognized, if the bargaining representative is instead prevented from exercising control over the presentation of grievances, the opportunity arises for "dissident groups, who may belong to rival unions, . . . to press aggressively all manner of grievances, regardless of their merit, in an effort to squeeze the last drop of competitive advantage out of each grievance and to use the settlement even of the most trivial grievances, as a vehicle to build up their own prestige." Cox, *Rights Under a Labor Agreement*, 60 Harv. L. Rev. 601, 626 (1956). In such circumstances, "[t]he settlement of grievances could become the source of friction and competition and a means for creating and perpetuating employee dissatisfaction instead of a method of eliminating it." *Ibid.* The same potential for friction and competition exists, of course, when minority unions are allowed to participate in disciplinary proceedings such as those at issue here.⁴

We find no merit in petitioner's contention that the right of railroad operating employees to be represented by minority unions at company-level grievance and disciplinary proceedings is implicit in §2, Eleventh (c).

This congressional intent underlying §2, Eleventh (c), was extensively analyzed by the Court in *Pennsylvania R. Co. v. Rychlik*, 352 U. S. 480, 489 (1957). The Court there noted

⁴Of course, an employee may be entitled to be heard through the representative of his choice at company-level grievance and disciplinary proceedings if that has become the "usual manner" of handling disputes at his workplace.

that the different crafts in the railroad industry were often represented by different unions and that employees often shuttled back and forth between two crafts. A union-shop agreement would ordinarily have required such an employee either to "belong to two unions—one representing each of his crafts—or . . . to shuttle between unions as he shuttles between jobs." *Id.*, at 490. The former alternative would be "expensive and sometimes impossible," we observed, while the latter alternative would be "complicated and might mean loss of seniority and union benefits." *Ibid.* Accordingly, we concluded that Congress had enacted § 2, Eleventh (c), for the single narrow purpose of "prevent[ing] compulsory dual unionism or the necessity of changing from one union to another when an employee temporarily changes crafts." *Id.*, at 492.

This purpose has been fully achieved in the instant case. Petitioner has been accorded his statutory right to refrain from acquiring membership in the BLE—either instead of or in addition to his membership in the UTU—as a condition of his employment as an engineer by Amtrak. However, unless the UTU becomes the official bargaining representative for Amtrak engineers or the "usual manner" of processing disputes on the Amtrak property is changed, petitioner cannot claim the additional right to be represented by the UTU at company-level grievance and disciplinary proceedings.

There is no reason to believe that petitioner will suffer any appreciable prejudice if he cannot be represented by the UTU at grievance and disciplinary proceedings conducted on the Amtrak property. It is appropriate to assume that petitioner's interests will be adequately represented by the BLE, which owes the same duty of fair representation to all members of the bargaining unit regardless of their union affiliation. See *Steele v. Louisville & Nashville R. Co.*, 323 U. S. 192, 204 (1944). Moreover, if the dispute cannot be re-

solved at the company level, petitioner may be heard by the Adjustment Board through the representative of his choice.

The judgment of the Court of Appeals is therefore

Affirmed.

EMPLOYMENT DIVISION, DEPARTMENT OF
HUMAN RESOURCES OF THE STATE OF
OREGON, ET AL. v. SMITH

CERTIORARI TO THE SUPREME COURT OF OREGON

No. 86-946. Argued December 8, 1987—Decided April 27, 1988*

On the basis of their employer's policy prohibiting its employees from using illegal nonprescription drugs, respondent drug and alcohol abuse rehabilitation counselors were discharged for ingesting a small quantity of peyote, a hallucinogenic drug, for sacramental purposes during a religious ceremony of the Native American Church. It is undisputed that respondents are members of that church and that their religious beliefs are sincere. Respondents applied for and were denied unemployment compensation by petitioner Employment Division under an Oregon statute disqualifying employees discharged for work-connected misconduct. The State Court of Appeals reversed. The State Supreme Court affirmed, reasoning that, although the benefits denials were proper under Oregon law, *Sherbert v. Verner*, 374 U. S. 398, and *Thomas v. Review Bd.*, *Indiana Employment Security Div.*, 450 U. S. 707, required the court to hold that the denials significantly burdened respondents' religious freedom in violation of the Free Exercise Clause of the First Amendment to the Federal Constitution. In reaching that conclusion, the court attached no significance to the fact that peyote possession is a felony in Oregon, declaring that the legality of ingesting peyote did not affect its analysis of the State's interest in denying benefits, which must be found in the unemployment compensation, rather than the criminal, statutes.

Held: These cases must be remanded to the State Supreme Court for a definitive ruling as to whether the religious use of peyote is legal in Oregon, since that question is relevant to the federal constitutional analysis. Although *Sherbert*, *Thomas*, and *Hobbie v. Unemployment Appeals Comm'n*, 480 U. S. 136, prohibited the denial of unemployment compensation to employees required to choose between fidelity to their religious beliefs and cessation of work, those cases all involved employee conduct that was perfectly legal. Their results might well have been different had the employees been discharged for criminal conduct, since the First Amendment protects "legitimate claims to the free exercise of

*Together with No. 86-947, *Employment Division, Department of Human Resources of the State of Oregon, et al. v. Black*, also on certiorari to the same court.

religion,'” see *Hobbie*, 480 U. S., at 142, not conduct that a State has validly proscribed. If Oregon does prohibit the religious use of peyote, and if that prohibition is consistent with the Federal Constitution (a question that is not decided here), there is no federal right to engage in that conduct in Oregon, and the State is free to withhold unemployment compensation from respondents. If, on the other hand, Oregon is among those States that exempt the religious use of peyote from statutory controlled substances prohibitions, respondents’ conduct may well be entitled to constitutional protection. Pp. 669–674.

No. 86–946, 301 Ore. 209, 721 P. 2d 445, and No. 86–947, 301 Ore. 221, 721 P. 2d 451, vacated and remanded.

STEVENS, 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 and BLACKMUN, JJ., joined, *post*, p. 674. KENNEDY, J., took no part in the consideration or decision of the cases.

William F. Gary, Deputy Attorney General of Oregon, argued the cause for petitioners. With him on the briefs were *Dave Frohnmayer*, Attorney General of Oregon, *Virginia L. Linder*, Solicitor General, *Michael D. Reynolds*, Assistant Solicitor General, and *Christine Chute*, Assistant Attorney General.

Suanne Lovendahl argued the cause and filed a brief for respondents.†

JUSTICE STEVENS delivered the opinion of the Court.

Respondents are drug and alcohol abuse rehabilitation counselors who were discharged after they ingested peyote, a hallucinogenic drug, during a religious ceremony of the Native American Church. Both applied for and were denied unemployment compensation by petitioner Employment Division. The Oregon Supreme Court held that this denial, al-

†Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union Foundation et al. by *Charles A. Horsky*, *David H. Remes*, *John A. Powell*, and *David B. Goldstein*; for the American Jewish Congress et al. by *Amy Adelson*, *Lois C. Waldman*, and *Marc D. Stern*; and for the Native American Church of North America et al. by *Walter R. Echo-Hawk* and *Steven C. Moore*.

though proper as a matter of Oregon law, violated the Free Exercise Clause of the First Amendment to the Federal Constitution.¹ In reaching that conclusion the state court attached no significance to the fact that the possession of peyote is a felony under Oregon law punishable by imprisonment for up to 10 years.² Because we are persuaded that the alleged illegality of respondents' conduct is relevant to the constitutional analysis, we granted certiorari, 480 U. S. 916 (1987), and now vacate the judgments and remand for further proceedings.

I

Respondents Alfred Smith and Galen Black were employed by the Douglas County Council on Alcohol and Drug Abuse Prevention and Treatment (ADAPT), a nonprofit corporation that provides treatment for alcohol and drug abusers. Both were qualified to be counselors, in part, because they had former drug and alcohol dependencies. As a matter of policy, ADAPT required its recovering counselors to abstain from the use of alcohol and illegal drugs.³ ADAPT ter-

¹"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." U. S. Const., Amdt. 1.

²Ore. Rev. Stat. §§475.992(4)(a), 161.605(2) (1987); see 301 Ore. 209, 219, n. 2, 721 P. 2d 445, 450, n. 2 (1986) (quoted in n. 10, *infra*).

³This policy reflected ADAPT's treatment philosophy that successful recovery from addiction requires complete abstinence from the use of alcohol and nonprescription drugs. The policy also served to assure that counselors were appropriate role models for their clients. ADAPT's policy statement on drug and alcohol abuse provided, in pertinent part:

"POLICY STATEMENT

ALCOHOL AND OTHER DRUG USE BY EMPLOYEES

"In keeping with our drug-free philosophy of treatment, and our belief in the disease concept of alcoholism, and associated complex issues involved in both alcoholism and drug addiction, we require the following of our employees:

"1. Use of an illegal drug or use of prescription drugs in a nonprescribed manner is grounds for immediate termination from employment.

"3. Any use of alcohol by recovering staff will not be allowed, and is grounds for immediate disciplinary action, up to and including termina-

minated respondents' employment because they violated that policy. As to each of them the violation consisted of a single act of ingesting a small quantity of peyote for sacramental purposes at a ceremony of the Native American Church. It is undisputed that respondents are members of that church, that their religious beliefs are sincere, and that those beliefs motivated the "misconduct" that led to their discharge.

Both respondents applied for unemployment compensation. Petitioner Employment Division considered the applications in a series of administrative hearings and appeals,⁴ at the conclusion of which it determined that the applications should be denied.⁵ Petitioner considered and rejected respondents' constitutional claim and concluded that they were

tion. Use shall be defined as any ingestion of an alcoholic beverage, in *any* situation." App. 11.

⁴Raising identical legal issues and presenting almost identical facts, these two cases proceeded in tandem through state administrative proceedings and through the state courts. They were consolidated upon order of this Court when the State's petitions for certiorari were granted. 480 U. S. 916 (1987).

⁵Each respondent requested a hearing after his application for benefits was denied because he had been discharged for work-related misconduct. After separate hearings, a referee decided that both respondents were entitled to unemployment compensation benefits. In Black's case, the referee held that his ingestion of peyote was "an isolated incident of poor judgment" rather than misconduct. App. 3-5. In Smith's case, the referee concluded that because "there is no evidence in the hearing record to indicate that granting benefits to claimants whose unemployment is caused by adherence to religious beliefs would have any significant impact on the trust fund, it cannot be held that the alleged State interest warrants interference with the claimant's freedom of religion." App. to Pet. for Cert. in No. 86-946, p. A25. On review the Employment Appeals Board disagreed with the referee and concluded that benefits should be denied in both cases. As to Smith, the Board ruled that the State had shown a compelling state interest in denying benefits. That interest was "in the proscription of illegal drugs, not merely in the burden upon the Unemployment Compensation Trust Fund." *Id.*, at A19-A20. In Black's case the Board merely reversed the referee's finding that Black had not been fired for misconduct without reaching the First Amendment issue. App. to Pet. for Cert. in No. 86-947, pp. A23-A24.

ineligible for benefits because they had been discharged for work-related "misconduct."⁶

The Oregon Court of Appeals, considering the constitutional issue en banc, reversed the Board's decisions.⁷ The Oregon Supreme Court granted the State's petitions for review in both cases to consider whether the denial of benefits violated the Oregon Constitution⁸ or the First Amendment to the Federal Constitution. The cases were argued together, but the court issued separate opinions, fully analyzing the constitutional issues only in *Smith*.

⁶ Oregon Rev. Stat. § 657.176(2)(a) (1987) provides that "[a]n individual shall be disqualified from the receipt of benefits . . . if . . . the individual . . . [h]as been discharged for misconduct connected with work."

Oregon Admin. Rule 471-30-038(3) (1987) provides:

"Under the provisions of ORS 657.176(2)(a) and (b), misconduct is a wilful violation of the standards of behavior which an employer has the right to expect of an employee. An act that amounts to a wilful disregard of an employer's interest, or recurring negligence which demonstrates wrongful intent is misconduct. Isolated instances of poor judgment, good faith errors, unavoidable accidents, absences due to illness or other physical or mental disabilities, or mere inefficiency resulting from lack of job skills or experience are not misconduct for purposes of denying benefits under ORS 657.176."

⁷ In *Black*'s case the majority concluded that the denial of benefits to persons who were discharged for engaging in a religious act constituted a substantial burden on free exercise rights that was not justified by the State's interest in protecting the Unemployment Compensation Fund from depletion and remanded for further factual findings on the religious nature of respondent's conduct. The dissenting judges expressed the opinion that because the ingestion of peyote was prohibited by Oregon law respondent had no protectible constitutional right on which to base his claim. 75 Ore. App. 735, 707 P. 2d 1274 (1985). *Smith*'s case was reversed and remanded for further consideration in light of the decision in *Black*. 75 Ore. App. 764, 709 P. 2d 246 (1985).

⁸ Article I of the Oregon Constitution provides, in part:

"Section 2. Freedom of worship. All men shall be secure in the Natural right, to worship Almighty God according to the dictates of their own consciences.

"Section 3. Freedom of religious opinion. No law shall in any case whatever control the free exercise, and enjoyment of religious opinions, or interfere with the rights of conscience."

In accordance with its usual practice,⁹ the court first addressed the Oregon constitutional issue. The court concluded:

"Under the Oregon Constitution's freedom of religion provisions, claimant has not shown that his right to worship according to the dictates of his conscience has been infringed upon by the denial of unemployment benefits. We do not imply that a governmental rule or policy disqualifying a person from employment or from public services or benefits by reason of conduct that rests on a religious belief or a religious practice could not impinge on the religious freedom guaranteed by Article I, sections 2 and 3. Nor do we revive a distinction between constitutional 'rights' and 'privileges.' But here it was not the government that disqualified claimant from his job for ingesting peyote. And the rule denying unemployment benefits to one who loses his job for what an employer permissibly considers misconduct, conduct incompatible with doing the job, is itself a neutral rule, as we have said. As long as disqualification by reason of the religiously based conduct is peculiar to the particular employment and most other jobs remain open to the worker, we do not believe that the state is denying the worker a vital necessity in applying the 'misconduct' exception of the unemployment compensation law." 301 Ore. 209, 216, 721 P. 2d 445, 448-449 (1986).

Turning to the federal issue, the court reasoned that our decisions in *Sherbert v. Verner*, 374 U. S. 398 (1963), and

⁹The Oregon Supreme Court stated in *Sterling v. Cupp*, 290 Ore. 611, 614, 625 P. 2d 123, 126 (1981):

"The proper sequence is to analyze the state's law, including its constitutional law, before reaching a federal constitutional claim. This is required, not for the sake either of parochialism or of style, but because the state does not deny any right claimed under the federal Constitution when the claim before the court in fact is fully met by state law."

See also Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 Ga. L. Rev. 165, 178-179 (1984).

Thomas v. Review Bd., Indiana Employment Security Div., 450 U. S. 707 (1981), required it to hold that the denial of unemployment benefits significantly burdened respondent's religious freedom. The court also concluded that the State's interest in denying benefits was not greater in this case than in *Sherbert* or *Thomas*. This conclusion rested on the premise that the Board had erroneously relied on the State's interest in proscribing the use of dangerous drugs rather than just its interest in the financial integrity of the compensation fund. Whether the state court believed that it was constrained by *Sherbert* and *Thomas* to disregard the State's law enforcement interest, or did so because it believed petitioner to have conceded that the legality of respondent's conduct was not in issue, is not entirely clear. The relevant paragraph in the court's opinion reads as follows:

"Nor is the state's interest in this case a more 'overriding' or 'compelling' interest than in *Sherbert* and *Thomas*. The Board found that the state's interest in proscribing the use of dangerous drugs was the compelling interest that justified denying the claimant unemployment benefits. However, the legality of ingesting peyote does not affect our analysis of the state's interest. The state's interest in denying unemployment benefits to a claimant discharged for religiously motivated misconduct must be found in the unemployment compensation statutes, not in the criminal statutes proscribing the use of peyote. The Employment Division concedes that 'the commission of an illegal act is not, in and of itself, grounds for disqualification from unemployment benefits. ORS 657.176(3) permits disqualification only if a claimant commits a felony in connection with work [T]he legality of [claimant's] ingestion of peyote has little direct bearing on this case.'" 301 Ore., at 218-219, 721 P. 2d, at 450.

The court noted that although the possession of peyote is a crime in Oregon, such possession is lawful in many jurisdictions.¹⁰

In its opinion in *Black*, the court rejected the Court of Appeals' conclusion that the case should be remanded for factual findings on the religious character of respondent's peyote use. Although the referee's findings concerning the use of peyote were somewhat sparse, the court found them sufficient to support the conclusions that the Native American Church is a recognized religion, that peyote is a sacrament of that church, and that respondent's beliefs were sincerely held. The court noted that other courts had acknowledged the role of peyote in the Native American Church and quoted at length from a decision of the California Supreme Court.¹¹

¹⁰ The court commented in a footnote:

"Under ORS 475.992(4) and OAR 855-80-020, the possession of peyote is a crime. Peyote (*Lophophora williamsii*) is a cactus that 'contains a number of active alkaloids with varying properties; the chief hallucinogen among these alkaloids is mescaline.' Note, *Hallucinogens*, 68 Colum L Rev 521, 525 (1968). The Oregon Court of Appeals, construing a previous statute, has held that religious users of peyote are not exempt from criminal sanctions. *State v. Soto*, 21 Or App 794, 537 P2d 142 (1975), *cert den* 424 US 955 (1976). The federal government and several states exempt the religious use of peyote through caselaw, statute or regulation. See *State v. Whittingham*, 19 Ariz App 27, 504 P2d 950 (1973), *cert den* 417 US 946 (1974); *People v. Woody*, 61 Cal 2d 716, 40 Cal Rptr 69, 394 P2d 813 (1964); *Whitehorn v. State*, 561 P2d 539 (Okla Crim App 1977); 21 CFR § 1307.31 (1985); Iowa Code Ann § 204.204(8) (1986); NM Stat Ann § 30-31-6(D) (1980); SD Comp Laws Ann § 34-20B-14(17) (1977); Tex Stat Ann 4476-15 § 4.11 (1976)." 301 Ore., at 219, n. 2, 721 P. 2d, at 450, n. 2.

¹¹ 301 Ore. 221, 225-227, 721 P. 2d 451, 453-454 (1986), quoting *People v. Woody*, 61 Cal. 2d 716, 720-721, 394 P. 2d 813, 817-818 (1964):

"Peyote, as we shall see, plays a central role in the ceremony and practice of the Native American Church, a religious organization of Indians. Although the church claims no official prerequisites to membership, no written membership rolls and no recorded theology, estimates of its membership range from 30,000 to 250,000, the wide variance deriving from differing definitions of a "member." As the anthropologists have ascertained through conversations with members, the theology of the church combines

This extensive quotation from an opinion that explains why the religious use of peyote is permitted in California raises the question whether the Oregon court might reach a similar conclusion.

certain Christian teachings with the belief that peyote embodies the Holy Spirit and that those who partake of peyote enter into direct contact with God.

"Peyotism discloses a long history. A reference to the religious use of peyote in Mexico appears in Spanish historical sources as early as 1560. Peyotism spread from Mexico to the United States and Canada; American anthropologists describe it as well established in this country during the latter part of the nineteenth century. Today, Indians of many tribes practice Peyotism. Despite the absence of recorded dogma, the several tribes follow surprisingly similar ritual and theology; the practices of Navajo members in Arizona practically parallel those of adherents in California, Montana, Oklahoma, Wisconsin, and Saskatchewan.

"The "meeting," a ceremony marked by the sacramental use of peyote, composes the cornerstone of the peyote religion. The meeting convenes in an enclosure and continues from sundown Saturday to sunrise Sunday. To give thanks for the past good fortune or find guidance for future conduct, a member will "sponsor" a meeting and supply to those who attend both the peyote and the next morning's breakfast. The "sponsor," usually but not always the "leader," takes charge of the meeting; he decides the order of events and the amount of peyote to be consumed. Although the individual leader exercises an absolute control of the meeting, anthropologists report a striking uniformity of its ritual.

"A meeting connotes a solemn and special occasion. Whole families attend together, although children and young women participate only by their presence. Adherents don their finest clothing, usually suits for men and fancy dresses for the women, but sometimes ceremonial Indian costumes. At the meeting the members pray, sing, and make ritual use of drum, fan, eagle bone, whistle, rattle and prayer cigarette, the symbolic emblems of their faith. The central event, of course, consists of the use of peyote in quantities sufficient to produce an hallucinatory state.

"At an early but fixed stage in the ritual the members pass around a ceremonial bag of peyote buttons. Each adult may take four, the customary number, or take none. The participants chew the buttons, usually with some difficulty because of extreme bitterness; later, at a set time in the ceremony any member may ask for more peyote; occasionally a member may take as many as four more buttons. At sunrise on Sunday the ritual ends; after a brief outdoor prayer, the host and his family serve

II

Respondents contend that the sacramental use of small quantities of peyote in the Native American Church is comparable to the sacramental use of small quantities of alcohol in Christian religious ceremonies. Even though the State may generally prohibit the use of hallucinogenic drugs and alcohol for recreational purposes and strictly regulate their use for medicinal purposes, respondents assert that the Constitution requires some measure of accommodation for religious use. Alternatively, they argue that Oregon's general prohibition against the possession of peyote is not applicable to its use in a genuine religious ceremony. Even if peyote use is a crime in Oregon, since the State does not administer its unemployment compensation program for law enforcement purposes, they conclude that our decisions in *Sherbert* and *Thomas* require that they be awarded benefits.

The Oregon Supreme Court agreed with respondents' conclusion, but it did not endorse all of their reasoning. The state court appears to have assumed, without specifically deciding, that respondents' conduct was unlawful. That assumption did not influence the court's disposition of the cases because, as a matter of state law, the commission of an illegal act is not itself a ground for disqualifying a discharged employee from benefits. It does not necessarily follow, how-

breakfast. Then the members depart. By morning the effects of the peyote disappear; the users suffer no after-effects.

"Although peyote serves as a sacramental symbol similar to bread and wine in certain Christian churches, it is more than a sacrament. Peyote constitutes in itself an object of worship; prayers are directed to it much as prayers are devoted to the Holy Ghost. On the other hand, to use peyote for nonreligious purposes is sacrilegious. Members of the church regard peyote also as a "teacher" because it induces a feeling of brotherhood with other members; indeed it enables the participant to experience the Deity. Finally, devotees treat peyote as a "protector." Much as a Catholic carries his medallion, an Indian G. I. often wears around his neck a beautifully beaded pouch containing one large peyote button'" (footnote omitted).

ever, that the illegality of an employee's misconduct is irrelevant to the analysis of the federal constitutional claim. For if a State has prohibited through its criminal laws certain kinds of religiously motivated conduct without violating the First Amendment, it certainly follows that it may impose the lesser burden of denying unemployment compensation benefits to persons who engage in that conduct.

There is no absolute "constitutional right to unemployment benefits on the part of all persons whose religious convictions are the cause of their unemployment." *Sherbert v. Verner*, 374 U. S., at 409-410. On three separate occasions, however, we have held that an employee who is required to choose between fidelity to religious belief and cessation of work may not be denied unemployment compensation because he or she is faithful to the tenets of his or her church. As we explained in *Sherbert*:

"Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship." *Id.*, at 404.

In *Sherbert*, as in *Thomas and Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U. S. 142 (1987), the conduct that gave rise to the termination of employment was perfectly legal;¹² indeed, the Court assumed that it was immune from state regulation.¹³

¹² In *Sherbert v. Verner*, the appellant was discharged because she would not work on Saturday, the Sabbath Day of her faith. When the petitioner in *Thomas v. Review Bd., Indiana Employment Security Div.*, 450 U. S. 707 (1981), was required to work on turrets for military tanks, he terminated his employment because his religious beliefs prevented him from participating in the production of war materials. And in *Hobbie v. Unemployment Appeals Comm'n of Fla.*, the appellant's religion precluded work between sundown on Friday and sundown on Saturday; she was discharged because she therefore could not work all of her scheduled shifts.

¹³ The distinction between the absolute constitutional protection against governmental regulation of religious beliefs on the one hand, and the quali-

The results we reached in *Sherbert*, *Thomas*, and *Hobbie* might well have been different if the employees had been discharged for engaging in criminal conduct. We have held that bigamy may be forbidden, even when the practice is dictated by sincere religious convictions. *Reynolds v. United States*, 98 U. S. 145 (1879). If a bigamist may be sent to jail despite the religious motivation for his misconduct, surely a State may refuse to pay unemployment compensation to a marriage counselor who was discharged because he or she entered into a bigamous relationship. The protection that the First Amendment provides to “legitimate claims to the free exercise of religion,” see *Hobbie*, 480 U. S., at 142 (quoting *Wisconsin v. Yoder*, 406 U. S. 205, 215 (1972)) (emphasis added), does not extend to conduct that a State has validly proscribed.

fied protection against the regulation of religiously motivated conduct, on the other, was carefully explained in our opinion in *Sherbert*:

“The door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious *beliefs* as such, *Cantwell v. Connecticut*, 310 U. S. 296, 303. Government may neither compel affirmation of a repugnant belief, *Torcaso v. Watkins*, 367 U. S. 488; nor penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities, *Fowler v. Rhode Island*, 345 U. S. 67; nor employ the taxing power to inhibit the dissemination of particular religious views, *Murdock v. Pennsylvania*, 319 U. S. 105; *Follett v. McCormick*, 321 U. S. 573; cf. *Grosjean v. American Press Co.*, 297 U. S. 233. On the other hand, the Court has rejected challenges under the Free Exercise Clause to governmental regulation of certain overt acts prompted by religious beliefs or principles, for ‘even when the action is in accord with one’s religious convictions, [it] is not totally free from legislative restrictions.’ *Braunfeld v. Brown*, 366 U. S. 599, 603. The conduct or actions so regulated have invariably posed some substantial threat to public safety, peace or order. See, e. g., *Reynolds v. United States*, 98 U. S. 145; *Jacobson v. Massachusetts*, 197 U. S. 11; *Prince v. Massachusetts*, 321 U. S. 158; *Cleveland v. United States*, 329 U. S. 14.

“Plainly enough, appellant’s conscientious objection to Saturday work constitutes no conduct prompted by religious principles of a kind within the reach of state legislation.” 374 U. S., at 402–403.

Neither the Oregon Supreme Court nor this Court has confronted the question whether the ingestion of peyote for sincerely held religious reasons is a form of conduct that is protected by the Federal Constitution from the reach of a State's criminal laws. It may ultimately be necessary to answer that federal question in this case, but it is inappropriate to do so without first receiving further guidance concerning the status of the practice as a matter of Oregon law.¹⁴ A substantial number of jurisdictions have exempted the use of peyote in religious ceremonies from legislative prohibitions against the use and possession of controlled substances.¹⁵ If Oregon is one of those States, respondents' conduct may well be entitled to constitutional protection. On the other hand, if Oregon does prohibit the religious use of peyote, and if that prohibition is consistent with the Federal Constitution, there is no federal right to engage in that conduct in Oregon. If that is the case, the State is free to withhold unemployment compensation from respondents for engaging in work-related misconduct, despite its religious motivation. Thus, paradoxical as it may first appear, a necessary predicate to a correct evaluation of respondents' federal claim is an understanding of the legality of their conduct as a matter of state law.

Relying on the fact that Oregon statutes prohibit the possession of peyote, see Ore. Rev. Stat. § 475.992(4) (1987), rather than its use, and the further fact that the Oregon Court of Appeals held that the ingestion of a controlled sub-

¹⁴ See nn. 10 and 11, *supra*.

¹⁵ See 21 CFR § 1307.31 (1987) (exempting use of peyote in bona fide religious ceremonies of the Native American Church); Iowa Code § 204.204 (8) (1985) (same); N. M. Stat. Ann. § 30-31-6(D) (1987) (exempting use of peyote in bona fide religious ceremonies by bona fide religious organizations); S. D. Codified Laws § 34-20B-14(17) (1987) (exempting sacramental use of peyote in services of the Native American Church); Tex. Rev. Civ. Stat. Ann., Art. 4476-15 § 4.11 (Supp. 1988) (exempting use of peyote by Native American Church members with not less than 25% Indian blood in bona fide religious ceremonies). These authorities were cited by the Oregon Supreme Court. See n. 10, *supra*.

stance into the bloodstream did not constitute "possession" within the meaning of the predecessor statute, *State v. Downes*, 31 Ore. App. 1183, 572 P. 2d 1328 (1977), respondents argue that their ceremonial use of the drug was not unlawful.¹⁶ The Attorney General of the State advises us that this argument is without merit. But in the absence of a definitive ruling by the Oregon Supreme Court we are unwilling to disregard the possibility that the State's legislation regulating the use of controlled substances may be construed to permit peyotism or that the State's Constitution may be interpreted to protect the practice.¹⁷ That the Oregon Supreme Court's opinions in these cases not only noted that other States "exempt the religious use of peyote through caselaw,"¹⁸ but also quoted extensively from a California opinion that did so, lends credence to the possibility that this conduct may be lawful in Oregon.

Because we are uncertain about the legality of the religious use of peyote in Oregon, it is not now appropriate for us to decide whether the practice is protected by the Federal Constitution. See *Ashwander v. TVA*, 297 U. S. 288, 346-347 (1936) (Brandeis, J., concurring). The possibility that respondents' conduct would be unprotected if it violated the State's criminal code is, however, sufficient to counsel against affirming the state court's holding that the Federal Constitution requires the award of benefits to these respondents. If the Oregon Supreme Court's holding rests on the

¹⁶ At the time *Downes* was decided, Oregon law proscribed both the use and possession of controlled substances. In 1977, the Oregon Legislature passed the Uniform Controlled Substances Act, Ore. Rev. Stat. § 475.005 *et seq.* (1987), which repealed the use and possession statutes discussed in *Downes* and enacted a provision that addresses only the possession of controlled substances. See § 475.992(4).

¹⁷ Our concern, of course, is not with whether some fact unique to respondents' cases bars their prosecution, but with whether Oregon law provides a general exemption from the scope of its criminal laws for the religious use of peyote.

¹⁸ See n. 10, *supra*.

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unstated premise that respondents' conduct is entitled to the same measure of federal constitutional protection regardless of its criminality, that holding is erroneous. If, on the other hand, it rests on the unstated premise that the conduct is not unlawful in Oregon, the explanation of that premise would make it more difficult to distinguish our holdings in *Sherbert*, *Thomas*, and *Hobbie*. We therefore vacate the judgments of the Oregon Supreme Court and remand the cases for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE KENNEDY took no part in the consideration or decision of these cases.

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

Respondents Smith and Black were fired for practicing their religion. The Employment Division of the Oregon Department of Human Resources deemed respondents' worship "misconduct connected with work," Ore. Rev. Stat. § 657.176(2)(a) (1987), and accordingly denied them unemployment benefits. Citing a "compelling state interest . . . in the proscription of illegal drugs," the Employment Appeals Board rejected the assertion that the Free Exercise Clause prohibited the denial of unemployment benefits to an employee discharged for religious use of peyote. App. to Pet. for Cert. in No. 86-946, p. A20. The Oregon Supreme Court, disavowing any state interest in enforcing its criminal laws through the denial of unemployment benefits, found the State's interest indistinguishable from those asserted in *Sherbert v. Verner*, 374 U. S. 398, 403 (1963), and *Thomas v. Review Bd., Indiana Employment Security Div.*, 450 U. S. 707 (1981). On the authority of those cases it held that the denial violated respondents' First Amendment right to exercise their religion freely. *Smith v. Employment Division*, 301 Ore. 209, 212, 721 P. 2d 445, 446 (1986); *Black v. Em-*

ployment Division, 301 Ore. 221, 721 P. 2d 451 (1986). This Court today strains the state court's opinion to transform the straightforward question that is presented into a question of first impression that is not.

A generation ago, we established that a State may not deny unemployment benefits to an employee discharged for her adherence to religious practices unless the "incidental burden on the free exercise of [her] religion [is] justified by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate . . .'" *Sherbert*, *supra*, at 403 (citation omitted). In *Thomas*, *supra*, and again as recently as last Term, see *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U. S. 142 (1987), we reaffirmed *Sherbert's* holding that, where the "state . . . denies . . . a benefit because of conduct mandated by religious belief," the resultant burden on the free exercise of religion "must be subjected to strict scrutiny and could be justified only by proof by the State of a compelling interest." 480 U. S., at 141 (quoting *Thomas*, *supra*, at 717-718) (emphasis omitted). Where the burden on religion is imposed pursuant to a statute, we have an independent obligation to ascertain that the legislature in fact intended to advance the asserted interest through the statutory scheme. Cf. *Sherbert*, *supra*, at 407. We may not, particularly when engaging in strict scrutiny, blindly accept the interest that the State asserts in court. See, e. g., *Mississippi University for Women v. Hogan*, 458 U. S. 718, 730 (1982) (all-women state university fails intermediate scrutiny because, "although the State recited a 'benign, compensatory purpose,' it failed to establish that the alleged objective is the actual purpose underlying the discriminatory [statutory] classification") (footnote omitted); *Hampton v. Mow Sun Wong*, 426 U. S. 88, 103-104 (1976) ("When the Federal Government asserts an overriding national interest as justification for a discriminatory rule . . . , due process requires that there be a legitimate basis for presuming that the rule was actually intended to serve that

interest"); *Weinberger v. Wiesenfeld*, 420 U. S. 636, 648, n. 16 (1975) (under rationality review, "[t]his Court need not . . . accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation").

Smith and Black—like *Sherbert*, *Thomas*, and *Hobbie*—were discharged from their employment because their religious practices conflicted with their employer's interests. The only difference between the cases before us and the situations we faced in *Sherbert*, *Thomas*, and *Hobbie* is that here the Employment Division has asserted in court a "compelling state interest . . . in the proscription of illegal drugs," not merely the interest in avoiding the financial "burden upon the Unemployment Compensation Trust Fund" that we found not compelling in *Sherbert*. *Smith*, *supra*, at 212, 721 P. 2d, at 446 (quoting opinion of Employment Appeals Board). Such an interest in criminal law enforcement would present a novel issue if it were in fact an interest that Oregon had sought to advance in its unemployment compensation statute.

Far from validating any such state interest, however, the State's highest court has disavowed it. In the paragraph that this Court quotes at length, *ante*, at 666, the Oregon Supreme Court could scarcely have been clearer. The state court understood that the Employment Division may not overcome the burden on religion by invoking a theoretically plausible interest that in fact the state legislature had no intention of furthering when it enacted the unemployment compensation statute: "The state's interest in denying unemployment benefits to a claimant discharged for religiously motivated misconduct must be found in the unemployment compensation statutes, not in the criminal statutes proscribing the use of peyote." *Smith*, *supra*, at 219, 721 P. 2d at 450 (footnote omitted); see also *Black*, *supra*, (relying on *Smith's* analysis). The state court could find no legislative

intent expressed in the unemployment statute to reinforce criminal drug-abuse laws. Although we are not bound by a state-court determination that a state legislature was actually motivated by a particular validating purpose, see *Stone v. Graham*, 449 U. S. 39, 41 (1980), we have never attributed to a state legislature a validating purpose that the State's highest court could find nowhere in the statute. To do so would be inconsistent with our responsibility to scrutinize strictly state-imposed burdens on fundamental rights. At any rate, this Court offers no reason to discount the Oregon Supreme Court's disavowal of the validating purpose. Nor has the Employment Division asserted any further interest other than those that *Sherbert*, *Thomas*, and *Hobbie* have rejected. I would therefore affirm the Oregon Supreme Court.

The Court avoids this straightforward analysis, proclaiming instead that it has difficulty discerning "[w]hether the state court believed that it was constrained by *Sherbert* and *Thomas* to disregard the State's law enforcement interest, or did so because it believed petitioner to have conceded that the legality of respondent's conduct was not in issue," *ante*, at 666. The difficulty, however, is entirely of this Court's own making, for it poses two entirely implausible interpretations of the opinions below and overlooks the only natural one.

The Oregon Supreme Court both introduced and concluded the relevant passage by stressing the *similarity* between the state interests asserted here and those asserted in *Sherbert* and *Thomas*. See *Smith*, 301 Ore., at 218, 721 P. 2d, at 450 (the "state's interest in this case [is no] more 'overriding' or 'compelling' . . . than in *Sherbert* and *Thomas*"); *id.*, at 219-220, 721 P. 2d, at 450-451 ("The state's interest is simply the financial interest in the payment of benefits from the unemployment insurance fund to this claimant and other claimants similarly situated," which "*Sherbert* and *Thomas* did not find . . . 'compelling' when weighed against the free exercise rights of the claimant"). At no point in the comparison did

the state court suggest, as this Court's first alternative interpretation does, that it could discern an additional state interest (namely, the interest in enforcing criminal drug-abuse laws) that *Sherbert* and *Thomas* "constrained" it to "disregard." Moreover, the state court did not so much as suggest why *Sherbert* and *Thomas* would so constrain the State. Even the State's attorney could not in good conscience offer the interpretation that this Court adopts, without the caveat "that it is not entirely apparent from the face of the opinion," Tr. of Oral Arg. 7.

Nor is it accurate to read the passage, as this Court's second alternative interpretation does, as merely binding the Employment Division to a concession "that the legality of respondent's conduct was not in issue." The Employment Division conceded only the patently obvious point that the asserted interest in criminal law enforcement is nowhere to "be found in the unemployment compensation statutes," 301 Ore., at 219, 721 P. 2d, at 450, and that the legality of peyote use was therefore irrelevant to the determination whether the *statute* purported to deny benefits. The Employment Division hotly disputed the proposition that it could not answer respondents' *free exercise challenge* by asserting an interest that appears nowhere in its unemployment compensation scheme. The very passage that the Court quotes demonstrates as much: "The Board found that the state's interest in proscribing the use of dangerous drugs was the compelling interest that justified denying the claimant unemployment benefits." *Id.*, at 218-219, 721 P. 2d, at 450. The remand in these cases thus rests on a purported ambiguity that has no basis in the opinions below.

Perhaps more puzzling than the imagined ambiguity is the Court's silence as to its relevance. The Court merely remands these cases to the Oregon Supreme Court for further proceedings after concluding that a "necessary predicate" to its analysis is a pronouncement by the state court on whether respondents' conduct was criminal. *Ante*, at 672. It seems

to me that the state court on remand could readily resolve these cases without reaching that issue. The Court has expressed no intention to depart from the longstanding rule that, in strictly scrutinizing state-imposed burdens on fundamental rights, courts may not assert on a State's behalf interests that the State does not have. See *supra*, at 675-676. Accordingly, I must assume that the Court has tacitly left the Oregon Supreme Court the option to dispose of these cases by simply reiterating its initial opinion and appending, "and we really mean it," or words to that effect.

A slot on this Court's calendar is both precious and costly. Inevitably, each Term this Court discovers only after painstaking briefing and oral argument that some cases do not squarely present the issues that the Court sought to resolve. There is always the temptation to trivialize the defect and decide the novel case that we *thought* we had undertaken rather than the virtual clone of precedent that we *actually* undertook. Here, however, the Court's belated effort to recoup sunk costs is not worth the price. Today's foray into the realm of the hypothetical will surely cost us the respect of the State Supreme Court whose words we misconstrue. That price is particularly exorbitant where, as here, the state court is most likely to respond to our efforts by merely reiterating what it has already stated with unmistakable clarity.

I dissent.

UNITED STATES POSTAL SERVICE *v.* NATIONAL
ASSOCIATION OF LETTER CARRIERS, AFL-CIO

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

No. 87-59. Argued April 20, 1988—Decided April 27, 1988

Certiorari dismissed. Reported below: 258 U. S. App. D. C. 260, 810 F.
2d 1239.

Glen D. Nager argued the cause for petitioner. With him on the briefs were *Solicitor General Fried*, *Assistant Attorney General Willard*, *Deputy Solicitor General Wallace*, *William Kanter*, and *Marc Richman*.

Keith E. Secular argued the cause and filed a brief for respondent.*

PER CURIAM.

The writ of certiorari is dismissed as improvidently granted.

*Briefs of *amici curiae* urging affirmance were filed for the American Federation of Labor and Congress of Industrial Organizations by *David M. Silberman* and *Laurence Gold*; and for the National Council on Compulsive Gambling, Inc., by *Albert B. Lewis*.

Syllabus

HUDDLESTON v. UNITED STATES

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

No. 87-6. Argued March 23, 1988—Decided May 2, 1988

Federal Rule of Evidence 404(b) provides that evidence of “other crimes, wrongs, or acts” is not admissible to prove a person’s character, but may be admissible for other purposes, such as proof of knowledge. Petitioner was charged under federal law with the knowing possession and sale of stolen videocassette tapes. At his trial, the District Court allowed the Government to introduce as evidence of “similar acts” under Rule 404(b) evidence of petitioner’s involvement in a series of sales of allegedly stolen televisions and appliances from the same suspicious source as the tapes, concluding that such evidence had clear relevance as to petitioner’s knowledge that the tapes were stolen. The jury convicted petitioner on the possession count only, and the Court of Appeals ultimately affirmed, declaring that it could not say that the District Court had abused its discretion in admitting the “similar acts” evidence under *United States v. Ebens*, 800 F. 2d 1422 (CA6), which authorized courts to admit such evidence if the proof showed by a preponderance of the evidence that the defendant did in fact commit the prior bad act.

Held: The district court need not itself make a preliminary finding that the Government has proved the “other act” by a preponderance of the evidence before it submits “similar acts” and other Rule 404(b) evidence to the jury. The requirement of such a preliminary finding would be inconsistent with the structure of Article IV of the Rules, which allows the admission of relevant evidence for a proper purpose subject only to general strictures, with Rule 404(b)’s plain language, and with the legislative history behind that Rule. Rather, “similar” acts evidence should be admitted if there is sufficient evidence to support a finding by the jury that the defendant committed the similar act. Here, petitioner does not dispute that the evidence of the appliance sales was properly admitted. Moreover, the trial court properly allowed the evidence of the television sales to go to the jury, since the jury reasonably could have concluded that the televisions were stolen in light of the low price sought by petitioner, the large quantity of televisions he offered for sale, his inability to produce a bill of sale, and his involvement in the sales of the stolen tapes and appliances. Pp. 685–692.

811 F. 2d 974, affirmed.

REHNQUIST, C. J., delivered the opinion for a unanimous Court.

Don Ferris argued the cause and filed briefs for petitioner.

Deputy Solicitor General Bryson argued the cause for the United States. With him on the brief were *Solicitor General Fried*, *Assistant Attorney General Weld*, *Jeffrey P. Minear*, and *Thomas E. Booth*.

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Federal Rule of Evidence 404(b) provides:

“Other crimes, wrongs, or acts.—Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.”

This case presents the question whether the district court must itself make a preliminary finding that the Government has proved the “other act” by a preponderance of the evidence before it submits the evidence to the jury. We hold that it need not do so.

Petitioner, Guy Rufus Huddleston, was charged with one count of selling stolen goods in interstate commerce, 18 U. S. C. § 2315, and one count of possessing stolen property in interstate commerce, 18 U. S. C. § 659. The two counts related to two portions of a shipment of stolen Memorex videocassette tapes that petitioner was alleged to have possessed and sold, knowing that they were stolen.

The evidence at trial showed that a trailer containing over 32,000 blank Memorex videocassette tapes with a manufacturing cost of \$4.53 per tape was stolen from the Overnight Express yard in South Holland, Illinois, sometime between April 11 and 15, 1985. On April 17, 1985, petitioner contacted Karen Curry, the manager of the Magic Rent-to-Own

in Ypsilanti, Michigan, seeking her assistance in selling a large number of blank Memorex videocassette tapes. After assuring Curry that the tapes were not stolen, he told her he wished to sell them in lots of at least 500 at \$2.75 to \$3 per tape. Curry subsequently arranged for the sale of a total of 5,000 tapes, which petitioner delivered to the various purchasers—who apparently believed the sales were legitimate.

There was no dispute that the tapes which petitioner sold were stolen; the only material issue at trial was whether petitioner knew they were stolen. The District Court allowed the Government to introduce evidence of “similar acts” under Rule 404(b), concluding that such evidence had “clear relevance as to [petitioner’s knowledge].” App. 11. The first piece of similar act evidence offered by the Government was the testimony of Paul Toney, a record store owner. He testified that in February 1985, petitioner offered to sell new 12” black and white televisions for \$28 apiece. According to Toney, petitioner indicated that he could obtain several thousand of these televisions. Petitioner and Toney eventually traveled to the Magic Rent-to-Own, where Toney purchased 20 of the televisions. Several days later, Toney purchased 18 more televisions.

The second piece of similar act evidence was the testimony of Robert Nelson, an undercover FBI agent posing as a buyer for an appliance store. Nelson testified that in May 1985, petitioner offered to sell him a large quantity of Amana appliances—28 refrigerators, 2 ranges, and 40 icemakers. Nelson agreed to pay \$8,000 for the appliances. Petitioner was arrested shortly after he arrived at the parking lot where he and Nelson had agreed to transfer the appliances. A truck containing the appliances was stopped a short distance from the parking lot, and Leroy Wesby, who was driving the truck, was also arrested. It was determined that the appliances had a value of approximately \$20,000 and were part of a shipment that had been stolen.

Petitioner testified that the Memorex tapes, the televisions, and the appliances had all been provided by Leroy Wesby, who had represented that all of the merchandise was obtained legitimately. Petitioner stated that he had sold 6,500 Memorex tapes for Wesby on a commission basis. Petitioner maintained that all of the sales for Wesby had been on a commission basis and that he had no knowledge that any of the goods were stolen.

In closing, the prosecution explained that petitioner was not on trial for his dealings with the appliances or the televisions. The District Court instructed the jury that the similar acts evidence was to be used only to establish petitioner's knowledge, and not to prove his character. The jury convicted petitioner on the possession count only.

A divided panel of the United States Court of Appeals for the Sixth Circuit initially reversed the conviction, concluding that because the Government had failed to prove by clear and convincing evidence that the televisions were stolen, the District Court erred in admitting the testimony concerning the televisions. 802 F. 2d 874 (1986).¹ The panel subsequently granted rehearing to address the decision in *United States v. Ebens*, 800 F. 2d 1422 (CA6 1986), in which a different panel had held: "Courts may admit evidence of prior bad acts if the proof shows by a preponderance of the evidence that the defendant did in fact commit the act." *Id.*, at 1432. On rehearing, the court affirmed the conviction. "Applying the preponderance of the evidence standard adopted in *Ebens*, we cannot say that the district court abused its discretion in admitting evidence of the similar acts in question here." 811 F. 2d 974, 975 (1987) (*per curiam*). The court noted that the evidence concerning the televisions was admitted for a proper purpose and that the probative value of this evidence was not outweighed by its potential prejudicial effect.

¹ "[T]he government's only support for the assertion that the televisions were stolen was [petitioner's] failure to produce a bill of sale at trial and the fact that the televisions were sold at a low price." 802 F. 2d, at 876, n. 5.

We granted certiorari, 484 U. S. 894 (1987), to resolve a conflict among the Courts of Appeals as to whether the trial court must make a preliminary finding before "similar act" and other Rule 404(b) evidence is submitted to the jury.² We conclude that such evidence should be admitted if there is sufficient evidence to support a finding by the jury that the defendant committed the similar act.

Federal Rule of Evidence 404(b)—which applies in both civil and criminal cases—generally prohibits the introduction of evidence of extrinsic acts that might adversely reflect on the actor's character, unless that evidence bears upon a relevant issue in the case such as motive, opportunity, or knowledge. Extrinsic acts evidence may be critical to the establishment of the truth as to a disputed issue, especially when that issue involves the actor's state of mind and the only means of ascertaining that mental state is by drawing inferences from conduct. The actor in the instant case was a criminal defendant, and the act in question was "similar" to the one with which he was charged. Our use of these terms

²The First, Fourth, Fifth, and Eleventh Circuits allow the admission of similar act evidence if the evidence is sufficient to allow the jury to find that the defendant committed the act. *United States v. Ingraham*, 832 F. 2d 229, 235 (CA1 1987); *United States v. Martin*, 773 F. 2d 579, 582 (CA4 1985); *United States v. Beechum*, 582 F. 2d 898, 914 (CA5 1978) (en banc), cert. denied, 440 U. S. 920 (1979); *United States v. Dothard*, 666 F. 2d 498, 502 (CA11 1982). Consistent with the Sixth Circuit, the Second Circuit prohibits the introduction of similar act evidence unless the trial court finds by a preponderance of the evidence that the defendant committed the act. *United States v. Leonard*, 524 F. 2d 1076, 1090-1091 (CA2 1975). The Seventh, Eighth, Ninth, and District of Columbia Circuits require the Government to prove to the court by clear and convincing evidence that the defendant committed the similar act. *United States v. Leight*, 818 F. 2d 1297, 1302 (CA7), cert. denied, 484 U. S. 958 (1987); *United States v. Weber*, 818 F. 2d 14 (CA8 1987); *United States v. Vaccaro*, 816 F. 2d 443, 452 (CA9), cert. denied *sub nom. Alvis v. United States*, 484 U. S. 914 (1987); *United States v. Lavelle*, 243 U. S. App. D. C. 47, 57, 751 F. 2d 1266, 1276, cert. denied, 474 U. S. 817 (1985).

is not meant to suggest that our analysis is limited to such circumstances.

Before this Court, petitioner argues that the District Court erred in admitting Toney's testimony as to petitioner's sale of the televisions.³ The threshold inquiry a court must make before admitting similar acts evidence under Rule 404(b) is whether that evidence is probative of a material issue other than character. The Government's theory of relevance was that the televisions were stolen, and proof that petitioner had engaged in a series of sales of stolen merchandise from the same suspicious source would be strong evidence that he was aware that each of these items, including the Memorex tapes, was stolen.⁴ As such, the sale of the televisions was a "similar act" only if the televisions were stolen. Petitioner acknowledges that this evidence was admitted for the proper purpose of showing his knowledge that the Memorex tapes were stolen. He asserts, however, that the evidence should not have been admitted because the Government failed to prove to the District Court that the televisions were in fact stolen.

Petitioner argues from the premise that evidence of similar acts has a grave potential for causing improper prejudice. For instance, the jury may choose to punish the defendant for the similar rather than the charged act, or the jury may infer that the defendant is an evil person inclined to violate the law. Because of this danger, petitioner maintains, the jury ought not to be exposed to similar act evidence until the trial court has heard the evidence and made a determination under Federal Rule of Evidence 104(a) that the defendant

³Petitioner does not dispute that Nelson's testimony concerning the Amana appliances was properly admitted under Rule 404(b).

⁴The Government also argues before this Court that the evidence concerning the televisions is relevant even if the jury could not conclude that the sets were stolen. We have found nothing in the record indicating that this theory was suggested to or relied upon by the courts below, and in light of our ruling, we need not address this alternative theory.

committed the similar act. Rule 104(a) provides that “[p]reliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b).” According to petitioner, the trial court must make this preliminary finding by at least a preponderance of the evidence.⁵

We reject petitioner’s position, for it is inconsistent with the structure of the Rules of Evidence and with the plain language of Rule 404(b). Article IV of the Rules of Evidence deals with the relevancy of evidence. Rules 401 and 402 establish the broad principle that relevant evidence—evidence that makes the existence of any fact at issue more or less probable—is admissible unless the Rules provide otherwise. Rule 403 allows the trial judge to exclude relevant evidence if, among other things, “its probative value is substantially outweighed by the danger of unfair prejudice.” Rules 404 through 412 address specific types of evidence that have generated problems. Generally, these latter Rules do not flatly prohibit the introduction of such evidence but instead limit the purpose for which it may be introduced. Rule 404(b), for example, protects against the introduction of extrinsic act evidence when that evidence is offered solely to prove character. The text contains no intimation, however, that any preliminary showing is necessary before such evidence may be

⁵ In his brief, petitioner argued that the Government was required to prove to the trial court the commission of the similar act by clear and convincing proof. At oral argument, his counsel conceded that such a position is untenable in light of our decision last Term in *Bourjaily v. United States*, 483 U. S. 171 (1987), in which we concluded that preliminary factual findings under Rule 104(a) are subject to the preponderance-of-the-evidence standard. Tr. of Oral Arg. 12. Petitioner now asserts that although the Sixth Circuit correctly held that the Government must prove the similar act by preponderant evidence before it is admitted, the court erred in applying that test to these facts. We consider first what preliminary finding, if any, the trial court must make before letting similar acts evidence go to the jury.

introduced for a proper purpose. If offered for such a proper purpose, the evidence is subject only to general strictures limiting admissibility such as Rules 402 and 403.

Petitioner's reading of Rule 404(b) as mandating a preliminary finding by the trial court that the act in question occurred not only superimposes a level of judicial oversight that is nowhere apparent from the language of that provision, but it is simply inconsistent with the legislative history behind Rule 404(b). The Advisory Committee specifically declined to offer any "mechanical solution" to the admission of evidence under 404(b). Advisory Committee's Notes on Fed. Rule Evid. 404(b), 28 U. S. C. App., p. 691. Rather, the Committee indicated that the trial court should assess such evidence under the usual rules for admissibility: "The determination must be made whether the danger of undue prejudice outweighs the probative value of the evidence in view of the availability of other means of proof and other factors appropriate for making decisions of this kind under Rule 403." *Ibid.*; see also S. Rep. No. 93-1277, p. 25 (1974) ("[I]t is anticipated that with respect to permissible uses for such evidence, the trial judge may exclude it only on the basis of those considerations set forth in Rule 403, *i. e.* prejudice, confusion or waste of time").

Petitioner's suggestion that a preliminary finding is necessary to protect the defendant from the potential for unfair prejudice is also belied by the Reports of the House of Representatives and the Senate. The House made clear that the version of Rule 404(b) which became law was intended to "plac[e] greater emphasis on admissibility than did the final Court version." H. R. Rep. No. 93-650, p. 7 (1973). The Senate echoed this theme: "[T]he use of the discretionary word 'may' with respect to the admissibility of evidence of crimes, wrongs, or other acts is not intended to confer any arbitrary discretion on the trial judge." S. Rep. No. 93-1277, *supra*, at 24. Thus, Congress was not nearly so concerned with the potential prejudicial effect of Rule 404(b) evidence

as it was with ensuring that restrictions would not be placed on the admission of such evidence.

We conclude that a preliminary finding by the court that the Government has proved the act by a preponderance of the evidence is not called for under Rule 104(a).⁶ This is not to say, however, that the Government may parade past the jury a litany of potentially prejudicial similar acts that have been established or connected to the defendant only by unsubstantiated innuendo. Evidence is admissible under Rule 404(b) only if it is relevant. "Relevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case." Advisory Committee's Notes on Fed. Rule Evid. 401, 28 U. S. C. App., p. 688. In the Rule 404(b) context, similar act evidence is relevant only if the jury can reasonably conclude that the act occurred and that the defendant was the actor. See *United States v. Beechum*, 582 F. 2d 898, 912-913 (CA5 1978) (en banc). In the instant case, the evidence that petitioner was selling the televisions was relevant under the Government's theory only if the jury could reasonably find that the televisions were stolen.

Such questions of relevance conditioned on a fact are dealt with under Federal Rule of Evidence 104(b). *Beechum*, *supra*, at 912-913; see also E. Imwinkelried, *Uncharged Misconduct Evidence* § 2.06 (1984). Rule 104(b) provides:

⁶Petitioner also suggests that in performing the balancing prescribed by Federal Rule of Evidence 403, the trial court must find that the prejudicial potential of similar acts evidence substantially outweighs its probative value unless the court concludes by a preponderance of the evidence that the defendant committed the similar act. We reject this suggestion because Rule 403 admits of no such gloss and because such a holding would be erroneous for the same reasons that a preliminary finding under Rule 104(a) is inappropriate. We do, however, agree with the Government's concession at oral argument that the strength of the evidence establishing the similar act is one of the factors the court may consider when conducting the Rule 403 balancing. Tr. of Oral Arg. 26.

"When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition."

In determining whether the Government has introduced sufficient evidence to meet Rule 104(b), the trial court neither weighs credibility nor makes a finding that the Government has proved the conditional fact by a preponderance of the evidence. The court simply examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact—here, that the televisions were stolen—by a preponderance of the evidence. See 21 C. Wright & K. Graham, *Federal Practice and Procedure* § 5054, p. 269 (1977). The trial court has traditionally exercised the broadest sort of discretion in controlling the order of proof at trial, and we see nothing in the Rules of Evidence that would change this practice. Often the trial court may decide to allow the proponent to introduce evidence concerning a similar act, and at a later point in the trial assess whether sufficient evidence has been offered to permit the jury to make the requisite finding.⁷ If the proponent has failed to meet this minimal standard of proof, the trial court must instruct the jury to disregard the evidence.

We emphasize that in assessing the sufficiency of the evidence under Rule 104(b), the trial court must consider all

⁷ "When an item of evidence is conditionally relevant, it is often not possible for the offeror to prove the fact upon which relevance is conditioned at the time the evidence is offered. In such cases it is customary to permit him to introduce the evidence and 'connect it up' later. Rule 104(b) continues this practice, specifically authorizing the judge to admit the evidence 'subject to' proof of the preliminary fact. It is, of course, not the responsibility of the judge sua sponte to insure that the foundation evidence is offered; the objector must move to strike the evidence if at the close of the trial the offeror has failed to satisfy the condition." 21 C. Wright & K. Graham, *Federal Practice and Procedure* § 5054, pp. 269–270 (1977) (footnotes omitted).

evidence presented to the jury. “[I]ndividual pieces of evidence, insufficient in themselves to prove a point, may in cumulation prove it. The sum of an evidentiary presentation may well be greater than its constituent parts.” *Bourjaily v. United States*, 483 U. S. 171, 179–180 (1987). In assessing whether the evidence was sufficient to support a finding that the televisions were stolen, the court here was required to consider not only the direct evidence on that point—the low price of the televisions, the large quantity offered for sale, and petitioner’s inability to produce a bill of sale—but also the evidence concerning petitioner’s involvement in the sales of other stolen merchandise obtained from Wesby, such as the Memorex tapes and the Amana appliances. Given this evidence, the jury reasonably could have concluded that the televisions were stolen, and the trial court therefore properly allowed the evidence to go to the jury.

We share petitioner’s concern that unduly prejudicial evidence might be introduced under Rule 404(b). See *Michelson v. United States*, 335 U. S. 469, 475–476 (1948). We think, however, that the protection against such unfair prejudice emanates not from a requirement of a preliminary finding by the trial court, but rather from four other sources: first, from the requirement of Rule 404(b) that the evidence be offered for a proper purpose; second, from the relevancy requirement of Rule 402—as enforced through Rule 104(b); third, from the assessment the trial court must make under Rule 403 to determine whether the probative value of the similar acts evidence is substantially outweighed by its potential for unfair prejudice,⁸ see Advisory Committee’s Notes on Fed. Rule Evid. 404(b), 28 U. S. C. App., p. 691; S. Rep. No. 93–1277, at 25; and fourth, from Federal Rule of Evidence 105, which provides that the trial court shall, upon request, instruct the jury that the similar acts evidence is to

⁸ As petitioner’s counsel conceded at oral argument, petitioner did not seek review of the Rule 403 balancing performed by the courts below. Tr. of Oral Arg. 14. We therefore do not address that issue.

be considered only for the proper purpose for which it was admitted. See *United States v. Ingraham*, 832 F. 2d 229, 235 (CA1 1987).

Affirmed.

Syllabus

UNITED STATES *v.* PROVIDENCE JOURNAL CO.
ET AL.CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE FIRST CIRCUIT

No. 87-65. Argued January 20, 1988—Decided May 2, 1988

Respondents, a newspaper and its executive editor, violated a temporary restraining order issued by the District Court in a civil suit brought to enjoin dissemination of surveillance logs and memoranda concerning the plaintiff's deceased father. Although the court subsequently vacated the order, it nevertheless appointed a private attorney to prosecute respondents for criminal contempt of the order, declining to ask the United States Attorney to pursue the matter because of his representation of the federal defendants in the underlying civil action. The court ultimately found respondents in criminal contempt, but the Court of Appeals reversed on the ground that the order was "transparently invalid" under the First Amendment. Although the Solicitor General denied the special prosecutor authority to represent the United States in this Court in seeking reinstatement of the contempt judgment, the prosecutor nevertheless filed a petition for a writ of certiorari, which was granted, and briefed and argued the case.

Held: Since the special prosecutor lacks authority to represent the United States before this Court, the writ of certiorari is dismissed for want of jurisdiction. Pp. 699-708.

(a) Title 28 U. S. C. § 518(a) and regulations issued by the Attorney General empower the Solicitor General or his designee to conduct and argue suits in this Court "in which the United States is interested." Pp. 699-700.

(b) This case is one "in which the United States is interested," within the plain meaning of § 518(a). The action was initiated, and continues to be litigated here, in order to further the United States' unique sovereign interest in vindicating the authority of its Judiciary. The rationale underlying *Young v. United States ex rel. Vuitton et Fils* S. A., 481 U. S. 787—which affirmed the inherent authority of federal courts to appoint private attorneys to prosecute disobedience of court orders in order to assure the Judiciary an independent means of vindicating its authority—does not necessitate the special prosecutor's appearance before this Court. Nor does *Young* create an exception to 28 U. S. C. §§ 516 and 547, and therefore to the similar provisions of § 518(a). Unlike § 518(a), both § 516 and § 547 give the Attorney General exclusive control

over litigation involving the United States "except as otherwise [provided or authorized] by law." *Young* simply acknowledges an excepted provision or authorization within the meaning of the statutory provisos. Pp. 700-705.

(c) If a judicially initiated contempt citation were not a case "in which the United States is interested," the policies underlying § 518(a)—that the United States speak with one voice before this Court, and that that voice reflect the common interest of the Government and the people in the development of the law, rather than a variety of parochial, inconsistent interests shaped by the immediate demands of the case *sub judice*—could be undermined by, and anomalous consequences could result from, a deluge of unauthorized certiorari petitions filed by United States Attorneys or by special prosecutors at the behest of district judges. Pp. 706-707.

820 F. 2d 1342 and 1354, certiorari dismissed for want of jurisdiction.

BLACKMUN, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, O'CONNOR, and SCALIA, JJ., joined. SCALIA, J., filed a concurring opinion, *post*, p. 708. STEVENS, J., filed a dissenting opinion, in which REHNQUIST, C. J., joined, *post*, p. 708. KENNEDY, J., took no part in the consideration or decision of the case.

Robert D. Parrillo argued the cause for the United States. With him on the briefs was *William A. Curran*.

Floyd Abrams argued the cause for respondents. With him on the brief were *Edward F. Hindle* and *Joseph V. Cavanagh, Jr.**

JUSTICE BLACKMUN delivered the opinion of the Court.

The United States seeks reinstatement of a judgment of contempt against a newspaper and its executive editor for

*Briefs of *amici curiae* urging reversal were filed for the United States by *Solicitor General Fried*, *Assistant Attorney General Willard*, *Deputy Solicitor General Bryson*, *Edwin S. Kneedler*, and *Douglas N. Letter*; and for the Washington Legal Foundation et al. by *Daniel J. Popeo* and *Michael P. McDonald*.

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *John A. Powell*, *Steven R. Shapiro*, *Lynette Labinger*, *Martha Minow*, *Kathleen M. Sullivan*, and *Marjorie Heins*; and for the American Newspaper Publishers Association et al. by *James C. Goodale* and *John G. Koeltl*.

violating an invalid temporary restraining order against publication. Having concluded that the court-appointed prosecutor who sought certiorari and briefed and argued the case without the authorization of the Solicitor General may not represent the United States before this Court, we dismiss the writ of certiorari.

I

On November 8, 1985, Raymond J. Patriarca, son of Raymond L. S. Patriarca, by then deceased, filed suit against the Federal Bureau of Investigation (FBI), its Director, the Department of Justice, the Attorney General of the United States, the Providence Journal Company (Journal), and WJAR Television Ten (WJAR), seeking to enjoin further dissemination of logs and memoranda compiled from 1962 to 1965 during the course of illegal electronic surveillance, see *Providence Journal Co. v. FBI*, 602 F. 2d 1010, 1013 (CA1 1979), cert. denied, 444 U. S. 1071 (1980), of the plaintiff's father. The complaint, as amended, was based on the Freedom of Information Act (FOIA), 5 U. S. C. § 552 (1982 ed., and Supp. IV), Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (Title III), 18 U. S. C. § 2510 *et seq.* (1982 ed., and Supp. IV), and the Fourth Amendment, and alleged that the FBI had improperly released the logs and memoranda to the Journal and WJAR pursuant to a FOIA request following the death of the senior Patriarca. The summons, complaint, and a motion for a temporary restraining order were served on the Journal on November 12, 1985. The next day counsel for the various parties gathered for a conference with the Chief Judge of the United States District Court for the District of Rhode Island. During that conference, of which, apparently, there is no transcript, the Chief Judge entered a temporary restraining order barring publication of the logs and memoranda and set a hearing for Friday,

November 15.¹ Counsel for both the Journal and the federal defendants objected to the order.

During the evening of November 13, respondent Charles M. Hauser, executive editor of the Journal, was first advised of the restraining order. After discussing with other Journal executives the perils of noncompliance, Hauser decided to publish a story based on the logs and memoranda. The following day, November 14, the Journal published one article about the Patriarcas and another about the "clash" between the District Court and the Journal. See App. 39, 18. Patriarca forthwith filed a motion to have the Journal and Hauser adjudged in criminal contempt.² *Id.*, at 223.

Patriarca, however, declined to prosecute the contempt motion,³ and the District Court decided not to ask the United States Attorney to pursue the matter because of his representation of the federal defendants in the underlying civil action.⁴ Invoking Federal Rule of Criminal Procedure 42(b),

¹ The conference was held in the Chief Judge's chambers at 12:30 p.m. on November 13. The District Court was prepared to hear argument the very next day, but, in order to accommodate counsel, set the matter for November 15 at 10 a.m.

² On November 15, as previously scheduled, the District Court held a hearing. After argument by counsel, the court set a preliminary injunction hearing for Tuesday, November 19, extending the restraining order until that date. App. 58-71. Following the preliminary injunction hearing, the court vacated the temporary restraining order, denied preliminary injunctive relief against the Journal and WJAR, and granted a preliminary injunction against further dissemination of the logs and memoranda by the federal defendants. *Id.*, at 71-89.

³ Our decision in *Young v. United States ex rel. Vuitton et Fils S. A.*, 481 U. S. 787 (1987), in any event, would have prohibited Patriarca from taking such action. In *Young*, we instructed courts to request the United States Attorney to prosecute the criminal contempt charge, and, if the United States Attorney declined, to appoint as a special prosecutor a private attorney other than the attorney for an interested party. *Id.*, at 801.

⁴ The United States as *amicus curiae*, argues that the District Court's reasons were legally "insufficient" to support the decision not to ask a Government attorney to undertake the contempt prosecution, because the pros-

the District Court appointed William A. Curran of the Rhode Island Bar as "prosecuting attorney with full authority to prosecute" the pending contempt motion. App. 237-238. On Curran's application, the District Court then ordered respondents to show cause why they should not be adjudged in criminal contempt. *Id.*, at 31-32.

Following a hearing on February 10, 1986, the District Court found respondents in criminal contempt of the order entered on November 13. The court concluded that it had jurisdiction to consider whether Patriarca's statutory and Fourth Amendment claims had merit, and whether his privacy interest outweighed the Journal's First Amendment interest in publication, and thus that the temporary restraining order entered to preserve the status quo pending consideration of significant legal issues was valid, even though it subsequently had been vacated. The District Court fined the Journal \$100,000 and suspended a jail sentence for Hauser, placing him on probation for 18 months and ordering that he perform 200 hours of public service. *Id.*, at 194-197.

Respondents appealed, and the United States Court of Appeals for the First Circuit reversed the judgment of contempt. *In re Providence Journal Co.*, 820 F. 2d 1342 (1986). The court found that the temporary restraining order was "transparently invalid" under the First Amendment, and thus its constitutionality could be collaterally challenged in the contempt proceedings. *Id.*, at 1353. According to the court, none of the grounds asserted in support of the order, including FOIA, Title III, and the Fourth Amendment, provided even a colorable basis for the prior restraint ordered by the District Court.

execution of the Journal in order to vindicate the District Court's authority did not pose any conflict for Government attorneys. Brief for United States as *Amicus Curiae* 1, and n. 1. Because of our disposition of this case, we need not address the circumstances under which the procedures prescribed in *Young*, of requesting the appropriate prosecuting authority to pursue the contempt action, may be bypassed.

The Court of Appeals, then sitting en banc, summarily modified the panel's opinion, holding that even those subject to a transparently invalid order must make a good-faith effort to seek emergency appellate relief. It ruled, however, that the publisher may proceed to publish and challenge the constitutionality of the order in the contempt proceeding if timely access to the appellate court is not available or if a timely decision is not forthcoming. The court was not convinced that respondents could have obtained emergency relief before the publisher had to make a final decision whether to run the story the following day, and found it unfair to subject respondents to substantial sanctions for failing to follow the newly announced procedures. *In re Providence Journal Co.*, 820 F. 2d 1354 (1987).

Because of the importance of the issues, we granted certiorari. 484 U. S. 814 (1987).

II

Before we can decide whether respondents could properly be held in contempt for violating the District Court's subsequently invalidated restraining order, we must consider respondents' motion to dismiss the writ of certiorari. It appears that the manner in which this unusual case reached us departed significantly from established practice. After the Court of Appeals reversed the judgment of contempt and, sitting en banc, modified the panel's opinion, the special prosecutor sought authorization from the Solicitor General to file a petition here for a writ of certiorari. By letter dated July 2, 1987, the Solicitor General denied that authorization. See App. to Brief for United States as *Amicus Curiae* in Response to Respondents' Motion to Dismiss 1a-2a (SG Letter). Respondents argue that, without this permission, the special prosecutor cannot proceed before this Court. While denying authorization to the special prosecutor to file or to appear on behalf of the United States, the Solicitor General questioned whether our recent decision in *Young v. United States ex rel.*

Vuitton et Fils S. A., 481 U. S. 787 (1987), rendered such authorization unnecessary in a case concerning a criminal contempt charge prosecuted by private counsel appointed pursuant to Federal Rule of Criminal Procedure 42(b). See SG Letter. See also Brief for United States as *Amicus Curiae* 2, n. 2. We find no such implication in our decision in *Young*, and we conclude that the special prosecutor lacks the authority to represent the United States before this Court. Because he is not a party entitled to petition for certiorari under 28 U. S. C. § 1254(1), we must dismiss the heretofore-granted writ of certiorari for want of jurisdiction.⁵

A

Title 28 U. S. C. § 518(a) provides in relevant part:

“Except when the Attorney General in a particular case directs otherwise, the Attorney General and the Solicitor General shall conduct and argue suits and appeals in the Supreme Court . . . in which the United States is interested.”

The Attorney General by regulation has delegated authority to the Solicitor General:

“The following-described matters are assigned to, and shall be conducted, handled, or supervised by, the Solicitor General, in consultation with each agency or official concerned:

“(a) Conducting, or assigning and supervising, all Supreme Court cases, including appeals, petitions for

⁵ As we hold today, a federal statute deprives the special prosecutor of the authority to pursue the litigation in this Court on behalf of the United States when the Solicitor General declines to petition for certiorari or to authorize the filing of such a petition. We dismiss the writ even though the United States eventually expressed its “interest” in the litigation and the Solicitor General filed a brief for the United States as *amicus curiae* in support of the position taken by the special prosecutor. See *Karcher v. May*, 484 U. S. 72 (1987); *Diamond v. Charles*, 476 U. S. 54, 63–64 (1986).

and in opposition to certiorari, briefs and arguments, and . . . settlement thereof." 28 CFR § 0.20 (1987).

Thus, unless this is a case other than one "in which the United States is interested," § 518(a), it must be conducted and argued in this Court by the Solicitor General or his designee. Cf. *United States v. Winston*, 170 U. S. 522, 524-525 (1898); *Confiscation Cases*, 7 Wall. 454, 458 (1869).

B

The present case clearly is one "in which the United States is interested." The action was initiated in vindication of the "judicial Power of the United States," U. S. Const., Art. III, § 1 (emphasis added), and it is that interest, unique to the sovereign, that continues now to be litigated in this Court. The special prosecutor seeks to reinstate a judgment of criminal contempt in a federal court, including a possible prison sentence for the individual defendant and a substantial fine for the newspaper defendant. The fact that the allegedly criminal conduct concerns the violation of a court order instead of common law or a statutory prohibition does not render the prosecution any less an exercise of the sovereign power of the United States. Indeed, just last Term, in a case much like the present one, involving a prosecution for criminal contempt under 18 U. S. C. § 401(3),⁶ we flatly stated: "Private attorneys appointed to prosecute a criminal contempt action represent the United States . . ." *Young v. United States ex rel. Vuitton et Fils S. A.*, 481 U. S., at 804 (emphasis added). See also *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 445 (1911) ("[P]roceedings at law for criminal contempt are between the public and the defendant . . .").

⁶Section 401 reads: "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."

The special prosecutor and the Solicitor General argue that this case is not one "in which the United States is interested" because that phrase, as used in § 518(a), refers solely to those cases where the interests of the Executive Branch of the United States are at issue. In this litigation, the argument goes, the special prosecutor acted in support of the power of the Judicial Branch, rather than in furtherance of the Executive's constitutional responsibility, U. S. Const., Art. II, § 3, to "take Care that the Laws be faithfully executed." This suggested interpretation of § 518(a), however, presumes that there is more than one "United States" that may appear before this Court, and that the United States is something other than "the sovereign composed of the three branches" *United States v. Nixon*, 418 U. S. 683, 696 (1974).

We find such a proposition somewhat startling, particularly when supported by the office whose authority would be substantially diminished by its adoption, and we reject that construction as inconsistent with the plain meaning of § 518(a). It seems to be elementary that even when exercising distinct and jealously separated powers, the three branches are but "co-ordinate parts of one government." *J. W. Hampton, Jr., & Co. v. United States*, 276 U. S. 394, 406 (1928). Congress is familiar enough with the language of separation of powers that we shall not assume it intended, without saying so, to exclude the Judicial Branch when it referred to the "interest of the United States." Moreover, while there may well be matters that are uniquely Executive Branch concerns, we do not think they would be fairly described by the broad statutory language of § 518(a).

In *Young*, we reaffirmed the inherent authority of a federal court to initiate a criminal contempt proceeding for disobedience of its order, and its ability to appoint a private attorney to prosecute the contempt action. 481 U. S., at 793. This power, considered to be a part of the judicial function, is grounded first and foremost upon necessity: "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." *Id.*, at 796. The special prosecutor claims his appearance before this Court is necessary for the vindication of the District Court's authority. For just as the District Court would be "at the mercy of another branch in deciding whether such proceedings should be initiated," *ibid.*, if it lacked the power to appoint a private attorney to prosecute a contempt charge, the judgment vindicating the District Court's authority would be vulnerable to the Attorney General's withholding of authorization to defend it. This argument, however, overlooks the circumstances under which the special prosecutor actually came to be in a position to seek review in this Court.

When, as here, a district court's judgment of contempt has been reversed on appeal, a special prosecutor may decide to seek a writ of certiorari on the basis of his professional judgment that the court of appeals' decision merits review. See generally this Court's Rule 17. Sometimes, as apparently occurred here, the special prosecutor and the Solicitor General will disagree with respect to whether the case presents issues worthy of review by this Court. That kind of disagreement actually arises on a regular basis between the Solicitor General and attorneys representing various agencies of the United States.⁷ But that disagreement does not in-

⁷ In fact, this Court relies on the Solicitor General to exercise such independent judgment and to decline to authorize petitions for review in this Court in the majority of the cases the Government has lost in the courts of appeals. See *Andres v. United States*, 333 U. S. 740, 764-765, n. 9 (1948) (Frankfurter, J., concurring); McCree, *The Solicitor General and His Client*, 59 Wash. U. L. Q. 337, 341 (1981). See also Griswold, *The Office of the Solicitor General—Representing the Interests of the United States Before the Supreme Court*, 34 Mo. L. Rev. 527, 535 (1969) ("The Solicitor General has a special obligation to aid the Court as well as to serve his client. . . . In providing for the Solicitor General, subject to the direction of the Attorney General, to attend to the 'interests of the United States' in litigation, the statutes have always been understood to mean the long-

terfere with the Judiciary's power to protect itself. In this very case, before the consent of the Solicitor General ever became relevant, members of the Judiciary had decided that the District Judge erred in adjudging the defendants in contempt. Where the majority of a panel of a court of appeals or perhaps, as here, a majority of an en banc court, itself has decided in favor of the alleged contemner, the necessity that required the appointment of an independent prosecutor has faded and, indeed, is no longer present.⁸

When, on the other hand, a district court has adjudged a party in contempt, and the appellate court has affirmed, a special prosecutor has little need of the services of this Court to fulfill his or her duties. It is only if the contemner petitions this Court for a writ of certiorari that the Solicitor General need be consulted and his authorization or participation obtained to oppose the petition and defend the judgment. Under such circumstances, if the Solicitor General declines to authorize a defense of the judgment and if § 518(a) prevented the special prosecutor from proceeding, the independent ability of the Judiciary to vindicate its authority might appear to be threatened: both courts would have agreed that the contemner had disobeyed an order of the court, but the Executive's judgment to the contrary would threaten to undermine those judicial decisions. This threat, however, is inconsequential, for it is this Court, a part of the Judicial Branch, that must decide whether to exercise its discretion to review

range interests of the United States, not simply in terms of its fisc, or its success in the particular litigation, but as a government, as a people") (footnote omitted).

⁸ In *Young* we emphasized:

"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. . . . [T]he court will exercise its inherent power of self-protection only as a last resort." 481 U. S., at 801.

the judgment below, and it is well within this Court's authority to appoint an *amicus curiae* to file briefs and present oral argument in support of that judgment. See, e. g., *Bob Jones University v. United States*, 456 U. S. 922 (1982) (order appointing *amicus curiae* in support of judgment); *United States v. Fausto*, 480 U. S. 904 (1987) (same).

The Solicitor General argues that § 518(a) does not apply to a contempt proceeding that is initiated unilaterally by a federal court, because in *Young* this Court sustained the power of the court to appoint a private attorney to prosecute a criminal contempt charge, despite the fact that 28 U. S. C. § 516, in language certainly somewhat similar to that of § 518(a), requires such litigation to be conducted by a Government attorney:

"Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, . . . is reserved to officers of the Department of Justice, under the direction of the Attorney General."

Also, 28 U. S. C. § 547 requires: "Except as otherwise provided by law, each United States attorney, within his district, shall . . . prosecute for all offenses against the United States." The Solicitor General concludes that *Young* necessarily implies that these broadly worded reservations of litigating authority, including § 518(a), do not apply to the case at hand.

Young neither expressed nor implied any such special consideration for a judicially initiated contempt proceeding. Both statutes implicated but not discussed in *Young* provide for the Attorney General's exclusive control over specified litigation *except as otherwise provided or authorized by law*. A fair reading of *Young* indicates that a federal court's inherent authority to punish disobedience and vindicate its authority is an excepted provision or authorization within the meaning of §§ 516 and 547. The "'power to punish for contempts is inherent in all courts,'" and was not first recognized by this

Court in *Young*; rather, it “has been many times decided and may be regarded as settled law.” *Young*, 481 U. S., at 795, quoting *Michaelson v. United States ex rel. Chicago, St. P., M. & O. R. Co.*, 266 U. S. 42, 65–66 (1924). Thus, contrary to the Solicitor General’s intimation, *Young* did not read an exception into §§ 516 and 547; instead, *Young* is consistent with the plain language of the provisos to those sections. Section 518(a), by way of vivid contrast, contains no such proviso.⁹

⁹The plain language of §§ 516 and 547 resolves any conflict between the express reservations of authority over litigation therein provided and any other provision of law that vests litigation authority elsewhere. A statute that begins with “Except as otherwise provided by law” creates a general rule that applies unless contradicted in some other provision. The Court in *Young* had no reason to address the application of §§ 516 and 547. This was not because those provisions do not apply to a contempt proceeding initiated by a court, but because having reaffirmed the well-established inherent authority of a federal court to appoint a private attorney to prosecute a contempt charge, there was no conflict with the statutory requirements.

The fact that § 518(a) admits of no exception, of course, does not mean that Congress, if it so chooses, cannot exempt litigation from the otherwise blanket coverage of the statute. It does mean, however, that any such alleged exception must be scrutinized and subjected to the ordinary tools of statutory construction to determine whether Congress intended to supersede § 518(a). Indeed, Congress has enacted some provisions that suggest exceptions to the blanket coverage of § 518(a). See, e. g., Federal Courts Improvement Act of 1982, § 169, 96 Stat. 51 (preserving existing authority of the Tennessee Valley Authority “to represent itself by attorneys of its choosing,” while adding, see § 117, 96 Stat. 32, the United States Claims Court and the United States Court of Appeals for the Federal Circuit to the courts named in § 518(a)); Ethics in Government Act of 1978, § 601(a) as amended, 28 U. S. C. § 594(a)(9) (authorizing independent counsel to initiate and conduct prosecutions “in any court of competent jurisdiction . . . in the name of the United States”). See, as to the last cited Act, *In re Sealed Case*, 267 U. S. App. D. C. 178, 838 F. 2d 476, prob. juris. noted *sub nom. Morrison v. Olson*, 484 U. S. 1058 (1988). See also Stern, “Inconsistency” in Government Litigation, 64 Harv. L. Rev. 759 (1951) (discussing independent litigating authority of Interstate Commerce Commission). Without pausing here to construe the effect of any of these enactments, we note that there is no similar indication that Congress

C

If the plain statutory language of § 518(a) were not reason enough to persuade us to accept respondents' objections and dismiss the writ of certiorari, we observe that the salutary policies that support § 518(a) could be undermined by, and anomalous consequences could result from, the approach urged upon the Court by the special prosecutor and the Solicitor General. Among the reasons for reserving litigation in this Court to the Attorney General and the Solicitor General, is the concern that the United States usually should speak with one voice before this Court, and with a voice that reflects not the parochial interests of a particular agency, but the common interests of the Government and therefore of all the people. Without the centralization of the decision whether to seek certiorari, this Court might well be deluged with petitions from every federal prosecutor, agency, or instrumentality, urging as the position of the United States, a variety of inconsistent positions shaped by the immediate demands of the case *sub judice*, rather than by longer term interests in the development of the law.

Under the procedures set out in *Young*, it seems evident that the majority of contempt cases will be prosecuted by the United States Attorney. See 481 U. S., at 801. Under the special prosecutor's interpretation of § 518(a), whereby a

intended any such exception for a special prosecutor appointed by a court to prosecute a contempt charge, despite the fact that Federal Rule of Criminal Procedure 42(b) reflects a longstanding practice—of which we assume Congress is aware—of private prosecutions of contempt actions. See *Young v. United States ex rel. Vuitton et Fils S. A.*, 481 U. S., at 793–796.

Similarly, nothing in § 518(a) precludes Members of Congress or the Judiciary from adding their views in litigation before this Court as intervenors or *amici curiae*, a practice we have long recognized, see, *e. g.*, *Bowsher v. Synar*, 478 U. S. 714 (1986), and which in some instances is directly authorized by statute, see, *e. g.*, 2 U. S. C. § 288e(a).

contempt citation initiated by a district court is not a case "in which the United States is interested," the United States Attorney would be free to file a petition for a writ of certiorari in this Court without the authorization of the Solicitor General. We need not speculate how a United States Attorney would resolve the conflict between his duty "to the preservation of respect for judicial authority," United States Attorneys' Manual § 9-39.318 (1984), and his duty to his superiors at the Department of Justice,¹⁰ because we reject out of hand the interpretation of § 518(a) that creates the potential for such a conflict. Similarly, if the United States Attorney concluded that a court of appeals' decision reversing a judgment of contempt did not merit further review and declined to file a petition with this Court, it would seem to follow from the Solicitor General's interpretation, that the district judge could then appoint another special prosecutor solely for purposes of seeking certiorari and, if the writ were granted, litigating the case before this Court. See Brief for United States as *Amicus Curiae* in Response to Respondents' Motion to Dismiss 9, n. 7. But, surely, neither the force of historical practice, nor the necessity of protecting the dignity of the district court—whose judgment of contempt has been reversed on appeal—warrants attributing such power to the district judge.

III

We conclude that a criminal contempt prosecution brought to vindicate the authority of the Judiciary and to punish disobedience of a court order is a suit "in which the United

¹⁰ It may well be, as the Solicitor General contends, that even while pursuing a judicially initiated contempt prosecution, the United States Attorney remains, for all practical purposes, an officer and representative of the Executive Branch under the direction of the Attorney General. See Brief for United States as *Amicus Curiae* in Response to Respondents' Motion to Dismiss 9, n. 7. But from the standpoint of § 518(a), the Solicitor's and the special prosecutor's interpretation would seem to permit a United States Attorney to appear in this Court on behalf of the interests at stake in a contempt prosecution.

STEVENS, J., dissenting

485 U. S.

States is interested," within the meaning of § 518(a), regardless of who is appointed by the district court to prosecute the action.¹¹ In this case, the special prosecutor filed a petition for a writ of certiorari without the authorization of the Solicitor General, and thus without authorization to appear on behalf of the United States. Absent a proper representative of the Government as a petitioner in this criminal prosecution, jurisdiction is lacking and the writ of certiorari, heretofore granted, is now dismissed.

It is so ordered.

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

JUSTICE SCALIA, concurring.

I join the opinion of the Court, which ably demonstrates that according 28 U. S. C. § 518(a) its plain meaning is fully consistent with the opinion of the Court in *Young v. United States ex rel. Vuitton et Fils S. A.*, 481 U. S. 787 (1987). I continue to believe, however, that district courts possess no power, inherent or otherwise, to prosecute contemnors for disobedience of court judgments and no derivative power to appoint an attorney to conduct contempt prosecutions. See *id.*, at 825 (SCALIA, J., concurring in judgment).

JUSTICE STEVENS, with whom THE CHIEF JUSTICE joins, dissenting.

A statute enacted by the First Congress in 1789 created the office of Attorney General of the United States and de-

¹¹How a case is captioned is of no significance to our holding. As we have previously observed, "courts must look behind names that symbolize the parties to determine whether a justiciable case or controversy is presented." *United States v. ICC*, 337 U. S. 426, 430 (1949). Thus, even if the case had not been recaptioned by the special prosecutor upon the filing of a petition in this Court to reflect the "adversary nature of the proceeding," see Petitioner's Objections to Respondents' Motion to Dismiss 2, n. 1, we would have been required to determine whether this was a case "in which the United States is interested." A criminal contempt prosecution in federal court, however styled, is such a case.

scribed some of the responsibilities of that office. That statute provided:

“ . . . And there shall also be appointed a meet person, learned in the law, to act as attorney-general for the United States, who shall be sworn or affirmed to a faithful execution of his office; *whose duty it shall be to prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned*, and to give his advice and opinion upon questions of law when required by the President of the United States, or when requested by the heads of any of the departments, touching any matters that may concern their departments, and shall receive such compensation for his services as shall by law be provided.” Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 93 (emphasis supplied).

The 1789 Act has been amended to make it clear that the Solicitor General has essentially the same authority to conduct litigation in this Court as does the Attorney General and that such authority may be delegated to others. See *ante*, at 699–700. In substance, however, the provision has remained unaltered for nearly 200 years; the Attorney General—and now the Solicitor General as well—is charged with conducting all litigation before this Court in which the United States is “concerned” or “interested.”

Most litigation in which the United States is interested is, of course, conducted by the Executive Branch of the Government. Orderly administration requires that such litigation be conducted under the supervision and direction of a single office. Congress therefore wisely granted the Attorney General broad enough authority to accomplish that mission. It is unlikely, however, that when this statute was enacted Congress foresaw the possibility that matters such as judicial contempts, see *Young v. United States ex rel. Vuitton et Fils S. A.*, 481 U. S. 787 (1987), legislative contempts, see *Anderson v. Dunn*, 6 Wheat. 204 (1821);

McGrain v. Daugherty, 273 U. S. 135 (1927), or the need to defend a legislative veto, see *INS v. Chadha*, 462 U. S. 919 (1983), would present justiciable controversies in which the Congress or the Judiciary might have interests that diverge from those of the Executive Branch of the Government, but nevertheless be cases "in which the United States shall be concerned." It is equally unlikely that Congress, through amendment and more recent consideration of the provision, has perceived, much less endorsed, the view that §518(a) should be read to place control of such litigation exclusively in the hands of the Executive Branch. Although the texts of the statutes that Congress enacted can be read to foreclose either the Congress or the Judiciary from appointing counsel to participate in litigation in this Court, we have long held that in construing a statute, we are not bound to follow the literal language of the statute—"however clear the words may appear on 'superficial examination'"—when doing so leads to "absurd," or even "unreasonable," results. *United States v. American Trucking Assns., Inc.*, 310 U. S. 534, 543–544 (1940) (citation omitted); see also *Offshore Logistics, Inc. v. Tallentire*, 477 U. S. 207 (1986); *O'Connor v. United States*, 479 U. S. 27 (1986); *California Federal Savings & Loan Assn. v. Guerra*, 479 U. S. 272, 284 (1987); *United States v. Wells Fargo Bank*, 485 U. S. 351 (1988).

Both history and common sense make clear that Congress never intended to grant the Executive Branch exclusive authority to control all litigation before this Court in which a coequal branch of government maintains a substantial, justiciable interest. As early as 1818, the House of Representatives adopted a resolution directing the Speaker of the House "to employ such counsel, as he may think proper to defend the suit brought by John Anderson against the said Thomas Dunn, and that the expenses be defrayed out of the contingent fund of the House." 33 *Annals of Cong.* 434 (1818). The Speaker retained William Wirt to defend the suit, which established the congressional power of legislative

contempt. See *Anderson v. Dunn*, *supra*. Although Wirt was then serving as Attorney General, Congress nonetheless deemed it necessary to retain Wirt in his private capacity and to pay him \$500 to defend the suit. See American State Papers, Misc. Vol. 2, p. 932 (1834) ("A statement of the sums paid to William Wirt, Attorney General of the United States, beyond his salary, for services not required of him by law"). Had Congress read "in which the United States shall be concerned" to extend beyond the interests of the Executive Branch, the Attorney General would already have been obliged to "prosecute" or "conduct" the suit in the Supreme Court, and no separate retainer agreement would have been necessary. Indeed, the House Committee on the Judiciary later explained that payment above and beyond the Attorney General's salary was proper because it was provided "for services rendered which did not belong to his office, which he was in no manner bound to perform, and for which, therefore, if he did perform them, he was entitled to be paid as any other professional man would be."¹ *Id.*, at 931.

¹ At the request of the House of Representatives, President Monroe transmitted to Congress "information relating to the amount of the public money paid the Attorney General, over and above his salary fixed by law" This information was accompanied by a Presidential message that sheds further light on the early understanding of the Act of 1789, providing, in part:

"By the act of the 24th of September, 1789, instituting the office of Attorney General, it was made his duty to prosecute and conduct all suits in the Supreme Court, in which the United States should be concerned It will be seen, therefore, by the statement communicated, that no money whatever has been paid to the Attorney General for his services in that character, nor for any duty belonging to his office, beyond his salary, as fixed by law." American State Papers, Misc. Vol. 2, p. 931 (1834).

The House Committee agreed with the President that the nonsalary payments to Attorney General Wirt were for services beyond the scope of his statutory duties:

"That the office of Attorney General was established by the act of the 24th September, 1789, and his duty defined to be, 'to prosecute and con-

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On numerous occasions since *Anderson v. Dunn*, Congress has seen fit to retain private counsel to represent its interests. See, e. g., *Kilbourn v. Thompson*, 103 U. S. 168 (1881); *The Pocket Veto Case*, 279 U. S. 655 (1929); *Powell v. McCormack*, 395 U. S. 486 (1969); *Gravel v. United States*, 408 U. S. 606 (1972); *INS v. Chadha*, 462 U. S. 919 (1983); *Bowsher v. Synar*, 478 U. S. 714 (1986). Similarly, the interests of the Federal Judiciary, which are certainly interests

duct all suits in the Supreme Court in which the United States shall be concerned’

“The appointments heretofore made, and the compensation heretofore and now allowed, have had reference only to the existing constitution of the office, and the duties belonging to it, as already stated.

“It follows clearly that no Department of the Government has a right, nor ever has had a right, to call upon the Attorney General to perform any other duties; and it would be difficult to show that an officer is under a greater obligation than a private citizen to render gratuitous services to the Government, particularly where they are of a nature to be estimated and paid for.

“In the extensive and interesting concerns of the nation, it will nevertheless happen, as it has frequently happened, that the Government will have occasion for other or further legal aid than that which their officers are bound, or, in some cases, able to afford. . . .

“Where such occasional aid can be afforded by the Attorney General without interference with his proper duties, . . . there is no objection to his being employed upon the ordinary professional footing—of receiving a compensation for the service required. It was not the design of the office, as has already appeared, that he should render any other than the stated duties for the stated compensation or salary; and it was never understood or intended that the office was to deprive the officer of the right to employ his professional talents and learning for his own benefit, where that could be done without prejudice to the faithful performance of his stated duties. . . .

“In reviewing the past, then, the committee finds nothing to disapprove. Where additional professional aid has been employed, it seems to have been necessary and proper, and not to have been compensated beyond a fair and reasonable amount. Where compensation has been allowed to the Attorney General, it has been for services rendered which did not belong to his office, which he was in no manner bound to perform, and for which, therefore, if he did perform them, he was entitled to be paid as any other professional man would be. . . .” *Id.*, at 930–931.

of the United States as well, have been represented in litigation in this Court by private counsel on several occasions. See, *e. g.*, *Will v. United States*, 389 U. S. 90 (1967); *Chandler v. Judicial Council of Tenth Circuit*, 398 U. S. 74 (1970); *Will v. Calvert Fire Ins. Co.*, 437 U. S. 655 (1978); *Young v. United States ex rel. Vuitton et Fils S. A.*, 481 U. S. 787 (1987). Yet, from the time of *Anderson v. Dunn* until today, we have heard argument in these cases without bothering to determine whether or not the Solicitor General approved of their participation in the litigation. In addition, we have frequently appointed counsel—sometimes designated as “*amicus curiae*,” but nevertheless fully authorized to argue cases in which the United States is interested, see, *e. g.*, *Myers v. United States*, 272 U. S. 52 (1926); *Bob Jones University v. United States*, 456 U. S. 922 (1982) (appointing counsel), 461 U. S. 574 (1983)—without asking for the approval of the Solicitor General before taking such action. Moreover, despite the fact that 28 U. S. C. § 516 contains language similar to that found in § 518(a),² we have confirmed the power of the Judiciary to appoint counsel to conduct litigation in which the United States is interested. See *Young v. United States ex rel. Vuitton et Fils S. A.*, *supra*.

This long and previously unquestioned practice comports well with common sense. Section 518(a) directs that “[e]xcept when the Attorney General in a particular case directs otherwise, the Attorney General and the Solicitor General shall conduct and argue suits and appeals in the Supreme Court . . . in which the United States is interested.” The language is mandatory. In any case in which the United States is interested, the Solicitor General *shall* argue an appeal in the Supreme Court. Of course, and quite properly so, the Solicitor General does not seek certiorari in every

²Title 28 U. S. C. § 516 provides:

“Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, . . . is reserved to officers of the Department of Justice, under the direction of the Attorney General.”

case adversely affecting an interest of the United States. Instead, the Solicitor General acts strategically, choosing the most important cases and the cases in which the United States is most likely to prevail. In thus separating the wheat from the chaff, the Solicitor General makes a series of judgments as to what is in the United States' interest. As an executive officer,³ the Solicitor General may reasonably weigh and consider the interests of the executive agencies. When faced with a difference of view between the Executive Branch and a coordinate branch of government, however, the Solicitor General faces a conflict of interest that undeniably would be intolerable if encountered in the private sector. In essence, he or she is asked to resolve conflicting interests between clients. Common sense dictates that Congress did not intend to create such a conflict in the Office of the Solicitor General.⁴ Moreover, and even more compellingly so, it is unreasonable to conclude that Congress intended to abdicate to the Solicitor General and the Department of Justice the function of determining what is in the interest of the Congress or the Judiciary. Certainly, Congress did not intend that these executive offices be charged with weighing competing executive and congressional or judicial interests, with authority—absent further legislation⁵—to deny Congress and the Judiciary access to this Court.

³ Title 28 U. S. C. § 501 provides that "[t]he Department of Justice is an executive department of the United States" Section 505, in turn, provides that "[t]he President shall appoint in the Department of Justice, by and with the advice and consent of the Senate, a Solicitor General, learned in the law, to assist the Attorney General in the performance of his duties."

⁴ Although this conflict could be avoided if the Solicitor General were to authorize certiorari and delegate control of the litigation in every case in which a coordinate branch asserts an interest, I doubt that Congress intended that the mandatory language of § 518(a) apply to Congress and the Judiciary merely so that the Solicitor General could then simply reallocate control of the litigation back to them whenever requested to do so.

⁵ In 1978, legislation was enacted creating the Office of Senate Legal Counsel. See 92 Stat. 1875, 2 U. S. C. § 288 *et seq.* (1982 ed. and Supp. III). Title 2 U. S. C. § 288e(a) provides: "When directed to do so . . . ,

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Not only is our prior practice consistent with a common-sense reading of § 518, but it is also significant that the officer most interested in a correct interpretation of that provision—the Solicitor General—places this interpretation on its text. In his brief in this case, he submits:

“[Title] 28 U. S. C. 518(a), like the other statutes that vest the Attorney General with exclusive control over

the Counsel shall intervene or appear as *amicus curiae* in the name of the Senate . . . in any legal action or proceeding pending in any court of the United States . . . in which the powers and responsibilities of Congress under the Constitution of the United States are placed in issue.” Section 288l further provides that “[p]ermission to intervene as a party or to appear as *amicus curiae* under section 288e . . . shall be of right” And § 288k relieves the Attorney General of certain representational responsibilities when notified that the Senate Counsel is handling the matter and also requires that the Attorney General “notify the Counsel with respect to any proceeding in which the United States is a party of any determination by the Attorney General or the Solicitor General not to appeal any court decision affecting the constitutionality of an Act . . . within such time as will enable the Senate to direct the Counsel to intervene as a party in such proceeding”

No similar statute provides for representation of the House of Representatives, which declined coverage under § 288. See H. R. Conf. Rep. No. 95-1756, p. 80 (1978). Moreover, it does not appear that in enacting § 288 Congress intended to create an exception to § 518(a), nor does it appear that Congress saw a need to do so. Rather, the Senate determined that “the interests of Congress as an institution make its present reliance on the ad hoc services of the Justice Department and private counsel wholly unsatisfactory.” S. Rep. No. 95-170, p. 11 (1977). Representation by the Department of Justice was deemed unsatisfactory because “[t]he Department of Justice is a part of the executive branch and its first and foremost responsibility is to represent the interests of the President and the executive branch,” *id.*, at 11-12, thus creating an unacceptable conflict of interest. The continued reliance on private representation in cases involving a conflict with the Department of Justice was also rejected because of the high cost of retaining private counsel on a case-by-case basis, because of the need to maintain consistency among legal positions taken by the Senate, and because there is often insufficient time when the need for representation arises to locate and retain private counsel. See *id.*, at 14-15. In essence, the Senate saw a need to hire in-house counsel, not a need to create an exception to § 518(a) permitting a form of legal representation that Congress has engaged in for years.

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litigation, applies to cases in which the United States is 'interested' by virtue of the constitutional and statutory responsibilities of the Executive Branch—the Branch in which the Attorney General serves. Cf. *ICC v. Southern Ry., Co.*, 543 F. 2d 534, 536 (5th Cir. 1976) (Section 516 'not only centralizes responsibility for the conduct of public litigation but enables the President, through the Attorney General, to supervise the various policies of the executive branch').” Brief for United States as *Amicus Curiae* in Response to Respondents’ Motion to Dismiss 13.

Because I agree with that interpretation of the statute, I respectfully dissent.

Syllabus

BUSINESS ELECTRONICS CORP. *v.* SHARP
ELECTRONICS CORP.CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

No. 85-1910. Argued January 19, 1988—Decided May 2, 1988

Petitioner and another retailer (Hartwell) were authorized by respondent manufacturer to sell its electronic calculators in the Houston area. In response to Hartwell's complaints about petitioner's prices, respondent terminated petitioner's dealership. Petitioner brought suit in Federal District Court, alleging that respondent and Hartwell had conspired to terminate petitioner and that such conspiracy was illegal *per se* under § 1 of the Sherman Act. The court submitted a liability interrogatory to the jury asking whether there was an agreement or understanding between respondent and Hartwell to terminate petitioner's dealership because of its price cutting, and instructed the jury that the Sherman Act is violated when a seller enters into such an agreement or understanding with one of its dealers. The jury answered the interrogatory affirmatively, awarding damages, and the court entered judgment for petitioner for treble damages. The Court of Appeals reversed and remanded for a new trial, holding that, to render illegal *per se* a vertical agreement between a manufacturer and a dealer to terminate a second dealer, the first dealer must expressly or impliedly agree to set its prices at some level.

Held: A vertical restraint of trade is not *per se* illegal under § 1 of the Sherman Act unless it includes some agreement on price or price levels. Pp. 723-736.

(a) Ordinarily, whether particular concerted action violates § 1 is determined through case-by-case application of the rule of reason. *Per se* rules are appropriate only for conduct that is manifestly anticompetitive. Although vertical agreements on resale prices are illegal *per se*, extension of that treatment to other vertical restraints must be based on demonstrable economic effect rather than upon formalistic line drawing. *Continental T. V., Inc. v. GTE Sylvania Inc.*, 433 U. S. 36, which held that vertical nonprice restraints are not *per se* illegal, recognized that such restraints have real potential to stimulate interbrand competition; that a rule of *per se* illegality for such restraints is not needed or effective to protect intrabrand competition; and that such restraints do not significantly facilitate cartelizing. There has been no showing here that different characteristics attend an agreement between a manufacturer and a dealer to terminate a "price cutter," without a further agreement on the

price or price levels to be charged by the remaining dealer. A quite plausible purpose of the vertical restriction here was to enable Hartwell to provide better services under its sales franchise agreement with respondent. There is also no merit to petitioner's contention that an agreement on the remaining dealer's price or price levels will so often follow from terminating another dealer because of its price cutting that prophylaxis against resale price maintenance warrants the District Court's *per se* rule. Pp. 723-731.

(b) The term "restraint of trade" in the Sherman Act, like the term at common law before the statute was adopted, refers not to a particular list of agreements, but to a particular economic consequence, which may be produced by quite different sorts of agreements in varying times and circumstances. Moreover, this Court's precedents do not indicate that the pre-Sherman Act common law prohibited as illegal *per se* an agreement of the sort made here. Nor is the District Court's rule of *per se* illegality compelled by precedents under the Sherman Act holding certain horizontal agreements to constitute price fixing and thus to be *per se* illegal even though they did not set prices or price levels. The notion of equivalence between the scope of horizontal *per se* illegality and that of vertical *per se* illegality was explicitly rejected in *GTE Sylvania*. Finally, earlier vertical price-fixing cases are consistent with the proposition that vertical *per se* illegality requires an agreement setting a price or a price level. Pp. 731-735.

780 F. 2d 1212, affirmed.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BRENNAN, MARSHALL, BLACKMUN, and O'CONNOR, JJ., joined. STEVENS, J., filed a dissenting opinion, in which WHITE, J., joined, *post*, p. 736. KENNEDY, J., took no part in the consideration or decision of the case.

Gary V. McGowan argued the cause and filed briefs for petitioner.

Harold R. Tyler, Jr. argued the cause for respondent. With him on the brief was Lance Gotthoffer.*

*Briefs of *amici curiae* urging reversal were filed for Forty-two States by J. Joseph Curran, Jr., Attorney General of Maryland, and Michael F. Brockmeyer and Craig J. Hornig, Assistant Attorneys General, by Anthony J. Celebrezze, Jr., Attorney General of Ohio, and Gregory E. Young and Matthew C. Lawry, Assistant Attorneys General, by Don Siegelman, Attorney General of Alabama, and James Prude, Assistant Attorney General, by Grace Berg Schaible, Attorney General of Alaska, and Richard D.

JUSTICE SCALIA delivered the opinion of the Court.

Petitioner Business Electronics Corporation seeks review of a decision of the United States Court of Appeals for the

Monkman, Assistant Attorney General, by *Robert K. Corbin*, Attorney General of Arizona, and *Alison B. Swan*, Assistant Attorney General, by *John Steven Clark*, Attorney General of Arkansas, and *Jeffrey A. Bell*, Deputy Attorney General, by *Duane Woodard*, Attorney General of Colorado, *Thomas P. McMahon*, First Assistant Attorney General, and *David S. Harmon* and *James R. Lewis*, Assistant Attorneys General, by *Joseph Lieberman*, Attorney General of Connecticut, and *Robert M. Langer*, Assistant Attorney General, by *Robert A. Butterworth*, Attorney General of Florida, by *James T. Jones*, Attorney General of Idaho, by *Neil F. Hartigan*, Attorney General of Illinois, and *Robert E. Davy, Jr.*, Assistant Attorney General, by *Linley E. Pearson*, Attorney General of Indiana, and *Frank A. Baldwin*, Deputy Attorney General, by *Thomas J. Miller*, Attorney General of Iowa, and *John R. Perkins*, Deputy Attorney General, by *Robert T. Stephan*, Attorney General of Kansas, and *Carl M. Anderson*, Assistant Attorney General, by *David L. Armstrong*, Attorney General of Kentucky, by *William J. Guste, Jr.*, Attorney General of Louisiana, by *James M. Shannon*, Attorney General of Massachusetts, and *Barbara Anthony*, Assistant Attorney General, by *Frank J. Kelley*, Attorney General of Michigan, *Louis J. Caruso*, Solicitor General, and *Frederick H. Hoffecker* and *Robert C. Ward*, Assistant Attorneys General, by *Hubert H. Humphrey III*, Attorney General of Minnesota, by *Edwin L. Pittman*, Attorney General of Mississippi, and *Robert E. Sanders*, Special Assistant Attorney General, by *William L. Webster*, Attorney General of Missouri, by *Mike Greely*, Attorney General of Montana, and *Joe Roberts*, Assistant Attorney General, by *Robert M. Spire*, Attorney General of Nebraska, and *Dale A. Comer*, Assistant Attorney General, by *Brian McKay*, Attorney General of Nevada, and *P. Gregory Giordano*, Deputy Attorney General, by *Stephen E. Merrill*, Attorney General of New Hampshire, and *Amy L. Ignatius*, Senior Assistant Attorney General, by *W. Cary Edwards*, Attorney General of New Jersey, and *Laurel A. Price*, Deputy Attorney General, by *Robert Abrams*, Attorney General of New York, *O. Peter Sherwood*, Solicitor General, and *Lloyd E. Constantine*, Assistant Attorney General, by *Lacy H. Thornburg*, Attorney General of North Carolina, and *Richard Carlton*, Assistant Attorney General, by *Dave Frohnmayer*, Attorney General of Oregon, by *Leroy S. Zimmerman*, Attorney General of Pennsylvania, and *Eugene F. Waye*, Deputy Attorney General, by *James E. O'Neil*, Attorney General of Rhode Island, by *Roger A. Tellinghuisen*, Attorney General of South Dakota, and *Jeffrey P.*

Fifth Circuit holding that a vertical restraint is *per se* illegal under § 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. § 1, only if there is an express or implied agreement to set resale prices at some level. 780 F. 2d 1212, 1215-1218 (1986). We granted certiorari, 482 U. S. 912 (1987), to resolve a conflict in the Courts of Appeals regarding the proper dividing line between the rule that vertical price restraints are illegal *per se* and the rule that vertical nonprice restraints are to be judged under the rule of reason.¹

Hallem, Assistant Attorney General, by *W. J. Michael Cody*, Attorney General of Tennessee, and *Perry A. Craft*, Deputy Attorney General, by *Jim Mattox*, Attorney General of Texas, *Mary F. Keller*, Executive Assistant Attorney General, and *J. L. Covington* and *Allene D. Evans*, Assistant Attorneys General, by *David L. Wilkinson*, Attorney General of Utah, and *Richard M. Hagstrom*, Assistant Attorney General, by *Jeffrey L. Amestoy*, Attorney General of Vermont, and *Glenn A. Jarrett*, Assistant Attorney General, by *Mary Sue Terry*, Attorney General of Virginia, and *Allen L. Jackson*, Assistant Attorney General, by *Kenneth O. Eikenberry*, Attorney General of Washington, and *John R. Ellis*, Deputy Attorney General, by *Charles G. Brown*, Attorney General of West Virginia, *C. William Ullrich*, First Deputy Attorney General, and *Mark D. Kindt*, Deputy Attorney General, by *Donald J. Hanaway*, Attorney General of Wisconsin, and *Kevin J. O'Connor*, Assistant Attorney General, and by *Joseph B. Meyer*, Attorney General of Wyoming; for K mart Corporation by *Robert W. Steele*, *Robert E. Hebda*, and *James C. Tuttle*; and for the National Mass Retailing Institute by *William D. Coston* and *Robert J. Verdisco*.

Briefs of *amici curiae* urging affirmance were filed for the Consumer Electronics Group of the Electronic Industries Association by *Gary J. Shapiro*; for the National Association of Manufacturers by *Jan S. Amundson*, *Quentin Riegel*, and *Donald I. Baker*; and for the National Office Machine Dealers Association by *Samuel Schoenberg*.

¹The Seventh, Eighth, and Tenth Circuits have agreed with the analysis of the Fifth. See *Morrison v. Murray Biscuit Co.*, 797 F. 2d 1430, 1440 (CA7 1986); *McCabe's Furniture, Inc. v. La-Z-Boy Chair Co.*, 798 F. 2d 323, 329 (CA8 1986), cert. pending, No. 86-1101; *Westman Commission Co. v. Hobart Int'l, Inc.*, 796 F. 2d 1216, 1223-1224 (CA10 1986), cert. pending, No. 86-484. Decisions of the Third and Ninth Circuits have disagreed. See *Cernuto, Inc. v. United Cabinet Corp.*, 595 F. 2d 164, 168-170 (CA3 1979); *Zidell Explorations, Inc. v. Conval Int'l, Ltd.*, 719 F. 2d 1465, 1469-1470 (CA9 1983).

I

In 1968, petitioner became the exclusive retailer in the Houston, Texas, area of electronic calculators manufactured by respondent Sharp Electronics Corporation. In 1972, respondent appointed Gilbert Hartwell as a second retailer in the Houston area. During the relevant period, electronic calculators were primarily sold to business customers for prices up to \$1,000. While much of the evidence in this case was conflicting—in particular, concerning whether petitioner was “free riding” on Hartwell’s provision of presale educational and promotional services by providing inadequate services itself—a few facts are undisputed. Respondent published a list of suggested minimum retail prices, but its written dealership agreements with petitioner and Hartwell did not obligate either to observe them, or to charge any other specific price. Petitioner’s retail prices were often below respondent’s suggested retail prices and generally below Hartwell’s retail prices, even though Hartwell too sometimes priced below respondent’s suggested retail prices. Hartwell complained to respondent on a number of occasions about petitioner’s prices. In June 1973, Hartwell gave respondent the ultimatum that Hartwell would terminate his dealership unless respondent ended its relationship with petitioner within 30 days. Respondent terminated petitioner’s dealership in July 1973.

Petitioner brought suit in the United States District Court for the Southern District of Texas, alleging that respondent and Hartwell had conspired to terminate petitioner and that such conspiracy was illegal *per se* under § 1 of the Sherman Act. The case was tried to a jury. The District Court submitted a liability interrogatory to the jury that asked whether “there was an agreement or understanding between Sharp Electronics Corporation and Hartwell to terminate Business Electronics as a Sharp dealer because of Business Electronics’ price cutting.” Record, Doc. No. 241. The District Court instructed the jury at length about this question:

"The Sherman Act is violated when a seller enters into an agreement or understanding with one of its dealers to terminate another dealer because of the other dealer's price cutting. Plaintiff contends that Sharp terminated Business Electronics in furtherance of Hartwell's desire to eliminate Business Electronics as a price-cutting rival.

"If you find that there was an agreement between Sharp and Hartwell to terminate Business Electronics because of Business Electronics' price cutting, you should answer yes to Question Number 1.

"A combination, agreement or understanding to terminate a dealer because of his price cutting unreasonably restrains trade and cannot be justified for any reason. Therefore, even though the combination, agreement or understanding may have been formed or engaged in . . . to eliminate any alleged evils of price cutting, it is still unlawful. . . .

"If a dealer demands that a manufacturer terminate a price cutting dealer, and the manufacturer agrees to do so, the agreement is illegal if the manufacturer's purpose is to eliminate the price cutting." App. 18-19.

The jury answered Question 1 affirmatively and awarded \$600,000 in damages. The District Court rejected respondent's motion for judgment notwithstanding the verdict or a new trial, holding that the jury interrogatory and instructions had properly stated the law. It entered judgment for petitioner for treble damages plus attorney's fees.

The Fifth Circuit reversed, holding that the jury interrogatory and instructions were erroneous, and remanded for a new trial. It held that, to render illegal *per se* a vertical agreement between a manufacturer and a dealer to terminate a second dealer, the first dealer "must expressly or impliedly agree to set its prices at some level, though not a specific one.

The distributor cannot retain complete freedom to set whatever price it chooses." 780 F. 2d, at 1218.

II

A

Section 1 of the Sherman Act provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U. S. C. § 1. Since the earliest decisions of this Court interpreting this provision, we have recognized that it was intended to prohibit only unreasonable restraints of trade. *National Collegiate Athletic Assn. v. Board of Regents of University of Oklahoma*, 468 U. S. 85, 98 (1984); see, e. g., *Standard Oil Co. v. United States*, 221 U. S. 1, 60 (1911). Ordinarily, whether particular concerted action violates § 1 of the Sherman Act is determined through case-by-case application of the so-called rule of reason—that is, "the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." *Continental T. V., Inc. v. GTE Sylvania Inc.*, 433 U. S. 36, 49 (1977). Certain categories of agreements, however, have been held to be *per se* illegal, dispensing with the need for case-by-case evaluation. We have said that *per se* rules are appropriate only for "conduct that is manifestly anticompetitive," *id.*, at 50, that is, conduct "that would always or almost always tend to restrict competition and decrease output," *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U. S. 284, 289–290 (1985), quoting *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U. S. 1, 19–20 (1979). See also *FTC v. Indiana Federation of Dentists*, 476 U. S. 447, 458–459 (1986) ("[W]e have been slow . . . to extend *per se* analysis to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious"); *National Collegiate*

Athletic Assn. v. Board of Regents of University of Oklahoma, supra, at 103–104 (“*Per se* rules are invoked when surrounding circumstances make the likelihood of anti-competitive conduct so great as to render unjustified further examination of the challenged conduct”); *National Society of Professional Engineers v. United States*, 435 U. S. 679, 692 (1978) (agreements are *per se* illegal only if their “nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality”).

Although vertical agreements on resale prices have been illegal *per se* since *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U. S. 373 (1911), we have recognized that the scope of *per se* illegality should be narrow in the context of vertical restraints. In *Continental T. V., Inc. v. GTE Sylvania Inc.*, *supra*, we refused to extend *per se* illegality to vertical nonprice restraints, specifically to a manufacturer’s termination of one dealer pursuant to an exclusive territory agreement with another. We noted that especially in the vertical restraint context “departure from the rule-of-reason standard must be based on demonstrable economic effect rather than . . . upon formalistic line drawing.” *Id.*, at 58–59. We concluded that vertical nonprice restraints had not been shown to have such a “‘pernicious effect on competition’” and to be so “‘lack[ing] [in] . . . redeeming value’” as to justify *per se* illegality. *Id.*, at 58, quoting *Northern Pacific R. Co. v. United States*, 356 U. S. 1, 5 (1958). Rather, we found, they had real potential to stimulate interbrand competition, “the primary concern of antitrust law,” 433 U. S., at 52, n. 19:

“[N]ew manufacturers and manufacturers entering new markets can use the restrictions in order to induce competent and aggressive retailers to make the kind of investment of capital and labor that is often required in the distribution of products unknown to the consumer. Established manufacturers can use them to induce retailers

to engage in promotional activities or to provide service and repair facilities necessary to the efficient marketing of their products. Service and repair are vital for many products. . . . The availability and quality of such services affect a manufacturer's goodwill and the competitiveness of his product. Because of market imperfections such as the so-called 'free-rider' effect, these services might not be provided by retailers in a purely competitive situation, despite the fact that each retailer's benefit would be greater if all provided the services than if none did." *Id.*, at 55.

Moreover, we observed that a rule of *per se* illegality for vertical nonprice restraints was not needed or effective to protect *intra*brand competition. First, so long as interbrand competition existed, that would provide a "significant check" on any attempt to exploit *intra*brand market power. *Id.*, at 52, n. 19; see also *id.*, at 54. In fact, in order to meet that interbrand competition, a manufacturer's dominant incentive is to lower resale prices. *Id.*, at 56, and n. 24. Second, the *per se* illegality of vertical restraints would create a perverse incentive for manufacturers to integrate vertically into distribution, an outcome hardly conducive to fostering the creation and maintenance of small businesses. *Id.*, at 57, n. 26.

Finally, our opinion in *GTE Sylvania* noted a significant distinction between vertical nonprice and vertical price restraints. That is, there was support for the proposition that vertical price restraints reduce *inter*brand price competition because they "facilitate cartelizing." *Id.*, at 51, n. 18, quoting Posner, Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions, 75 Colum. L. Rev. 282, 294 (1975). The authorities cited by the Court suggested how vertical price agreements might assist horizontal price fixing at the manufacturer level (by reducing the manufacturer's incentive to cheat on a cartel, since its retailers could not pass on lower prices to consumers) or might be used to

organize cartels at the retailer level. See R. Posner, *Anti-trust: Cases, Economic Notes and Other Materials* 134 (1974); E. Gellhorn, *Antitrust Law and Economics* 252, 256 (1976); Note, *Vertical Territorial and Customer Restrictions in the Franchising Industry*, 10 *Colum. J. L. & Soc. Prob.* 497, 498, n. 12 (1974). Similar support for the cartel-facilitating effect of vertical nonprice restraints was and remains lacking.

We have been solicitous to assure that the market-freeing effect of our decision in *GTE Sylvania* is not frustrated by related legal rules. In *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U. S. 752, 763 (1984), which addressed the evidentiary showing necessary to establish vertical concerted action, we expressed concern that “[i]f an inference of such an agreement may be drawn from highly ambiguous evidence, there is considerable danger that the doctrin[e] enunciated in *Sylvania* . . . will be seriously eroded.” See also *id.*, at 761, n. 6. We eschewed adoption of an evidentiary standard that “could deter or penalize perfectly legitimate conduct” or “would create an irrational dislocation in the market” by preventing legitimate communication between a manufacturer and its distributors. *Id.*, at 763, 764.

Our approach to the question presented in the present case is guided by the premises of *GTE Sylvania* and *Monsanto*: that there is a presumption in favor of a rule-of-reason standard; that departure from that standard must be justified by demonstrable economic effect, such as the facilitation of cartelizing, rather than formalistic distinctions; that interbrand competition is the primary concern of the antitrust laws; and that rules in this area should be formulated with a view towards protecting the doctrine of *GTE Sylvania*. These premises lead us to conclude that the line drawn by the Fifth Circuit is the most appropriate one.

There has been no showing here that an agreement between a manufacturer and a dealer to terminate a “price cutter,” without a further agreement on the price or price levels to be charged by the remaining dealer, almost always tends

to restrict competition and reduce output. Any assistance to cartelizing that such an agreement might provide cannot be distinguished from the sort of minimal assistance that might be provided by vertical nonprice agreements like the exclusive territory agreement in *GTE Sylvania*, and is insufficient to justify a *per se* rule. Cartels are neither easy to form nor easy to maintain. Uncertainty over the terms of the cartel, particularly the prices to be charged in the future, obstructs both formation and adherence by making cheating easier. Cf. *Maple Flooring Mfrs. Assn. v. United States*, 268 U. S. 563 (1925); *Cement Mfrs. Protective Assn. v. United States*, 268 U. S. 588 (1925); see generally *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U. S. 574, 590 (1986). Without an agreement with the remaining dealer on price, the manufacturer both retains its incentive to cheat on any manufacturer-level cartel (since lower prices can still be passed on to consumers) and cannot as easily be used to organize and hold together a retailer-level cartel.²

The District Court's rule on the scope of *per se* illegality for vertical restraints would threaten to dismantle the doctrine of *GTE Sylvania*. Any agreement between a manufacturer and a dealer to terminate another dealer who happens to have charged lower prices can be alleged to have been directed against the terminated dealer's "price cutting." In the vast majority of cases, it will be extremely difficult for the manufacturer to convince a jury that its motivation was to ensure adequate services, since price cutting and

²The dissent's principal fear appears to be not cartelization at either level, but Hartwell's assertion of dominant retail power. This fear does not possibly justify adopting a rule of *per se* illegality. Retail market power is rare, because of the usual presence of interbrand competition and other dealers, see *Continental T. V., Inc. v. GTE Sylvania Inc.*, 433 U. S. 36, 54 (1977), and it should therefore not be assumed but rather must be proved. Cf. Baxter, *The Viability of Vertical Restraints Doctrine*, 75 Calif. L. Rev. 933, 948-949 (1987). Of course this case was not prosecuted on the theory, and therefore the jury was not asked to find, that Hartwell possessed such market power.

some measure of service cutting usually go hand in hand. Accordingly, a manufacturer that agrees to give one dealer an exclusive territory and terminates another dealer pursuant to that agreement, or even a manufacturer that agrees with one dealer to terminate another for failure to provide contractually obligated services, exposes itself to the highly plausible claim that its real motivation was to terminate a price cutter. Moreover, even vertical restraints that do not result in dealer termination, such as the initial granting of an exclusive territory or the requirement that certain services be provided, can be attacked as designed to allow existing dealers to charge higher prices. Manufacturers would be likely to forgo legitimate and competitively useful conduct rather than risk treble damages and perhaps even criminal penalties.

We cannot avoid this difficulty by invalidating as illegal *per se* only those agreements imposing vertical restraints that contain the word "price," or that affect the "prices" charged by dealers. Such formalism was explicitly rejected in *GTE Sylvania*. As the above discussion indicates, all vertical restraints, including the exclusive territory agreement held not to be *per se* illegal in *GTE Sylvania*, have the potential to allow dealers to increase "prices" and can be characterized as intended to achieve just that. In fact, vertical nonprice restraints only accomplish the benefits identified in *GTE Sylvania* because they reduce intrabrand price competition to the point where the dealer's profit margin permits provision of the desired services. As we described it in *Monsanto*: "The manufacturer often will want to ensure that its distributors earn sufficient profit to pay for programs such as hiring and training additional salesmen or demonstrating the technical features of the product, and will want to see that 'free-riders' do not interfere." 465 U. S., at 762-763. See also *GTE Sylvania*, 433 U. S., at 55.

The dissent erects a much more complex analytic structure, which ultimately rests, however, upon the same dis-

credited premise that the only function this nonprice vertical restriction can serve is restraint of dealer-level competition. Specifically, the dissent's reasoning hinges upon its perception that the agreement between Sharp and Hartwell was a "naked" restraint—that is, it was not "ancillary" to any other agreement between Sharp and Hartwell. *Post*, at 736–742, 744–745. But that is not true, unless one assumes, contrary to *GTE Sylvania* and *Monsanto*, and contrary to our earlier discussion, that it is not a quite plausible purpose of the restriction to enable Hartwell to provide better services under the sales franchise agreement.³ From its

³The conclusion of "naked" restraint could also be sustained on another assumption, namely, that an agreement is not "ancillary" unless it is designed to enforce a contractual obligation of one of the parties to the contract. The dissent appears to accept this assumption. See *post*, at 739–741, and n. 3, 744–746. It is plainly wrong. The classic "ancillary" restraint is an agreement by the seller of a business not to compete within the market. See *Mitchel v. Reynolds*, 1 P. Wms. 181, 24 Eng. Rep. 347 (1711); Restatement (Second) of Contracts § 188(2)(a) (1981). That is not ancillary to any other contractual obligation, but, like the restraint here, merely enhances the value of the contract, or permits the "enjoyment of [its] fruits." *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 282 (CA6 1898), *aff'd*, 175 U. S. 211 (1899); cf. Restatement (Second) of Contracts §§ 187, 188 (1981) (restraint may be ancillary to a "transaction or relationship") (emphasis added); R. Bork, *The Antitrust Paradox* 29 (1978) (hereinafter Bork) (vertical arrangements are ancillary to the "transaction of supplying and purchasing").

More important than the erroneousness of the dissent's common-law analysis of "naked" and "ancillary" restraints are the perverse economic consequences of permitting nonprice vertical restraints to avoid *per se* invalidity only through attachment to an express contractual obligation. Such an approach is contrary to the express views of the principal scholar on whom the dissent relies. See 7 P. Areeda, *Antitrust Law* § 1457c, p. 170 (1986) (hereinafter Areeda) (legality of terminating price cutter should not depend upon formal adoption of service obligations that termination is assertedly designed to protect). In the precise case of a vertical agreement to terminate other dealers, for example, there is no conceivable reason why the existence of an exclusivity commitment by the manufacturer to the one remaining dealer would render anticompetitive effects less likely, or the procompetitive effects on services more likely—so that the

faulty conclusion that what we have before us is a "naked" restraint, the dissent proceeds, by reasoning we do not entirely follow, to the further conclusion that it is therefore a horizontal rather than a vertical restraint. We pause over this only to note that in addition to producing what we think the wrong result in the present case, it introduces needless confusion into antitrust terminology. Restraints imposed by agreement between competitors have traditionally been denominated as horizontal restraints, and those imposed by agreement between firms at different levels of distribution as vertical restraints.⁴

dissent's line for *per se* illegality fails to meet the requirement of *Continental T. V., Inc. v. GTE Sylvania Inc.*, 433 U. S., at 59, that it be based on "demonstrable economic effect." If anything, the economic effect of the dissent's approach is perverse, encouraging manufacturers to agree to otherwise inefficient contractual provisions for the sole purpose of attaching to them efficient nonprice vertical restraints which, only by reason of such attachment, can avoid *per se* invalidity as "naked" restraints. The dissent's approach would therefore create precisely the kind of "irrational dislocation in the market" that legal rules in this area should be designed to avoid. *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U. S. 752, 764 (1984).

⁴The dissent apparently believes that whether a restraint is horizontal depends upon whether its anticompetitive effects are horizontal, and not upon whether it is the product of a horizontal agreement. *Post*, at 745-747, and n. 10. That is of course a conceivable way of talking, but if it were the language of antitrust analysis there would be no such thing as an unlawful vertical restraint, since all anticompetitive effects are by definition horizontal effects. The dissent quotes a statement of Professor Areeda as supposed adoption of its definition of horizontal restraint. *Post*, at 745-746, n. 10, quoting Areeda § 1457d, p. 174. That statement seems to us to be, to the contrary, Professor Areeda's attempt to explain a peculiar usage of the term "horizontal" in *Cernuto, Inc. v. United Cabinet Corp.*, 595 F. 2d, at 168, noting that (even though *Cernuto* did not involve a horizontal restraint) the use of the term "horizontal" was "appropriate to capture the fact that dealer interests opposed to those of the manufacturer were being served." Areeda § 1457d, p. 174. The dissent also seeks to associate Judge Bork with its terminological confusion. See *post*, at 746, n. 10, quoting Bork 288. What the quoted passage says, how-

Finally, we do not agree with petitioner's contention that an agreement on the remaining dealer's price or price levels will so often follow from terminating another dealer "because of [its] price cutting" that prophylaxis against resale price maintenance warrants the District Court's *per se* rule. Petitioner has provided no support for the proposition that vertical price agreements generally underlie agreements to terminate a price cutter. That proposition is simply incompatible with the conclusion of *GTE Sylvania* and *Monsanto* that manufacturers are often motivated by a legitimate desire to have dealers provide services, combined with the reality that price cutting is frequently made possible by "free riding" on the services provided by other dealers. The District Court's *per se* rule would therefore discourage conduct recognized by *GTE Sylvania* and *Monsanto* as beneficial to consumers.

B

In resting our decision upon the foregoing economic analysis, we do not ignore common-law precedent concerning what constituted "restraint of trade" at the time the Sherman Act was adopted. But neither do we give that pre-1890 precedent the dispositive effect some would. The term "restraint of trade" in the statute, like the term at common law, refers not to a particular list of agreements, but to a particular economic consequence, which may be produced by quite different sorts of agreements in varying times and circumstances. The changing content of the term "restraint of trade" was well recognized at the time the Sherman Act was enacted. See *Gibbs v. Consolidated Gas Co.*, 130 U. S. 396, 409 (1889) (noting that English case laying down the common-law rule

ever, is that a facially vertical restraint imposed by a manufacturer only because it has been coerced by a "horizontal carte[l]" agreement among his distributors is in reality a horizontal restraint. That says precisely what we say: that a restraint is horizontal not because it has horizontal effects, but because it is the product of a horizontal agreement.

that contracts in restraint of trade are invalid "was made under a condition of things, and a state of society, different from those which now prevail, [and therefore] the rule laid down is not regarded as inflexible, and has been considerably modified"); see also *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U. S., at 406 ("With respect to contracts in restraint of trade, the earlier doctrine of the common law has been substantially modified in adaptation to modern conditions"); B. Cardozo, *The Nature of the Judicial Process* 94-96 (1921).

The Sherman Act adopted the term "restraint of trade" along with its dynamic potential. It invokes the common law itself, and not merely the static content that the common law had assigned to the term in 1890. See *GTE Sylvania*, 433 U. S., at 53, n. 21; *Standard Oil Co. v. United States*, 221 U. S., at 51-60; see also *McNally v. United States*, 483 U. S. 350, 372-373 (1987) (STEVENS, J., joined by O'CONNOR, J., dissenting); *Associated General Contractors of California, Inc. v. Carpenters*, 459 U. S. 519, 533, n. 28, 539-540, and n. 43 (1983); Bork 37. If it were otherwise, not only would the line of *per se* illegality have to be drawn today precisely where it was in 1890, but also case-by-case evaluation of legality (conducted where *per se* rules do not apply) would have to be governed by 19th-century notions of reasonableness. It would make no sense to create out of the single term "restraint of trade" a chronologically schizoid statute, in which a "rule of reason" evolves with new circumstances and new wisdom, but a line of *per se* illegality remains forever fixed where it was.

Of course the common law, both in general and as embodied in the Sherman Act, does not lightly assume that the economic realities underlying earlier decisions have changed, or that earlier judicial perceptions of those realities were in error. It is relevant, therefore, whether the common law of

restraint of trade ever prohibited as illegal *per se* an agreement of the sort made here, and whether our decisions under § 1 of the Sherman Act have ever expressed or necessarily implied such a prohibition.

With respect to this Court's understanding of pre-Sherman Act common law, petitioner refers to our decision in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, *supra*. Though that was an early Sherman Act case, its holding that a resale price maintenance agreement was *per se* illegal was based largely on the perception that such an agreement was categorically impermissible at common law. *Id.*, at 404-408. As the opinion made plain, however, the basis for that common-law judgment was that the resale restriction was an unlawful restraint on alienation. See *ibid.* As we explained in *Boston Store of Chicago v. American Graphophone Co.*, 246 U. S. 8, 21-22 (1918), "*Dr. Miles* . . . decided that under the general law the owner of movables . . . could not sell the movables and lawfully by contract fix a price at which the product should afterwards be sold, because to do so would be at one and the same time to sell and retain, to part with and yet to hold, to project the will of the seller so as to cause it to control the movable parted with when it was not subject to his will because owned by another." In the present case, of course, no agreement on resale price or price level, and hence no restraint on alienation, was found by the jury, so the common-law rationale of *Dr. Miles* does not apply. Cf. *United States v. General Electric Co.*, 272 U. S. 476, 486-488 (1926) (*Dr. Miles* does not apply to restrictions on price to be charged by one who is in reality an agent of, not a buyer from, the manufacturer).

Petitioner's principal contention has been that the District Court's rule on *per se* illegality is compelled not by the old common law, but by our more recent Sherman Act precedents. First, petitioner contends that since certain horizontal agreements have been held to constitute price fixing (and

thus to be *per se* illegal) though they did not set prices or price levels, see, e. g., *Catalano, Inc. v. Target Sales, Inc.*, 446 U. S. 643, 647–650 (1980) (*per curiam*), it is improper to require that a vertical agreement set prices or price levels before it can suffer the same fate. This notion of equivalence between the scope of horizontal *per se* illegality and that of vertical *per se* illegality was explicitly rejected in *GTE Sylvania, supra*, at 57, n. 27—as it had to be, since a horizontal agreement to divide territories is *per se* illegal, see *United States v. Topco Associates, Inc.*, 405 U. S. 596, 608 (1972), while *GTE Sylvania* held that a vertical agreement to do so is not. See also *United States v. Arnold, Schwinn & Co.*, 388 U. S. 365, 390–391 (1967) (Stewart, J., joined by Harlan, J., concurring in part and dissenting in part); *White Motor Co. v. United States*, 372 U. S. 253, 263 (1963).

Second, petitioner contends that *per se* illegality here follows from our two cases holding *per se* illegal a group boycott of a dealer because of its price cutting. See *United States v. General Motors Corp.*, 384 U. S. 127 (1966); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U. S. 207 (1959). This second contention is merely a restatement of the first, since both cases involved horizontal combinations—*General Motors, supra*, at 140, 143–145, at the dealer level,⁵ and *Klor's, supra*, at 213, at the manufacturer and wholesaler levels. Accord, *GTE Sylvania, supra*, at 58, n. 28, *United States v. Arnold, Schwinn & Co.*, 388 U. S., at 373, 378; *id.*, at 390 (Stewart, J., joined by Harlan, J., concurring in part and dissenting in part); *White Motor Co. v. United States, supra*, at 263.

⁵ Contrary to the dissent, *post*, at 742–743, 747, *General Motors* does not differ from the present case merely in that it involved a three-party rather than a two-party agreement. The agreement was among competitors in *General Motors*; it was between noncompetitors here. Cf. Bork 330 (defining “boycotts” as “agreements among competitors to refuse to deal”).

Third, petitioner contends, relying on *Albrecht v. Herald Co.*, 390 U. S. 145 (1968), and *United States v. Parke, Davis & Co.*, 362 U. S. 29 (1960), that our vertical price-fixing cases have already rejected the proposition that *per se* illegality requires setting a price or a price level. We disagree. In *Albrecht*, the maker of the product formed a combination to force a retailer to charge the maker's advertised retail price. See 390 U. S., at 149. This combination had two aspects. Initially, the maker hired a third party to solicit customers away from the noncomplying retailer. This solicitor "was aware that the aim of the solicitation campaign was to force [the noncomplying retailer] to lower his price" to the suggested retail price. *Id.*, at 150. Next, the maker engaged another retailer who "undertook to deliver [products] at the suggested price" to the noncomplying retailer's customers obtained by the solicitor. *Ibid.* This combination of maker, solicitor, and new retailer was held to be *per se* illegal. *Id.*, at 150, 153. It is plain that the combination involved both an explicit agreement on resale price and an agreement to force another to adhere to the specified price.

In *Parke, Davis*, a manufacturer combined first with wholesalers and then with retailers in order to gain the "retailers' adherence to its suggested minimum retail prices." 362 U. S., at 45-46, and n. 6. The manufacturer also brokered an agreement among its retailers not to advertise prices below its suggested retail prices, which agreement was held to be part of the *per se* illegal combination. This holding also does not support a rule that an agreement on price or price level is not required for a vertical restraint to be *per se* illegal—first, because the agreement not to advertise prices was part and parcel of the combination that contained the price agreement, *id.*, at 35-36, and second because the agreement among retailers that the manufacturer organized was a *horizontal* conspiracy among competitors. *Id.*, at 46-47.

In sum, economic analysis supports the view, and no precedent opposes it, that a vertical restraint is not illegal *per se*

unless it includes some agreement on price or price levels. Accordingly, the judgment of the Fifth Circuit is

Affirmed.

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

JUSTICE STEVENS, with whom JUSTICE WHITE joins, dissenting.

In its opinion the majority assumes, without analysis, that the question presented by this case concerns the legality of a "vertical nonprice restraint." As I shall demonstrate, the restraint that results when one or more dealers threaten to boycott a manufacturer unless it terminates its relationship with a price-cutting retailer is more properly viewed as a "horizontal restraint." Moreover, an agreement to terminate a dealer because of its price cutting is most certainly not a "nonprice restraint." The distinction between "vertical nonprice restraints" and "vertical price restraints," on which the majority focuses its attention, is therefore quite irrelevant to the outcome of this case. Of much greater importance is the distinction between "naked restraints" and "ancillary restraints" that has been a part of our law since the landmark opinion written by Judge (later Chief Justice) Taft in *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (CA6 1898), *aff'd*, 175 U. S. 211 (1899).

I

The plain language of §1 of the Sherman Act prohibits "every" contract that restrains trade.¹ Because such a literal reading of the statute would outlaw the entire body of private contract law, and because Congress plainly intended

¹ Section 1 of the Sherman Act, as set forth in 15 U. S. C. § 1, provides:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

the Act to be interpreted in the light of its common-law background, the Court has long held that certain "ancillary" restraints of trade may be defended as reasonable. As we recently explained without dissent:

"The Rule of Reason suggested by *Mitchel v. Reynolds* [1 P. Wms. 181, 24 Eng. Rep. 347 (1711)] has been regarded as a standard for testing the enforceability of covenants in restraint of trade which are ancillary to a legitimate transaction, such as an employment contract or the sale of a going business. Judge (later Mr. Chief Justice) Taft so interpreted the Rule in his classic rejection of the argument that competitors may lawfully agree to sell their goods at the same price as long as the agreed-upon price is reasonable. *United States v. Addyston Pipe & Steel Co.*" *National Society of Professional Engineers v. United States*, 435 U. S. 679, 689 (1978).

Judge Taft's rejection of an argument that a price-fixing agreement could be defended as reasonable was based on a detailed examination of common-law precedents. He explained that in England there had been two types of objection to voluntary restraints on one's ability to transact business. "One was that by such contracts a man disabled himself from earning a livelihood with the risk of becoming a public charge, and deprived the community of the benefit of his labor. The other was that such restraints tended to give to the covenantee, the beneficiary of such restraints, a monopoly of the trade, from which he had thus excluded one competitor, and by the same means might exclude others." 85 F., at 279. Certain contracts, however, such as covenants not to compete in a particular business, for a certain period of time, within a defined geographical area, had always been considered reasonable when necessary to carry out otherwise procompetitive contracts, such as the sale of a business. *Id.*, at 280-282. The difference between ancillary covenants that

may be justified as reasonable and those that are "void" because there is "nothing to justify or excuse the restraint," *id.*, at 282-283, was described in the opinion's seminal discussion:

"[T]he contract must be one in which there is a main purpose, to which the covenant in restraint of trade is merely ancillary. The covenant is inserted only to protect one of the parties from the injury which, in the execution of the contract or enjoyment of its fruits, he may suffer from the unrestrained competition of the other. The main purpose of the contract suggests the measure of protection needed, and furnishes a sufficiently uniform standard by which the validity of such restraints may be judicially determined. In such a case, if the restraint exceeds the necessity presented by the main purpose of the contract, it is void for two reasons: First, because it oppresses the covenantor, without any corresponding benefit to the covenantee; and, second, because it tends to a monopoly. But where the sole object of both parties in making the contract as expressed therein is merely to restrain competition, and enhance or maintain prices, it would seem that there was nothing to justify or excuse the restraint, that it would necessarily have a tendency to monopoly, and therefore would be void. In such a case there is no measure of what is necessary to the protection of either party, except the vague and varying opinion of judges as to how much, on principles of political economy, men ought to be allowed to restrain competition. There is in such contracts no main lawful purpose, to subserve which partial restraint is permitted, and by which its reasonableness is measured, but the sole object is to restrain trade in order to avoid the competition which it has always been the policy of the common law to foster." *Ibid.*

Although Judge Taft was writing as a Circuit Judge, his opinion is universally accepted as authoritative. We af-

firmed his decision without dissent, we have repeatedly cited it with approval,² and it is praised by a respected scholar as "one of the greatest, if not the greatest, antitrust opinions in the history of the law." R. Bork, *The Antitrust Paradox* 26 (1978). In accordance with the teaching in that opinion, it is therefore appropriate to look more closely at the character of the restraint of trade found by the jury in this case.

II

It may be helpful to begin by explaining why the agreement in this case does not fit into certain categories of agreement that are frequently found in antitrust litigation. First, despite the contrary implications in the majority opinion, this is not a case in which the manufacturer is alleged to have imposed any vertical nonprice restraints on any of its dealers. The term "vertical nonprice restraint," as used in *Continental T. V., Inc. v. GTE Sylvania Inc.*, 433 U. S. 36 (1977), and similar cases, refers to a contractual term that a dealer must accept in order to qualify for a franchise. Typically, the dealer must agree to meet certain standards in its advertising, promotion, product display, and provision of repair and maintenance services in order to protect the goodwill of the manufacturer's product. Sometimes a dealer must agree to sell only to certain classes of customers—for example, wholesalers generally may only sell to retailers and may be required not to sell directly to consumers. In *Sylvania*, to take another example, we examined agreements between a manufacturer and its dealers that included "provisions barring the retailers from selling franchised products from locations other than those specified in agreements." *Id.*, at 37. Restrictions of that kind, which are a part of, or ancillary to,

² See, e. g., *Arizona v. Maricopa County Medical Society*, 457 U. S. 332, 350, n. 22 (1982); *United States v. Topco Associates, Inc.*, 405 U. S. 596, 608 (1972); *Northern Pacific R. Co. v. United States*, 356 U. S. 1, 5 (1958).

the basic franchise agreement, are perfectly lawful unless the "rule of reason" is violated. Although vertical nonprice restraints may have some adverse effect on competition, as long as they serve the main purpose of a procompetitive distribution agreement, the ancillary restraints may be defended under the rule of reason. And, of course, a dealer who violates such a restraint may properly be terminated by the manufacturer.³

In this case, it does not appear that respondent imposed any vertical nonprice restraints upon either petitioner or Hartwell. Specifically, respondent did not enter into any "exclusive" agreement, as did the defendant in *Sylvania*. It is true that before Hartwell was appointed and after petitioner was terminated, the manufacturer was represented by only one retailer in the Houston market, but there is no evidence that respondent ever made any contractual commitment to give either of them any exclusive rights. This therefore is not a case in which a manufacturer's right to grant exclusive territories, or to change the identity of the dealer in an established exclusive territory, is implicated. The case is one in which one of two competing dealers entered into an agreement with the manufacturer to terminate a particular competitor without making any promise to provide better or more efficient services and without receiving any guarantee of exclusivity in the future. The contractual relationship between respondent and Hartwell was exactly

³Thus, in *Morrison v. Murray Biscuit Co.*, 797 F. 2d 1430 (CA7 1986), cited *ante*, at 720, n. 1, the plaintiff had been terminated because he violated a lawful restriction on the customers to whom he could sell. As the court correctly explained:

"As long as the supplier's motive is not to keep his established dealers' prices up but only to maintain his system of lawful nonprice restrictions, he can terminate noncomplying dealers without fear of antitrust liability even if he learns about the violation from dealers whose principal or perhaps only concern is with protecting their prices." 797 F. 2d, at 1440.

There was no such justification for the termination in this case.

the same after petitioner's termination as it had been before that termination.

Second, this case does not involve a typical vertical price restraint. As the Court of Appeals noted, there is some evidence in the record that may support the conclusion that respondent and Hartwell implicitly agreed that Hartwell's prices would be maintained at a level somewhat higher than petitioner had been charging before petitioner was terminated. 780 F. 2d 1212, 1219 (CA5 1986). The illegality of the agreement found by the jury does not, however, depend on such evidence. For purposes of analysis, we should assume that no such agreement existed and that respondent was perfectly willing to allow its dealers to set prices at levels that would maximize their profits. That seems to have been the situation during the period when petitioner was the only dealer in Houston. Moreover, after respondent appointed Hartwell as its second dealer, it was Hartwell, rather than respondent, who objected to petitioner's pricing policies.

Third, this is not a case in which the manufacturer acted independently. Indeed, given the jury's verdict, it is not even a case in which the termination can be explained as having been based on the violation of any distribution policy adopted by respondent. The termination was motivated by the ultimatum that respondent received from Hartwell and that ultimatum, in turn, was the culmination of Hartwell's complaints about petitioner's competitive price cutting. The termination was plainly the product of coercion by the stronger of two dealers rather than an attempt to maintain an orderly and efficient system of distribution.⁴

⁴"When a manufacturer acts on its own, in pursuing its own market strategy, it is seeking to compete with other manufacturers by imposing what may be defended as reasonable vertical restraints. This would appear to be the rationale of the *GTE Sylvania* decision. However, if the action of a manufacturer or other supplier is taken at the direction of its customer, the restraint becomes primarily horizontal in nature in that one customer is seeking to suppress its competition by utilizing the power of a

In sum, this case does not involve the reasonableness of any vertical restraint imposed on one or more dealers by a manufacturer in its basic franchise agreement. What the jury found was a simple and naked "agreement between Sharp and Hartwell to terminate Business Electronics because of Business Electronics' price cutting." *Ante*, at 722.

III

Because naked agreements to restrain the trade of third parties are seldom identified with such stark clarity as in this case, there appears to be no exact precedent that determines the outcome here. There are, however, perfectly clear rules that would be decisive if the facts were changed only slightly.

Thus, on the one hand, if it were clear that respondent had acted independently and decided to terminate petitioner because respondent, for reasons of its own, objected to petitioner's pricing policies, the termination would be lawful. See *United States v. Parke, Davis & Co.*, 362 U. S. 29, 43-45 (1960). On the other hand, it is equally clear that if respondent had been represented by three dealers in the Houston market instead of only two, and if two of them had threatened to terminate their dealerships "unless respondent ended its relationship with petitioner within 30 days," *ante*, at 721, an agreement to comply with the ultimatum would be an obvious violation of the Sherman Act. See, e. g., *United States v. General Motors Corp.*, 384 U. S. 127 (1966); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U. S. 207 (1959).⁵ The

common supplier. Therefore, although the termination in such a situation is, itself, a vertical restraint, the desired impact is horizontal and on the dealer, not the manufacturer, level." *Cernuto, Inc. v. United Cabinet Corp.*, 595 F. 2d 164, 168 (CA3 1979).

⁵ Thus, a boycott "is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy. Monopoly can as surely thrive by the elimination of such small businessmen, one at a time, as it can by driving them out in large groups." *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U. S.,

question then is whether the two-party agreement involved in this case is more like an illegal three-party agreement or a legal independent decision. For me, the answer is plain.

The distinction between independent action and joint action is fundamental in antitrust jurisprudence.⁶ Any at-

at 213 (footnote omitted). Again, Judge Adams' analysis in the *Cernuto* opinion, n. 4, *supra*, is relevant:

"The importance of the horizontal nature of this arrangement is illustrated by *United States v. General Motors Corp.*, 384 U. S. 127 . . . (1966). Although General Motors, the manufacturer, was seemingly imposing vertical restraints when it pressured recalcitrant automobile dealers not to deal with discounters, the Supreme Court noted that in fact these restraints were induced by the dealers seeking to choke off aggressive competitors at their level, and found a *per se* violation, rejecting the suggestion that only unilateral restraints were at issue. So here, if [the manufacturer and the sales representative acted at the nonterminated dealer's] direction, both the purpose and effect of the termination was to eliminate competition at the retail level, and not, as in *GTE Sylvania*, to promote competition at the manufacturer level. Accordingly, the pro-competitive redeeming virtues so critical in *GTE Sylvania* may not be present here." 595 F. 2d, at 168 (footnote omitted).

As we said in *General Motors*:

"The protection of price competition from conspiratorial restraint is an object of special solicitude under the antitrust laws. We cannot respect that solicitude by closing our eyes to the effect upon price competition of the removal from the market, by combination or conspiracy, of a class of traders. Nor do we propose to construe the Sherman Act to prohibit conspiracies to fix prices at which competitors may sell, but to allow conspiracies or combinations to put competitors out of business entirely." 384 U. S., at 148.

⁶ See *United States v. Colgate & Co.*, 250 U. S. 300, 307-308 (1919). In *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U. S. 752, 761 (1984), we noted that "the basic distinction between concerted and independent action" was "not always clearly drawn by parties and courts." In its opinion today the majority virtually ignores that basic distinction. Thus, *ante*, at 728, the majority discusses the manufacturer's risks arising out of its agreement "with one dealer to terminate another for failure to provide contractually obligated services." But if such a breach of contract has occurred, the manufacturer should have an independent motivation for acting

tempt to define the boundaries of *per se* illegality by the number of parties to different agreements with the same anti-competitive consequences can only breed uncertainty in the law and confusion for the businessman.

More importantly, if instead of speculating about irrelevant vertical nonprice restraints, we focus on the precise character of the agreement before us, we can readily identify its anticompetitive nature. Before the agreement was made, there was price competition in the Houston retail market for respondent's products. The stronger of the two competitors was unhappy about that competition; it wanted to have the power to set the price level in the market and therefore it "complained to respondent on a number of occasions about petitioner's prices." *Ante*, at 721. Quite obviously, if petitioner had agreed with either Hartwell or respondent to discontinue its competitive pricing, there would have been no ultimatum from Hartwell and no termination by respondent. It is equally obvious that either of those agreements would have been illegal *per se*.⁷ Moreover, it is also reasonable to assume that if respondent were to replace petitioner with another price-cutting dealer, there would soon be more complaints and another ultimatum from Hartwell. Although respondent has not granted Hartwell an exclusive dealership—it retains the right to appoint multiple dealers—its

and need not enter into any agreement with a dealer to do so. As we held in *Monsanto*, the mere fact that the breach of contract may have been called to the manufacturer's attention by another dealer does not make the manufacturer's independent decision to terminate a price-cutting dealer unlawful.

⁷"We have not wavered in our enforcement of the *per se* rule against price fixing." *Arizona v. Maricopa County Medical Society*, 457 U. S., at 347. Thus, in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U. S. 373 (1911), the Court determined that vertical price fixing is *per se* invalid because resale price maintenance plans serve the profit motives of the dealers, not the manufacturers, and are thereby similar to plans pursuant to which the dealers themselves conspire to fix prices. *Id.*, at 407-408. There is no doubt that horizontal intrabrand price fixing is *per se* illegal, even if the conspirators lack the market power to affect interbrand competition in a manner that would violate the rule of reason.

agreement has protected Hartwell from price competition. Indeed, given the jury's finding and the evidence in the record, that is the *sole function* of the agreement found by the jury in this case. It therefore fits squarely within the category of "naked restraints of trade with no purpose except stifling of competition." *White Motor Co. v. United States*, 372 U. S. 253, 263 (1963).

This is the sort of agreement that scholars readily characterize as "inherently suspect."⁸ When a manufacturer responds to coercion from a dealer, instead of making an independent decision to enforce a predetermined distribution policy, the anticompetitive character of the response is evident.⁹ As Professor Areeda has correctly noted, the fact that the agreement is between only one complaining dealer and the manufacturer does not prevent it from imposing a "horizontal" restraint.¹⁰ If two critical facts are present—a

⁸ "[S]cenarios that involve a firm or firms at one level of activity using vertical restraints deliberately to confer market power on firms at an adjacent level are inherently suspect. To do so is, typically, to inflict self-injury, just as it would be for consumers to confer market power on the retailers from whom they buy." Baxter, *The Viability of Vertical Restraints Doctrine*, 75 Calif. L. Rev. 933, 938 (1987).

⁹ "Termination responses reflecting the manufacturer's own distribution policy differ greatly from those imposed upon him by a complaining dealer. In the latter case, the manufacturer's compliance with the complainer's demand is more likely to be anticompetitive. There is a superficial resemblance to *Parke Davis* in that three parties are involved, but my earlier analysis suggested that the key to that case was 'complex enforcement,' which is absent where a complaining dealer simply threatens to abandon the manufacturer who continues selling to discounting dealers." 7 P. Areeda, *Antitrust Law* § 1457, p. 166 (1986).

¹⁰ Commenting on Judge Adams' opinion in *Cernuto*, see nn. 4 and 5, *supra*, Professor Areeda wrote:

"That the complainer was a single firm did not weaken the 'horizontal' characterization. Because the elimination of price competition was the purpose of the complaint and the termination, the court declared that per se illegality would be appropriate. However, the court made clear that no illegal agreement would be found if United was implementing its own unilaterally chosen distribution policy. Thus, the court's implicit theory was that an agreement arose when the manufacturer bowed to the complainer's

naked purpose to eliminate price competition as such and coercion of the manufacturer¹¹—the conflict with antitrust policy is manifest.¹²

will. In that situation, the 'horizontal' characterization is appropriate to capture the fact that dealer interests opposed to those of the manufacturer were being served." Areeda, *supra*, at 174 (footnotes omitted).

See also R. Bork, *The Antitrust Paradox* 288 (1978):

"A restraint—whether on price, territory, or any other term—is vertical, according to the usage employed here, when a firm operating at one level of an industry places restraints upon rivalry at another level for its own benefit. (This definition excludes restraints, vertical in form only, that are actually imposed by horizontal cartels at any level of the industry, e. g., resale price maintenance that is compelled not by the manufacturer but by the pressure of organized retailers.)"

¹¹The two critical facts that had not yet been determined by a jury in the *Cernuto* case are perfectly plain in this case. As Professor Areeda explained:

"The *Cernuto* case was decided on summary judgment which accepted the plaintiff's view of the facts. But two facts critical for the court will often be obscure. *First*, was it the manufacturer's purpose to eliminate price competition as such? Let us assume that termination was not based on such completely independent grounds as non-payment of bills. Even so, the existence of an inevitable price effect does not establish a purpose to control prices in a forbidden way. A purpose to facilitate point-of-sale services or to protect minimum economies of scale could induce a manufacturer to limit intrabrand competition. Notwithstanding price effects, such limitations are lawful when reasonable and not subject to automatic condemnation. Indeed, termination of one dealer in order to grant another exclusive distribution rights in an area is generally lawful. Nevertheless, so long as the manufacturer is not implementing his own interest but that of the complainer, the vice of eliminating 'horizontal' competition with the complainer's rivals seems equally present when the complainer thereby succeeds in eliminating horizontal competition with respect to customers or territories. *Second*, was the manufacturer coerced or was he indulging his own preferences? As we have seen, this question cannot be answered in the abstract. The court correctly acknowledged that the manufacturer might also be implementing his own unilateral vision of optimal distribution without regard to the complainer's desires and held that no illegal agreement would arise if that were the case." Areeda, *supra*, at 174–175 (footnotes omitted).

¹²"Let us defer for the moment problems of proof and assume that a manufacturer does not wish to terminate the plaintiff dealer but does so to

Indeed, since the economic consequences of Hartwell's ultimatum to respondent are identical to those that would result from a comparable ultimatum by two of three dealers in a market—and since a two-party price-fixing agreement is just as unlawful as a three-party price-fixing agreement—it is appropriate to employ the term “boycott” to characterize this agreement. In my judgment the case is therefore controlled by our decision in *United States v. General Motors Corp.*, 384 U. S. 127 (1966).

The majority disposes quickly of both *General Motors* and *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U. S. 207 (1959), by concluding that “both cases involved horizontal combinations.” *Ante*, at 734. But this distinction plainly will

placate the complaining dealer, who would otherwise cease handling the product. This manufacturer would rather keep both dealers but, when forced to choose between them, concludes that terminating the plaintiff hurts him less (considering sales lost, transaction costs in finding and perhaps training a replacement, and any spillover effects upon his relations with other dealers) than losing the complainer's patronage.

“The present situation is *Colgate* in reverse. In *Colgate*, it was the supplier who was controlling the dealer's behavior. Here a dealer is conditioning his patronage in a way that controls the manufacturer's behavior. The agreement concept seems parallel. But the economic effects can be very different. From the policy viewpoint, it can matter greatly whether manufacturer or dealer interests are being served. The former is more likely to seek efficient distribution, which stimulates interbrand competition; the latter is more likely to seek excess profits, which dampen interbrand competition. Accordingly, antitrust policy can be more hospitable toward manufacturer efforts to control dealer prices, customers, or territories than toward the efforts of dealers to control *their* competitors through the manufacturer.

“Of course, manufacturer and dealer interests are not necessarily antagonistic. Like the manufacturer, dealers might also believe that restricted distribution increases dealer services and sales and thus strengthens interbrand competition. However, this objective seems unlikely when the manufacturer is forced to violate the distribution policy he thinks best. Although he might be mistaken about what his optimal distribution policy ought to be, he should be presumed a better judge of that than coercing dealers who always desire excess profits unnecessary for efficient distribution.” *Areeda, supra*, at 167–168 (footnotes omitted).

not suffice. In *General Motors*, a group of Chevrolet dealers conspired with General Motors to eliminate sales from the manufacturer to discounting dealers. We held that “[e]limination, by joint collaborative action, of discounters from access to the market is a *per se* violation of the Act,” 384 U. S., at 145, and explained that “inherent in the success of the combination in this case was a substantial restraint upon price competition—a goal unlawful *per se* when sought to be effected by combination or conspiracy.” *Id.*, at 147. Precisely the same goal was sought and effected in this case—the elimination of price competition at the dealer level. Moreover, the method of achieving that goal was precisely the same in both cases—the manufacturer’s refusal to sell to discounting dealers. The difference between the two cases is not a difference between horizontal and vertical agreements—in both cases the critical agreement was between market actors at the retail level on the one hand and the manufacturer level on the other. Rather, the difference is simply a difference in the number of conspirators. Hartwell’s coercion of respondent in order to eliminate petitioner because of its same-level price competition is not different in kind from the Chevrolet dealers’ coercion of General Motors in order to eliminate other, price-cutting dealers; the only difference between the two cases—one dealer seeking a naked price-based restraint in today’s case, many dealers seeking the same end in *General Motors*—is merely a difference in degree. Both boycotts lack any efficiency justification—they are simply naked restraints on price competition, rather than integral, or ancillary, parts of the manufacturers’ pre-determined distribution policies.

IV

What is most troubling about the majority’s opinion is its failure to attach any weight to the value of intrabrand competition. In *Continental T. V., Inc. v. GTE Sylvania Inc.*,

433 U. S. 36 (1977), we correctly held that a demonstrable benefit to interbrand competition will outweigh the harm to intrabrand competition that is caused by the imposition of vertical nonprice restrictions on dealers. But we also expressly reaffirmed earlier cases in which the illegal conspiracy affected only intrabrand competition.¹³ Not a word in the *Sylvania* opinion implied that the elimination of intrabrand competition could be justified as reasonable without any evidence of a purpose to improve interbrand competition.

In the case before us today, the relevant economic market was the sale at retail in the Houston area of calculators manufactured by respondent.¹⁴ There is no dispute that an agree-

¹³ See 433 U. S., at 58, n. 28 (citing *United States v. General Motors Corp.*, 384 U. S. 127 (1966), and *United States v. Topco Associates, Inc.*, 405 U. S. 596 (1972)).

¹⁴ It might be helpful to note at this point that although the majority mentions only the reduction of *interbrand* competition as a justification for a *per se* rule against vertical price restraints, see *ante*, at 725-726, our opinion in *Sylvania* was quite different. As we stated then:

"The market impact of vertical restrictions is complex because of their potential for a simultaneous reduction of intrabrand competition and stimulation of interbrand competition. Significantly, the Court in *Schwinn* did not distinguish among the challenged restrictions on the basis of their individual potential for intrabrand harm or interbrand benefit. Restrictions that completely eliminated intrabrand competition among Schwinn distributors were analyzed no differently from those that merely moderated intrabrand competition among retailers." 433 U. S., at 51-52 (footnotes omitted).

In the following pages, we pointed out that because vertical nonprice restrictions imposed by manufacturers may serve to advance interbrand competition, the restriction on intrabrand competition should be subject only to a rule of reason analysis. Along these same lines, we explained that "[e]conomists also have argued that manufacturers have an economic interest in maintaining as much intrabrand competition as is consistent with the efficient distribution of their products." *Id.*, at 56. Thus, although the majority neglects to mention it, fostering intrabrand competition has been recognized as an important goal of antitrust law, and although a manufacturer's efficiency-enhancing vertical nonprice restraints may subject a reduction of intrabrand competition only to a rule of reason analysis, a

ment to fix prices in that market, either horizontally between petitioner and Hartwell or vertically between respondent and either or both of the two dealers, would violate the Sherman Act. The "quite plausible" assumption, see *ante*, at 729, that such an agreement might enable the retailers to provide better services to their customers would not have avoided the strict rule against price fixing that this Court has consistently enforced in the past.

similar reduction without the procompetitive "redeeming virtues" of manufacturer-imposed vertical nonprice restraints, *id.*, at 54, causes nothing but economic harm. As one commentator has recently stated:

"Intrabrand competition can benefit the consumer, and it is therefore important to insure that a manufacturer's motive for a vertical restriction is not simply to acquiesce in his distributors' desires to limit competition among themselves. The Supreme Court has recognized that restrictions on intrabrand competition can only be tolerated because of the countervailing positive impact on interbrand competition." Piraino, *The Case for Presuming the Legality of Quality Motivated Restrictions on Distribution*, 63 *Notre Dame L. Rev.* 1, 17 (1988) (footnotes omitted).

See also H. R. Rep. No. 100-421, pp. 23, 38 (1987) (accompanying bill H. R. 585, the Freedom from Vertical Price Fixing Act of 1987, passed by the House and currently pending before the Senate; criticizing the Fifth Circuit's decision in this case, and restating "plainly and unequivocally that *all forms* of resale price maintenance are illegal per se under the antitrust laws," including "where a conspiracy exists between a supplier and distributor to terminate or cut off supply to a second distributor because of the second distributor's pricing policies") (emphasis in original); Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriation Act, 1986, Pub. L. 99-180, 99 Stat. 1169-1170 (congressional resolution that Department of Justice Vertical Restraints Guidelines "are inconsistent with established antitrust law, . . . in maintaining that such policy guidelines do not treat vertical price fixing when, in fact, some provisions of such policy guidelines suggest that certain price fixing conspiracies are legal if such conspiracies are 'limited' to restricting intrabrand competition; . . . in stating that vertical restraints that have an impact upon prices are subject to the per se rule of illegality only if there is an 'explicit agreement as to the specific prices'"); Report of Attorney General's National Committee to Study the Antitrust Laws 149-155 (1955) (criticizing laws that permit resale price maintenance as a "throttling of price competition in the process of distribution").

Under petitioner's theory of the case, an agreement between respondent and Hartwell to terminate petitioner because of its price cutting was just as indefensible as any of those price-fixing agreements. At trial the jury found the existence of such an agreement to eliminate petitioner's price competition. Respondent had denied that any agreement had been made and asked the jury to find that it had independently decided to terminate petitioner because of its poor sales performance,¹⁵ but after hearing several days of testimony, the jury concluded that this defense was pretextual.

Neither the Court of Appeals nor the majority questions the accuracy of the jury's resolution of the factual issues in this case. Nevertheless, the rule the majority fashions today is based largely on its concern that in other cases juries will be unable to tell the difference between truthful and pretextual defenses. Thus, it opines that "even a manufacturer that agrees with one dealer to terminate another for failure to provide contractually obligated services, exposes itself to the highly plausible claim that its real motivation was to terminate a price cutter." *Ante*, at 728. But such a "plausible" concern in a hypothetical case that is so different from this one should not be given greater weight than facts that can be established by hard evidence. If a dealer has, in fact, failed to provide contractually obligated services, and if the manufacturer has, in fact, terminated the dealer for that reason, both of those objective facts should be provable by admissible

¹⁵ The court instructed the jury:

"Sharp, on the other hand, contends that it terminated Business Electronics unilaterally, not as a result of any agreement or understanding with Hartwell, but because of Business Electronics' sales performance. If you find that Sharp did not terminate Business Electronics pursuant to an agreement or understanding with Hartwell to eliminate price cutting by Business Electronics, then you should answer 'no' to question number 1." 22 Record 1587.

See also nn. 18-19, *infra*.

evidence.¹⁶ Both in its disposition of this case and in its attempt to justify a new approach to agreements to eliminate price competition, the majority exhibits little confidence in the judicial process as a means of ascertaining the truth.¹⁷

¹⁶ In *Morrison v. Murray Biscuit Co.*, 797 F. 2d 1430 (CA7 1986), cited *ante*, at 720, n. 1, Morrison, a wholesale distributor, sued Murray Biscuit, a producer of cookies and crackers, charging a conspiracy between Murray Biscuit and Feldman, a food broker, to suppress price competition between Feldman and Morrison. 797 F. 2d, at 1431. But it was quite clear that Murray Biscuit "had assigned particular customers to particular middlemen, whether brokers [like Feldman] or warehouse distributors [like Morrison]." *Id.*, at 1435. Judge Posner's opinion explained:

"Suppose that after *Sylvania* was decided, a seller that had a price-fixing agreement (illegal per se) with its dealers adopted a lawful customer allocation agreement pursuant to which it terminated a dealer. That dealer could not sue for price fixing, even if the price-fixing agreement had never been rescinded, *unless he could show that his breach of the customer allocation agreement was not the real reason for his termination; maybe the agreement was a mask behind which the illegal price fixing continued.* The reason for Morrison's termination was that he tried to take away a customer who had been assigned to Feldman; there is no indication that the assignment was a mask for resale price maintenance. Since Feldman had the exclusive right to sell Murray Biscuit's products to the Certified account, Morrison had no business selling to Certified at any price." *Id.*, at 1439 (emphasis added).

Judge Posner thus made it clear that although Morrison had been terminated pursuant to a valid vertical nonprice restraint, a terminated dealer might prevail if it could prove that the nonprice agreement was "a mask behind which the illegal price fixing continued." *Ibid.*

¹⁷ "When faced with conflicting evidence, the jury must determine whether the nonprice justifications for the termination advanced by the defendant are legitimate, or are mere pretext to disguise a per se illegal agreement with the nonterminated dealer to maintain resale prices. It is the Court's duty under *Monsanto* to decide whether sufficient evidence was presented for a jury to make that determination." *McCabe's Furniture, Inc. v. La-Z-Boy Chair Co.*, 798 F. 2d 323, 329 (CA8 1986), cited *ante*, at 720, n. 1.

See also L. Sullivan, *Law of Antitrust* 202 (1977) ("A shorthand method which may help to identify a restraint affecting price as naked is to examine the arguments which are being pressed in justification of the practice").

The majority fails to consider that manufacturers such as respondent will only be held liable in the rare case in which the following can be proved: First, the terminated dealer must overcome the high hurdle of *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U. S. 752 (1984). A terminated dealer must introduce "evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently." *Id.*, at 764. Requiring judges to adhere to the strict test for agreement laid down in *Monsanto*, in their jury instructions or own findings of fact, goes a long way toward ensuring that many legitimate dealer termination decisions do not succumb improperly to antitrust liability.¹⁸

Second, the terminated dealer must prove that the agreement was based on a purpose to terminate it because of its price cutting. Proof of motivation is another commonplace in antitrust litigation of which the majority appears apprehensive, but as we have explained or demonstrated many times, see, e. g., *Aspen Skiing Co. v. Aspen Highlands Ski-*

¹⁸ Although at trial respondent had asked the jury to find that it had acted independently, see n. 15, *supra*, and accompanying text, respondent has not disputed, either in the Court of Appeals or here, the jury's finding of an agreement. (Respondent has, of course, contended that no agreement was reached requiring some level of resale price maintenance. As I have argued, though, such an agreement is not needed to invoke the *per se* rule in a case such as this.) Respondent did argue before the District Court for an instruction explaining that "it must be shown that the manufacturer agreed with the complaining dealer to terminate the existing dealer and that, in so agreeing, the manufacturer shared with the complaining dealer the same desire of eliminating price competition for the complaining dealer." 1 Record 151. Respondent later objected to the court's decision not to give this instruction, *id.*, at 54, 22 Record 1599, but the court in fact had quite carefully explained to the jury that "[w]hat a preponderance . . . of the evidence in the case must show in order to establish the existence of the required combination, agreement, or understanding is that Sharp and Hartwell knowingly came to a common and mutual understanding to accomplish or to attempt to accomplish an unlawful purpose." *Id.*, at 1584-1585.

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ing Corp., 472 U. S. 585, 610–611 (1985); *McLain v. Real Estate Board of New Orleans, Inc.*, 444 U. S. 232, 243 (1980); *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 224–226, n. 59 (1940); *Chicago Board of Trade v. United States*, 246 U. S. 231, 238 (1918); see also Piraino, *The Case for Presuming the Legality of Quality Motivated Restrictions on Distribution*, 63 *Notre Dame L. Rev.* 1, 4, 16–19 (1988), in antitrust, as in many other areas of the law, motivation matters and factfinders are able to distinguish bad from good intent.

Third, the manufacturer may rebut the evidence tending to prove that the sole purpose of the agreement was to eliminate a price cutter by offering evidence that it entered the agreement for legitimate, nonprice-related reasons.

Although in this case the jury found a naked agreement to terminate a dealer because of its price cutting, *ante*, at 721–722, the majority boldly characterizes the same agreement as “this nonprice vertical restriction.” *Ante*, at 729. That characterization is surely an oxymoron when applied to the agreement the jury actually found. Nevertheless, the majority proceeds to justify it as “ancillary” to a “quite plausible purpose . . . to enable Hartwell to provide better services under the sales franchise agreement.” *Ibid.* There are two significant reasons why that justification is unacceptable.

First, it is not supported by the jury’s verdict. Although it did not do so with precision, the District Court did instruct the jury that in order to hold respondent liable it had to find that the agreement’s purpose was to eliminate petitioner because of its price cutting and that no valid vertical nonprice restriction existed to which the motivation to eliminate price competition at the dealership level was merely ancillary.¹⁹

¹⁹ The Court instructed the jury:

“The Sherman Act is violated when a seller enters into an agreement or understanding with one of its dealers to terminate another dealer because of the other dealer’s price cutting. Plaintiff contends that Sharp termi-

Second, the "quite plausible purpose" the majority hypothesizes as salvation for the otherwise anticompetitive elimination of price competition—"to enable Hartwell to provide better services under the sales franchise agreement," *ibid.*,—is simply not the type of concern we sought to protect in *Continental T. V., Inc. v. GTE Sylvania Inc.*, 433 U. S. 36 (1977). I have emphasized in this dissent the difference between restrictions imposed in pursuit of a manufacturer's structuring of its product distribution, and those imposed at the behest of retailers who care less about the general efficiency of a product's promotion than their own profit margins. *Sylvania* stressed the importance of the former, not the latter; we referred to the use that *manufacturers* can

nated Business Electronics in furtherance of Hartwell's desire to eliminate Business Electronics as a price-cutting rival.

"If you find that there was an agreement between Sharp and Hartwell to terminate Business Electronics because of Business Electronics' price cutting, you should answer 'yes' to question number 1.

"Sharp, on the other hand, contends that it terminated Business Electronics unilaterally, not as a result of any agreement or understanding with Hartwell, but because of Business Electronics' sales performance. If you find that Sharp did not terminate Business Electronics pursuant to an agreement or understanding with Hartwell to eliminate price cutting by Business Electronics, then you should answer 'no' to question number 1." 22 Record 1587.

Respondent had asked for an instruction requiring the jury to consider circumstantial evidence as proof of a motivation to eliminate price competition only if such evidence could not "equally be interpreted to show that Sharp terminated Business Electronics Corporation for other business reasons and not pursuant to any agreement with Mr. Hartwell to fix resale prices of calculators." 1 Record 148. Respondent objected to the failure to give this instruction, *id.*, at 54, and also objected, more specifically, to the instruction that was given on the ground that "it allows the jury to find against the defendant even if they do not believe that Sharp cared about [Business Electronics'] price cutting or if they believe that Sharp had a dual motive in making the termination." 22 Record 1599. The instruction quoted above, though, makes it highly unlikely that the jury would have found for petitioner although finding respondent's motives to be mixed ones.

make of vertical nonprice restraints, see *id.*, at 54–57, and nowhere did we discuss the benefits of permitting dealers to structure intrabrand competition at the retail level by coercing manufacturers into essentially anticompetitive agreements. Thus, while Hartwell may indeed be able to provide better services under the sales franchise agreement with petitioner out of the way, one would not have thought, until today, that the mere possibility of such a result—at the expense of the elimination of price competition and absent the salutary overlay of a manufacturer's distribution decision with the entire product line in mind—would be sufficient to legitimate an otherwise purely anticompetitive restraint. See n. 14, *supra*. In fact, given the majority's total reliance on "economic analysis," see *ante*, at 735, it is hard to understand why, if such a purpose were sufficient to avoid the application of a *per se* rule in this context, the same purpose should not also be sufficient to trump the *per se* rule in all other price-fixing cases that arguably permit cartel members to "provide better services."

If, however, we continue to accept the premise that competition in the relevant market is worthy of legal protection—that we should not rely on competitive pressures exerted by sellers in other areas and purveyors of similar but not identical products—and if we are faithful to the competitive philosophy that has animated our antitrust jurisprudence since Judge Taft's opinion in *Addyston Pipe*, we can agree that the elimination of price competition will produce wider gross profit margins for retailers, but we may not assume that the retailer's self-interest will result in a better marketplace for consumers.

"The Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services. 'The heart of our national economic policy long has been faith in the value of competition.' *Standard Oil Co. v. FTC*, 340 U. S. 231, 248. The assumption that competition is the best

method of allocating resources in a free market recognizes that all elements of a bargain—quality, service, safety, and durability—and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers. Even assuming occasional exceptions to the presumed consequences of competition, the statutory policy precludes inquiry into the question whether competition is good or bad.” *National Society of Professional Engineers v. United States*, 435 U. S., at 695.

The “plausible purpose” posited by the majority as its sole justification for this mischaracterized “nonprice vertical restriction” is inconsistent with the legislative judgment that underlies the Sherman Act itself. Under the facts as found by the jury in this case, the agreement before us is one whose “sole object is to restrain trade in order to avoid the competition which it has always been the policy of the common law to foster.” *United States v. Addyston Pipe & Steel Co.*, 85 F., at 283.

V

In sum, this simply is not a case in which procompetitive vertical nonprice restraints have been imposed; in fact, it is not a case in which *any* procompetitive agreement is at issue.²⁰ The sole purpose of the agreement between re-

²⁰ Thus, the Courts of Appeals decisions cited by the majority as supporting its view, see *ante*, at 720, n. 1, are, in fact, consistent with the rule that a naked intent to eliminate price competition is *per se* invalid. Each of the opinions contains a discussion that distinguishes between, on the one hand, an agreement between manufacturer and dealer to eliminate a price-cutting competitor based solely on an intent to eliminate price competition, and, on the other hand, an agreement between manufacturer and dealer to eliminate a price-cutting competitor that is grounded not only in an antipathy to price competition, but also in a purpose to implement a procompetitive system of vertical nonprice restraints. See *McCabe's Furniture, Inc. v. La-Z-Boy Chair Co.*, 798 F. 2d, at 329–330; *Morrison v. Murray Biscuit Co.*, 797 F. 2d, at 1439–1440; *Westman Commission Co. v. Hobart Int'l, Inc.*, 796 F. 2d 1216, 1223 (CA10 1986). Moreover, none of

STEVENS, J., dissenting

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spondent and Hartwell was to eliminate price competition at Hartwell's level. As Judge Bork has aptly explained:

"Since the naked boycott is a form of predatory behavior, there is little doubt that it should be a *per se* violation of the Sherman Act." Bork, *The Antitrust Paradox*, at 334.

I respectfully dissent.

these opinions proposes the rule that the majority sanctions today: that an agreement as to some level of resale price maintenance is necessary for invocation of the *per se* rule in these situations.

Syllabus

KUNGYS v. UNITED STATES

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

No. 86-228. Argued April 27, 1987—Reargued October 13, 1987—
Decided May 2, 1988

The Immigration and Nationality Act provides for the denaturalization of citizens whose citizenship orders and certificates of naturalization “were illegally procured or were procured by concealment of a material fact or by willful misrepresentation.” 8 U. S. C. § 1451(a). In 1982, the United States filed a complaint pursuant to § 1451(a) to denaturalize petitioner, who came to the United States in 1948 under an immigration visa which he had applied for in Germany in 1947 and was naturalized as a United States citizen in 1954. The District Court entered judgment for petitioner. It rejected the Government’s first claim that petitioner had participated in executing Lithuanian citizens (most of them Jewish) in 1941, holding that the evidence was insufficient to sustain the charges. Regarding the Government’s second claim, the court held that, although petitioner had made false statements as to, *inter alia*, his date and place of birth in his visa and naturalization applications, the misrepresentations were not material within the meaning of § 1451(a), as illuminated by *Chaunt v. United States*, 364 U. S. 350. The court also rejected the Government’s third asserted ground for denaturalization, that petitioner’s citizenship had been “illegally procured” under § 1451(a) for lack of “good moral character,” required for naturalization by 8 U. S. C. § 1427 (a). Although 8 U. S. C. § 1101(f)(6) makes the giving of false testimony to obtain immigration or naturalization benefits determinative of lack of “good moral character,” the court ruled that petitioner’s false statements were not covered by this provision because they were not material. The Court of Appeals declined to pass on the Government’s submission as to its first claim, and upheld the District Court’s rejection of the third asserted ground for denaturalization. However, the Court of Appeals reversed the District Court’s rejection of the second ground, concluding that petitioner’s willful misrepresentation in his visa and naturalization applications of the date and place of his birth was material for purposes of § 1451(a)’s “concealment or misrepresentation” provision. The Court of Appeals therefore reversed the judgment of the District Court and remanded for denaturalization proceedings.

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

793 F. 2d 516, reversed and remanded.

JUSTICE SCALIA delivered the opinion of the Court with respect to Parts I, II-A, and III-A, concluding that:

1. For purposes of § 1451(a)'s "concealment or misrepresentation" provision, the test of whether concealments or misrepresentations are "material" is whether they can be shown by clear, unequivocal, and convincing evidence to have been predictably capable of affecting, *i. e.*, to have had a natural tendency to affect, the Immigration and Naturalization Service's decisions. This test is consistent with the lower federal courts' uniform understanding of the "materiality" concept as embodied in other federal statutes criminalizing false statements to public officials. See, *e. g.*, 18 U. S. C. §§ 1001, 1621, and 1623. The dicta in *Chaunt v. United States* should not be used to construct a different materiality standard in the immigration context. Materiality under § 1451(a), as under other federal statutes, is an issue of law, which is for the court, and not one of fact, which must be decided by the trier of facts. Pp. 767-772.

2. Contrary to the Court of Appeals' holding (for purposes of the Government's claim under § 1451(a)'s "illegally procured" provision), § 1101 (f)(6) does not impose a materiality requirement for false testimony. Section 1101(f)(6)—which provides that a person shall be deemed not to be of good moral character if he "has given false testimony for the purpose of obtaining" immigration or naturalization benefits—is to be given its plain meaning, denominating one who has made false oral statements under oath with the subjective intent of obtaining immigration or naturalization benefits. The absence of a materiality requirement in § 1101 (f)(6) can be explained by the fact that its primary purpose is not (like the misrepresentation clause of § 1451(a)) to prevent false pertinent data from being introduced into the naturalization process, but to identify lack of good moral character. Pp. 779-782.

JUSTICE SCALIA, joined by THE CHIEF JUSTICE, JUSTICE BRENNAN, and (as to Part III-B) JUSTICE O'CONNOR, concluded in Parts II-B and III-B, that:

1. Under the "natural tendency" test, petitioner's misrepresentation of the date and place of his birth in his 1954 naturalization petition was not shown to be clearly, unequivocally, and convincingly material within the meaning of § 1451(a)'s "concealment or misrepresentation" provision. It is improper to address the 1947 episode when petitioner made the same misrepresentation in his visa application, since § 1451(a)'s "concealment or misrepresentation" clause is limited to falsehoods or deceptions that procure the order and certificate of naturalization. As to petition-

er's naturalization petition, there has been no showing that the date and place of his birth were themselves relevant to his qualifications for citizenship or that true information, if supplied, would predictably have disclosed other facts relevant to his qualifications. For purposes of determining the natural tendency of a misrepresentation to affect a decision under § 1451(a), what must have a natural tendency to influence the official decision is the misrepresentation itself, not the failure to create an inconsistency with an earlier misrepresentation.

It is for the Third Circuit on remand to determine whether other misrepresentations or concealments that the District Court found to have been made in 1954 were supported by the evidence and material to the naturalization decision. If so, it will have to reach another, independent § 1451(a) issue: whether petitioner "procured" his citizenship by means of those misrepresentations or concealments. This does not require the Government to establish "but for" causality—that is, that naturalization would not have been granted if the misrepresentations or concealments had not occurred. Section 1451(a)'s "procured by" language should be read to express the notion that one who obtained his citizenship in a proceeding where he made material misrepresentations was presumably unqualified. The naturalized citizen should be able to refute that presumption, and avoid the consequence of denaturalization, by showing, through a preponderance of the evidence, that the statutory requirement as to which the misrepresentation had a natural tendency to produce a favorable decision was in fact met. Pp. 772–779.

2. Although the Third Circuit erred in importing a materiality requirement into § 1101(f)(6), denaturalization cannot be affirmed on the alternative basis of that section because the question whether any misrepresentation made by petitioner constituted "false testimony for the purpose of obtaining" immigration or naturalization benefits cannot be answered without resolving the additional question of law—which this Court will not resolve because the case must be remanded—as to whether petitioner's misrepresentation constituted "testimony." Moreover, an additional question, which must be resolved by the trier of fact, is whether in making the misrepresentations petitioner possessed the subjective intent of thereby obtaining immigration or naturalization benefits. P. 782.

JUSTICE STEVENS, joined by JUSTICE MARSHALL and JUSTICE BLACKMUN, would vacate the decision below and remand for further proceedings consistent with the following conclusions:

1. Our conclusion in *Chaunt* that the Government cannot denaturalize a citizen under the misrepresentation clause of § 1451(a) without proving the existence of a disqualifying fact is supported by both the requirement that the misrepresentation be material and the requirement that it pro-

cure citizenship. Together and separately, the materiality and procurement requirements reflect congressional intent that citizenship status not be taken away unless the Government proves that the defendant was not qualified to hold that status at the time citizenship was obtained.

A misrepresentation is material within the meaning of § 1451(a) only if it is capable of influencing the decision whether to confer citizenship. Because the decision whether to confer citizenship is an objective one, the only statements that are capable of influencing the outcome are those that conceal disqualifying facts or that prevent or hinder the discovery of disqualifying facts.

To demonstrate that citizenship was "procured by" a material misrepresentation, the Government must demonstrate by clear, unequivocal, and convincing evidence that it relied on the misrepresentation in deciding whether to confer citizenship. Unless a disqualifying fact existed, it cannot be said that a misrepresentation procured citizenship. Thus, the existence of a disqualifying fact is a necessary element of the Government's proof of materiality and reliance. Pp. 785-795.

2. A citizen cannot be found to lack good moral character under § 1101(f)(6) for giving "false testimony for the purpose of obtaining any benefits" under the naturalization laws unless the false statements were material and had the actual effect of securing some benefit under the immigration and naturalization laws. A materiality requirement is implicit in § 1101(f)(6). In *Fedorenko v. United States*, 449 U. S. 490, we held that the language of § 10 of the Displaced Persons Act providing for the exclusion from the United States of persons who willfully made misrepresentations for the purpose of gaining admission to the United States implicitly included a materiality requirement. The logic of our decision in *Fedorenko* applies equally here.

An objective test of whether a false statement was made for the purpose of obtaining a benefit under the immigration laws is more reasonable than a subjective test. An objective test is more consistent with the heavy burden of proof borne by the Government in denaturalization cases and has the virtue of diminishing the risk of erroneous determinations. Pp. 795-800.

SCALIA, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II-A, and III-A, in which REHNQUIST, C. J., and BRENNAN, WHITE, and O'CONNOR, JJ., joined, and an opinion with respect to Parts II-B and III-B, in which REHNQUIST, C. J., and BRENNAN and (as to Part III-B only) O'CONNOR, JJ., joined. BRENNAN, J., filed a concurring opinion, *post*, p. 783. STEVENS, J., filed an opinion concurring in the judgment, in which MARSHALL and BLACKMUN, JJ., joined, *post*, p. 784. O'CONNOR, J., filed an opinion concurring in part

and dissenting in part, *post*, p. 801. WHITE, J., filed a dissenting opinion, *post*, p. 801. KENNEDY, J., took no part in the consideration or decision of the case.

Donald J. Williamson reargued the cause for petitioner. With him on the briefs were *Michael F. Rehill* and *Ivars Berzins*.

Robert H. Klonoff reargued the cause for the United States. With him on the briefs were *Solicitor General Fried*, *Assistant Attorney General Weld*, *Deputy Solicitor General Bryson*, *Samuel Rosenthal*, *Michael Wolf*, and *Joseph F. Lynch*.*

JUSTICE SCALIA announced the judgment of the Court and delivered the opinion of the Court as to Parts I, II-A, and III-A, and an opinion as to Parts II-B and III-B, in which THE CHIEF JUSTICE and JUSTICE BRENNAN joined and in Part III-B of which JUSTICE O'CONNOR joined.

Juozas Kungys seeks our review of a judgment and opinion of the Third Circuit remanding his case for the completion of denaturalization proceedings. The issues presented are: first, whether certain misrepresentations or concealments made by Kungys in connection with his naturalization proceeding were material within the meaning of the Immigration and Nationality Act of 1952, §340(a), 66 Stat. 260, as amended, 8 U. S. C. §1451(a), and *Chaunt v. United States*, 364 U. S. 350 (1960); and second, whether those misrepresentations, made under oath and in the form of forged documents, rendered Kungys' citizenship "illegally procured" under 8 U. S. C. §§1101(f)(6), 1427(a)(3), and 1451(a), because they

*William S. Hemsley, Jr., and Frank A. S. Campbell filed a brief for the Baltic-Ukrainian-American Compact et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the Anti-Defamation League of B'nai B'rith et al. by *Ruti Teitel*, *Justin J. Finger*, *Jeffrey P. Sinensky*, and *Jovi Tenev*; and for the World Jewish Congress by *Eli M. Rosenbaum* and *Robert H. Lande*.

established that he lacked the requisite good moral character when he was naturalized 34 years ago.

I

Petitioner applied for an immigration visa in Stuttgart, Germany, in 1947. In 1948, the visa was issued, and he came to the United States; he was naturalized as a citizen in 1954. In 1982, the United States, acting through the Office of Special Investigations of the Department of Justice, filed a complaint pursuant to 8 U. S. C. § 1451(a) to denaturalize him.¹ The United States advanced three grounds. First, it attempted to show that Kungys had participated in executing over 2,000 Lithuanian civilians, most of them Jewish, in Kedainiai, Lithuania, between July and August 1941. As proof of this claim, the United States offered in evidence three videotaped depositions taken for use in this case in the Soviet Union. After determining that for numerous reasons the Soviet-source depositions were inherently unreliable, the District Court admitted them only for the limited purpose of showing that the atrocities actually occurred. The District Court then held that the admissible evidence was insufficient to sustain the charges that Kungys had participated in the Kedainiai atrocities.

Second, the United States attempted to show that, in applying for his visa and in his naturalization petition, Kungys had made false statements with respect to his date and place of birth, wartime occupations, and wartime residence. The

¹ Section 1451(a) provides in pertinent part:

“(a) It shall be the duty of the United States attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 1421 of this title in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were illegally procured or were procured by concealment of a material fact or by willful misrepresentation”

District Court found that these misrepresentations had been made but held them not to be material within the meaning of 8 U. S. C. § 1451(a), as illuminated by language in *Chaunt v. United States*, *supra*.

Third, the United States argued that Kungys' citizenship had been "illegally procured" under § 1451(a) because when he was naturalized he lacked the good moral character required of applicants for citizenship by 8 U. S. C. § 1427(a).² In support of this theory, the United States asserted that Kungys' false representations, whether or not material, were sufficient to show that he had given false testimony to obtain immigration or naturalization benefits, which 8 U. S. C. § 1101(f)(6) makes determinative of lack of good moral character.³ The District Court ruled that the false statements at issue were not covered by 8 U. S. C. § 1101(f)(6) because they were not material.

² Section 1427(a) provides:

"No person, except as otherwise provided in this subchapter, shall be naturalized unless such petitioner, (1) immediately preceding the date of filing his petition for naturalization has resided continuously, after being lawfully admitted for permanent residence, within the United States for at least five years and during the five years immediately preceding the date of filing his petition has been physically present therein for periods totaling at least half of that time, and who has resided within the State in which the petitioner filed the petition for at least six months, (2) has resided continuously within the United States from the date of the petition up to the time of admission to citizenship, and (3) during all the period referred to in this subsection has been and still is a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States."

³ Section 1101(f)(6) provides in pertinent part:

"(f) For the purposes of this chapter—

No person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established, is, or was—

(6) one who has given false testimony for the purpose of obtaining any benefits under this chapter."

Having rejected each of the three asserted grounds for denaturalization, the District Court entered judgment for Kungys. 571 F. Supp. 1104 (NJ 1983). The United States appealed. The Third Circuit declined to pass on the United States' submission that the first asserted ground (participation in the Kedainiai atrocities) was wrongfully rejected because of error in failing to admit unqualifiedly the Soviet-source depositions. It reversed, however, the District Court's rejection of the second ground, concluding that Kungys' willful misrepresentation of the date and place of his birth in connection with his applications for visa and naturalization (which was no longer disputed), was material for purposes of the "concealment or misrepresentation" provision of § 1451(a). Finally, the Third Circuit upheld the District Court's rejection of the third asserted ground for denaturalization agreeing that in order to establish "illegal procurement" under § 1451(a) on account of lack of good moral character under § 1101(f)(6), false testimony must be shown to have been material. 793 F. 2d 516 (1986).

We granted certiorari, 479 U. S. 947 (1986), and heard argument last Term, on the question of what materiality standard applies to the "concealment or misrepresentation" clause of § 1451(a) and the false testimony provision of § 1101(f)(6) as incorporated by the "illegally procured" clause of § 1451(a). On June 26, 1987, we restored the case to the calendar and directed parties to file supplemental briefs addressing certain questions.⁴ 483 U. S. 1017. The case was reargued October 13, 1987.

⁴ Those questions were:

"(1) Whether petitioner is subject to denaturalization for want of good moral character under 8 U. S. C. §§ 1451(a), 1427(a), and 1101(f)(6), with particular attention to:

"(a) whether the "false testimony" provision of 8 U. S. C. § 1101(f)(6) should be interpreted to include a requirement that the false testimony concern a material fact;

II

A

As noted above, 8 U. S. C. § 1451(a) provides for the denaturalization of citizens whose citizenship orders and certificates of naturalization "were procured by concealment of a material fact or by willful misrepresentation" This Court has previously suggested, and the parties do not dispute, that this requires misrepresentations or concealments that are both willful and material. See *Fedorenko v. United States*, 449 U. S. 490, 507-508, n. 28 (1981). So understood, the provision plainly contains four independent requirements: the naturalized citizen must have misrepresented or concealed some fact, the misrepresentation or concealment must have been willful, the fact must have been material, and the naturalized citizen must have procured citizenship as a result of the misrepresentation or concealment. It is no longer in dispute that the first two of these requirements were met here, since petitioner now concedes that he willfully misrepresented the date and place of his birth in his naturalization proceeding in 1954 as well as in applying for his visa in 1947.⁵

"(b) what standards should govern the determination under 8 U. S. C. § 1101(f)(6) whether "false testimony" has been given "for the purpose of obtaining any benefits under this chapter"; and

"(c) whether the latter determination is one of law or fact.

"(2)(a) Should the materiality standard articulated in *Chaunt v. United States*, 364 U. S. 350 (1960), be abandoned and, if so, what standard should govern the materiality inquiry under 8 U. S. C. § 1451(a); and

"(b) is the determination of materiality under 8 U. S. C. § 1451(a) one of law or fact.

"(3) When a misrepresentation has been established as "material" within the meaning of 8 U. S. C. § 1451(a), must any further showing be made to establish that citizenship was "procured by" that misrepresentation.'" 483 U. S. 1017.

⁵The Government asserted that the purpose of the misrepresentations was to distance Kungys from Kedainiai, where atrocities had occurred, and to make it more difficult to identify him as one of the perpetrators. Kungys contended that even greater atrocities had occurred in the city he

This Court has had occasion to consider the last two requirements only twice. In *Chaunt v. United States*, 364 U. S. 350 (1960), we held that a naturalized citizen who had willfully and falsely stated during the naturalization process that he had never been arrested could nevertheless not be denaturalized pursuant to § 1451. A year later, in *Costello v. United States*, 365 U. S. 265 (1961), we held that a naturalized citizen who had willfully and falsely stated during the naturalization process that his occupation was “real estate,” when in fact it would more accurately have been described as “bootlegging,” could be denaturalized pursuant to § 1451. In neither case did the Court’s opinion purport to announce a conclusive judicial test to guide the determination whether a given misrepresentation or concealment was “material” and whether it “procured” a naturalization certificate. Indeed, in neither case did the opinion clearly differentiate between these two separate requirements. Nevertheless, it has been thought that a test for materiality can profitably be derived from certain language in *Chaunt*. That language comes at the end of the opinion, where the Court, in summarizing its holding, states that “the Government has failed to show by ‘clear, unequivocal, and convincing’ evidence either (1) that facts were suppressed which, if known, would have warranted denial of citizenship or (2) that their disclosure might have been useful in an investigation possibly leading to the

falsely listed as his birthplace; and that the age difference (two years) was of little consequence for identification purposes. Kungys asserted that he had lied concerning his date and place of birth in obtaining identity documents from the Nazis to go from Lithuania to Germany—the purpose of the dissembling at that time being to place him above the age of conscription and to avoid the risk of persecution for his participation in the Lithuanian resistance movement. (Vydaudas Vidiekunas, a leader of the resistance movement validated Kungys’ account of his participation.) Kungys asserted that in applying for his visa he simply repeated the information contained on his identity documents, believing the falsities inconsequential for United States immigration purposes; and that with similar belief he conformed his naturalization petition to his visa application.

discovery of other facts warranting denial of citizenship." 364 U. S., at 355. The efforts to make this formulation the test for materiality have not met with notable success. Not only have the Courts of Appeals failed to arrive at a single interpretation (compare *United States v. Riela*, 337 F. 2d 986 (CA3 1964), and *United States v. Rossi*, 299 F. 2d 650 (CA9 1962), with *Kassab v. INS*, 364 F. 2d 806 (CA6 1966), and *Langhammer v. Hamilton*, 295 F. 2d 642 (CA1 1961)), but our one attempt to dispel their confusion, see *Fedorenko*, 449 U. S., at 521, n. 4 (BLACKMUN, J., concurring in judgment), seemingly produced at least three variants on this Court, see *id.*, at 508-509; *id.*, at 523-526 (BLACKMUN, J., concurring in judgment); *id.*, at 528-530 (WHITE, J., dissenting); *id.*, at 536-538 (STEVENS, J., dissenting).

With the wisdom of experience, we now conclude that the attempts to construct a standard from the *Chaunt* dicta have been both unnecessary and unfortunate. The term "material" in § 1451(a) is not a hapax legomenon. Its use in the context of false statements to public officials goes back as far as Lord Coke, who defined the crime of perjury as follows:

"Perjury is a crime committed, when a lawful oath is ministred by any that hath authority, to any person, in any judicial proceeding, who sweareth absolutely, and falsly in a matter material to the issue, or cause in question, by their own act, or by the subornation of others." 3 E. Coke, *Institutes* 164 (6th ed. 1680).

Blackstone used the same term, writing that in order to constitute "the crime of wilful and corrupt *perjury*" the false statement "must be in some point material to the question in dispute; for if it only be in some trifling collateral circumstance, to which no regard is paid," it is not punishable. 4 W. Blackstone, *Commentaries* *137. See also 1 W. Hawkins, *Pleas of the Crown*, ch. 27, § 8, p. 433 (Curwood ed. 1824). Given these common-law antecedents, it is unsurprising that a number of federal statutes criminalizing false statements to public officials use the term "material." The most

prominent of these is perhaps 18 U. S. C. § 1001, which makes unlawful willful concealment of material facts in any matter within the jurisdiction of a department or agency of the United States. The federal courts have long displayed a quite uniform understanding of the "materiality" concept as embodied in such statutes. See, e. g., *Gonzales v. United States*, 286 F. 2d 118, 122 (CA10) (construing 18 U. S. C. § 1001), cert. denied, 365 U. S. 878 (1961); *Weinstock v. United States*, 97 U. S. App. D. C. 365, 367-368, and n. 6, 231 F. 2d 699, 701-702, and n. 6 (1956) (same); *Blackmon v. United States*, 108 F. 2d 572, 573 (CA5 1940) (construing language now codified at 18 U. S. C. § 1621); *Carroll v. United States*, 16 F. 2d 951, 953 (CA2) (same), cert. denied, 273 U. S. 763 (1927); *United States v. Lardieri*, 497 F. 2d 317, 319 (CA3 1974) (construing 18 U. S. C. § 1623); *United States v. Koonce*, 485 F. 2d 374, 380 (CA8 1973) (same). The most common formulation of that understanding is that a concealment or misrepresentation is material if it "has a natural tendency to influence, or was capable of influencing, the decision of" the decisionmaking body to which it was addressed. See, e. g., *Weinstock v. United States*, *supra*, at 367-368, 231 F. 2d at 701-702; *United States v. Corsino*, 812 F. 2d 26, 30-31 (CA1 1987) (citing cases). While we have before us here a statute revoking citizenship rather than imposing criminal fine or imprisonment, neither the evident objective sought to be achieved by the materiality requirement, nor the gravity of the consequences that follow from its being met, is so different as to justify adoption of a different standard. "Where Congress uses terms that have accumulated settled meaning under either equity or the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." *NLRB v. Amax Coal Co.*, 453 U. S. 322, 329 (1981). See also *Perrin v. United States*, 444 U. S. 37, 42-43 (1979).

One might perhaps view the *Chaunt* test as not a repudiation of the established meaning of "material," but as an attempt to craft a more precise test for what constitutes "a natural tendency to influence" a naturalization decision. Surely, however, there is no less need for precision in the criminal context than in the denaturalization context. The more general formulation is preferable there, as we think it is here, because the judgment in question does not lend itself to mechanical resolution. The disagreement between the District Court and the Court of Appeals in *Fedorenko* turned on whether the *Chaunt* test required that, had the truth been told, an investigation *would* have resulted which *would* have disclosed disqualifying facts, or rather that an investigation *would* have resulted which *might* have disclosed disqualifying facts. *Fedorenko*, *supra*, at 528 (WHITE, J., dissenting). But if the ultimate question is "natural tendency to influence," it would seem to make little difference whether the probabilities of investigation and resulting disclosure, respectively, are 100%-20%, 20%-100%, 51%-51%, or even 30%-30%. It has never been the test of materiality that the misrepresentation or concealment would *more likely than not* have produced an erroneous decision, or even that it would *more likely than not* have triggered an investigation. Thus, while the *Chaunt* formulation may be an adequate explanation of why the misrepresentation in that case was judged not to have had a natural tendency to influence the decision, it does not necessarily facilitate judgment in the infinite variety of other factual patterns that may emerge—which is perhaps why we did not employ it in *Costello* a year later. We think it safer in the naturalization context, as elsewhere, to fix as our guide the central object of the inquiry: whether the misrepresentation or concealment was predictably capable of affecting, *i. e.*, had a natural tendency to affect, the official decision. The official decision in question, of course, is whether the applicant meets the requirements for citizenship, so that the test more specifically is whether the misrep-

resentation or concealment had a natural tendency to produce the conclusion that the applicant was qualified. This test must be met, of course, by evidence that is clear, unequivocal, and convincing. See, e. g., *Schneiderman v. United States*, 320 U. S. 118, 158 (1943). Though this formulation may seem less verbally precise than *Chaunt*, in application it may well produce greater uniformity, since judges are accustomed to using it, and can consult a large body of case precedent.

We hold, therefore, that the test of whether Kungys' concealments or misrepresentations were material is whether they had a natural tendency to influence the decisions of the Immigration and Naturalization Service. To determine the effect of this holding upon our disposition of the present case, we must first consider whether materiality under § 1451(a) is an issue of law, which we may decide for ourselves, or one of fact, which must be decided by the trial court. Here again we see no reason not to follow what has been done with the materiality requirement under other statutes dealing with misrepresentations to public officers. "[T]he materiality of what is falsely sworn, when an element in the crime of perjury, is one for the court." *Sinclair v. United States*, 279 U. S. 263, 298 (1929). As the Sixth Circuit has said in a case involving 18 U. S. C. § 1001:

"[A]lthough the materiality of a statement rests upon a factual evidentiary showing, the ultimate finding of materiality turns on an interpretation of substantive law. Since it is the court's responsibility to interpret the substantive law, we believe [it is proper to treat] the issue of materiality as a legal question." *United States v. Abadi*, 706 F. 2d 178, 180, cert. denied, 464 U. S. 821 (1983).

B

We turn, then, to whether the one misrepresentation on which the trial court's finding was considered and upheld by the Third Circuit—misrepresentation of the date and place of

Kungys' birth—was material under the foregoing test.⁶ As discussed earlier, Kungys made that misrepresentation in both the 1947 visa proceeding and the 1954 naturalization proceeding. But insofar as application of the “concealment or misrepresentation” clause of § 1451(a) is concerned, we find it improper to address the 1947 episode. Unlike § 1101(f)(6), which covers false testimony “for the purpose of obtaining *any* benefits” under the immigration and naturalization laws, the “concealment or misrepresentation” clause of § 1451(a) applies only where the “*order and certificate of naturalization . . . were procured by concealment of a material fact or by willful misrepresentation.*” Procurement of other benefits, including visas, is not covered. Especially in light of this contrast with § 1101(f)(6), we are unpersuaded by the Government's argument that a misrepresentation in the visa proceeding “procures” the naturalization because it obtains United States residence, which in turn is a prerequisite to naturalization, see 8 U. S. C. § 1429. The same argument could be made with respect to a misrepresentation that effects free enrollment in a reading course, which produces the prerequisite of English literacy, see 8 U. S. C. § 1423.⁷ Such analysis stretches the “concealment or misrepresentation” clause of § 1451(a) beyond its intent, which we think is

⁶ Although as JUSTICE WHITE observes there is no requirement that we focus only on this one misrepresentation, *post*, at 809, it is not our normal practice to consider fact-bound legal consequences of contested district court findings not yet reviewed by the court of appeals.

⁷ JUSTICE WHITE considers the prospect of such coverage “foolish.” *Post*, at 808. As a policy matter it assuredly is, which is precisely why we use it as an example. JUSTICE WHITE fails to establish, however, how language requiring that the “order and certificate of naturalization [be] . . . procured by . . . misrepresentation” can conceivably be interpreted to exclude this example while yet including the misrepresentation at the visa stage which (we concede) would not as a policy matter be foolish. It is not our function to construct prudent policy except within the confines of the statutory text.

limited to falsehoods or deceptions in the naturalization proceeding.⁸

Looking, therefore, solely to the question whether Kungys' misrepresentation of the date and place of his birth in his naturalization petition was material within the meaning of § 1451(a), we conclude that it was not. There has been no suggestion that those facts were themselves relevant to his qualifications for citizenship. Even though they were not, the misrepresentation of them would have a natural tendency to influence the citizenship determination, and thus be a misrepresentation of material facts, if the true date and place of birth would predictably have disclosed other facts relevant to his qualifications.⁹ But not even that has been found here. The Third Circuit merely held:

"[H]ad [Kungys] told the truth at the time he applied for his citizenship, the discrepancies between the truth and his visa materials would have resulted in either a field investigation or an outright denial of the petition. Had an investigation transpired, . . . such investigation probably would have resulted in a denial of the petition since it would have tended to prove his ineligibility for a visa in the first instance. In this case, as previously noted,

⁸It is a quite different question, not argued here, whether, under the statutes governing the issuance of visas in 1947, Kungys' misrepresentations or concealments at that time *rendered his visa invalid*, thus causing his United States residence to be unlawful, and (since lawful residence is a requirement of naturalization) his naturalization to be "illegally procured" under that separate provision of § 1451(a). See *Fedorenko v. United States*, 449 U. S. 490, 509 (1981).

⁹JUSTICE STEVENS minimizes the substance of what we require by describing it as no more than a showing "by clear and convincing evidence that the true facts would have led to further investigation." *Post*, at 793. But further investigation would not occur—and its predictability could assuredly not be clear and convincing—if the facts at issue were not such as gave cause to believe that the applicant was not qualified. We are not talking about investigations by detective hobbyists, but by public officials seeking only evidence concerning citizenship qualifications.

the defendant's claim of persecution by the Nazis—which is directly related to eligibility—would be called into question.” 793 F. 2d, at 533.

It seems to us not so clear that, had Kungys explained his earlier misstatement of date and place of birth as he has here, see n. 5, *supra*, the discrepancy would likely have produced either “outright denial” or an investigation, or that an investigation would have produced the described outcome.¹⁰ But even a high probability that one or another of those consequences would have resulted from the discrepancy does not establish that Kungys’ misrepresentation was material. Section 1451(a) imposes denaturalization for “concealment of a material fact” (emphasis added); and the materiality requirement implicit in the misrepresentation provision likewise relates to misrepresentation of a material fact. Thus, for purposes of determining the natural tendency of a misrepresentation to affect a decision under § 1451(a), what is relevant is what would have ensued from official knowledge of the misrepresented fact (in this case, Kungys’ true date and place of birth), not what would have ensued from official knowledge of inconsistency between a posited assertion of the truth and an earlier assertion of falsehood. On the basis of the Third Circuit’s reasoning, a misrepresentation that, in and of itself, is utterly immaterial *both* in the visa proceeding *and* in the naturalization proceeding, becomes material simply because it is repeated in both. That is not what the stat-

¹⁰ We note in this regard that there was a factual dispute whether those who had been victims of Nazi persecution were given priority for non-preference visas. Although the District Court apparently found the evidence on this point inconclusive, 571 F. Supp. 1104, 1137, n. 7 (NJ 1983), the Court of Appeals resolved the dispute in the Government’s favor. We do not believe that resolution is the only one that could be drawn from the record, and thus conclude that the Court of Appeals improperly made a finding on a disputed question of fact. See *Icicle Seafoods, Inc. v. Worthington*, 475 U. S. 709 (1986).

ute intends. What must have a natural tendency to influence the official decision is the misrepresentation itself, not the failure to create an inconsistency with an earlier misrepresentation; the failure to state the truth, not the failure to state what had been stated earlier. The Government has failed to establish clearly, unequivocally, and convincingly that Kungys' misrepresentation of the date and place of his birth had this natural tendency.

We leave it to the Third Circuit on remand to determine whether the other misrepresentations or concealments that the District Court found to have been made in 1954 were supported by the evidence and material to the naturalization decision under the standard we have described—bearing in mind the unusually high burden of proof in denaturalization cases. *Baumgartner v. United States*, 322 U. S. 665, 670 (1944); *Schneiderman*, 320 U. S., at 158. If so, it will have to reach the fourth § 1451(a) issue described in our earlier analysis: whether Kungys “procured” his citizenship by means of those misrepresentations or concealments. That requirement demands, first of all, that citizenship be obtained as a result of the application process in which the misrepresentations or concealments were made. The difficult question, and that on which we part company with JUSTICE STEVENS’ opinion concurring in the judgment, is what it demands beyond that. We do not agree with petitioner’s contention that it requires the Government to establish that naturalization would not have been granted if the misrepresentations or concealments had not occurred. If such a “but for” causation requirement existed in § 1451(a), it is most unlikely that a materiality requirement would have been added as well—requiring, in addition to distortion of the decision, a natural tendency to distort the decision. Moreover, the difficulty of establishing “but for” causality, by clear, unequivocal, and convincing evidence many years after the fact, is so

great that we cannot conceive that Congress intended such a burden to be met before a material misrepresentation could be sanctioned. We do think, however, that the "procured by" language can and should be given some effect beyond the mere requirement that the misrepresentation have been made in the application proceeding. Proof of materiality can sometimes be regarded as establishing a rebuttable presumption. See, e. g., *Basic Inc. v. Levinson*, 485 U. S. 224, 245-249 (1988). Though the "procured by" language of the present statute cannot be read to *require* proof of disqualification, we think it can be read to express the notion that one who obtained his citizenship in a proceeding where he made material misrepresentations was *presumably* disqualified. The importance of the rights at issue leads us to conclude that the naturalized citizen should be able to refute that presumption, and avoid the consequence of denaturalization, by showing, through a preponderance of the evidence, that the statutory requirement as to which the misrepresentation *had a natural tendency* to produce a favorable decision was in fact met.¹¹ Such a construction gives ample meaning to both the "materiality" and "procured by" requirements.

JUSTICE STEVENS' concurrence would adopt a requirement of "but for" causality, emphasizing the necessity that the

¹¹ The italicized language in this sentence is ignored by the statement in JUSTICE STEVENS' concurrence that we require the applicant to "refute the existence of every disqualifying fact that *might have been* revealed by an investigation." *Post*, at 793 (emphasis added).

JUSTICE STEVENS is correct that "even demonstrating that there is a completely innocent explanation for the misrepresentation would not be sufficient" always to prevent a finding of procurement by willful misrepresentation. *Ibid.* Sometimes it might, however, since it is certainly one of the factors that the court can take into account in determining whether the applicant has established that the disqualifying fact relevant to the misrepresentation did not exist. In any case, it will assuredly be rare that a lie which has been shown, clearly, unequivocally, and convincingly, to have a natural tendency to produce the conclusion that the applicant was qualified, will have a "completely innocent explanation."

Government establish, at least, that the misrepresenting applicant was in fact not qualified to be naturalized. This emphasis highlights another difficulty with "but for" causality: that requirement is simply not a conceivable construction of the "procured by misrepresentation" provision of § 1451(a) if one adheres, as JUSTICE STEVENS' concurrence purports to do, see *post*, at 795–796, to our holding in *Fedorenko* that even without any misrepresentation the applicant's failure to meet a statutory requirement for naturalization subjects him to denaturalization under the "illegally procured" provision of § 1451(a). *Fedorenko*, 449 U. S., at 506–507, 514–515.¹² Thus, JUSTICE STEVENS' concurrence's construction violates the cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant. See, e. g., *Colautti v. Franklin*, 439 U. S. 379, 392 (1979); *Jarecki v. G. D. Searle & Co.*, 367 U. S. 303, 307–308 (1961); *United States v. Menasche*, 348 U. S. 528, 538–539 (1955). It makes nonsense of the statute to say that its misrepresentation provision can only be the basis of denaturalization if the Govern-

¹²JUSTICE STEVENS' concurrence avoids this difficulty by saying that *Fedorenko* does not apply to "insignificant," or "trivia[!]," or "technical[]" requirements. *Post*, at 799–800, n. 11. Apart from the less than precise character of this qualification, it is nowhere to be found in *Fedorenko*, which said:

"At the same time, our cases have also recognized that there must be strict compliance with all the congressionally imposed prerequisites to the acquisition of citizenship. Failure to comply with any of these conditions renders the certificate of citizenship 'illegally procured,' and naturalization that is unlawfully procured can be set aside." 449 U. S., at 506 (emphasis added).

It is, moreover, difficult to see how any willful misrepresentation regarding compliance with a naturalization requirement, no matter how technical that requirement, can be considered merely an "insignificant" or "trivial" violation for purposes of determining whether citizenship has been unlawfully procured. Thus, even by amending *Fedorenko* JUSTICE STEVENS has not succeeded in showing how the willful misrepresentation provision, interpreted as he would prefer, would do anything not already achieved by the "illegally procured" provision.

ment establishes *in addition* a factor that is itself, without misrepresentation, a basis for denaturalization anyway. On JUSTICE STEVENS' concurrence's reading, the law says, in effect: Citizenship you obtain by lying may be revoked, but only for a reason other than lying. This is likely to have the congressionally desired deterrent effect upon only the most dim-witted of prevaricators. But worse than making an enigma of the statute, JUSTICE STEVENS' concurrence's position makes a scandal of the results the statute achieves: Proof that an applicant lied when he said he was not an SS officer at Dachau would not suffice for denaturalization without clear, unequivocal, and convincing proof—after 40 years of disappearing evidence—that he was guilty of war crimes.

III

A

The United States argues, as an alternative basis for affirming the Third Circuit's upholding of denaturalization, that Kungys' misrepresentations, made under oath and in the form of forged documents, rendered his citizenship "illegally procured" under 8 U. S. C. §§ 1101(f)(6), 1427(a)(3), and 1451(a). As discussed earlier, the alleged ground of "illegal procurement" is that Kungys lacked the requisite good moral character in 1954, at the time of his naturalization, because he had given false testimony for the purpose of obtaining benefits in both the visa and naturalization proceedings, in violation of § 1101(f)(6). In connection with this aspect of the judgment, we address only the issue considered (and resolved in the affirmative) by the Third Circuit: whether § 1101(f)(6) contains a materiality requirement for false testimony. We hold that it does not.

Under 8 U. S. C. § 1101(f)(6), a person shall be deemed not to be of good moral character if he "has given false testimony for the purpose of obtaining" immigration or naturalization benefits. On its face, § 1101(f)(6) does not distinguish between material and immaterial misrepresentations. Liter-

ally read, it denominates a person to be of bad moral character on account of having given false testimony if he has told even the most immaterial of lies with the subjective intent of obtaining immigration or naturalization benefits. We think it means precisely what it says.

The absence of a materiality requirement in § 1101(f)(6) can be explained by the fact that its primary purpose is not (like § 1451(a)) to prevent false pertinent data from being introduced into the naturalization process (and to correct the result of the proceedings where that has occurred), but to identify lack of good moral character. The latter appears to some degree whenever there is a subjective intent to deceive, no matter how immaterial the deception. A literal reading of the statute does not produce draconian results, for several reasons. First, "testimony" is limited to oral statements made under oath. The United States concedes that it does not include "other types of misrepresentations or concealments, such as falsified documents or statements not made under oath." Supplemental Brief for United States 3. See, *e. g.*, *Sharaiha v. Hoy*, 169 F. Supp. 598, 601 (SD Cal. 1959); *Matter of Ngan*, 10 I. & N. Dec. 725, 726 (1964); *Matter of G-L-T-*, 8 I. & N. Dec. 403, 404-405 (1959). See also *Ensign v. Pennsylvania*, 227 U. S. 592, 599 (1913). Second, § 1101(f)(6) applies to only those misrepresentations made with the subjective intent of obtaining immigration benefits. As the Government acknowledges:

"It is only dishonesty accompanied by this precise intent that Congress found morally unacceptable. Willful misrepresentations made for other reasons, such as embarrassment, fear, or a desire for privacy, were not deemed sufficiently culpable to brand the applicant as someone who lacks good moral character." Supplemental Brief for United States 12.

Obviously, it will be relatively rare that the Government will be able to prove that a misrepresentation that does not have the natural tendency to influence the decision re-

garding immigration or naturalization benefits was nonetheless made with the subjective intent of obtaining those benefits. This is especially so since the invalidating intent, like all other factual matters necessary to support denaturalization, must be proved by “‘clear, unequivocal, and convincing’ evidence which does not leave ‘the issue in doubt.’” *Schneiderman*, 320 U. S., at 158. Third, unlike the misrepresentation clause of § 1451(a), the false testimony provisions of § 1101(f)(6) do not apply to “concealments.” With all these built-in limitations, and given the evident purpose of the provision, we see no reason for straining to avoid its natural meaning.

JUSTICE STEVENS would read a materiality requirement into § 1101(f) because in his view “[t]here is no ‘material’ distinction,” *post*, at 797, between the language of that provision and the language of § 10 of the Displaced Persons Act of 1948 (DPA), which we found to contain a materiality requirement in *Fedorenko*. We think there is a world of difference between the two. First, the texts of the statutes are significantly different. Section 10 of the DPA uses the phrase “willfully make a misrepresentation.” Our conclusion in *Fedorenko* that this contains a materiality requirement was grounded in the word “misrepresentation,” which has been held to have that implication in many contexts—as the name of the common-law tort of misrepresentation (which requires a material falsehood) adequately demonstrates. Section 1101(f), by contrast, uses the phrase “giv[e] false testimony.” While we do not say that statutory use of the term “false” or “falsity” can never imply a requirement of materiality, such a requirement is at least not so commonly associated with that term as it is with misrepresentation. In fact, we recently described falsity and materiality as *separate* requirements of misrepresentation, see *Basic Inc. v. Levinson*, 485 U. S., at 238, 239–240, n. 17. Second, the statutory provisions differ in their purpose and their relationship to other provisions in their respective statutory schemes. Section 10 of the DPA,

like the willful misrepresentation provision of § 1451(a), is a freestanding provision having no apparent purpose but to punish and thereby deter misrepresentation in the immigration process. Section 1101(f)(6), on the other hand, is part of a definition of what constitutes a lack of "good moral character" for purposes of qualifying for immigration. More importantly, § 10 is the only provision treating misrepresentation in the DPA, whereas § 1101(f)(6) must be reconciled with the willful misrepresentation provision of § 1451(a). That seems to us ill achieved by reading the two differently worded provisions (or, as the concurrence would have it, *three* differently worded provisions, see, *supra*, at 777-779) to be redundant.

B

Accordingly, it is clear that the Third Circuit erred in importing a materiality requirement into § 1101(f)(6). Nevertheless, we cannot affirm denaturalization under that section because the question whether any misrepresentation made by Kungys constituted "false testimony for the purpose of obtaining" immigration or naturalization benefits cannot be answered without resolving an additional question of law and an additional question of fact. The former, which we choose not to resolve ourselves, since the case must be remanded in any event, is whether Kungys' misrepresentations constituted "testimony." The latter, which must be resolved by the trier of fact, is whether in making the misrepresentations Kungys possessed the subjective intent of thereby obtaining immigration or naturalization benefits. See generally *Pullman-Standard v. Swint*, 456 U. S. 273, 288 (1982) (issues of intent are factual matters for the trier of fact); *Berenyi v. District Director, INS*, 385 U. S. 630, 634-635 (1967). We are unpersuaded by the United States' argument that Kungys' so-called pattern of lies establishes the illegal subjective intent of his alleged false testimony as a matter of law.

* * *

For the reasons stated, the judgment of the Third Circuit is reversed, and the case remanded for further proceedings consistent with this opinion.

It is so ordered.

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

JUSTICE BRENNAN, concurring.

I join the Court's opinion. I write separately, however, to spell out in more detail the showing I believe the Government must make to raise a presumption of ineligibility. The Court holds that a misrepresentation is material if it has "a natural tendency to produce the conclusion that the applicant was qualified" for citizenship. *Ante*, at 772. A misrepresentation or concealment can be said to have such a tendency, the Court explains, if honest representations "would predictably have disclosed other facts relevant to [the applicant's] qualifications." *Ante*, at 774. Proof by clear, unequivocal, and convincing evidence that the misrepresentation had this tendency raises a presumption of ineligibility, which the naturalized citizen is then called upon to rebut. *Ante*, at 777.

I agree with this construction of the statute. I wish to emphasize, however, that in my view a presumption of ineligibility does not arise unless the Government produces evidence sufficient to raise a fair inference that a statutory disqualifying fact actually existed. It is this fair inference of ineligibility, coupled with the fact that the citizen's misrepresentation necessarily frustrated the Government's investigative efforts, that in my mind justifies the burden-shifting presumption the Court employs. Evidence that simply raises the possibility that a disqualifying fact might have existed does not entitle the Government to the benefit of a presumption that the citizen was ineligible, for as we have repeatedly emphasized, citizenship is a most precious right, see, *e. g.*, *Klapprott v. United States*, 335 U. S. 601, 611-612 (1949),

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and as such should never be forfeited on the basis of mere speculation or suspicion. I therefore would not permit invocation of the presumption of disqualification in circumstances where it would not otherwise be fair to infer that the citizen was actually ineligible.

Because nothing in the Court's opinion is inconsistent with this standard, I join it.

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

American citizenship is "a right no less precious than life or liberty." *Klapprott v. United States*, 335 U. S. 601, 616-617 (1949) (Rutledge, J., concurring in result). For the native-born citizen it is a right that is truly inalienable. For the naturalized citizen, however, Congress has authorized a special procedure that may result in the revocation of citizenship. That statute provides that a certificate of naturalization may be canceled and an order granting citizenship revoked if the Government proves that "such order and certificate of naturalization were illegally procured or were procured by concealment of a material fact or by willful misrepresentation." 8 U. S. C. § 1451(a).¹

In this case the Government maintains that petitioner is subject to denaturalization because it has proved that he made certain misrepresentations in his 1947 Application for Immigration Visa (Quota), which he repeated in his October 23, 1953, Petition for Naturalization. He stated that his date of birth was October 4, 1913, when it in fact was September 21, 1915; he stated that his place of birth was Kaunas, Lithuania, when it was in fact Reistru. He asserted that he

¹ Although the denaturalization statute refers to "willful misrepresentation" and "concealment of a material fact" in the disjunctive, this Court has construed the statute to require that the concealment, no less than the misrepresentation, be willful and that the misrepresentation, no less than the concealment, relate to a material fact. See *Costello v. United States*, 365 U. S. 265, 271-272, n. 3 (1961); *Fedorenko v. United States*, 449 U. S. 490, 507-508, n. 28 (1981).

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resided in Kedainiai, Lithuania, only through July 1941, when in fact he did not leave Kedainiai until October 1941. He failed to disclose that he had been a bookkeeper-clerk in a Kaunas brush and broom establishment during the war. The Government failed in its efforts to prove that petitioner would have been denied a visa if he had disclosed the true facts in his application. It also failed to prove that truthful responses would have led to a more complete investigation of petitioner's background before granting him a visa or that an investigation would have revealed any fact that would have disqualified petitioner from obtaining a visa. Indeed, the Government failed to prove the existence of any fact that, if known, would have led to the denial of petitioner's visa application or disqualified him from later becoming an American citizen.

In support of its position that petitioner's false statements in 1947 and 1953 justify his denaturalization the Government makes two separate legal arguments. First, it argues that the misrepresentations were "material" within the meaning of § 1451(a) and that they procured petitioner's citizenship. Second, the Government urges that petitioner's citizenship was "illegally procured," because his misrepresentations—even if not material—demonstrate that he lacked the requisite good moral character at the time of his application for citizenship. Neither argument is tenable.

I

Over a quarter of a century ago, in *Chaunt v. United States*, 364 U. S. 350 (1960), the Court considered a case in which the District Court found that petitioner had concealed his membership in the Communist Party as well as three arrests that, had they been disclosed, would have led to further investigation by the Immigration and Naturalization Service. Although the dissenting Justices thought that Chaunt's failure to tell the truth about his arrest record was sufficient reason to revoke his citizenship, see *id.*, at 360, the majority

came to the contrary conclusion. It held that the Government had failed to prove "either (1) that facts were suppressed which, if known, would have warranted denial of citizenship or (2) that their disclosure might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship." *Id.*, at 355. Thus we announced a test for whether citizenship was procured by a material misrepresentation that required the Government to prove the existence of a disqualifying fact. This result was compelled both by the statute's requirement that the misrepresentation be material and by the requirement that it procure citizenship. The controversy between the parties here makes it necessary to parse the statute, paying particular attention to the meaning of the word "material." That parsing, however, merely confirms the conclusion we reached in *Chaunt*.

"Material" means "having real importance" or "great consequences." Webster's Ninth New Collegiate Dictionary 733 (1983). The adjective "material" is widely used to distinguish false statements that are actionable at law from those that are not. In the context of criminal false statements, the term "material" has been said to require that the false statement be one that had "a natural tendency to influence, or was capable of influencing, the decision of" the decisionmaking body to which it was addressed. See *ante*, at 770. In tort law, a misrepresentation is material if "a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question." Restatement (Second) of Torts § 538, p. 80 (1977). In contract law, a misrepresentation is material if "it would be likely to induce a reasonable person to manifest his assent." Restatement (Second) of Contracts § 162, p. 439 (1981).

In all of these contexts, the use of the word "material" serves to distinguish the trivial from the substantive, drawing the line between statements that appear to be capable of

influencing an outcome and those that do not. It is reasonable to assume that the term serves the same role in the denaturalization statute. It guarantees that trivial misstatements do not result in the loss of citizenship by making actionable only those that are capable of influencing the decision whether to confer citizenship. This principle may be stated more specifically. Unlike the decision to enter a contract or to do some act in detrimental reliance on the assertion of another, the decision whether to grant citizenship is an objective one. The applicant either does or does not possess the requisite qualifications. The process relies on facts, not hunches or intuitions. Thus, in the denaturalization context, the only statements that are capable of influencing the outcome are those that conceal disqualifying facts or that prevent or hinder the discovery of disqualifying facts. Our statement in *Chaunt* was not a rejection of the traditional definition of materiality, it was merely an acknowledgment of the realistic consequences of that term's use in the context of an objective decisionmaking process.

Our holding in *Chaunt* is also supported by the statutory requirement that there must be a causal connection between the misrepresentation and the award of citizenship. Section 1451(a) provides that the Government must demonstrate that the misrepresentation "procured" citizenship. That is, the statute requires that the Government demonstrate that it relied on the misrepresentation in deciding whether to allow the applicant to become a citizen. In imposing this causation requirement, the statute again merely tracks the law of actionable misrepresentation in other contexts. A material misrepresentation, that is, a statement not in accordance with the truth that a reasonable person would attach importance to in deciding whether to enter a contract, may form the basis for voiding or reforming the contract, but only if the contracting party in fact relied on the statement in entering the contract. Restatement (Second) of Contracts § 164. The material misrepresentation must have induced the re-

recipient of the statement to enter the contract.² Likewise, in tort law, a person may recover for a loss resulting from another's material misrepresentation, but only if he or she in fact relied upon the misrepresentation to his or her detriment. Restatement (Second) of Torts § 525. Although in both contract and tort law it is recognized that if a misrepresentation was material, the recipient probably relied on it, that probability does not alleviate the requirement that inducement be proved distinctly. Restatement (Second) of Contracts § 167.

If anything, the causation requirement of § 1451(a) is stricter than that in tort and contract law. The statute specifically requires that the material misrepresentation "procure" citizenship, not merely that it have been an inducement to granting citizenship. Thus it requires that the material misrepresentation must have had the effect of allowing the person to obtain citizenship when a truthful statement would have led directly or after investigation to the denial of citizenship. In other words, the Government must have relied on the statement in offering the defendant the opportunity to become a citizen. Although as is recognized in tort and contract law, it is likely that any material misrepresentation was relied on by the Government, this likelihood does not change the burden imposed by the statute.³

²Contract law also allows recovery for *nonmaterial* statements if they are fraudulent. But even in this instance the misrepresentation must have induced the formation of the contract. Restatement (Second) of Contracts § 167 (1981).

³The following example, though admittedly unlikely, demonstrates the distinction in the roles played by the materiality and procurement elements. Suppose an individual appears to qualify for American citizenship on two distinct grounds. He or she claims to have lived in the United States the required number of years and to be "a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United

Thus the Government cannot prevail in a denaturalization action based on a false statement in an application for a naturalization certificate unless it can prove by clear, unequivocal, and convincing evidence the existence of a disqualifying fact. To prove that a misrepresentation was material, the Government must prove that the statement concealed a disqualifying fact or hindered the discovery of a disqualifying fact. Further, the existence of a disqualifying fact is a necessary element of the Government's proof of reliance. Unless a disqualifying fact existed, it cannot be said that a misrepresentation "procured" citizenship. Section 1451(a) does not allow an individual who was in all ways qualified to be an American citizen to be deprived of that citizenship because of a false statement that did not prevent the discovery of a fact that would have affected his or her eligibility to become a United States citizen. Together and separately, the materiality and procurement requirements reflect congressional intent that citizenship status not be taken away unless the Government proves that the person was not qualified to hold that status at the time it was obtained.⁴

States." See 8 U. S. C. § 1427(a). The individual also claims to be the surviving spouse of an American member of the Armed Forces who died while on active duty. See 8 U. S. C. § 1430(d). The claim to be a surviving spouse is false, but the other representations are true. The claim to be a surviving spouse is clearly material because it is capable of influencing the outcome of the naturalization process. However, if in fact citizenship was conferred because of the individual's other qualifications, then the Government would not be able to demonstrate that the material misrepresentation "procured" citizenship.

⁴ As I stated in *Fedorenko v. United States*, 449 U. S. 490 (1981):

"There are really three inquiries [under the *Chaunt* test]: (1) whether a truthful answer would have led to an investigation, (2) whether a disqualifying circumstance actually existed, and (3) whether it would have been discovered by the investigation. Regardless of whether the misstatement was made on an application for a visa or for citizenship, in my opinion the proper analysis should focus on the first and second components and attach little or no weight to the third. Unless the Government can prove the ex-

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In his separate opinion in *Fedorenko v. United States*, 449 U. S. 490, 518 (1981), JUSTICE BLACKMUN correctly pointed out that as construed by our decision in *Chaunt* the misrepresentation ground of § 1451(a) requires that the Government "prove the existence of disqualifying facts." *Id.*, at 523-524.⁵ Until today, JUSTICE WHITE was the only Mem-

istence of a circumstance that would have disqualified the applicant, I do not believe that citizenship should be revoked on the basis of speculation about what might have been discovered if an investigation had been initiated. But if the Government can establish the existence of a disqualifying fact, I would consider a willful misstatement material if it were more probable than not that a truthful answer would have prompted more inquiry." *Id.*, at 537 (STEVENS, J., dissenting).

⁵JUSTICE BLACKMUN continued:

"First, this Court's reasoning before *Chaunt* contains no suggestion that a naturalized citizen would be reduced to alien status merely because a thwarted Government inquiry *might* have shown him to be unqualified. Instead, the Court has been willing to approve denaturalization only upon a clear and convincing showing that the prescribed statutory conditions of citizenship had never been met. This, it seems to me, is the clear import of the Court's exhaustive reviews in *Nowak v. United States*, 356 U. S., at 663-668; *Knauer v. United States*, 328 U. S., at 656-669; *Baumgartner v. United States*, 322 U. S., at 666-678; and *Schneiderman v. United States*, 320 U. S., at 131-159. Of course, the Government's ability to investigate with vigor may be affected adversely by its inability to discover that certain facts have been suppressed. That standard announced by the Court of Appeals, however, seems to me to transform this interest in unhampered investigation into an end in itself. Application of that court's standard suggests that a deliberately false answer to any question the Government deems worth asking may be considered material. I do not believe that such a weak standard of proof was ever contemplated by this Court's decisions prior to *Chaunt*.

"Instead, I conclude that the Court in *Chaunt* intended to follow its earlier cases, and that its 'two tests' are simply two methods by which the existence of ultimate disqualifying facts might be proved. This reading of *Chaunt* is consistent with the actual language of the so-called second test; it also appears to be the meaning that the dissent in *Chaunt* believed the Court to have intended.

"Significantly, this view accords with the policy considerations informing the Court's decisions in the area of denaturalization. If naturalization can be revoked years or decades after it is conferred, on the mere suspicion

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ber of the Court to have disagreed with this reading of the *Chaunt* opinion. Even today, it is not clear whether the Court disagrees with this interpretation of *Chaunt*, or simply rejects it based on its current notion of "the wisdom of experience." See *ante*, at 769.

In my opinion, the wisdom of experience has provided firm support for *Chaunt*'s holding. Our construction of the denaturalization statute must be animated by our longstanding recognition of the severity of the sanction being sought. I firmly believe that denaturalization is far too heavy a sanction to impose on an otherwise innocent citizen for making false statements in 1947 and 1953. Without evidence of any wrongdoing before he came to the United States in 1948 or after he acquired his citizenship in 1954, the revocation of petitioner's citizenship—a punishment that is tantamount to exile or banishment—is patently excessive.⁶

The wisdom of experience is further reflected in our prior cases imposing a special burden on the Government when it

that certain undisclosed facts *might* have warranted exclusion, I fear that the valued rights of citizenship are in danger of erosion." 449 U. S., at 524–526 (emphasis in original) (footnotes omitted).

⁶ In his concurrence explaining why special procedural safeguards are appropriate in denaturalization proceedings, Justice Rutledge advanced an argument that further demonstrates the importance of the requirement that the Government prove the existence of a disqualifying fact. He wrote:

"To take away a man's citizenship deprives him of a right no less precious than life or liberty, indeed of one which today comprehends those rights and almost all others. To lay upon the citizen the punishment of exile for committing murder, or even treason, is a penalty thus far unknown to our law and at most but doubtfully within Congress' power. U. S. Const., Amend. VIII. Yet by the device or label of a civil suit, carried forward with none of the safeguards of criminal procedure provided by the Bill of Rights, this most comprehensive and basic right of all, so it has been held, can be taken away and in its wake may follow the most cruel penalty of banishment.

"No such procedures could strip a natural-born citizen of his birthright or lay him open to such a penalty." *Klapprott v. United States*, 335 U. S. 601, 616–617 (1949).

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seeks to denaturalize an American citizen. Thus, in explaining why the Government's burden of proof in this kind of civil proceeding is equivalent to that enforced in criminal cases, and why default judgments in denaturalization proceedings are intolerable, the Court has written:

"Denaturalization consequences may be more grave than consequences that flow from conviction for crimes. . . . This Court has long recognized the plain fact that to deprive a person of his American citizenship is an extraordinarily severe penalty. The consequences of such a deprivation may even rest heavily upon his children. 8 U. S. C. § 719. As a result of the denaturalization here, petitioner has been ordered deported. 'To deport one who so claims to be a citizen, obviously deprives him of liberty It may result also in loss of both property and life; or of all that makes life worth living.' *Ng Fung Ho v. White*, 259 U. S. 276, 284 [1922]. Because denaturalization proceedings have not fallen within the technical classification of crimes is hardly a satisfactory reason for allowing denaturalization without proof while requiring proof to support a mere money fine or a short imprisonment.

"Furthermore, because of the grave consequences incident to denaturalization proceedings we have held that a burden rests on the Government to prove its charges in such cases by clear, unequivocal and convincing evidence which does not leave the issue in doubt. *Schneiderman v. United States*, 320 U. S. 118, 158 [1943]. This burden is substantially identical with that required in criminal cases—proof beyond a reasonable doubt." *Klapprott v. United States*, 335 U. S., at 611–612.

Virtually ignoring the foregoing settled law, today the Court announces a new burden-shifting presumption that lowers the standard of proof required for the Government to prevail in a denaturalization proceeding. Under the Court's test, a misrepresentation or concealment is material if it con-

cerned a fact that was relevant to the naturalization decision or if the true facts "would predictably have disclosed other facts relevant to [the citizen's] qualifications." *Ante*, at 774. A fact may be relevant if it would have led to an investigation. *Ante*, at 775. Thus the Government becomes entitled to the presumption that the citizen was not qualified to become a citizen, that is, to the presumption that citizenship was "procured by" the misrepresentation, if it shows by clear and convincing evidence that the true facts would have led to further investigation. The citizen then bears the burden of "showing, through a preponderance of the evidence, that the statutory requirement as to which the misrepresentation *had a natural tendency* to produce a favorable decision was in fact met." *Ante*, at 777 (emphasis in original). Since under the Court's test the Government is never required to identify a specific disqualifying fact, apparently the citizen must refute the existence of every disqualifying fact that might have been revealed by an investigation. The Government need not introduce any proof whatsoever suggesting the existence of a disqualifying fact.

Though joining the Court's opinion, JUSTICE BRENNAN would require more. He would not allow the Government the benefit of the presumption unless it first produced "evidence sufficient to raise a fair inference that a statutory disqualifying fact actually existed." *Ante*, at 783. Although JUSTICE BRENNAN imposes a burden of production on the Government, he agrees with the majority that the burden of ultimate persuasion rests with the defendant. Under JUSTICE BRENNAN's approach, however, the defendant at least has the benefit of knowing specifically what disqualifying fact must be rebutted. Both approaches require the defendant to rebut the existence of the presumed disqualifying fact—even demonstrating that there is a completely innocent explanation for the misrepresentation would not be sufficient to rebut the presumption.

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Neither the majority's nor JUSTICE BRENNAN's formulation of shifting burdens is faithful to our previous recognition of the special burden the Government must bear when it seeks to denaturalize an American citizen or to our previous rejection of default judgments in denaturalization proceedings. See *Klapprott v. United States*, 335 U. S., at 611-612; *supra*, at 790-792.⁷ "[B]ecause of the grave consequences incident to denaturalization proceedings," *Klapprott*,

⁷In *Schneiderman v. United States*, 320 U. S. 118 (1943), a case in which the Government sought "to turn the clock back twelve years after full citizenship was conferred upon petitioner by a judicial decree, and to deprive him of the priceless benefits that derive from [citizenship] status," we discussed the grave consequences of denaturalization and the special burden borne by the Government in denaturalization proceedings:

"In its consequences it is more serious than a taking of one's property, or the imposition of a fine or other penalty. For it is safe to assert that nowhere in the world today is the right of citizenship of greater worth to an individual than it is in this country. It would be difficult to exaggerate its value and importance. By many it is regarded as the highest hope of civilized men. This does not mean that once granted to an alien, citizenship cannot be revoked or cancelled on legal grounds under appropriate proof. But such a right once conferred should not be taken away without the clearest sort of justification and proof. So, . . . in an action instituted . . . for the purpose of depriving one of the precious right of citizenship previously conferred we believe the facts and the law should be construed as far as is reasonably possible in favor of the citizen. Especially is this so when the attack is made long after the time when the certificate of citizenship was granted and the citizen has meanwhile met his obligations and has committed no act of lawlessness. It is not denied that the burden of proof is on the Government in this case.

"... [A] certificate of citizenship is 'an instrument granting political privileges, and open like other public grants to be revoked if and when it shall be found to have been unlawfully or fraudulently procured.' . . . To set aside such a grant the evidence must be 'clear, unequivocal, and convincing,'—'it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt.' . . . This is so because rights once conferred should not be lightly revoked. And more especially is this true when the rights are precious and when they are conferred by solemn adjudication, as is the situation when citizenship is granted." *Id.*, at 122-123, 125.

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335 U. S., at 612, this Court has always held that the Government must prove its charges in denaturalization cases by clear, unequivocal, and convincing evidence which does not leave the issue in doubt. We have recognized that this burden is substantially identical to the beyond-a-reasonable-doubt burden of proof borne by the Government in criminal cases. *Ibid.* Indeed, the factors that support the imposition of so heavy a burden are largely the same in both contexts—particularly critical are the immense importance of the interests at stake, *ibid.*; *In re Winship*, 397 U. S. 358, 363 (1970), the possibility of loss of liberty, *Klapprott*, 335 U. S., at 612; *In re Winship*, 397 U. S., at 363, the resultant stigmatization, *Schneiderman v. United States*, 320 U. S. 118, 122–23 (1943); *In re Winship*, 397 U. S., at 363, and the societal interest in the reliability of the outcome, *id.*, at 363–364. The use of burden-shifting presumptions to reduce the Government's burden of proof in criminal cases has been consistently rejected by this Court without regard to whether the presumptions were rebuttable. See *Francis v. Franklin*, 471 U. S. 307, 313 (1985), and cases cited therein. Such presumptions are equally objectionable in the denaturalization context.

II

The reasons why the Court has required the Government to carry a heavy burden of proof in denaturalization cases apply equally to the argument that petitioner is subject to denaturalization because his false statements demonstrate that he lacked good moral character in 1953.

As amended in 1961, § 1451(a) allows the Government to revoke the citizenship of anyone whose citizenship was “illegally procured.” In *Fedorenko*, we held that citizenship had been illegally procured because the petitioner, a former armed concentration camp guard, was ineligible for the visa he had been issued under the Displaced Persons Act of 1948 (DPA), 62 Stat. 1009. Because the naturalization statutes required applicants to be lawfully admitted to the United

States for permanent residence, petitioner had failed to "satisfy a statutory requirement which Congress has imposed as a prerequisite to the acquisition of citizenship by naturalization." *Fedorenko*, 449 U. S., at 515. One prerequisite to naturalization is that the applicant be of "good moral character." 8 U. S. C. § 1427(a). Certain minimum standards for being deemed in possession of good moral character are set out in 8 U. S. C. § 1101(f). Subsection 6 of § 1101(f) provides that no person shall be deemed to be of good moral character if he or she "has given false testimony for the purpose of obtaining any benefits under this chapter." The Government contends that it is not necessary for it to establish that petitioner's false statements were material to denaturalize him under this provision. Under the Government's theory, the mere fact that the statements were false is sufficient to compel petitioner's denaturalization if they were made under oath and with the subjective intention of obtaining a benefit—any benefit, no matter how trivial⁸—under the natural-

⁸ At oral argument, counsel for the Government made the following remarks in response to questioning by a Member of the Court:

"QUESTION: You know, there are a lot of people that came to this country who were given different names at Ellis Island. The immigration officer couldn't pronounce the name, and they said, well, Sam, is that okay? Yeah, that's my name Sam. Now his name wasn't Sam.

"Did he give that name to procure the visa, or to procure admission to the United States, falsely to procure?

"MR. KLONOFF [Assistant to the Solicitor General]: That's a factual question in each case, we would submit.

"QUESTION: He just wants to facilitate the thing. The guy will never learn how to spell Salvator, or whatever the name is, and the officer—it's happened very often.

"MR. KLONOFF: It has to be a question of fact. If the person had adopted a false I. D. many, many years earlier for a totally different purpose—

"QUESTION: No, no, there is no evil purpose except to facilitate getting in. I don't want to be here, you know, trying to straighten out what

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ization laws. Because I am convinced that a materiality requirement is implicit in § 1101(f)(6), I reject this contention.

In *Fedorenko v. United States*, we were called upon to interpret the language of § 10 of the DPA, which provided that “[a]ny person who shall willfully make a misrepresentation for the purpose of gaining admission into the United States as an eligible displaced person shall thereafter not be admissible into the United States.” 62 Stat. 1013. We held, agreeing with the Government, that this provision applied “only [to] willful misrepresentations about ‘material’ facts.” 449 U. S., at 507. We found the implication of a materiality requirement in the DPA’s willful misrepresentation section to follow logically from our construction of § 1451(a) as having such a requirement even though its plain language requires only that the misrepresentation have been willful. That same logic applies here. There is no “material” distinction between the language of the DPA at issue in *Fedorenko* and the language of § 1101(f)(6). See *United States v. Sheshtawy*, 714 F. 2d 1038, 1041 (CA10 1983). It is implausi-

the proper spelling of my name is. He says Sam, what do I care; Sam is fine.

“MR. KLONOFF: If he adopted a false identity to facilitate getting in and jumped ahead of the pack—

“QUESTION: Do you consider that facilitating getting in?

“MR. KLONOFF: We would.

“QUESTION: Just to facilitate—to make it quicker so the fellow doesn’t have to figure out how to spell Salvator.

“MR. KLONOFF: That would be our position. That’s consistent with the statutory—

“QUESTION: Wow, that’s a tough position, and I think there are probably a lot of people that are excludable.” Tr. of Oral Arg. 39–40.

The observation that a lot of people would be excludable (and a lot of Americans put at risk of losing their citizenship) under the Government’s interpretation is, of course, correct. The example instructs that misrepresentations as to matters that are immaterial to the decisions being made by immigration officials simply do not reflect the lack of good moral character § 1101(f)(6) seeks to identify.

ble to suggest that Congress intended by the language of the DPA to engraft a materiality requirement, but had no such intention in drafting § 1101(f)(6).⁹

In addition to requiring materiality, both § 10 of the DPA and § 1101(f)(6) require that the false statement have been made for the purpose of obtaining a benefit under the immigration and naturalization laws. The Government would have us adopt a subjective test of the individual's motive in any particular case, thus forcing the factfinder to inquire of the defendant in each case why the particular falsehood was asserted and insuring that many citizenship determinations would boil down to credibility battles. An objective test is far more reasonable. Under an objective approach, a false testimonial statement would be considered made "for the purpose of obtaining any benefits under [the immigration laws]" if it in fact had the effect of giving the defendant a benefit under the immigration laws. An objective test would eliminate the necessity of inquiring in each case whether a person lied about his or her date of birth for personal reasons,

⁹ It is somewhat ironic that both the Government and the Court accept the fact that a materiality requirement is implicit in the disjunctive reference to "willful misrepresentation" in § 1451(a), see *ante*, at 767, but reach a contrary conclusion with respect to § 1101(f)(6). Moreover, the implication of a materiality requirement in § 1101(f)(6) is consistent with the interpretation of 18 U. S. C. § 1015(a), which punishes the making of "any false statement under oath, in any case, proceeding, or matter relating to . . . naturalization, citizenship, or registry of aliens." Courts have construed the statute to contain a requirement that the false statement be material. *United States v. Bressi*, 208 F. 369, 370-371 (WD Wash. 1913) (to constitute the crime of false swearing in a naturalization case the testimony given had to be material even though the statute does not expressly so state); *United States v. Laut*, 17 F. R. D. 31, 34 (SDNY 1955) (courts have consistently construed § 1015(a) and its forebears to have a materiality requirement even though the statute does not expressly contain this limitation).

such as mere vanity, or to conceal information that would lead to the denial of a visa or certificate of naturalization.¹⁰ If the false statement as to age actually had the effect of obtaining for the individual a benefit he or she would not otherwise have enjoyed, then, and only then, would American citizenship have been "illegally procured." An objective test is more consistent with the heavy burden of proof borne by the Government in denaturalization cases and with the severity of the sanction. Because states of mind are notoriously difficult to prove, an objective test also has the critical virtue of diminishing the risk of erroneous determinations.

It is obvious that there is some overlap between the scope of the misrepresentation and illegally-procured clauses of § 1451(a).¹¹ That the Government may in some cases be able to choose one of two available paths for denaturalizing a citi-

¹⁰ Counsel for the Government asserted at oral argument:

"Let me just round the situation out. Let's say that age is fundamentally important to the decision that's being made, but the person doesn't know this. He lies about his age not because he's trying to obtain immigration benefit, but because his wife is sitting there next to him and throughout their marriage he has lied about his age and he doesn't want to tell the truth.

"Now, that type of lie is willful. He clearly was lying deliberately, but he wasn't lying to obtain immigration benefits. . . . He has made a material misrepresentation and it's willful, but he doesn't fit within the good moral character provisions." Tr. of Oral Arg. 29-30.

¹¹ Although they overlap, they are not coterminous. Illegal procurement originally appeared as a ground for denaturalization in the Act of June 29, 1906, Pub. L. 59-338, § 15, 34 Stat. 601, which provided that denaturalization proceedings could be based "on the ground of fraud or on the ground that such certificate of citizenship was illegally procured." The provision was retained in the Nationality Act of 1940, Pub. L. 76-853, 54 Stat. 1137. It was deleted, however, in the Immigration and Nationality Act of 1952, Pub. L. 82-414, § 340(f), 66 Stat. 261, which substituted the provision that citizenship could be revoked if it was procured by "concealment of a material fact or by willful misrepresentation." The purpose of the change in language was to make clear that the statute en-

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zen for essentially the same conduct, however, does not suggest that either of the paths should be made more lenient than Congress intended.

compassed both extrinsic and intrinsic fraud. S. Rep. No. 1515, 81st Cong., 2d Sess., 756, 769 (1950).

Illegal procurement was restored as an alternative ground for denaturalization by the Act of September 26, 1961, Pub. L. 87-301, § 18, 75 Stat. 656. It is clear from the legislative history that the purpose of the restoration was to allow denaturalization of persons who did not meet important statutory prerequisites for naturalization but who were not guilty of willful misrepresentation. See H. R. Rep. No. 1086, 87th Cong., 1st Sess., 1, 38-40 (1961). Congress was particularly concerned that criminal conduct such as rape, incest, and fraud could not form the basis for denaturalization without the illegally-procured provision. Although the illegally-procured provision may reach some of the conduct encompassed within the material misrepresentation provision, the illegally-procured provision has an independent and broader reach.

Further, the material misrepresentation provision reaches some conduct not assailable under the illegally-procured provision. The Government contends that construing the material misrepresentation provision to require proof of a disqualifying fact renders that provision meaningless since the Government could always seek denaturalization under the illegally-procured provision if it could prove a disqualifying fact. The Government apparently construes our holding on the facts in *Fedorenko* that citizenship may be considered illegally procured if it is discovered that the applicant failed at the time citizenship was conferred to meet a statutory prerequisite of citizenship as warranting the conclusion that every newly discovered noncompliance, no matter how insignificant, would warrant a subsequent finding that citizenship had been illegally procured. Thus, for example, an innocent miscalculation of the applicant's period of physical presence within the United States or residence within a particular State, see *ante*, at 765, n. 2, would place a naturalized citizen's status in permanent jeopardy. I disagree. I do not construe the illegally-procured provision to reach such trivialities despite the reality that an individual who submitted an application for citizenship one day before fulfilling the residency requirements would technically have failed to "satisfy a statutory requirement which Congress has imposed as a prerequisite to the acquisition of citizenship by naturalization." *Fedorenko*, 449 U. S., at 515. However, if the Government could establish that a naturalized citizen had willfully misrepresented his or her time of residence and that he or she would have been denied citizenship if the true duration of residency had been known, that person would be subject to denaturalization under § 1451(a).

III

The Government attempted to prove the existence of a disqualifying fact before the District Court by introducing videotaped deposition testimony, which it asserted proved petitioner's participation in the Kedainiai atrocities. The District Court found the deposition testimony unreliable and admitted the depositions only for the limited purpose of establishing that the atrocities occurred.¹² Because the Court of Appeals did not address the propriety of this ruling, I would vacate its judgment and remand the case for further proceedings not inconsistent with this opinion.

JUSTICE O'CONNOR, concurring in part and dissenting in part.

I join Parts I, II-A, and III of JUSTICE SCALIA's opinion in this case. For the reasons given in Part II of JUSTICE WHITE's opinion, however, I dissent from Part II-B of JUSTICE SCALIA's opinion. In my view, when the correct standard of materiality is applied to the facts of this case, the misrepresentations made by petitioner are properly viewed as material.

JUSTICE WHITE, dissenting.

In 1982, the Government filed a complaint to denaturalize petitioner. It set out three reasons why this action was justified. First, it tried to show that petitioner assisted in the arrest and execution of more than 2,000 civilians in Kedainiai, Lithuania, during a 2-month period in 1941. The Government offered three videotaped depositions taken in the Soviet Union as proof of this claim. Although the District Court observed that these depositions would strongly tend to prove the Government's case if they were admitted as evidence

¹² The difference between this case and the Court's hypothetical concerning an SS officer at Dachau, see *ante*, at 779, is critical. Proof by clear and convincing evidence that a naturalized citizen concealed his official status at Dachau would establish his lack of good moral character. In this case, however, there is no such proof of any official or unofficial connection between petitioner and the atrocities at Kedainiai.

without qualification, it admitted them only for the purpose of showing that the atrocities took place. Without the excluded evidence, the District Court held that the Government failed to prove this claim.

The Government also showed that petitioner had made certain false statements in applying for his visa and in his naturalization petition. These false statements concerned his date and place of birth, his wartime occupations, and his wartime residence: petitioner added two years to his age and misstated the city in which he was born, listed various occupations that he was engaged in from 1942 to 1947 without listing that he was a bookkeeper for several of those years, and swore that he had resided in another city rather than in Kedainiai at the time these atrocities occurred. The District Court found that petitioner had indeed made these misrepresentations, but that they were immaterial under 8 U. S. C. § 1451(a) because the true facts, if known, would not themselves have warranted denial of a visa and would not have led to an investigation. See *Chaunt v. United States*, 364 U. S. 350 (1960). It therefore did not inquire into what an investigation might have uncovered.

Finally, the Government asserted that petitioner's false representations, whether or not material, were in themselves sufficient to show that petitioner did not have good moral character and that therefore he did not qualify for naturalization under 8 U. S. C. §§ 1427(a) and 1101(f)(6). The District Court rejected this claim also, ruling that because the false statements at issue were not material, they were not in themselves sufficient to prove that petitioner lacked good moral character.

The District Court accordingly entered judgment for petitioner. The Government appealed, and the Court of Appeals reversed. Initially, the Court of Appeals agreed with the District Court that misrepresentations must be material in order to constitute sufficient grounds for finding lack of "good moral character" under § 1101(f)(6). It disagreed with

the District Court, however, with respect to the materiality of the false statements in the visa application and the naturalization petition, holding that the misrepresentations about birth and age would have triggered an investigation that *probably* would have led to the discovery of facts disqualifying petitioner for a visa and for naturalization. It did not rule on the Government's further submission that the District Court erred by not admitting the videotaped depositions into evidence without qualification.

This case has been argued and now reargued before this Court. The Court today reverses the judgment of the Court of Appeals and remands for further consideration of several issues. Although I agree with Parts I, II-A, and III-A of the Court's opinion, I disagree with other parts and with the result it reaches. I therefore dissent.

I

I would affirm the judgment below and grant the Government's petition for denaturalization. The Court holds, and I agree, that there was error in the holding below that petitioner's misrepresentations must be material in order to constitute sufficient grounds for finding that petitioner lacks "good moral character" under § 1101(f)(6). As the Court states, the statute "does not distinguish between material and immaterial misrepresentations," but instead "denominates a person to be of bad moral character on account of having given false testimony if he has told even the most immaterial of lies with the subjective intent of obtaining immigration or naturalization benefits." *Ante*, at 779-780. In addition to the language of § 1101(f)(6), which in itself compels this conclusion, the legislative history of the 1961 amendments to the statute, Pub. L. 87-301, § 18, 75 Stat. 656, shows that Congress sought to *broaden*, not restrict, the grounds upon which naturalization could be revoked.¹

¹ Prior to 1952, "illegal procurement" constituted grounds for revoking a citizen's naturalization. When Congress enacted § 340 of the Immigration

In this connection, we must bear in mind the necessity of striking an appropriate balance between the serious consequences that attend loss of citizenship and the need for "strict compliance with all the congressionally imposed prerequisites to the acquisition of citizenship." *Fedorenko v. United States*, 449 U. S. 490, 506 (1981). We need not decide in this case whether § 1101(f)(6) would bar naturalization of an individual who offered a single piece of false testimony in only one instance or who later offered a reasonable explanation for why misstatements were made; we also need not decide whether such a construction of the statute would be inconsistent with a proper balancing of the two important but opposing considerations set out above. There may well be cases in which a single willful but immaterial misrepresentation would be insufficient to establish lack of good character, but would constitute grounds for denaturalization if it were material. Similarly, there are cases like this one in which repeated and numerous willful misrepresentations justify a

and Nationality Act of 1952, it dropped, without explanation, the "illegal procurement" provision, adding in its stead the "concealment of a material fact" or "willful misrepresentation" language. The deleted provision was reinserted in § 1451(a) by the 1961 amendments, Pub. L. 87-301, § 18, 75 Stat. 656. The House Report accompanying the amendments noted that "[e]limination of the illegality ground bars denaturalization under section 340 unless it is proved that the naturalized person has been guilty of wrongdoing amounting to concealment of a material fact or willful misrepresentation. . . ." H. R. Rep. No. 1086, 87th Cong., 1st Sess., p. 38 (1961). The Report explained that "[p]roof of concealment of material facts or willful misrepresentation . . . is fraught with difficulty," *id.*, at 39, and that the amendment to § 1451(a) was necessary because "[t]he congressional mandate that no person shall be naturalized unless possessed of certain qualifications is ineffectual unless there is also statutory provision for revoking citizenship where the prerequisites did not in fact exist." *Ibid.* These statements evince clear congressional intent that "illegal procurement" be maintained as a *separate* basis for denaturalization, and do not sanction collapsing § 1101(f)(6) into the willful and material misrepresentation or concealment provision of § 1451(a).

finding of lack of good moral character notwithstanding that the misrepresentations may not involve material facts.

Here, petitioner's false testimony was not confined to one occasion, nor did it concern only a single piece of evidence. And at no time before or during the naturalization process did petitioner voluntarily step forward and attempt to explain the reasons for his various misrepresentations. To the contrary, the facts as found by the District Court demonstrate clearly, unequivocally, and convincingly that petitioner engaged in a pattern of repeated misrepresentations and nondisclosures at both the visa application stage and during his naturalization proceedings. The District Court found:

"Throughout his visa and citizenship proceedings [petitioner] misrepresented the date and place of his birth. In addition in his application for a visa [petitioner] failed to disclose (and therefore concealed) his presence in Kedainiai during the 1940-42 period and he failed to disclose (and therefore concealed) that he had been a bookkeeper-clerk in the Kaunas brush and broom establishment during the 1941-44 period. [Petitioner] in effect perpetuated these non-disclosures or concealments throughout his naturalization proceedings by representing that the information contained in his visa application was correct." 571 F. Supp. 1104, 1139 (NJ 1983).²

² On October 23, 1953, petitioner swore under oath before a naturalization examiner that the contents of his naturalization forms were true. As stated above, this testimony was false in that petitioner supplied an incorrect date and place of birth, and he represented that the information he had supplied in the visa application was true. This false testimony falls within the coverage of § 1101(f) because petitioner offered it "during the period for which good moral character is required to be established." Although petitioner's false testimony given at the visa application stage is not, standing alone, similarly covered by this provision, it is directly relevant to the "good moral character" determination. Section 1427(e) provides that in making this determination, a court "shall not be limited to the petitioner's conduct during the five years preceding the filing of the petition, but may

The congressional mandate expressed in § 1101(f)(6) speaks clearly to such a pattern of falsehoods, and that statute would have precluded a determination in 1954 that petitioner possessed "good moral character." Accordingly, petitioner lacked an essential prerequisite to becoming a naturalized citizen, and he is now subject to denaturalization for having "illegally procured" his citizenship. § 1451(a).

Despite its recognition that materiality is not required by § 1101(f)(6), the Court declines to uphold the judgment below, and remands the case for further consideration of one point of law and one point of fact. Neither point is at all substantial. The point of law is whether petitioner's misrepresentations constituted "testimony" within the meaning of the statute. As the Court notes, the term "testimony" in § 1101(f)(6) has been construed as referring only to oral evidence, and thus as excluding the written documents submitted by petitioner in his naturalization petition. Yet petitioner in this case did make oral misrepresentations: he testified falsely when he swore under oath before a naturalization examiner that the contents of his naturalization forms were true. Deposition of Julius Goldberg, App. 145-162. See also *Matter of Ngan*, 10 I. & N. Dec. 725 (1964). Furthermore, he had testified falsely in order to obtain his visa into this country.

The point of fact is whether petitioner made these misrepresentations "for the purpose of obtaining any benefits" under the immigration and naturalization laws. There is no difficulty about this point either. The willful misrepresentations at issue here were made in the context of petitioner's naturalization petition and were made earlier at the visa

take into consideration . . . the petitioner's conduct and acts at any time prior to that period." It is also of some interest, though irrelevant to this determination, that petitioner was still lying in 1981, when he tried to explain his previous falsehoods. App. 79-137. The trial court also found that he falsely denied at trial his membership in a local rifleman's organization that at the time of the atrocities provided military training to its members and on occasion assisted German occupation forces.

stage. The fact that the misrepresentations were willful, coupled with the fact that they were made during proceedings and on documents required for immigration and naturalization purposes—indeed, the very proceedings and documents that petitioner was required to complete in order to “obtai[n]” the “benefits” he sought of gaining naturalization—satisfies the elements of § 1101(f)(6). The District Court itself found that petitioner’s naturalization petition was false *in particular* because it “stated that defendant had not previously given false testimony to obtain benefits under the immigration and naturalization laws.” 571 F. Supp., at 1138.³ In light of this specific finding by the District Court, there is no justification for remanding this issue to be resolved *again* by the trier of fact.

II

Because the Court declines to affirm the decision below on the basis of § 1101(f)(6), it finds it necessary to revisit the definition of the term “material” as it is used in § 1451(a). The Court today holds that the proper test of materiality is whether the misrepresentations “had a natural tendency to influence the decisions of the Immigration and Naturalization

³ The Court phrases this inquiry as whether petitioner made these misrepresentations with “the subjective intent of obtaining immigration or naturalization benefits,” and finds it necessary to remand on this issue because issues of intent are properly matters for resolution by the trier of fact. *Ante*, at 780, 782. This approach rests on a recasting of the statutory language, which requires that the misrepresentations be made “for the purpose of obtaining” such benefits, but even if those two linguistic formulations were exactly the same, it is quite clear that when misrepresentations of fact are made in the process of applying for immigration and naturalization benefits, in a very real and immediate sense those misrepresentations are made “for the purpose of obtaining” such benefits, and at least in this case all of this is so clear that we should find it to be established as a matter of law. Although the Court is certainly correct that issues of intent are normally reserved for resolution by the trier of fact, I do not think that we should prolong proceedings unnecessarily by parsing matters in microscopic detail, creating a legion of subissues, and demanding their resolution while losing sight of what is both clear and dispositive about this case.

Service.” *Ante*, at 772. I do not disagree with this definition, but the Court’s application of the definition in this case is flawed.

To begin with, the Court finds it proper under § 1451(a) to consider only the misrepresentations petitioner made in his naturalization proceedings but not those made in his earlier visa proceedings. The view of the United States is much more persuasive: the misrepresentations made by petitioner at the visa stage were instrumental to his procuring naturalization, for by obtaining the visa petitioner obtained lawful admission to residence in this country, which is one requirement for naturalization under § 1429. See also *Fedorenko*, 449 U. S., at 518–520 (BLACKMUN, J., concurring in judgment). The Court responds that by that logic, *any* misrepresentation that helps an individual to obtain *any* prerequisite to naturalization, such as English literacy, would be considered material. These two things, however, are not the same, and the Court’s supposed extension of its logic is merely foolish. The visa proceedings and the naturalization proceedings are intimately related not only because they both are proceedings governed by the same provisions of the immigration and naturalization laws, but also because the visa and the certificate of naturalization are obtained as part of the same process for obtaining citizenship, and both must be *lawfully* procured. For example, it is not mere residence in this country that is a prerequisite to naturalization, but residence after being “lawfully admitted.” § 1429. It makes no sense, on the other hand, to speak of proceedings to attain “lawful” literacy skills or a “lawful” understanding of American history and government, as required under § 1423, and the statute does not speak in these terms but instead manifests complete and understandable indifference as to how the individual came by those proficiencies. Thus the visa proceedings can accurately be regarded as one crucial stage in the naturalization proceedings themselves, yet the time spent acquiring literacy skills or an understanding of Ameri-

can history and government obviously cannot be regarded as a stage in those proceedings.

Even if I were to accept the proposition that we should consider only the materiality of the misrepresentations that petitioner made in the naturalization proceedings, those misrepresentations surely had a natural tendency to influence the decisions of the INS. As an initial matter, there is no requirement that the Court focus only on petitioner's misrepresentations about his date and place of his birth and leave aside his other potentially more significant misrepresentations that were also identified by the District Court.⁴ But even limiting the focus as the Court does, I would find these statements to be material. In reaching this conclusion I would ask not only whether these misrepresentations of fact would have a natural tendency to influence the decisions of the INS, but also whether the fact of these misrepresentations *itself* would have had such a tendency. In other words, the proper inquiry is not only whether the true date and place of birth, in isolation, would have aroused suspicion, but also whether an investigation would have ensued had petitioner revealed the true facts and thereby disclosed the discrepancy between them and the false statements in his supporting documents. Former Ambassador Seymour Maxwell Finger, Vice Consul in Stuttgart in January 1947, testified that if there were discrepancies between the visa application and the supporting documents an investigation certainly would have occurred, a view that is consistent with the regulations then in effect. See 22 CFR § 61.329 (Supp. 1946).

⁴The District Court found as a matter of fact that petitioner also misrepresented his residence and employment during the time in which the atrocities occurred at Kedainiai. 571 F. Supp. 1104, 1139 (NJ 1983). The correctness of those factual findings has not been challenged. The Government, as respondent, urges us to consider the effect of these other misrepresentations as an additional reason for affirming the decision below, which is entirely proper.

The Court of Appeals arrived at the same conclusion, and the United States supports this construction of the statute, which is a sound one. The materiality of misrepresentations may be, but need not be, established by considering the true facts alone. It also may be shown by a comparison between those true facts and the false assertions made about those same matters. Therefore, when the plurality states that "[w]hat must have a natural tendency to influence the official decision is *the misrepresentation itself . . . the failure to state the truth*," *ante*, at 776 (emphasis added), it is wrong to limit its consideration to whether those true facts alone, if known, would have had a natural tendency to influence the decisions of the INS. Instead, it should also consider whether "the misrepresentation itself . . . the failure to state the truth" would have had such a tendency; this inquiry also encompasses the INS' knowing the fact that the true facts do not match the false assertions that the individual seeking naturalization has made about those same matters. For whether a misrepresentation has actually been made is itself a matter of fact, and in certain circumstances this fact alone may possess great significance. Unless a court is to pretend that petitioner's lies themselves are not facts, it defies reality to conclude that "official knowledge of the misrepresented fact," *ante*, at 775, means only that the INS now knows how to correct the lies but must not take into account the fact that those lies have been told.

For these reasons, I would affirm the decision below on this ground also. At the very least I note that it is open to the trier of fact on remand to consider whether knowledge of petitioner's repeated and numerous misrepresentations would have had a natural tendency to influence the decisions of the INS.

III

As a final point, it should be emphasized that the Court of Appeals never passed on the correctness of the District Court's determination that the videotaped depositions could

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not be admitted into evidence unqualifiedly because they were inherently unreliable.⁵ On remand, this issue should be resolved definitively. If the depositions are found to be admissible without qualification, rather than merely for the limited purpose allowed by the District Court, then the petition for denaturalization would be granted regardless of how the other issues are resolved, for it is undisputed that if petitioner were shown to have participated in the mass arrests and executions at Kedainiai, he never would have qualified for naturalization and thus now would be properly subject to denaturalization.

I respectfully dissent.

⁵ The District Court found the three videotaped depositions to be unreliable largely because they were taken in the Soviet Union, which "has a strong state interest" in this case and which "on occasion distorts or fabricates evidence in cases such as this involving an important state interest," and because these depositions "were conducted in a manner which made it impossible to determine if the testimony had been influenced improperly by Soviet authorities." 571 F. Supp., at 1132.

ORDERS FOR FEBRUARY 24 THROUGH
MAY 24, 1968

FEBRUARY 24, 1968

Continued Under Rule 23

FEBRUARY 25, 1968

Continued Under Rule 23

REPORTER'S NOTE

The next page is purposely numbered 901. The numbers between 811 and 901 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

REPORTER'S NOTE

The next page is page 601 numbered 601. The number 601 and 601 were intentionally omitted in order to make it possible to publish the order with previous page numbers, thus making the official and now available upon publication of the preliminary report of the United States Report.

ORDERS FOR FEBRUARY 24 THROUGH
MAY 13, 1988

FEBRUARY 24, 1988

Certiorari Granted. (See No. 86-1430, *ante*, at 84, n. 4.)

FEBRUARY 25, 1988

Dismissals Under Rule 53

No. 87-1163. AMERICAN FERMAC, INC., ET AL. *v.* UNITED STATES. C. A. Fed. Cir. *Certiorari* dismissed under this Court's Rule 53. Reported below: 831 F. 2d 269.

No. 87-883. HONDA MOTOR CO., LTD., ET AL. *v.* CAMACHO ET UX. Sup. Ct. Colo. *Certiorari* dismissed under this Court's Rule 53. Reported below: 741 P. 2d 1240.

No. 87-183. DUFF & PHELPS, INC., ET AL. *v.* JORDAN. C. A. 7th Cir. *Certiorari* dismissed under this Court's Rule 53. Reported below: 815 F. 2d 429.

FEBRUARY 29, 1988

Dismissal Under Rule 53

No. 87-828. SZABO FOOD SERVICE, INC., ET AL. *v.* CANTEEN CORP. C. A. 7th Cir. *Certiorari* dismissed under this Court's Rule 53. Reported below: 823 F. 2d 1073.

Appeals Dismissed

No. 87-747. DUFFY ET UX. *v.* CITY OF ARCADIA. Appeal from Ct. App. Cal., 2d App. Dist., dismissed for want of substantial federal question. Reported below: 195 Cal. App. 3d 308, 243 Cal. Rptr. 87.

No. 87-1179. WEIL ET AL. *v.* CHU ET AL. Appeal from Ct. App. N. Y. dismissed for want of substantial federal question. Reported below: 70 N. Y. 2d 783, 515 N. E. 2d 908.

No. 87-1133. FIRST FEDERAL SAVINGS & LOAN ASSOCIATION OF CLAREMORE, OKLAHOMA, ET AL. *v.* OKLAHOMA TAX COMMISSION. Appeal from Sup. Ct. Okla. dismissed for want of juris-

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diction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this case. Reported below: 743 P. 2d 640.

No. 87-1145. POTTER *v.* WACKENHUT CORP. ET AL. Appeal from C. A. 11th 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: 831 F. 2d 1069.

No. 87-1148. NORTON *v.* ILLINOIS. Appeal from App. Ct. Ill., 3d Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 152 Ill. App. 3d 1167, 515 N. E. 2d 1068.

No. 87-6258. HOWARD *v.* VIACOM INTERNATIONAL ET AL. Appeal from D. C. N. D. Ind. dismissed for want of jurisdiction.

Certiorari Granted—Vacated and Remanded

No. 87-5269. OHSE *v.* HUGHES ET AL. C. A. 7th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Forrester v. White*, 484 U. S. 219 (1988). Reported below: 816 F. 2d 1144.

Miscellaneous Orders

No. 103, Orig. SOUTH DAKOTA *v.* NEBRASKA ET AL. Pending motion for leave to file bill of complaint denied without prejudice to renewal of the motion. [For earlier order herein, see, *e. g.*, 475 U. S. 1093.]

No. 86-1294. WEBSTER, DIRECTOR OF CENTRAL INTELLIGENCE *v.* DOE. C. A. D. C. Cir. [Certiorari granted, 482 U. S. 913.] Motion of respondent for leave to file a supplemental brief after argument granted. JUSTICE KENNEDY took no part in the consideration or decision of this motion.

No. 87-573. UNITED STATES *v.* TAYLOR. C. A. 9th Cir. [Certiorari granted, 484 U. S. 1025.] Motion for appointment of counsel granted, and it is ordered that Ian G. Loveseth, Esq., of San Francisco, Cal., be appointed to serve as counsel for respondent in this case.

No. 87-1068. OKLAHOMA TAX COMMISSION *v.* MUSCOGEE (CREEK) NATION ET AL. C. A. 10th Cir. The Solicitor General

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is invited to file a brief in this case expressing the views of the United States.

No. 87-1080. *MARYLAND NATIONAL BANK v. MARYLAND STATE DEPARTMENT OF ASSESSMENTS AND TAXATION*. Appeal from Ct. App. Md. 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 this order.

No. 87-1279. *MORRISON, INDEPENDENT COUNSEL v. OLSON ET AL.* C. A. D. C. Cir. [Probable jurisdiction noted, 484 U. S. 1058.] Motion of Whitney North Seymour, Jr., Independent Counsel, for leave to file a brief as *amicus curiae* granted. JUSTICE KENNEDY took no part in the consideration or decision of this motion.

No. 87-5277. *AMADEO v. KEMP, WARDEN*. C. A. 11th Cir. [Certiorari granted, 484 U. S. 912.] Motion of petitioner for an extension of time to file a reply brief denied.

Probable Jurisdiction Noted

No. 87-746. *MICHAEL H. ET AL. v. GERALD D.* Appeal from Ct. App. Cal., 2d App. Dist. Probable jurisdiction noted. Reported below: 191 Cal. App. 3d 995, 236 Cal. Rptr. 810.

Certiorari Granted

No. 86-1879. *NATIONAL TREASURY EMPLOYEES UNION ET AL. v. VON RAAB, COMMISSIONER, UNITED STATES CUSTOMS SERVICE*. C. A. 5th Cir. Certiorari granted. Reported below: 816 F. 2d 170.

No. 86-1904. *ARIZONA v. YOUNGBLOOD*. Ct. App. Ariz. Certiorari granted. Reported below: 153 Ariz. 50, 734 P. 2d 592.

No. 87-1097. *BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES v. GEORGETOWN UNIVERSITY HOSPITAL ET AL.* C. A. D. C. Cir. Certiorari granted. Reported below: 261 U. S. App. D. C. 262, 821 F. 2d 750.

No. 87-1190. *UNITED STATES v. BROCE ET AL.* C. A. 10th Cir. Certiorari granted.

No. 87-981. *BEECH AIRCRAFT CORP. v. RAINEY ET AL.*;

No. 87-1028. *BEECH AEROSPACE SERVICES, INC. v. RAINEY ET AL.*; and

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No. 87-1146. PRATT & WHITNEY CANADA INC. *v.* RAINEY ET AL. C. A. 11th Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 827 F. 2d 1498.

No. 87-751. CARLUCCI, SECRETARY OF DEFENSE, ET AL. *v.* DOE. C. A. D. C. Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 261 U. S. App. D. C. 96, 820 F. 2d 1275.

No. 87-1277. LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION *v.* NELSON. C. A. 8th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 828 F. 2d 446.

Certiorari Denied. (See also Nos. 87-1133, 87-1145, and 87-1148, *supra.*)

No. 86-203. GREAT ATLANTIC & PACIFIC TEA CO., INC. *v.* MOLDOVAN ET AL., AS TRUSTEES FOR THE TRI-STATE UFCW AND EMPLOYERS BENEFIT FUND; and

No. 86-208. MOLDOVAN ET AL., AS TRUSTEES FOR THE TRI-STATE UFCW AND EMPLOYERS BENEFIT FUND *v.* GREAT ATLANTIC & PACIFIC TEA CO., INC. C. A. 3d Cir. Certiorari denied. Reported below: 790 F. 2d 894.

No. 86-262. U. A. 198 HEALTH & WELFARE, EDUCATION & PENSION FUNDS *v.* RESTER REFRIGERATION SERVICE, INC. C. A. 5th Cir. Certiorari denied. Reported below: 790 F. 2d 423.

No. 86-1019. SIGN, PICTORIAL & DISPLAY INDUSTRY PENSION TRUST FUND ET AL. *v.* FORMETRICS, INC. C. A. 9th Cir. Certiorari denied.

No. 86-1854. NEW BEDFORD FISHERMEN'S WELFARE FUND ET AL. *v.* BALTIC ENTERPRISES, INC., ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 813 F. 2d 503.

No. 87-421. BRAVO *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 43 Cal. 3d 600, 738 P. 2d 336.

No. 87-644. SCHMIDT ET AL. *v.* SERPAS ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 827 F. 2d 23.

No. 87-655. GOLDBERG *v.* UNITED STATES DEPARTMENT OF STATE. C. A. D. C. Cir. Certiorari denied. Reported below: 260 U. S. App. D. C. 205, 818 F. 2d 71.

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No. 87-814. *TERMINAL REALTY PENN CO. v. AUERBACH ET AL.* C. A. D. C. Cir. Certiorari denied. Reported below: 264 U. S. App. D. C. 390, 829 F. 2d 175.

No. 87-875. *REDDINGTON v. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES.* C. A. 4th Cir. Certiorari denied. Reported below: 825 F. 2d 408.

No. 87-903. *CROCKER ET AL. v. FEDERAL DEPOSIT INSURANCE CORPORATION ET AL.* C. A. 5th Cir. Certiorari denied. Reported below: 826 F. 2d 347.

No. 87-949. *CONGREGATION SONS OF ISRAEL v. SHAFTAN.* Super. Ct. N. J., App. Div. Certiorari denied.

No. 87-953. *KONIZESKI ET AL. v. LIVERMORE LABS ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 820 F. 2d 982.

No. 87-1105. *ARKANSAS v. MAYFIELD.* Sup. Ct. Ark. Certiorari denied. Reported below: 293 Ark. 216, 736 S. W. 2d 12.

No. 87-1106. *PYLE ET UX. v. UNITED STATES.* C. A. 8th Cir. Certiorari denied. Reported below: 827 F. 2d 360.

No. 87-1115. *EBAUGH v. CESSNA AIRCRAFT Co.* C. A. 4th Cir. Certiorari denied. Reported below: 830 F. 2d 535.

No. 87-1125. *HOLMES v. WEST VIRGINIA.* Sup. Ct. App. W. Va. Certiorari denied.

No. 87-1127. *KONARSKI v. NEW YORK MEDICAL COLLEGE, INC., ET AL.* App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 129 App. Div. 2d 1018, 513 N. Y. S. 2d 905.

No. 87-1129. *ALASKA TRAMS CORP., AKA ALASKA TRAMS, INC. v. ALASKA ELECTRIC LIGHT & POWER ET AL.* Sup. Ct. Alaska. Certiorari denied. Reported below: 743 P. 2d 350.

No. 87-1134. *CONSULATE GENERAL OF NIGERIA ET AL. v. JOSEPH.* C. A. 9th Cir. Certiorari denied. Reported below: 830 F. 2d 1018.

No. 87-1137. *KIRK v. MICHAEL REESE HOSPITAL & MEDICAL CENTER ET AL.* Sup. Ct. Ill. Certiorari denied. Reported below: 117 Ill. 2d 507, 513 N. E. 2d 387.

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No. 87-1141. KOCH REFINING CO. ET AL. *v.* FARMERS UNION CENTRAL EXCHANGE, INC., ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 831 F. 2d 1339.

No. 87-1144. IN RE VANNIER. Sup. Ct. Mo. Certiorari denied.

No. 87-1147. VILLAGE OF NEW LENOX, ILLINOIS *v.* UNION NATIONAL BANK & TRUST COMPANY OF JOLIET, AS TRUSTEE, ET AL. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 152 Ill. App. 3d 919, 505 N. E. 2d 1.

No. 87-1149. REAGIN *v.* TERRY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 829 F. 2d 36.

No. 87-1158. FORASTIERE, CHAIRMAN OF THE BOARD OF FIRE COMMISSIONERS OF SPRINGFIELD, MASSACHUSETTS *v.* BREAUULT. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 401 Mass. 26, 513 N. E. 2d 1277.

No. 87-1171. CODY ET AL. *v.* HILLARD ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 830 F. 2d 912.

No. 87-1175. PARKER-HANNIFIN CORP. *v.* KISER ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 831 F. 2d 423.

No. 87-1188. CASTANEDA *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 8th Cir. Certiorari denied. Reported below: 828 F. 2d 501.

No. 87-1204. JONES ET UX. *v.* BOROUGH OF MORRISVILLE, PENNSYLVANIA, ET AL; and JONES ET UX. *v.* PRINCETON UNIVERSITY ET AL. C. A. 3d Cir. Certiorari denied.

No. 87-1211. GUIDER *v.* SMITH ET AL. Ct. App. Mich. Certiorari denied. Reported below: 157 Mich. App. 92, 403 N. W. 2d 505.

No. 87-1233. MACDONALD *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 833 F. 2d 741.

No. 87-1242. GOAD *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 837 F. 2d 1096.

No. 87-1247. McDONOUGH *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 205 Conn. 352, 533 A. 2d 857.

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No. 87-1255. *KAPLAN v. UNITED STATES*. C. A. 1st Cir. Certiorari denied. Reported below: 832 F. 2d 676.

No. 87-5564. *MERCADO v. UNITED STATES*. C. A. 6th Cir. Certiorari denied. Reported below: 828 F. 2d 20.

No. 87-5581. *WHITE v. OKLAHOMA*. Ct. Crim. App. Okla. Certiorari denied. Reported below: 726 P. 2d 905.

No. 87-5647. *THOMPSON v. PFEIFFER ET AL.* C. A. 5th Cir. Certiorari denied. Reported below: 822 F. 2d 57.

No. 87-5674. *BROWN v. CALIFORNIA*. Ct. App. Cal., 6th App. Dist. Certiorari denied. Reported below: 191 Cal. App. 3d 761, 236 Cal. Rptr. 506.

No. 87-5755. *LEGGINS v. LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION*. C. A. 8th Cir. Certiorari denied. Reported below: 822 F. 2d 764.

No. 87-5788. *MILLER v. UNITED STATES*. Ct. App. D. C. Certiorari denied.

No. 87-5849. *JONES v. JONES, WARDEN, ET AL.* C. A. 11th Cir. Certiorari denied. Reported below: 828 F. 2d 774.

No. 87-5869. *SALISBURY v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 824 F. 2d 973.

No. 87-5929. *NORMAN v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 831 F. 2d 1068.

No. 87-5958. *McKoy v. UNITED STATES*. Ct. App. D. C. Certiorari denied. Reported below: 518 A. 2d 1013.

No. 87-6006. *PEREZ v. UNITED STATES*. C. A. 3d Cir. Certiorari denied. Reported below: 831 F. 2d 288.

No. 87-6117. *PAGE v. GEORGIA*. Sup. Ct. Ga. Certiorari denied. Reported below: 257 Ga. 538, 361 S. E. 2d 153.

No. 87-6168. *ABOKHAI v. UNITED STATES*. C. A. 8th Cir. Certiorari denied. Reported below: 829 F. 2d 666.

No. 87-6176. *STOUT v. GRAND PRAIRIE INDEPENDENT SCHOOL DISTRICT ET AL.* Ct. App. Tex., 5th Dist. Certiorari denied. Reported below: 733 S. W. 2d 290.

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No. 87-6193. *COOK v. LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION*. C. A. 8th Cir. Certiorari denied.

No. 87-6195. *CAZARES v. REFUGIA SANDOVAL*. Ct. App. Tex., 3d Dist. Certiorari denied.

No. 87-6197. *DONEGAN v. MCWHERTER, WARDEN, ET AL.* C. A. 6th Cir. Certiorari denied. Reported below: 833 F. 2d 1012.

No. 87-6204. *MILTON v. WORLD SAVINGS & LOAN ASSN.* C. A. 5th Cir. Certiorari denied.

No. 87-6208. *ROBINSON v. CITY OF DECATUR, ALABAMA, ET AL.* C. A. 11th Cir. Certiorari denied. Reported below: 820 F. 2d 1229.

No. 87-6210. *HALLINGSTAD v. HARVEY ET AL.* Sup. Ct. Wis. Certiorari denied.

No. 87-6218. *MUNGIN v. GEORGIA*. Ct. App. Ga. Certiorari denied. Reported below: 183 Ga. App. 290, 358 S. E. 2d 673.

No. 87-6229. *SAZENSKI v. UNITED STATES*. C. A. 8th Cir. Certiorari denied. Reported below: 833 F. 2d 741.

No. 87-6249. *ROSS v. ZIMMERMAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AND DIAGNOSTIC AND CLASSIFICATION CENTER AT GRATERFORD, ET AL.* C. A. 3d Cir. Certiorari denied.

No. 87-6280. *ESCH v. UNITED STATES*. C. A. 10th Cir. Certiorari denied. Reported below: 832 F. 2d 531.

No. 87-6288. *WILSON v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 833 F. 2d 310.

No. 87-6290. *BROWN v. UNITED STATES*. C. A. 7th Cir. Certiorari denied. Reported below: 832 F. 2d 991.

No. 87-6303. *SMITH v. UNITED STATES*. Ct. App. D. C. Certiorari denied.

No. 87-6305. *FERRIS v. UNITED STATES*. C. A. Fed. Cir. Certiorari denied. Reported below: 833 F. 2d 1023.

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No. 87-6309. *HARDIN v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 833 F. 2d 1008.

No. 87-6313. *GRIFFIN v. UNITED STATES*. C. A. 7th Cir. Certiorari denied. Reported below: 827 F. 2d 1108.

No. 86-1963. *ARIZONA v. CHICAGO TITLE INSURANCE CO. ET AL.* C. A. 3d Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 815 F. 2d 696.

No. 86-7002. *BRECHEEN v. OKLAHOMA*. Ct. Crim. App. Okla. Certiorari denied. Reported below: 732 P. 2d 889.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

This Court has insisted that an accused be tried by "a public tribunal free of prejudice, passion, excitement, and tyrannical power." *Chambers v. Florida*, 309 U. S. 227, 236-237 (1940). We have recognized that failure to ensure the impartiality of a jury "violates even the minimal standards of due process." *Irvin v. Dowd*, 366 U. S. 717, 722 (1961). The Oklahoma court's denial of petitioner's unopposed motion for change of venue raises serious doubts about whether those minimal standards were met in this case. These doubts demand that we undertake two separate inquiries. First, we must consider whether and to what extent our precedents regarding jury impartiality set constitutional limits on state change of venue standards. Second, we must address the proper application of those precedents to the unique setting of capital sentencings.

I

On March 23, 1983, Marie Stubbs, wife of Hilton Stubbs, a prominent storekeeper in Ardmore, Oklahoma, was shot and killed in her home. The murder and the subsequent arrest of petitioner Robert Brecheen were the subject of extensive local newspaper and television coverage. Ardmore, which has a population of approximately 25,000, is located in Carter County, which has a population of approximately 40,000. Petitioner's attorney filed a motion, accompanied by affidavits, for change of venue from Carter County. Although the motion was unopposed, the trial judge refused to grant it after conducting *voir dire*. The jury that was finally empaneled contained one person who knew the victim, one

who knew the victim's daughter, and three who knew the victim's husband. All but one of the jurors were customers at the Stubbs' family store. Three jurors knew the prosecuting attorney and three knew officers who would testify for the prosecution. All of the jurors had heard of the case through pretrial publicity. The jury convicted petitioner of burglary and homicide and sentenced him to death.

On appeal, petitioner challenged, *inter alia*, the trial court's refusal to grant him a change of venue. The Oklahoma Court of Criminal Appeals rejected petitioner's claim, holding that "[i]t is only when a criminal defendant establishes by clear and convincing evidence that a fair trial is a virtual impossibility that such a motion should be granted." App. to Pet. for Cert. 2.

II

This Court has established that a refusal to grant a motion for change of venue may constitute a violation of due process. See *Groppi v. Wisconsin*, 400 U. S. 505 (1971); *Rideau v. Louisiana*, 373 U. S. 723 (1963); *Irvin v. Dowd*, *supra*. A defendant seeking to establish such a violation must demonstrate either that his trial resulted in "identifiable prejudice" or that it gave rise to a presumption of prejudice because it involved "such a probability that prejudice will result that it is deemed inherently lacking in due process." *Estes v. Texas*, 381 U. S. 532, 542-543 (1965). In deciding whether such a presumption of prejudice is warranted, courts must examine "any indications in the totality of circumstances that petitioner's trial was not fundamentally fair." *Murphy v. Florida*, 421 U. S. 794, 799 (1975).

We have had little occasion to apply these basic principles to determine whether particular state standards for change of venue comport with the requirements of due process. Most of our precedents regarding due process and jury neutrality consist of careful examinations of the circumstances surrounding specific trials to determine whether they give rise to a presumption of prejudice. See, e. g., *Sheppard v. Maxwell*, 384 U. S. 333 (1966); *Turner v. Louisiana*, 379 U. S. 466 (1965). Although we did strike down one state venue statute which categorically denied change of venue for misdemeanors, see *Groppi v. Wisconsin*, *supra*, we have not considered any other wholesale restrictions on venue change.

In this vacuum of constitutional precedent, States have taken divergent paths. Most States have followed the well-trod course of granting motions for venue change when the totality of the circumstances establish "a reasonable likelihood that in the absence of such relief, a fair trial cannot be had." *Martinez v. Superior Court*, 29 Cal. 3d 574, 577-578, 629 P. 2d 502, 503 (1981) (quoting *Maine v. Superior Court*, 68 Cal. 2d 375, 383, 438 P. 2d 372, 377 (1968)). The *Martinez* court defined "reasonable likelihood" as a lesser standard of proof than "more probable than not." 29 Cal. 3d, at 578, 629 P. 2d, at 503. See also *People v. Gendron*, 41 Ill. 2d 351, 243 N. E. 2d 208 (1968) (adopting "reasonable likelihood" standard), cert. denied, 396 U. S. 889 (1969); *State v. Cuevas*, 288 N. W. 2d 525 (Iowa 1980) (same); *State v. Beier*, 263 N. W. 2d 622 (Minn. 1978) (same). Other States have decided to grant change of venue motions when the circumstances establish a substantial likelihood of prejudice. See, e. g., *Commonwealth v. Cohen*, 489 Pa. 167, 413 A. 2d 1066, cert. denied, 449 U. S. 840 (1980). The American Bar Association has explicitly endorsed this latter approach in its Standards Relating to Fair Trial and Free Press 8-3.3(c) (2d ed. 1980). Oklahoma, however, diverges sharply from its sister States in setting a much higher threshold for granting a change of venue motion, requiring "clear and convincing evidence" that a fair trial is a "virtual impossibility."

In my view, Oklahoma's strong presumption against venue change fails to accommodate properly the concerns expressed in our due process precedents. Those precedents implicitly acknowledge that the defendant's interest in a fundamentally fair trial outweighs the State's interest in holding that trial in a particular district. Oklahoma's standard is out of step with this Court's repeated recognition that "our system of law has always endeavored to prevent *even the probability* of unfairness." *In re Murchison*, 349 U. S. 133, 136 (1955) (emphasis added), quoted in *Sheppard v. Maxwell*, *supra*, at 352; *Estes v. Texas*, *supra*, at 543. We frequently have invoked the opinion of Chief Justice Taft 50 years ago, which held that "[e]very procedure which would offer a *possible* temptation to the average man . . . to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law." *Tumey v. Ohio*, 273 U. S. 510, 532 (1927) (emphasis added), cited in *Irvin v. Dowd*, *supra*, at 722; *Estes v. Texas*,

supra, at 543. We should grant certiorari to establish clearly the minimal requirements of the Due Process Clause for state change of venue standards.

III

Our prior precedents have left a second gap of perhaps even more importance. We have failed to give any guidance as to the circumstances that might give rise to a presumption of prejudice in the sentencing phase of a bifurcated capital trial. Our cases have dealt exclusively with factors that might influence the jury in its factfinding function when it makes determinations of guilt or innocence. We held, for example, that the pretrial broadcast of a defendant in the act of confessing to the charged crime inherently prejudiced the jury's ability to evaluate objectively his guilt. See *Rideau v. Louisiana*, *supra*. Similarly, we held that when key government witnesses doubled as official guardians of the jury during deliberations, the ability of the jury to assess witness credibility was presumptively prejudiced. See *Turner v. Louisiana*, *supra*. But the influences that might impair the truth-seeking function of the jury in guilt determinations are not identical to those that impinge on its responsibility to administer fairly the death penalty.

This case demonstrates that lack of congruence. The fact that many of the jurors knew the victim or members of the victim's family might not presumptively establish the fundamental unfairness of the guilt proceedings. There may be little reason to doubt the testimony of such jurors at *voir dire* that they could put aside their knowledge of the consequences of the crime in order to establish the facts of its commission. But the jury wears an altogether different hat when it sits as sentencer. It must make a moral decision whether a defendant already found guilty deserves to die for his crime. As we have previously recognized, the function of the sentencing jury is to "express the conscience of the community on the ultimate question of life or death." *Witherspoon v. Illinois*, 391 U. S. 510, 519 (1968). When a jury is composed, as this petitioner's was, of people who are personally familiar with the consequences of a defendant's crime, it cannot perform this function in an impartial manner. We held as much just last Term, when we declared that the Eighth Amendment forbids the introduction of a victim impact statement during the sentencing phase of a capital trial. We concluded that a description of the effects of the murder on the victim's family and friends

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was too likely to inflame the jury and lead to a sentence based on caprice or emotion rather than reason. See *Booth v. Maryland*, 482 U. S. 496 (1987). Surely empaneling a jury with personal knowledge of these effects would have much the same result. The likelihood of such a result should give rise to a presumption of prejudice during the sentencing phase, just as extensive news coverage might establish that presumption in the guilt phase.

IV

This petition raises two important issues that call for this Court's review. We must establish what the Due Process Clause requires of state legislatures and courts in formulating general standards for change of venue. Oklahoma's strong presumption against granting such motions raises serious concerns about the fundamental fairness of its criminal proceedings. In addition, we must recognize and rule on the difference between the guilt and penalty phases of a capital trial for the purpose of presuming prejudice when jury impartiality is called into question. This distinction is required not because death is a qualitatively different penalty from any other (although it is), but because the jury's function is profoundly altered when it sits as sentencer.

No. 87-699. *MARYLAND ET AL. v. ANDERSON*. Ct. App. Md. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 310 Md. 217, 528 A. 2d 904.

No. 87-771. *CLARK-COWLITZ JOINT OPERATING AGENCY v. FEDERAL ENERGY REGULATORY COMMISSION ET AL.* C. A. D. C. Cir. Certiorari denied. JUSTICE SCALIA took no part in the consideration or decision of this petition. Reported below: 264 U. S. App. D. C. 58, 826 F. 2d 1074.

No. 87-841. *MISSISSIPPI v. DAVIS*. Sup. Ct. Miss. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 512 So. 2d 1291.

No. 87-970. *HUGHES ET UX. v. UNITED VAN LINES, INC., ET AL.* C. A. 7th Cir. Certiorari denied. Reported below: 829 F. 2d 1407.

JUSTICE WHITE, dissenting:

The Court of Appeals for the Seventh Circuit held in this case that the Carmack Amendment to the Interstate Commerce

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Act, 49 U. S. C. § 10103, bars a shipper from pursuing state and common-law remedies against a carrier for damages to goods shipped in interstate commerce. The court reasoned that the Act was designed to establish "uniform federal guidelines" that would "remove the uncertainty surrounding a carrier's liability when damage occurs to a shipper's interstate shipment." 829 F. 2d 1407, 1415 (1987). The congressional intent to eliminate such uncertainty would be defeated, said the court, if shippers were allowed to choose among federal, state, and common-law remedies. The court's decision relied in large measure on *Adams Express Co. v. Croninger*, 226 U. S. 491 (1913), which construed an earlier version of the Carmack Amendment as pre-empting state regulation of carrier liability.

The court recognized that its view of the pre-emptive scope of the Carmack Amendment was shared by three other Circuits. See 829 F. 2d, at 1414 (citing *Air Products & Chemicals, Inc. v. Illinois Central Gulf R. Co.*, 721 F. 2d 483, 484-485 (CA5 1983), cert. denied, 469 U. S. 832 (1984); *Fulton v. Chicago, R. I. & P. R. Co.*, 481 F. 2d 326, 331-332 (CA8), cert. denied, 414 U. S. 1040 (1973); *W. D. Lawson & Co. v. Penn Central Co.*, 456 F. 2d 419, 421 (CA6 1972)). The court noted that a divergent position had been taken by the Tenth Circuit, however, in *Reed v. AAACON Auto Transport, Inc.*, 637 F. 2d 1302, 1304-1305 (1981); *Litvak Meat Co. v. Baker*, 446 F. 2d 329 (1971); and *L. E. Whitlock Truck Service, Inc. v. Regal Drilling Co.*, 333 F. 2d 488 (1964). For example, the *Litvak* court held that the Carmack Amendment "did not oust all other remedial rights of shippers" against interstate carriers. 446 F. 2d, at 337.

Accordingly, because a conflict exists among the Circuits concerning the pre-emptive scope of the Carmack Amendment, I would grant certiorari.

No. 87-999. *MCQUILLEN v. WISCONSIN EDUCATION ASSOCIATION COUNCIL ET AL.* C. A. 7th Cir. Certiorari denied. Reported below: 830 F. 2d 659.

JUSTICE WHITE, dissenting.

This case presents the question whether a plaintiff may prevail on a disparate treatment claim under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, 42 U. S. C. § 2000e *et seq.*, only by establishing that the employer's discriminatory intent was the "but for" cause of the adverse employment action.

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The Court of Appeals for the Seventh Circuit held in this case that a Title VII plaintiff must prove that "the discriminatory motivation was a determining factor in the challenged employment decision in that the employee would have received the job absent the discriminatory motivation." 830 F. 2d 659, 664 (1987). The court found support for this "but for" standard of causation in the language of Title VII, which prohibits employers from discriminating against an employee or potential employee "because of such individual's race, color, religion, sex or national origin." § 2000e-2(a)(1) (emphasis added).

The Seventh Circuit expressly rejected the standard of causation adopted by the Eighth Circuit in *Bibbs v. Block*, 778 F. 2d 1318 (1985) (en banc). A plaintiff can establish Title VII liability under *Bibbs* merely by proving that "an unlawful motive played some part in the employment decision." *Id.*, at 1323. If the employer establishes that discriminatory intent was not the determinative factor in the employment decision, however, the plaintiff's recovery is limited to declaratory relief, an injunction against future or continued discrimination, and partial attorney's fees.

The Seventh Circuit's view that Title VII liability is established only when an unlawful motive was the "but for" cause of the challenged employment action is shared by three other Circuits. See *Haskins v. United States Dept. of Army*, 808 F. 2d 1192, 1198 (CA6), cert. denied, 484 U. S. 815 (1987); *Lewis v. University of Pittsburgh*, 725 F. 2d 910, 915-916 (CA3 1983), cert. denied, 469 U. S. 892 (1984); *Mack v. Cape Elizabeth School Bd.*, 553 F. 2d 720, 722 (CA1 1977). Two Circuits have indicated that the discriminatory motive must be a "significant" or "substantial" factor, but not necessarily the determinative factor, before liability may be imposed on an employer under Title VII. See *Fadhl v. City and County of San Francisco*, 741 F. 2d 1163, 1166 (CA9 1984); *Whiting v. Jackson State University*, 616 F. 2d 116, 121 (CA5 1980).

Accordingly, in view of the divergent positions taken by the Federal Courts of Appeals with regard to the standard of causation to be applied in determining Title VII liability, I would grant certiorari.

No. 87-1119. PARAVECCHIO *v.* MEMORIAL HOSPITAL OF LARAMIE COUNTY ET AL. Sup. Ct. Wyo. Motion of Dean Crocker

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et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 742 P. 2d 1276.

No. 87-1132. TOLEDO TRUST CO., AS TRUSTEE OF TRUST NO. 4117, ET AL. v. SANTA BARBARA FOUNDATION. Sup. Ct. Ohio. Motions of Ohio Bankers Association Trust Division and American Bankers Association for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 32 Ohio St. 3d 141, 512 N. E. 2d 664.

No. 87-1143. HOLLIS v. CAMPBELL COUNTY DISTRICT COURT. C. A. 6th Cir. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant the petition for writ of certiorari and reverse the judgment. Reported below: 829 F. 2d 38.

No. 87-5323. STEFFEN v. OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 31 Ohio St. 3d 111, 509 N. E. 2d 383.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins and 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 petition for a writ of certiorari and vacate the death sentence in this case. But even if I did not hold this view, I would grant this petition in order to address the important unresolved issue whether an instruction that reduces a jury's sense of responsibility over a death sentence is nonetheless *per se* constitutional if it is accurate and non-misleading, even when the instruction serves no legitimate state penological interest.

II

In this case, petitioner was sentenced to death in accordance with the jury's recommendation. The trial court had instructed the jury:

"You must understand, however, the jury recommendation to the Court that the death penalty be imposed is just that, a recommendation, and is not binding upon the Court. The final decision as to whether the death penalty shall be imposed upon the defendant rests upon this Court after the

Court follows certain additional procedures required by the laws of this State. Therefore, even if you recommend the death penalty, the law requires the Court to decide whether or not the defendant, David Joseph Steffen, will actually be sentenced to death or to life imprisonment." Pet. for Cert. 6.

The Ohio Supreme Court characterized this as an "instruction to the jury that their recommendation of death would not be binding on the court, and that the final responsibility for the imposition of the death penalty rests with the court." 31 Ohio St. 3d 111, 113, 509 N. E. 2d 383, 387 (1987). The Ohio Supreme Court then rejected petitioner's argument that "such an instruction impermissibly reduces the jury's sense of responsibility and increases the likelihood of a recommendation of death," *ibid.*, relying upon *State v. Buell*, 22 Ohio St. 3d 124, 489 N. E. 2d 795 (1986), a prior Ohio Supreme Court case that had rejected the same challenge to a substantially similar instruction. Although *Buell* went out of its way to "emphatically emphasize [that] the better procedure would be to have no comment by the prosecutor or by the trial judge on the question of who bears the ultimate responsibility," the court concluded that the instruction was neither an inaccurate nor a misleading statement of Ohio law and held that the instruction was thus constitutional. *Id.*, at 144, 489 N. E. 2d, at 813.

I have no cause to second-guess the conclusion that this instruction accurately reflects the state of Ohio law, as authoritatively construed by the Ohio Supreme Court itself. I note, however, that although an Ohio jury's recommendation of death is not binding on a trial court, a trial court cannot impose the death sentence when the jury recommends life imprisonment. Ohio Rev. Code Ann. §2929.03(D)(2) (1987). Ohio's statutory scheme thus contemplates that juries will bear a crucial responsibility in deciding whether Ohio will impose a death sentence: making their recommendation necessary, if not sufficient, to any sentence of death. The question this case presents is whether an instruction stressing the preliminary nature of a jury's decision can so minimize the jury's sense of responsibility for its decision and so increase the likelihood of a recommendation of death as to be unconstitutional despite the accuracy of the instruction. This question is particularly sharpened here, where the state court evidently concedes that the instruction serves no valid state interest and in-

deed "emphatically emphasize[s]" that the instruction should not be given.

In *Caldwell v. Mississippi*, 472 U. S. 320 (1985), this Court laid down a general prohibition against trial comments that minimize a jury's sense of responsibility for a death sentence. We stated: "This Court has always premised its capital punishment decisions on the assumption that a capital sentencing jury recognizes the gravity of its task and proceeds with the appropriate awareness of its 'truly awesome responsibility.'" *Id.*, at 341. The Eighth Amendment was thus violated, we concluded, when the State attempted "to minimize the jury's sense of responsibility for determining the appropriateness of death," *ibid.*, by suggesting that the sentencing jury was not ultimately responsible because appellate review would be available. Such a suggestion, we reasoned, biased a jury in favor of death sentences in four ways: (1) a jury comprised of laypersons might not understand the limited nature of appellate review; (2) a jury might reach a death verdict, even if it was unconvinced death was the appropriate punishment, in order to "send a message" of extreme disapproval; (3) some jurors might correctly assume that judicial review can reverse a death sentence but not a life sentence and thus might reach a death verdict in order to delegate, and thus avoid, responsibility for making a decision between death and life; and (4) jurors otherwise reluctant to vote for a death sentence might, particularly on a divided jury, view the availability of judicial review as a good argument for giving in to a death sentence verdict. *Id.*, at 330-333.

Of these four sources of bias, only the first is arguably not present in this case because a jury's recommendation of death is subject to plenary judicial review in Ohio. The other three sources of bias cited in *Caldwell* are, however, just as applicable here as they were in *Caldwell*. This suggests that an accurate and non-misleading instruction may still raise sufficient fear of jury bias to make it unconstitutional under the *Caldwell* analysis. Indeed, a four-Justice plurality of the Court implied that an instruction that minimized a jury's sense of responsibility for a death sentence had to be "both accurate and relevant to a legitimate state penological interest" to survive Eighth Amendment scrutiny. *Id.*, at 335-336 (MARSHALL, J., joined by BRENNAN, BLACKMUN, and STEVENS, JJ.) (emphasis added). The plurality went on to suggest that an accurate and nonmisleading instruction about appellate review

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might be invalid because it would serve no valid state penological interest:

"That appellate review is available to a capital defendant sentenced to death is no valid basis for a jury to return such a sentence if otherwise it might not. It is simply a factor that in itself is wholly irrelevant to the determination of the appropriate sentence. The argument here urged the jurors to view themselves as taking only a preliminary step toward the actual determination of the appropriateness of death—a determination which would eventually be made by others and for which the jury was not responsible. Creating this image in the minds of the capital sentencers is not a valid state goal" *Id.*, at 336.

This analysis is equally applicable to an accurate instruction regarding the nonbinding nature of an Ohio jury's recommendation of death. JUSTICE O'CONNOR, however, did not join the part of *Caldwell* articulating this analysis and wrote separately to state her view that an accurate and nonmisleading instruction would present no constitutional difficulties. *Id.*, at 341–343 (concurring in part and concurring in judgment). Accordingly, because Justice Powell did not take part in *Caldwell*, see *id.*, at 341, a majority of this Court has never expressed a view as to the constitutional status of accurate and nonmisleading instructions that minimize jury responsibility by emphasizing the preliminary nature of their decision.

I would therefore vote to grant the petition and set the case for oral argument on the issue left unresolved by *Caldwell*.

No. 87–5449. *ANDREWS v. SHULSEN, WARDEN, ET AL.* C. A. 10th Cir. Certiorari denied. Reported below: 802 F. 2d 1256.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN 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, see *Gregg v. Georgia*, 428 U. S. 153, 231–241 (1976) (MARSHALL, J., dissenting), I would grant the petition for certiorari and vacate petitioner's death sentence. Even if I did not hold this view, I would grant the petition because petitioner William Andrews was convicted of murder and sentenced to death under circumstances raising grave concerns

of impermissible racial bias. These circumstances include a mid-trial incident in which a juror handed the bailiff a napkin with a drawing of a man on a gallows above the inscription, "Hang the Niggers." The District Court in this case refused even to undertake an evidentiary hearing to investigate petitioner's substantial allegations of racial prejudice. The Constitution cannot countenance such indifference and summary treatment when a person's life is at stake.

I

Petitioner was convicted for his role in a multiple murder during the robbery of a hi-fi shop in Ogden, Utah. The ringleader of the crimes, Dale Pierre, was executed last year. Evidence at trial indicated that petitioner had a substantially less active role in the murders than Pierre. The two men entered the shop together and forced five people into the store's basement. There the victims were forced to drink liquid drain cleaner, which induced violent vomiting. One of the two victims who survived the robbery testified that petitioner said, "I can't do it, I'm scared," and that petitioner left the scene shortly thereafter. Only after petitioner left did Pierre carry out, in particularly gruesome fashion, the multiple murders for which petitioner has been sentenced to die. Pet. for Cert. 3.

The murders understandably attracted substantial attention in the local press and the community from which the jury venire was drawn. The incident also may have generated racist sentiments, inasmuch as the defendants were black people and the victims were white members of the local community. The single black member of the venire was excluded, and an all-white jury was empaneled.

An ugly racial incident involving the jury occurred during the trial. The jury was eating lunch in a separate dining room when a juror presented the bailiff with a drawing that had been made on a napkin. The drawing represented a stick figure hanging on a gallows. Underneath the figure were the words, "Hang the Niggers." The bailiff was unable to say who had made the drawing or how many other jurors had seen it, although he did inform the court that "some of the jurors" had asked him "what the court may do about this." The only action the trial court took in response was to issue a general instruction to the jury to "ignore communications from foolish people." *Id.*, at 9-10, and n. 4.

After petitioner and Pierre were convicted, the court ordered a 5-day recess. The jury was not sequestered. During this time, media coverage of the conviction was widespread and, petitioner alleges, racially inflammatory. Petitioner alleges, for example, that one newspaper ran a false report that petitioner had directed a "Black Power" closed-fist gesture at one of the surviving victims after the verdict was read. *Id.*, at 10. The jury returned for the separate sentencing hearing and voted unanimously to sentence petitioner to death.

In his petition for a writ of habeas corpus, petitioner alleged that adverse publicity and hostile community sentiment had injected racial animus into his trial and undermined his right to a fair trial. The District Court refused to convene an evidentiary hearing to consider this claim. 600 F. Supp. 408, 415-416 (Utah 1984). The Court of Appeals for the Tenth Circuit upheld this refusal with little discussion, stating: "Having reviewed the briefs and the appellate record, we conclude that no hearing is required under the principles of *Townsend v. Sain*, 372 U. S. 293 (1963), and that the constitutional standard for a fair trial has been met." 802 F. 2d 1256, 1260 (1986) (citations omitted).

II

"This Court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias." *Smith v. Phillips*, 455 U. S. 209, 215 (1982). Such a hearing is, of course, especially vital when the defendant has been condemned to die. In *Turner v. Murray*, 476 U. S. 28 (1986), the Court vacated a death sentence entered in a case in which the trial court had refused the defendant's request to question the prospective jurors on racial prejudice. The plurality recognized that "in light of the complete finality of the death sentence," the Constitution requires district courts to be especially solicitous of allegations of racial prejudice in capital cases. *Id.*, at 35. The Court therefore vacated the sentence, even though no specific allegations of racial prejudice had been made other than the fact that the case involved a black defendant and a white victim. The plurality concluded that "the risk that racial prejudice may have infected petitioner's capital sentencing [was] unacceptable in light of the ease with which that risk could have been minimized." *Id.*, at 36.

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This case involves far more serious and specific allegations of racial animus than did *Turner*, including a vulgar incident of lynch-mob racism reminiscent of Reconstruction days. Moreover, petitioner is not asking this Court to decide whether there is sufficient evidence of racial prejudice to impeach the conviction and sentence. He seeks only to have the District Court undertake an evidentiary hearing to consider his charges. I would think it clear that the Constitution, not to mention common decency, requires no less than this modest procedure. See *Tanner v. United States*, 483 U. S. 107, 142 (1987) (MARSHALL, J., concurring in part and dissenting in part).

III

Was it one (or more) of petitioner's jurors who drew a black man hanging on a gallows and attached the inscription, "Hang the Niggers"? How many other jurors saw the incendiary drawing before it was turned over to the bailiff? Might it have had any effect on the deliberations? Was the jury's decision to sentence petitioner to die influenced by racially charged media coverage of the trial between the guilt and penalty phases? These are among the questions that petitioner deserves to have at least considered before he is put to death for a series of murders in which he played only a secondary role. It is conscience shocking that all three levels of the federal judiciary are willing to send petitioner to his death without so much as investigating these serious allegations at an evidentiary hearing. Not only is this less process than due; it is no process at all. I dissent.

No. 87-5722. *PATTERSON v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 812 F. 2d 1188.

JUSTICE WHITE, with whom JUSTICE BRENNAN joins, dissenting.

In *Michigan v. Tucker*, 417 U. S. 433, 447 (1974), this Court expressly left open the question of the admissibility of physical evidence obtained as a result of an interrogation conducted contrary to the rules set forth in *Miranda v. Arizona*, 384 U. S. 436 (1966). Since that time, the state and federal courts have been divided on this question.¹ Indeed, in *Massachusetts v. White*, 439 U. S. 280

¹Some courts faced with this question have concluded that physical evidence so obtained must be suppressed. See, e. g., *United States v. Castellana*, 488 F. 2d 65, 67 (CA5 1974); *State v. Preston*, 411 A. 2d 402, 407-408 (Me. 1980); *Commonwealth v. White*, 374 Mass. 132, 371 N. E. 2d 777 (1977),

(1978), this Court was evenly divided on the issue of the admissibility of physical evidence obtained from an interrogation that violated *Miranda*.

Here, petitioner was arrested in Mexico by local officials when he attempted to pass a counterfeit \$20 bill at a store in Tijuana. While still in the custody of Mexican police, petitioner was questioned by United States Secret Service agents who failed to inform him of his rights under *Miranda*. During the questioning, petitioner provided agents with a detailed description of a counterfeiting operation based in San Diego, California. Agents used petitioner's confession to obtain a warrant to search the facility petitioner described; there, a variety of items relating to the counterfeiting enterprise were discovered.

Petitioner argued that the physical evidence obtained in the search of the counterfeiting operation should be suppressed, claiming that this evidence was inadmissible as "fruits" of the interrogation which violated *Miranda*. But the Court of Appeals for the Ninth Circuit affirmed the District Court's rejection of this contention. 812 F. 2d 1188 (1987). The Court of Appeals rested its conclusion in part on prior Ninth Circuit decisions, *e. g.*, *United States v. Lemon*, 550 F. 2d 467, 473 (1977), and in part on our decision in *Oregon v. Elstad*, 470 U. S. 298, 304-309 (1985), which held that a confession that was the "fruit" of an earlier violation of *Miranda* (but not the Fifth Amendment) was admissible.

While *Elstad* has been considered illuminating by some Courts of Appeals on the question of admissibility of physical evidence yielded from a *Miranda* violation,² that decision did not squarely address the question presented here, and in fact, left the matter open. *Elstad*, 470 U. S., at 308; *id.*, at 347, n. 29 (BRENNAN, J., dissenting). Consequently, I would grant certiorari in this case

aff'd by an equally divided Court, 439 U. S. 280 (1978). Others have reached the opposite conclusion. See, *e. g.*, *United States ex rel. Hudson v. Cannon*, 529 F. 2d 890, 894-895 (CA7 1976); *United States v. Massey*, 437 F. Supp. 843, 860-861 (MD Fla. 1977); *Wilson v. Zant*, 249 Ga. 373, 377-379, 290 S. E. 2d 442, 447-448, cert. denied, 459 U. S. 1092 (1982).

Many courts have noted the conflict, but have declined to take a position. See, *e. g.*, *United States v. Scaf*, 708 F. 2d 1540, 1545-1546 (CA10 1983); *United States v. Downing*, 665 F. 2d 404, 409, n. 5 (CA1 1981).

² See, *e. g.*, 812 F. 2d, at 1193 (case below); *United States v. Quinn*, 815 F. 2d 153, 160 (CA1 1987); *United States v. Morales*, 788 F. 2d 883, 886-887 (CA2 1986).

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to resolve the conflict which has existed since *Tucker*, and answer the question presented here.

No. 87-5781. *ENGLE v. FLORIDA*. Sup. Ct. Fla. Certiorari denied. Reported below: 510 So. 2d 881.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN 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, see *Gregg v. Georgia*, 428 U. S. 153, 231-241 (1976) (MARSHALL, J., dissenting), I would grant the petition for certiorari and vacate petitioner's death sentence.

I

Even if I did not hold this view, I would grant the petition for certiorari to consider petitioner's contention that the Florida Supreme Court is applying the review standard of *Tedder v. State*, 322 So. 2d 908, 910 (1975) (*per curiam*), in a manner that has denigrated the role of legitimate mitigating circumstances in Florida's sentencing scheme and that has led to the arbitrary infliction of the death penalty. Petitioner's sentencing jury recommended life imprisonment, but the trial judge overrode the jury's recommendation and imposed the death sentence. Under Florida's unusual system of capital sentencing, the trial judge is given the power to overturn a sentencing jury's rejection of the death penalty. In upholding Florida's sentencing system against various constitutional challenges, this Court repeatedly has relied on the Florida rule, announced in *Tedder*, that "[i]n order to sustain a sentence of death following a jury's recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ," *ibid.* See *Spaziano v. Florida*, 468 U. S. 447, 465-466 (1984); *Barclay v. Florida*, 463 U. S. 939, 955-956, 958 (1983) (REHNQUIST, J., joined by Burger, C. J., and WHITE and O'CONNOR, JJ.); *Proffitt v. Florida*, 428 U. S. 242, 249 (1976) (opinion of Stewart, Powell, and STEVENS, JJ.). The trial judge in this case failed even to consider the reasonableness of the jury's recommendation and refused to recognize petitioner's lesser role in the crime as a valid mitigating circumstance. The Florida Supreme Court nonetheless affirmed the override of the jury's recommendation, arguing that it would be

"unreasonable . . . to conclude that [petitioner] played no part in the brutal slaying." 510 So. 2d 881, 884 (1987) (*per curiam*). This reasoning evinces a cramped view of mitigating circumstances regarding evidence of petitioner's lesser role that is contrary to the constitutional principles recognized in *Lockett v. Ohio*, 438 U. S. 586 (1978), and *Eddings v. Oklahoma*, 455 U. S. 104 (1982). In addition, a review of this and other cases convinces me that the Florida Supreme Court has embraced conflicting views of whether such mitigating evidence may justify the jury's recommendation of life imprisonment. The court's inconsistent application of the *Tedder* standard in felony-murder cases has led to the arbitrary imposition of the death penalty.

Petitioner was charged, along with Rufus Stevens, with the murder of Eleanor Tolin, a cashier at the Majik Market in Jacksonville, Florida.¹ Evidence presented by the State at trial indicated that Stevens had a leadership role and planned the robbery of the market, whereas petitioner was the follower in the scheme. Evidence also indicated that Stevens was the actual killer. During guilt-phase deliberations, the jurors twice asked the judge whether they had "to be convinced the defendant personally killed the victim to render a [verdict] of murder in the first degree." Pet. for Cert. 5.² The penalty phase of the trial began immediately after the jury returned the guilty verdict. No additional evidence was presented. Counsel presented closing arguments and the jury was instructed to base its penalty recommendation on the evidence presented during the guilt phase. In his summation to the jury prior to the sentencing phase, the prosecutor stated:

"You're concerned whether he had to have actually thrust the knife on her. I know you were concerned about that. . . . But if you believe, if you believe that Rufus Stevens killed that girl for the purpose of not being identified, that he

¹ Stevens was convicted of Eleanor Tolin's murder in a separate trial. The same trial judge, Judge Santora, overrode the jury's recommendation of life imprisonment and sentenced Stevens to death. The conviction and sentence were affirmed by the Florida Supreme Court. *Stevens v. State*, 419 So. 2d 1058 (1982), cert. denied, 459 U. S. 1228 (1983).

² Under Florida law, an individual is guilty of first-degree murder when a killing occurs during the commission of a robbery even though the individual did not actually do the killing. See *Hawkins v. State*, 436 So. 2d 44, 46 (Fla. 1983).

formed the intent to kill her for that purpose, that is first degree murder and then if you believe that [petitioner] gave this knife to Rufus Stevens, you find he is just as guilty as Rufus Stevens." *Id.*, at 6-7.

After deliberating for only 25 minutes, the jury returned a recommendation that petitioner be sentenced to life imprisonment.

Defense counsel argued to the trial judge that the jury's recommendation was reasonable because it was based on the view that Rufus Stevens was the leader, planner, and dominant participant in the robbery and murder, whereas petitioner was the follower and not the actual killer. The trial judge responded: "Are you under the impression that if two men participate in a crime like this, one of them kills her and the other one sits there and aids and abets, that he is not equally guilty? . . . That he should not suffer the same fate?" *Id.*, at 8. The trial judge proceeded to override the jury's recommendation and sentenced petitioner to death. On direct appeal, the Florida Supreme Court affirmed petitioner's conviction but reversed the death sentence because the trial judge had considered the testimony of Rufus Stevens at his separate trial in violation of petitioner's Sixth Amendment right of confrontation. See *Engle v. State*, 438 So. 2d 803, 813-814 (1983).

Following a new sentencing hearing, the same trial judge found four aggravating circumstances and no mitigating circumstances, and he again sentenced petitioner to death. The judge did not refer to the jury's recommendation of life imprisonment and made no attempt to evaluate the reasoning behind that recommendation. On appeal, petitioner argued that the jury's recommendation of life imprisonment was reasonable and thus should be upheld under the standard of *Tedder v. State*, 322 So. 2d 908 (1975). As developed by the Florida Supreme Court, and relied on by this Court, the *Tedder* standard requires an inquiry into whether the jury reasonably could have based its recommendation on statutory or nonstatutory mitigating circumstances. See *Amazon v. State*, 487 So. 2d 8, 13 (1986); *Welty v. State*, 402 So. 2d 1159, 1164 (1981). Petitioner argued that evidence before the jury—evidence presented by the State's own witnesses—indicated that petitioner played a lesser role in the robbery and murder and that Stevens did the actual killing. The jury's questions during its guilt-phase deliberations, and the remarks of the prosecutor prior

to the sentencing phase, reinforced the view that the jury returned its life recommendation based on this lesser role.

The Florida Supreme Court affirmed the imposition of the death sentence. The court held that there was "ample support . . . for each of the aggravating circumstances," 510 So. 2d, at 884, and found no error in the trial judge's determination that there were no mitigating circumstances. The court noted petitioner's claim that the jury's recommendation was reasonable because it may have believed that Stevens actually did the killing and was the dominant force behind the robbery. The court concluded, however, that "[i]t would be unreasonable under these circumstances to conclude that [petitioner] *played no part* in the brutal slaying. Hence, there was not a reasonable basis for the jury's recommendation of life imprisonment." *Ibid.* (emphasis added).

The Florida Supreme Court's reasoning thus requires that unless petitioner can show he "played no part" in the killing, evidence that he was not the actual killer, and that his role was as a follower rather than a leader, are not mitigating circumstances on which a reasonable juror could rely in recommending a life sentence. Such a view is wrong as a matter of federal law. In *Lockett v. Ohio*, *supra*, and *Eddings v. Oklahoma*, *supra*, this Court held that any aspect of the defendant's character and the circumstances of the offense may be considered in mitigation. This Court often has recognized that "the level of criminal responsibility of a person convicted of murder may vary according to the extent of that individual's participation in the crime." *Sumner v. Shuman*, 483 U. S. 66, 79 (1987). Indeed, in *Tison v. Arizona*, 481 U. S. 137, 151 (1987), the Court recognized that a State may never constitutionally impose the death penalty for felony murder unless the defendant was a major participant in the felony and displayed a reckless indifference to human life. By finding the jury's recommendation unreasonable because petitioner was unable to show he played no part in the killing, the Florida Supreme Court ignored the presence of valid mitigating evidence that the jury apparently relied on in rendering its recommendation of life imprisonment. The court's determination denigrates the role of valid mitigating circumstances in Florida's sentencing scheme, contrary to the principles of *Lockett* and *Eddings*.

Completely apart from this infirmity, the Florida Supreme Court's endorsement of the trial judge's refusal to consider the mitigating effect of petitioner's lesser role in this case is at odds with other Florida Supreme Court decisions applying the *Tedder* standard. This inconsistency is unexplained. The haphazard application of the *Tedder* standard in cases in which an accomplice's lesser role may have influenced the jury's recommendation of life imprisonment convinces me that the Florida sentencing scheme is being applied in a manner inconsistent with the requirements of due process.

The Florida Supreme Court's decisions in *Barclay v. State*, 470 So. 2d 691 (1985), and *Hawkins v. State*, 436 So. 2d 44 (1983), illustrate the court's occasional readiness to defer to jury recommendations of life imprisonment based on the defendant's lesser role in the capital crime. In *Barclay* the court reversed the trial judge's override of the jury's recommendation of life imprisonment. The defendant Barclay was a member of a group that called itself the Black Liberation Army. The group abducted a hitchhiker and drove him to a trash dump. The victim was then stabbed repeatedly by Barclay, and shot twice in the head by the apparent leader of the group, Jacob Dougan. See *Barclay v. State*, 343 So. 2d 1266, 1267 (1977). The Florida Supreme Court held that the jury's recommendation of life imprisonment for Barclay was reasonable. The court argued:

"The jury apparently distinguished between Barclay and his main co-defendant, Jacob John Dougan, as evidenced by its recommendations of life imprisonment for Barclay (the follower) and death for Dougan (the leader). We hold that there was a rational basis for the jury's distinction between these co-defendants and that the trial court erred in overriding the jury's recommendation." 470 So. 2d, at 695.

Similarly, in *Hawkins* the court reversed an override of the jury's recommendation of life imprisonment, noting that evidence indicated that the defendant was not the triggerman, and holding that under those circumstances "there was a reasonable basis for the jury not to recommend the imposition of the death sentence." 436 So. 2d, at 47. Just as Barclay's and Hawkins' roles as followers justified the jury's recommendation of life, petitioner's role as a follower would seem to justify the jury's life recommendation. In the present case, the court did not cite or try to distinguish

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its holdings in *Barclay* and *Hawkins*, and simply concluded that because petitioner played some part in the murder, the jury's life recommendation was unreasonable. Without more, I fail to see how this reasoning can be squared with *Barclay* and *Hawkins*, in which both defendants also clearly played some part in the murders.

Defendants Barclay, Hawkins, and Engle all were present during violent murders. Each presented evidence in mitigation indicating that they were followers, not leaders, and that they did not do the actual killings. All three were sentenced to die by the trial judge after their juries determined that death was an inappropriate sentence. Barclay and Hawkins are now serving life sentences. If the Florida Supreme Court's decision in this case is allowed to stand, Engle will die in the electric chair. The Florida Supreme Court has not explained how these cases can be reconciled. As petitioner explains, these holdings create confusion as to whether it is wise, or even competent, for defense counsel to emphasize at trial the defendant's lesser role in a capital crime. The opinions in *Barclay*, *Hawkins*, and *Engle* appear collectively to "stand for the proposition that trying a penalty phase or appealing a 'life override' under Florida's capital sentencing scheme is akin to Russian Roulette." Pet. for Cert. 26. I believe the Florida Supreme Court has failed to apply the *Tedder* review standard in a consistent manner in these cases, leading to the arbitrary imposition of the death penalty. I also believe that in the present case the Florida Supreme Court based its decision on a view of mitigation that is contrary to the constitutional principles of *Lockett* and *Eddings*. I would therefore grant the petition for certiorari.

No. 87-5834. *WILLIAMSON v. FLORIDA*. Sup. Ct. Fla.;
No. 87-5860. *BARNARD v. TEXAS*. Ct. Crim. App. Tex.;
No. 87-5976. *CLAYTON v. PENNSYLVANIA*. Sup. Ct. Pa.;
No. 87-6150. *GHEENT v. CALIFORNIA*. Sup. Ct. Cal.;
No. 87-6158. *HAYS v. ALABAMA*. Sup. Ct. Ala.;
No. 87-6159. *DAVIS v. KEMP, WARDEN*. C. A. 11th Cir.;
No. 87-6203. *KIGHT v. FLORIDA*. Sup. Ct. Fla.; and
No. 87-6212. *DELONG v. VIRGINIA*. Sup. Ct. Va. Certiorari denied. Reported below: No. 87-5834, 511 So. 2d 289; No. 87-5860, 730 S. W. 2d 703; No. 87-5976, 516 Pa. 263, 532 A. 2d 385; No. 87-6150, 43 Cal. 3d 739, 739 P. 2d 1250; No. 87-6158, 518 So.

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2d 768; No. 87-6159, 829 F. 2d 1522; No. 87-6203, 512 So. 2d 922; No. 87-6212, 234 Va. 357, 362 S. E. 2d 669.

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. 87-460. *BOSCIO v. UNITED STATES*, 484 U. S. 1004;

No. 87-720. *HAGEN, EXECUTRIX OF THE ESTATE OF HAGEN v. SOUTH DAKOTA ET AL.*, 484 U. S. 998;

No. 87-890. *WALKER v. CONSUMERS POWER Co.*, 484 U. S. 1011;

No. 87-5782. *BECKER v. ADAMS DRUG Co., INC., ET AL.*, 484 U. S. 1015;

No. 87-5797. *VERHAGEN v. NEW YORK STATE OFFICE OF COURT ADMINISTRATION ET AL.*, 484 U. S. 1015; and

No. 87-5801. *ARUNGA v. JOHNSON ET AL.*, 484 U. S. 1015. Petitions for rehearing denied. JUSTICE KENNEDY took no part in the consideration or decision of these petitions.

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Dismissals Under Rule 53

No. 87-660. *PETERS ET AL. v. CITY OF SHREVEPORT*. C. A. 5th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 818 F. 2d 1148.

No. 87-985. *FINA OIL & CHEMICAL Co. ET AL. v. EL PASO NATURAL GAS Co.* Sup. Ct. Tex. Certiorari dismissed as to petitioner Sun Exploration & Production Co. under this Court's Rule 53.

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Appeal Dismissed

No. 87-317. *BEMIS PENTECOSTAL CHURCH ET AL. v. TENNESSEE ET AL.* Appeal from Sup. Ct. Tenn. dismissed for want of substantial federal question. Reported below: 731 S. W. 2d 897.

Certiorari Granted—Vacated and Remanded

No. 86-1008. *IMMIGRATION AND NATURALIZATION SERVICE v. FAZELIHKOMABAD*. C. A. 9th Cir. Certiorari granted, judg-

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ment vacated, and case remanded for further consideration in light of *INS v. Abudu*, ante, p. 94. Reported below: 794 F. 2d 1470.

No. 86-1049. *CITY OF LITTLE ROCK, ARKANSAS v. WILLIAMS*. C. A. 8th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *St. Louis v. Praprotnik*, ante, p. 112. Reported below: 802 F. 2d 296.

No. 87-852. *UNION OIL COMPANY OF CALIFORNIA v. SIERRA CLUB*. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U. S. 49 (1987). Reported below: 813 F. 2d 1480.

Miscellaneous Orders

No. — — —. *MURRAY v. UNITED STATES*. Motion to direct the Clerk to file the petition for writ of certiorari from the Judicial Council for the Ninth Circuit denied.

No. 94, Orig. *SOUTH CAROLINA v. BAKER, SECRETARY OF THE TREASURY*. Motion for clarification of the order entered December 7, 1987 [484 U. S. 973], granted. One-half of the total fee application filed November 4, 1987, is to be paid by the United States. One-fourth of the total fee application is to be paid by the State of South Carolina. One-fourth of the total fee application is to be paid by the National Governors' Association. [For earlier order herein, see, *e. g.*, 484 U. S. 973.]

No. 105, Orig. *KANSAS v. COLORADO*. Joint motion for approval of expenses incurred by Special Master Wade H. McCree, Jr., deceased, granted, and the allocation set forth in the motion is approved. [For earlier order herein, see, *e. g.*, 484 U. S. 910.]

No. 108, Orig. *NEBRASKA v. WYOMING ET AL.* Motion of Basin Electric to file a response to plaintiff's motion to amend petition granted. Motion of plaintiff to amend petition for an order enforcing decree and for injunctive relief denied. [For earlier order herein, see, *e. g.*, 484 U. S. 1040.]

No. 86-492. *BOYLE, PERSONAL REPRESENTATIVE OF THE HEIRS AND ESTATE OF BOYLE v. UNITED TECHNOLOGIES CORP.* C. A. 4th Cir. [Certiorari granted, 479 U. S. 1029.] Parties may file supplemental briefs on reargument, provided the briefs do not exceed 20 pages. *Amici curiae* may file supplemental briefs on reargument, provided the briefs do not exceed 10 pages. Such

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briefs shall be served and filed on or before close of business Wednesday, April 13, 1988.

No. 86-495. *K MART CORP. v. CARTIER, INC., ET AL.*;

No. 86-624. *47TH STREET PHOTO, INC. v. COALITION TO PRESERVE THE INTEGRITY OF AMERICAN TRADEMARKS ET AL.*; and

No. 86-625. *UNITED STATES ET AL. v. COALITION TO PRESERVE THE INTEGRITY OF AMERICAN TRADEMARKS ET AL.* C. A. D. C. Cir. [Certiorari granted, 479 U. S. 1005.] Cases restored to calendar for reargument on the merits.

No. 86-2037. *LANDERS v. NATIONAL RAILROAD PASSENGER CORPORATION ET AL.* C. A. 1st Cir. [Certiorari granted, 484 U. S. 962.] Motion of respondents to reconsider order denying motion for divided argument [484 U. S. 1055] denied.

No. 87-578. *BANK OF NOVA SCOTIA v. UNITED STATES*; and

No. 87-602. *KILPATRICK ET AL. v. UNITED STATES.* C. A. 10th Cir. [Certiorari granted, 484 U. S. 1003.] Motion of petitioners for leave to file portion of joint appendix under seal granted.

No. 87-5468. *JOHNSON v. MISSISSIPPI.* Sup. Ct. Miss. [Certiorari granted, 484 U. S. 1003.] Motion of Committee on Civil Rights of the Association of the Bar of the City of New York for leave to file a brief as *amicus curiae* granted.

No. 87-6248. *WILSON-THOMAS v. SMALL BUSINESS ADMINISTRATION.* C. A. 3d Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until March 28, 1988, within which to pay the docketing fee required by Rule 45(a) and to submit a petition for writ of certiorari 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. 87-5888. *IN RE ROY.* Petition for writ of habeas corpus denied.

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Probable Jurisdiction Noted

No. 87-1160. DUQUESNE LIGHT CO. ET AL. *v.* BARASCH ET AL. Appeal from Sup. Ct. Pa. Probable jurisdiction noted. Reported below: 516 Pa. 142, 532 A. 2d 325.

Certiorari Granted

No. 86-1088. CITY OF CANTON, OHIO *v.* HARRIS ET AL. C. A. 6th Cir. Certiorari granted. Reported below: 798 F. 2d 1414.

No. 87-996. COIT INDEPENDENCE JOINT VENTURE *v.* FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, AS RECEIVER OF FIRSTSOUTH, F. A. C. A. 5th Cir. Certiorari granted. Reported below: 829 F. 2d 563.

No. 87-1031. REED *v.* UNITED TRANSPORTATION UNION ET AL. C. A. 4th Cir. Certiorari granted. Reported below: 828 F. 2d 1066.

No. 87-1168. COMMISSIONER OF INTERNAL REVENUE *v.* CLARK ET UX. C. A. 4th Cir. Certiorari granted. Reported below: 828 F. 2d 221.

No. 87-121. DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. *v.* ADAMS. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 804 F. 2d 1526 and 816 F. 2d 1493.

No. 87-470. FORT WAYNE BOOKS, INC. *v.* INDIANA ET AL. Sup. Ct. Ind.; and

No. 87-614. SAPPENFIELD ET AL. *v.* INDIANA. Ct. App. Ind. Motions of PHE, Inc., Video Software Dealers Association, and American Booksellers Association, Inc., et al. for leave to file briefs as *amici curiae* in No. 87-470 granted. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: No. 87-470, 504 N. E. 2d 559; No. 87-614, 505 N. E. 2d 504.

No. 87-1167. PRICE WATERHOUSE *v.* HOPKINS. C. A. D. C. Cir. Certiorari granted. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 263 U. S. App. D. C. 321, 825 F. 2d 458.

No. 87-5259. TEAGUE *v.* LANE, DIRECTOR, ILLINOIS DEPARTMENT OF CORRECTIONS, ET AL. C. A. 7th Cir. Motion of peti-

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tioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 820 F. 2d 832.

No. 87-5677. HARRIS *v.* REED, WARDEN, ET AL. C. A. 7th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Question 1 presented by the petition. Reported below: 822 F. 2d 684.

Certiorari Denied

No. 86-1803. BLATTY *v.* NEW YORK TIMES CO. ET AL. Sup. Ct. Cal. Certiorari denied. Reported below: 42 Cal. 3d 1033, 728 P. 2d 1177.

No. 86-6710. LEWIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 788 F. 2d 1561.

No. 87-679. MCSURELY *v.* HUTCHISON. C. A. 6th Cir. Certiorari denied. Reported below: 823 F. 2d 1002.

No. 87-690. PETRONE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 822 F. 2d 54.

No. 87-695. TURNER, EXECUTRIX OF THE ESTATE OF TURNER *v.* CITY OF ATLANTA. Sup. Ct. Ga. Certiorari denied. Reported below: 257 Ga. 306, 357 S. E. 2d 802.

No. 87-710. SWAN ET AL. *v.* RUBEN ET AL.; and

No. 87-735. WARREN CITY SCHOOL DISTRICT BOARD OF EDUCATION ET AL. *v.* RUBEN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 825 F. 2d 977.

No. 87-784. PORTER *v.* UNITED STATES; and

No. 87-1334. BELL ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 821 F. 2d 968.

No. 87-845. GOWDY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 825 F. 2d 408.

No. 87-872. TIMES-PICAYUNE PUBLISHING CORP. ET AL. *v.* EDWARDS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 823 F. 2d 111.

No. 87-873. UNION DE TRANSPORTS AERIENS *v.* BECKMAN. C. A. D. C. Cir. Certiorari denied. Reported below: 264 U. S. App. D. C. 174, 828 F. 2d 24.

No. 87-876. KITCHENS ET AL. *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 825 F. 2d 1337.

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No. 87-947. OKUN BROTHERS SHOE STORE, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. Reported below: 825 F. 2d 102.

No. 87-950. RED LAKE BAND OF CHIPPEWA INDIANS ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 827 F. 2d 380.

No. 87-958. PENNSYLVANIA ET AL. *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 829 F. 2d 392.

No. 87-961. BEGAY ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 831 F. 2d 302.

No. 87-966. ISMAILI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 828 F. 2d 153.

No. 87-972. SCHARRER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 828 F. 2d 773.

No. 87-1026. STOKES *v.* UNIVERSITY OF TENNESSEE AT MARTIN. Ct. App. Tenn. Certiorari denied. Reported below: 737 S. W. 2d 545.

No. 87-1053. PERLMUTTER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 835 F. 2d 1430.

No. 87-1164. TERPSTRA *v.* FORD MOTOR CREDIT Co. Ct. App. Ind. Certiorari denied. Reported below: 495 N. E. 2d 561.

No. 87-1177. BURLINGTON NORTHERN JOINT PROTECTIVE BOARD, BROTHERHOOD RAILWAY CARMEN DIVISION, TRANSPORTATION COMMUNICATIONS UNION *v.* BURLINGTON NORTHERN RAILROAD Co. ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 822 F. 2d 810.

No. 87-1178. TRIPLE-A BASEBALL CLUB ASSOCIATES ET AL. *v.* NORTHEASTERN BASEBALL, INC., ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 832 F. 2d 214.

No. 87-1182. RASCHICK *v.* PRUDENT SUPPLY, INC., ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 830 F. 2d 1497.

No. 87-1185. UNITED MINE WORKERS OF AMERICA 1974 BENEFIT PLAN AND TRUST *v.* DISTRICT 29, UNITED MINE WORKERS

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OF AMERICA, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 826 F. 2d 280.

No. 87-1186. DUNCAN, CARROLL COUNTY COMMISSIONER, ET AL. *v.* CITY OF CARROLLTON, GEORGIA, BRANCH OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 829 F. 2d 1547.

No. 87-1198. CROWN CORK & SEAL CO., INC. *v.* MCNASBY ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 832 F. 2d 47.

No. 87-1202. HUTTER NORTHERN TRUST ET AL. *v.* CITY OF CHICAGO ET AL. C. A. 7th Cir. Certiorari denied.

No. 87-1225. CHERRY HILL TOWNSHIP *v.* CAMDEN COUNTY BOARD OF TAXATION. Super. Ct. N. J., App. Div. Certiorari denied.

No. 87-1231. PENDERGRASS *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 833 F. 2d 1024.

No. 87-1232. ROSE *v.* LONG ISLAND RAILROAD PENSION PLAN ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 828 F. 2d 910.

No. 87-1237. YEE *v.* SMITH ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 827 F. 2d 771.

No. 87-1238. LUND *v.* NORWEST BANK MINNEAPOLIS ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 825 F. 2d 1249.

No. 87-1272. PEEPLES *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. Reported below: 829 F. 2d 1120.

No. 87-1273. WISLOCKI-GOIN *v.* MEARS, JUDGE, LAKE COUNTY SUPERIOR COURT, JUVENILE DIVISION, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 831 F. 2d 1374.

No. 87-1289. MCMAHON *v.* FRANKLIN MINT CO. C. A. 3d Cir. Certiorari denied. Reported below: 835 F. 2d 283.

No. 87-1300. BRUSGULIS *v.* JUSTICES OF THE SUPERIOR COURT OF MASSACHUSETTS. C. A. 1st Cir. Certiorari denied.

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No. 87-1307. *PORTO v. ARMCO, INC., ET AL.* C. A. 8th Cir. Certiorari denied. Reported below: 825 F. 2d 1274.

No. 87-1330. *POTTER ET AL. v. UNITED STATES.* C. A. 9th Cir. Certiorari denied. Reported below: 830 F. 2d 1049.

No. 87-5752. *E. R. E. v. DISTRICT OF COLUMBIA.* Ct. App. D. C. Certiorari denied. Reported below: 523 A. 2d 998.

No. 87-5806. *CALBAS v. UNITED STATES.* C. A. 2d Cir. Certiorari denied. Reported below: 821 F. 2d 887.

No. 87-5979. *ABRAHAM v. DEFELICE.* C. A. 2d Cir. Certiorari denied.

No. 87-6022. *FORET ET AL. v. TOWN OF GRAND ISLE ET AL.* C. A. 5th Cir. Certiorari denied. Reported below: 827 F. 2d 767.

No. 87-6037. *MARTINEZ-DIAZ v. UNITED STATES.* C. A. 5th Cir. Certiorari denied. Reported below: 830 F. 2d 1128.

No. 87-6038. *AVERY v. WISCONSIN.* Sup. Ct. Wis. Certiorari denied. Reported below: 141 Wis. 2d 985, 416 N. W. 2d 297.

No. 87-6054. *BADIA v. UNITED STATES.* C. A. 11th Cir. Certiorari denied. Reported below: 827 F. 2d 1458.

No. 87-6214. *MURPHY v. SISCO ET AL.* C. A. 10th Cir. Certiorari denied.

No. 87-6217. *LEGRONE v. TEXAS.* Ct. Crim. App. Tex. Certiorari denied. Reported below: 742 S. W. 2d 659.

No. 87-6220. *WILLIAMS v. CALIFORNIA.* Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 87-6224. *ROGERS v. CARVER, SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTION.* C. A. 1st Cir. Certiorari denied. Reported below: 833 F. 2d 379.

No. 87-6228. *MANTER v. TOWN OF FAYETTE, MAINE.* Sup. Jud. Ct. Me. Certiorari denied. Reported below: 528 A. 2d 887.

No. 87-6230. *BURRELL v. IOWA.* Sup. Ct. Iowa. Certiorari denied. Reported below: 412 N. W. 2d 556.

No. 87-6240. *THOMAS v. NEWSOME ET AL.* C. A. 11th Cir. Certiorari denied. Reported below: 828 F. 2d 773.

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No. 87-6242. *BEAUFORD v. FATHER FLANAGAN'S BOYS' HOME*. C. A. 8th Cir. Certiorari denied. Reported below: 831 F. 2d 768.

No. 87-6247. *HAAS v. WILCOX ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 829 F. 2d 1128.

No. 87-6263. *FIED v. WASHINGTON*. Sup. Ct. Wash. Certiorari denied. Reported below: 108 Wash. 2d 662, 740 P. 2d 848.

No. 87-6268. *SPRINGER, AKA MCNEAL v. UNITED STATES*. C. A. 8th Cir. Certiorari denied. Reported below: 831 F. 2d 781.

No. 87-6270. *CARTER v. LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS*. C. A. 5th Cir. Certiorari denied. Reported below: 826 F. 2d 408.

No. 87-6275. *BIRDELL v. LEACH ET AL.* C. A. 8th Cir. Certiorari denied.

No. 87-6293. *SMOLARSKI v. OWENS, COMMISSIONER, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL.* C. A. 3d Cir. Certiorari denied. Reported below: 833 F. 2d 307.

No. 87-6296. *WICKER v. TEXAS*. Ct. Crim. App. Tex. Certiorari denied. Reported below: 740 S. W. 2d 779.

No. 87-6298. *ECONOMOU ET UX. v. SECURITIES AND EXCHANGE COMMISSION*. C. A. 2d Cir. Certiorari denied. Reported below: 830 F. 2d 431.

No. 87-6308. *EAKINS v. FOLTZ, WARDEN*. C. A. 6th Cir. Certiorari denied.

No. 87-6323. *MOLINE v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 833 F. 2d 190.

No. 87-6324. *HARRY v. UNITED STATES*. C. A. 8th Cir. Certiorari denied. Reported below: 837 F. 2d 479.

No. 87-6327. *TIMMONDS v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 835 F. 2d 1439.

No. 87-6337. *PARKER v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 834 F. 2d 408.

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No. 87-6345. *IRVING v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 835 F. 2d 1438.

No. 87-6347. *AYERS v. UNITED STATES*. C. A. 3d Cir. Certiorari denied. Reported below: 838 F. 2d 463.

No. 87-6352. *CORDOBA v. NEW MEXICO*. Ct. App. N. M. Certiorari denied.

No. 87-6366. *LUNA v. NEW MEXICO ET AL.* C. A. 10th Cir. Certiorari denied.

No. 86-2070. *KAMEN v. NORDBERG, JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS (KEMPER FINANCIAL SERVICES, INC., ET AL., REAL PARTIES IN INTEREST)*. C. A. 7th Cir. Certiorari denied.

JUSTICE WHITE, dissenting.

The issue here is when mandamus relief will be available to a party who claims that the District Court wrongly deprived him of the right to a jury trial. Petitioner is a shareholder in a mutual fund and brought a derivative suit against the two companies that administer the fund, alleging breach of fiduciary duty under § 36(b) of the Investment Company Act of 1940, 15 U. S. C. § 80a-35(b). The District Court granted defendants' motion to strike petitioner's demand for a jury trial on this claim, and petitioner sought mandamus from the Court of Appeals to compel the District Court to honor his demand for a jury trial. The Seventh Circuit denied relief in an order (No. 87-1455, Apr. 13, 1987), citing its prior decision in *First National Bank of Waukesha v. Warren*, 796 F. 2d 999 (1986).

In *Warren*, the Seventh Circuit held that mandamus will lie to enforce a party's demand for a jury trial only when, first, the party's right to a jury trial is clear and indisputable and, second, the party has no other adequate means to attain the relief he desires. *Id.*, at 1006. The second point is especially critical because it will prevent interlocutory review of many requests for a writ of mandamus to direct the granting of a jury trial, as in many cases the petitioning party can seek this same relief on appeal from the ultimate resolution of the case in the trial court. This decision conflicts with the decisions of other Courts of Appeals, which hold that mandamus relief is available to review an order denying a claimed right of trial by jury, and that a proper petition

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for mandamus in these circumstances obliges the Court of Appeals to address the merits of the claimed right to a jury trial. *In re Union Nacional de Trabajadores*, 502 F. 2d 113, 115-116 (CA1 1974), vacated on other grounds, 527 F. 2d 602 (1975); *Lee Pharmaceuticals v. Mishler*, 526 F. 2d 1115, 1116-1117 (CA2 1975) (*per curiam*); *Eldredge v. Gourley*, 505 F. 2d 769, 770 (CA3 1974); *General Tire & Rubber Co. v. Watkins*, 331 F. 2d 192, 194 (CA4), cert. denied, 377 U. S. 952 (1964); *Black v. Boyd*, 248 F. 2d 156, 159-161 (CA6 1957); *In re Vorpahl*, 695 F. 2d 318, 319 (CA8 1982); *Owens-Illinois, Inc. v. United States District Court*, 698 F. 2d 967, 969 (CA9 1983); *In re Zweibon*, 184 U. S. App. D. C. 167, 170-171, 565 F. 2d 742, 745-746 (1977) (*per curiam*). It may also be inconsistent with this Court's prior decisions in *Beacon Theatres, Inc. v. Westover*, 359 U. S. 500 (1959), and *Dairy Queen, Inc. v. Wood*, 369 U. S. 469 (1962), which emphasize the responsibility of the Courts of Appeals to grant mandamus relief where it is necessary to protect the constitutional right to trial by jury. I would grant certiorari to resolve the split among the Circuits on this issue.

No. 87-160. GRANT, SUPERINTENDENT, CORRECTIONS CAMP PROGRAM *v.* CASPER. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 817 F. 2d 756.

No. 87-1227. KEMP, WARDEN *v.* DIX. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 832 F. 2d 546.

No. 87-220. CITY OF SANTA BARBARA *v.* HALL ET UX. C. A. 9th Cir. Motion of Golden State Mobilehome Owners League, Inc., for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 833 F. 2d 1270.

No. 87-730. UNITED STATES *v.* MEYER ET AL. C. A. D. C. Cir. Motions of respondents Judith Hand, Mary Daily, Robert Coleman, Susan Blake, and Mindy Washington for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 258 U. S. App. D. C. 263, 810 F. 2d 1242.

No. 87-731. GLOBE NEWSPAPER CO. ET AL. *v.* KING. Sup. Jud. Ct. Mass. Motion of American Newspaper Publishers Association et al. for leave to file a brief as *amici curiae* granted.

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Certiorari denied. JUSTICE BRENNAN would grant certiorari. Reported below: 400 Mass. 705, 512 N. E. 2d 241.

No. 87-894. *SLYPER ET AL. v. MEESE, ATTORNEY GENERAL, ET AL.* C. A. D. C. Cir. Certiorari denied. Reported below: 264 U. S. App. D. C. 170, 827 F. 2d 821.

JUSTICE WHITE, dissenting.

This case presents the issue whether the decision of the United States Information Agency (USIA) to recommend against waiver of the requirement that a foreign doctor in this country for graduate medical training return to his or her foreign residence for two years prior to applying for permanent residence status here is subject to judicial review for abuse of discretion. See 8 U. S. C. § 1182(e) (1982 ed., Supp. IV). A waiver from the 2-year foreign residence requirement can be obtained on "hardship" grounds, one condition for which is that the Director of the USIA make a favorable recommendation concerning the waiver. The Court of Appeals held that because neither the relevant statute nor implementing regulation provided a standard against which to assess the Director's exercise of discretion, the decision was one committed to the agency's discretion by law and accordingly not reviewable under the Administrative Procedure Act, 5 U. S. C. § 701(a)(2). 264 U. S. App. D. C. 170, 172-173, 827 F. 2d 821, 823-824 (1987). In so holding, the court reached the same conclusion as the Second and Ninth Circuits, *Dina v. Attorney General*, 793 F. 2d 473, 476 (CA2 1986) (*per curiam*); *Abdelhamid v. Ilchert*, 774 F. 2d 1447, 1449-1450 (CA9 1985), and rejected the contrary conclusion of the Third Circuit, *Chong v. Director, USIA*, 821 F. 2d 171, 176 (1987). I would grant certiorari to resolve the conflict among the Circuits over this question of federal law.

No. 87-975. *SCROGGY ET AL. v. SUMMERS.* C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 825 F. 2d 411.

No. 87-994. *GENERAL MOTORS CORP. ET AL. v. BENNETT ET AL.* C. A. 9th Cir. Motion of National Railway Labor Conference for leave to file a brief as *amicus curiae* granted. Certiorari denied. JUSTICE STEVENS and JUSTICE KENNEDY took no part in the consideration or decision of this motion and this petition. Reported below: 815 F. 2d 1305.

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No. 87-1151. *LEDERLE LABORATORIES, A DIVISION OF AMERICAN CYANAMID CO. v. TONER ET AL.* C. A. 9th Cir. Certiorari denied. JUSTICE KENNEDY took no part in the consideration or decision of this petition. Reported below: 828 F. 2d 510.

No. 87-1166. *MENDEZ v. MENDEZ*. Dist. Ct. App. Fla., 3d Dist. Motion of Watchtower Bible & Tract Society of New York, Inc., for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 527 So. 2d 820.

No. 87-5803. *LEKAS v. ILLINOIS*. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 155 Ill. App. 3d 391, 508 N. E. 2d 221.

JUSTICE WHITE, dissenting.

This petition presents a constitutional issue over which the state courts are divided: whether the confrontation of a detainee with new evidence or another's confession is a sufficient intervening event to purge the taint of an allegedly unlawful arrest. The Appellate Court of Illinois held that it was, notwithstanding the facts that the confession here occurred during a period of continued detention following a warrantless nighttime arrest, assumed not to be supported by probable cause, and 12 hours of intermittent custodial interrogation. In contrast, the courts of three other States have reached the opposite conclusion, holding that newly discovered evidence or the confession of a codefendant is an insufficient intervening circumstance to prevent the in-custody confession from being fruit of the illegal arrest. *State v. Winegar*, 147 Ariz. 440, 711 P. 2d 579 (1985); *Commonwealth v. Barnett*, 471 Pa. 34, 369 A. 2d 1180 (1977); *Gregg v. State*, 667 S. W. 2d 125 (Tex. Crim. App. 1984), overruled on other grounds by *Russell v. State*, 717 S. W. 2d 7 (Tex. Crim. App. 1986). This Court has recognized that release from custody or presentation before a neutral magistrate can purge the taint of an illegal arrest, *Wong Sun v. United States*, 371 U. S. 471, 491 (1963); *Johnson v. Louisiana*, 406 U. S. 356, 365 (1972), but we have not held that merely confronting the illegally and continuously detained defendant with new evidence severs the link between the custodial confession and the Fourth Amendment violation. Here, there was apparently no exigency preventing the police from presenting the defendant to a magistrate during the 12-hour period over which they intermittently questioned him. The conflict created by this decision

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over the scope of the Fourth Amendment's protection against illegal arrests and the use of the fruits therefrom presents an important question of constitutional law, see *Taylor v. Alabama*, 457 U. S. 687 (1982); *Brown v. Illinois*, 422 U. S. 590 (1975), and I would grant certiorari.

No. 87-5971. *ROBERTS v. FLORIDA*. Sup. Ct. Fla.;

No. 87-5984. *NOLAND v. NORTH CAROLINA*. Gen. Ct. Justice, Super. Ct. Div., Mecklenburg County, N. C.;

No. 87-6223. *KOON v. FLORIDA*. Sup. Ct. Fla.;

No. 87-6236. *ALDERMAN v. GEORGIA*. Sup. Ct. Ga.; and

No. 87-6266. *FORD v. GEORGIA*. Sup. Ct. Ga. Certiorari denied. Reported below: No. 87-5971, 510 So. 2d 885; No. 87-6223, 513 So. 2d 1253; No. 87-6266, 257 Ga. 461, 360 S. E. 2d 258.

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. 87-6173. *DARDEN v. DUGGER*, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 825 F. 2d 287.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg v. Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentence in this case.

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

I would grant the petition for certiorari and summarily reverse the judgment below primarily for the reasons stated in the dissent in *Darden v. Wainwright*, 477 U. S. 168, 188 (1986). I was not persuaded then, and I am not persuaded now, that petitioner Willie Jasper Darden received a fair trial in the Florida courts. A person should not be condemned to die and be executed under any system of justice in this country without a fair trial.

No. 87-6256. *ERICKSON ET AL. v. ALLTECH ASSOCIATES, INC.* App. Ct. Ill., 1st Dist. Motion of petitioner Hogan for leave to

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proceed *in forma pauperis* denied. Petitioner Hogan is allowed until March 28, 1988, within which to pay the docketing fee required by Rule 45(a) and to submit a petition for writ of certiorari in compliance with Rule 33 of the Rules of this Court. Petition for writ of certiorari as to petitioner Erickson denied.

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*.

Rehearing Denied

No. 86-6867. *LOWENFIELD v. PHELPS, SECRETARY, LOUISIANA DEPARTMENT OF CORRECTIONS, ET AL.*, 484 U. S. 231;

No. 87-5587. *MURPHY v. AETNA LIFE & CASUALTY ET AL.*, 484 U. S. 961;

No. 87-5839. *DANIELS v. SECRETARY OF HEALTH AND HUMAN SERVICES*, 484 U. S. 1016;

No. 87-5904. *TRAPANI v. CBS RECORDS, INC., ET AL.*, 484 U. S. 1036; and

No. 87-6056. *WHITE v. DEPARTMENT OF JUSTICE*, 484 U. S. 1046. Petitions for rehearing denied. JUSTICE KENNEDY took no part in the consideration or decision of these petitions.

No. 87-732. *WHEELER ET AL. v. COMMISSIONER OF HIGHWAYS OF KENTUCKY*, 484 U. S. 1007. Petition for rehearing and/or other relief denied. JUSTICE KENNEDY took no part in the consideration or decision of this petition.

No. 87-5879 (A-631). *FRAZIER v. RAILROAD RETIREMENT BOARD*, 484 U. S. 1029. Application to suspend the effect of the order denying certiorari, addressed to JUSTICE KENNEDY and referred to the Court, denied. Petition for rehearing denied. JUSTICE KENNEDY took no part in the consideration or decision of this application and petition.

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Dismissal Under Rule 53

No. 87-1229. *S. G. ADAMS PRINTING & STATIONERY CO. v. MAY CENTERS, INC.* App. Ct. Ill., 5th Dist. Certiorari dis-

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missed under this Court's Rule 53. Reported below: 153 Ill. App. 3d 1018, 506 N. E. 2d 691.

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Certiorari Denied

No. 87-6596 (A-696). *FELDE v. BUTLER, WARDEN*. Sup. Ct. La. 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: 520 So. 2d 758.

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.

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Miscellaneous Order

No. A-693. *DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. v. JOHNSON*. Application of the Attorney General of Florida for an order to vacate the stay of execution of sentence of death entered by the United States District Court for the Northern District of Florida, presented to JUSTICE KENNEDY, and by him referred to the Court, denied.

JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE joins, dissenting.

Larry Joe Johnson was scheduled to be executed on March 9, 1988. The State informs us that it was served with a petition for a writ of habeas corpus at about 5:45 p.m. on March 7, 1988. That petition raised an issue, under *Caldwell v. Mississippi*, 472 U. S. 320 (1985), in which Johnson claims that the sentencing jury was improperly informed that its role in the sentencing decision was merely advisory. Noting that issues similar or identical to Johnson's *Caldwell* claim are pending before the United States Court of Appeals for the Eleventh Circuit and before this Court, the United States District Court for the Northern District of Florida granted an indefinite stay of execution. The United States Court of Appeals for the Eleventh Circuit denied the State's mo-

tion to vacate the stay. The State then applied to the Circuit Justice for the Eleventh Circuit for a vacation of the stay, and the application was referred to the full Court. Johnson did not file any response, and this Court has voted to deny the application. I respectfully dissent.

The State argues that Johnson has abused the writ of habeas corpus by raising his *Caldwell* claim at this time. The State avers that Johnson had raised the same claim, along with others, in a previous petition for federal habeas, which was filed before this Court's decision in *Caldwell*. The claim was rejected on procedural grounds at that time, and it was not among the issues on which Johnson appealed to the Eleventh Circuit. Our decision in *Caldwell* was announced while the appeal was pending in the Eleventh Circuit, and Johnson apparently did not bring it to the attention of that court. Concluding that the claim was abandoned, the State now urges that Johnson's effort to renew the claim at this time constitutes an abuse of the writ.

In my view, the State is clearly correct to argue that the writ of habeas corpus is abused when a claim is raised in one petition, abandoned on appeal, and then raised again in a successive petition. If Johnson's *Caldwell* claim falls into this category, then the District Court would seem to have abused its discretion by granting an indefinite stay of execution on the ground that *Caldwell* issues are present in other cases pending before the Eleventh Circuit and before this Court.

Without ruling out the possibility that extraordinary circumstances might justify a stay of execution in this case, I note that no such circumstances have been called to our attention. The District Court did not address the argument that the State has made to this Court. The State explains this in the following way. In an effort to facilitate the District Court's consideration of any habeas petition that Johnson might file, it lodged an anticipatory response with that court. That response did not address Johnson's *Caldwell* claim because the State considered that claim abandoned. After Johnson filed his petition on March 7, the State prepared a supplemental response, which it expected to offer to the court at a hearing that was scheduled for the next morning at 10 o'clock. Counsel for the State arrived at 9:30, but "was informed that the hearing was cancelled and that the [District] Court had entered a stay without allowing the State to be heard." The State's attorney filed its written supplemental response with

the Clerk of the District Court, and subsequently filed a motion to vacate the stay with the Eleventh Circuit.

Arguing before the Eleventh Circuit, Johnson gave two reasons for concluding that the District Court had considered and rejected the State's abuse-of-the-writ argument. First, Johnson had anticipated and answered the argument in his petition. Second, the stay of execution was not actually entered until 10:31 a.m. on March 8, by which time the District Court would have had an opportunity to review the State's supplemental response to the petition. Johnson also argued to the Eleventh Circuit that entry of the stay of execution was not an abuse of discretion because he did not "consciously" abandon the *Caldwell* claim he raised on his first petition for federal habeas. Rather, he suggested, in failing to appeal the rejection of that claim his attorneys merely "conceded defeat on the merits."

On March 11, 1988, the Eleventh Circuit denied the State's motion to vacate the stay of execution. No reasons were given, and the only allusion to the State's arguments was the following sentence: "Such denial is without prejudice to [the State's] right to present in district court its argument that petitioner's *Caldwell* claim is barred because of failure to exhaust, procedural default or otherwise."

The standard under which we consider motions to vacate stays of execution is deferential, and properly so. Only when the lower courts have clearly abused their discretion in granting a stay should we take the extraordinary step of overturning such a decision. In the present case, however, there is no evident legal basis whatsoever for a stay. The State has presented an apparently meritorious argument that Johnson's attempt to raise a *Caldwell* claim at this time is an abuse of the writ, and Johnson's suggestion that his previous abandonment of the claim was a "concession of defeat on the merits," rather than a "conscious abandonment" seems altogether specious. If the District Court refused to consider the State's apparently meritorious argument, that was certainly an abuse of discretion. If the District Court considered the argument but deemed it too insubstantial to require any comment, that too must be considered an abuse of discretion unless and until we are informed of reasons that would justify the implicit rejection of the State's position. The Eleventh Circuit articulated no such reasons, and in fact appeared to indicate that it knew of none.

The Eleventh Circuit seems to have thought that the proper course was to leave the stay in effect, but to indicate that the State was free to return to the District Court and repeat the argument it had sought to present earlier. I disagree. When a stay of execution has been granted without an apparent legal basis, and the court of appeals cannot articulate a reason for leaving the stay in effect, the proper course is to vacate the stay. Because neither the District Court nor the Court of Appeals has articulated an adequate legal basis for entering a stay in this case, I would grant the State's application to vacate. Johnson would, of course, remain free to return to the District Court and seek a stay based on adequate legal grounds, if there are any.

A majority of this Court has previously expressed its disapproval of the litigation tactics that seem to have been employed in this case:

"This is another capital case in which a last-minute application for a stay of execution and a new petition for habeas corpus relief have been filed with no explanation as to why the claims were not raised earlier or why they were not all raised in one petition. It is another example of abuse of the writ." *Woodard v. Hutchins*, 464 U. S. 377, 377-378 (1984) (Powell, J., joined by Burger, C. J., and BLACKMUN, REHNQUIST, and O'CONNOR, JJ., concurring).

While the details of this case are somewhat different, we are faced once again with a last-minute effort to obtain a stay of execution on the basis of a claim that appears to be procedurally barred. Allowing this stay to remain in effect creates incentives that will almost surely lead to similar problems in the future:

"If this Court defers only to grants of stays, while giving searching review to every denial of a stay, the lower federal courts may in time come to issue stays routinely. In that event, *Barefoot v. Estelle*'s statement that stays of execution are not automatic in capital cases, 463 U. S. [880, 895 (1983)], would effectively be overruled." *Wainwright v. Booker*, 473 U. S. 935, 936, n. 3 (1985) (Powell, J., concurring).

Accordingly, I respectfully dissent from the Court's denial of the State's application in this case.

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Certiorari Denied

No. 87-6606 (A-699). *DARDEN v. DUGGER*, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Certiorari denied. JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN dissent for the reasons stated in JUSTICE BLACKMUN'S dissent from the denial of the petition for writ of certiorari in *Darden v. Dugger*, ante, p. 943.

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.

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Dismissal Under Rule 53

No. 87-1079. *PALUMBO ET AL. v. UNITED STATES*. C. A. 6th Cir. Certiorari dismissed as to petitioner Robert T. Porter under this Court's Rule 53. Reported below: 829 F. 2d 39.

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Appeals Dismissed

No. 87-1074. *FIRST UNION NATIONAL BANK OF FLORIDA ET AL. v. FLORIDA DEPARTMENT OF REVENUE ET AL.* Appeal from Sup. Ct. Fla. dismissed for want of substantial federal question. JUSTICE BLACKMUN would note probable jurisdiction and set case for oral argument. Reported below: 513 So. 2d 114.

No. 87-1120. *POUDRE VALLEY RURAL ELECTRIC ASSN., INC. v. CITY OF GREELEY, COLORADO, ET AL.* Appeal from Sup. Ct. Colo. dismissed for want of properly presented federal question. Reported below: 744 P. 2d 739.

No. 87-1173. *ADIRONDACK CHAIR CO., INC. v. COMMISSIONER OF FINANCE OF THE CITY OF NEW YORK*. Appeal from App. Div., Sup. Ct. N. Y., 1st Jud. Dept., dismissed for want of substantial federal question. Reported below: 129 App. Div. 2d 1012, 513 N. Y. S. 2d 903.

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No. 87-1174. *STERLING BANCORP v. NEW YORK CITY DEPARTMENT OF FINANCE ET AL.* Appeal from App. Div., Sup. Ct. N. Y., 1st Jud. Dept., dismissed for want of substantial federal question. Reported below: 128 App. Div. 2d 1026, 512 N. Y. S. 2d 609.

No. 87-1195. *WILLIAMS v. LAWYERS PROFESSIONAL RESPONSIBILITY BOARD OF MINNESOTA.* Appeal from Sup. Ct. Minn. dismissed for want of substantial federal question. Reported below: 414 N. W. 2d 394.

No. 87-1275. *REPLAN DEVELOPMENT, INC., ET AL. v. DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT OF THE CITY OF NEW YORK ET AL.* Appeal from Ct. App. N. Y. dismissed for want of substantial federal question. Reported below: 70 N. Y. 2d 451, 517 N. E. 2d 200.

No. 87-1367. *BOMHARDT v. MARYLAND.* Appeal from Ct. Sp. App. Md. dismissed for want of substantial federal question. Reported below: 71 Md. App. 609, 526 A. 2d 983.

No. 87-1266. *BELL v. BELL.* Appeal from Ct. App. Cal., 6th 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. 87-1320. *ROSENBAUM v. ROSENBAUM.* Appeal from App. Ct. Ill., 1st Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 87-6227. *PRENZLER v. McLAUGHLIN, SECRETARY OF LABOR.* 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.

No. 87-6259. *MOHIUDDIN v. CALIFORNIA.* 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. 87-6285. *EDWARDS ET AL. v. FISHER ET AL.* Appeal from C. A. 5th 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: 831 F. 2d 1059.

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Certiorari Granted—Reversed and Remanded. (See No. 87-133, ante, p. 265.)

Certiorari Granted—Vacated and Remanded

No. 86-1503. *SAMAYOA ET AL. v. CHICAGO BOARD OF EDUCATION ET AL.* C. A. 7th Cir. Certiorari granted, judgment vacated, and case remanded to the Court of Appeals to consider the question of mootness. Reported below: 798 F. 2d 1046.

Miscellaneous Orders

No. — — ——. *NATIVE VILLAGE OF TANAMA v. ALASKA DEPARTMENT OF HEALTH AND SOCIAL SERVICES.* Motion to direct the Clerk to file a petition for writ of certiorari out of time denied.

No. A-632. *WINSLOW ET AL. v. WILLIAMS ET AL.* Sup. Ct. Colo. Application for stay, addressed to JUSTICE KENNEDY and referred to the Court, denied.

No. A-668 (87-6491). *PAVLICO v. UNITED STATES.* C. A. 4th Cir. Application for stay, addressed to JUSTICE O'CONNOR and referred to the Court, denied.

No. D-656. *IN RE DISBARMENT OF FRIEDMAN.* Disbarment entered. [For earlier order herein, see 484 U. S. 893.]

No. D-657. *IN RE DISBARMENT OF ROSENTHAL.* Disbarment entered. [For earlier order herein, see 484 U. S. 893.]

No. D-662. *IN RE DISBARMENT OF VAVRIK.* Disbarment entered. [For earlier order herein, see 484 U. S. 941.]

No. D-664. *IN RE DISBARMENT OF WITTMACK.* Disbarment entered. [For earlier order herein, see 484 U. S. 973.]

No. D-665. *IN RE DISBARMENT OF ENRICO.* Disbarment entered. [For earlier order herein, see 484 U. S. 973.]

No. D-667. *IN RE DISBARMENT OF SMITH.* It is ordered that Francis X. Smith, of Long Island City, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-672. *IN RE DISBARMENT OF COOPER.* Edward Samuel Cooper, of Los Angeles, Cal., having requested to resign as a member of the Bar of this Court, it is ordered that his name be

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stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on January, 25, 1988 [484 U. S. 1040], is hereby discharged.

No. D-675. *IN RE DISBARMENT OF PRICE*. It is ordered that Richard Douglas Price, Jr., of Peoria, Ill., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-676. *IN RE DISBARMENT OF SERVER*. It is ordered that Richard E. Server, of Danville, Ill., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-677. *IN RE DISBARMENT OF BELMONT*. It is ordered that Gordon L. Belmont, of Homewood, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-678. *IN RE DISBARMENT OF FLUME*. It is ordered that Richard August Flume, Jr., of San Antonio, Tex., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-679. *IN RE DISBARMENT OF KOTSOS*. It is ordered that Petros A. Kotsos, of Glenview, Ill., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-680. *IN RE DISBARMENT OF MALONE*. It is ordered that E. Clayton Malone, of Livingston, Tex., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-681. *IN RE DISBARMENT OF FELDMAN*. It is ordered that Jeffrey Stuart Feldman, of Livingston, 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.

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No. D-682. *IN RE DISBARMENT OF BRISCOE*. It is ordered that John F. Briscoe, of Lakewood, N. J., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-683. *IN RE DISBARMENT OF KERN*. It is ordered that Walter M. D. Kern, Jr., of Ridgewood, 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. 65, Orig. *TEXAS v. NEW MEXICO*. Motion of the Special Master for allowance of interim fees and disbursements granted. JUSTICE STEVENS took no part in the consideration or decision of this motion. [For earlier order herein, see, *e. g.*, 484 U. S. 973.]

JUSTICE BLACKMUN, dissenting.

Charles J. Meyers, formerly the dean of Stanford Law School and now a partner in the Denver branch of Gibson, Dunn & Crutcher, a large Los Angeles law firm, on July 2, 1984, was appointed by this Court, see 468 U. S. 1202, to succeed the Honorable Jean S. Breitenstein, Senior Judge of the United States Court of Appeals for the Tenth Circuit and since deceased, as Special Master in this litigation between Texas and New Mexico.

In December 1985, the successor Master filed an application for interim fees of \$33,511 and for reimbursement of expenses of \$702.09, a total of \$34,213.09. That request was granted by the Court over three dissenting votes. See 475 U. S. 1004 (1986). Chief Justice Burger, writing for the dissenters, complained about Master Meyers' omission of "any information concerning the experience levels of the four attorneys for whose services he seeks to charge"; about the absence of any statement that the four even were members of the Bar; and about the lack of information as to hourly rates charged. *Ibid.* The Chief Justice cited his corresponding dissent to the allowance of compensation requested by this same applicant as Master in *Louisiana v. Mississippi*, 466 U. S. 921 (1984). He repeated his earlier observation that a Special Master's charges, when allowed by the Court, "represent our assurance to the parties that the charges are reasonable and proper," and that this is so even where "the parties do not oppose the application." 475 U. S., at 1004. The Chief Justice also

noted: "I believe the public service aspect of the appointment is a factor that is not to be wholly ignored in determining the reasonableness of fees charged in a case like this." He stated: "The contending litigants have a right to expect this Court to exercise its independent judgment on fees rather than requiring each or both of them to challenge the amounts." *Id.*, at 1005.

In September 1986, this Special Master once again moved for interim fees, this time for an amount totaling \$69,608.50. The Court granted that motion as well. 479 U. S. 806 (1986).

The present application for more interim fees and for reimbursement of expenses was filed January 11, 1988. Master Meyers now requests \$69,661.25 in fees and \$2,544.37 for expenses, a total of \$72,205.62. He says that these amounts are those incurred since the interim allowance of \$69,608.50 in late 1986.

The applicant attaches a computer printout to his motion. He asserts that nearly all the work during this period was performed either by him or by Diana Poole, "who has replaced Steven Crafton as my law clerk on this matter"; that clerk Crafton left the Denver office of the firm in August 1986; and that Ms. Poole assumed her duties in July 1987 and, revealingly, "expended considerable effort in the early months mastering the background of the case before commencing research on the issues arising in devising a decree."

The Master points out once again that he is a partner in his law firm and is head of its "Natural Resources Group"; that he received his law degree from the University of Texas and his master's and doctoral degrees from Columbia University; and that he has taught at Texas, Columbia, and Stanford, and was dean of Stanford Law School for five years. He states that Ms. Poole received her law degree in 1983 from the University of Minnesota, where she was an editor of the Law Review, and that she now is an associate (nonpartner) lawyer in his firm's Denver office. She worked for one year as a law clerk for Judge Myron H. Bright of the United States Court of Appeals for the Eighth Circuit, and "has been in private practice for over three years."

The Master requests compensation for his time at a "weighted average" of \$275.12 per hour. He requests compensation at a "weighted average" of \$181.30 per hour for the time of Ms. Poole. He says that he spent 85.25 hours on the case; that Ms. Poole spent 246.25 hours; and that small additional amounts of time were ex-

pended by former clerk Crafton and by one L. A. O'Neill, who, for all we know, may have been a paralegal and not a lawyer.

It seems apparent—indeed the Master so concedes when he describes the nature of the “early months” of her work on the case—that a substantial amount of Ms. Poole’s time was self-education as to the issues and was duplicative background work already performed by former clerk Crafton who had left the Denver office. The consequences of Crafton’s departure hardly are to be charged to these litigants. It also is difficult for me to accept the fact that in Denver, Colorado, this partner’s time is now worth \$290 an hour, having been increased from \$265 on November 1, 1987, and that the time of Ms. Poole is now worth \$200 an hour, having been elevated from \$170 beginning November 1, 1987. Ms. Poole, after all, was only four years out of law school and only three years in practice. I cannot agree that so recent a law school graduate, no matter how inherently bright she may be, of such limited experience can be said to be worth that amount in a case the retired Chief Justice described as possessing a “public service aspect.”

This Court does have a duty to the public and to the parties when it approves a Master’s request for fees. The fact that the two States which are the parties to this litigation have not lodged specific objections to the fees is of no great relevance. The States, after all, are parties and are consigned in their continuing litigation to this same Master.

I would reduce the request for interim fees from the asserted amount of \$69,661.25 to \$50,000 to reflect both a reasonable amount of time necessarily expended and realistic charges. I would also reduce the request for reimbursement for expenses by \$240, an amount described as having been paid for secretarial overtime. There is no explanation proffered by Master Meyers as to why this overtime was necessary. He can and should be more specific in his accounting to this Court.

I add that it seems to me that “establishment” law firms are doing themselves and the public a disservice by asserting fees of this magnitude so persistently over dissents from the Court. Public dissatisfaction with lawyers is not unknown; neither is public distrust of lawyers. A fee application of this kind tends to build that dissatisfaction and that distrust.

It is enlightening, incidentally, to compare with this application the fees recently charged by two very distinguished lawyers who

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served this Court as Special Masters on other similar assignments. See *South Carolina v. Baker*, 484 U. S. 973 (1987), and *Kansas v. Colorado*, *ante*, p. 931.

I dissent.

No. 86-495. *K MART CORP. v. CARTIER, INC., ET AL.*;

No. 86-624. *47TH STREET PHOTO, INC. v. COALITION TO PRESERVE THE INTEGRITY OF AMERICAN TRADEMARKS ET AL.*; and

No. 86-625. *UNITED STATES ET AL. v. COALITION TO PRESERVE THE INTEGRITY OF AMERICAN TRADEMARKS ET AL.* C. A. D. C. Cir. [Certiorari granted, 479 U. S. 1005.] Motion of Yamaha International Corp. et al. for leave to participate in oral argument as *amici curiae*, for divided argument, and for additional time for oral argument denied.

No. 87-283. *BUDINICH v. BECTON DICKINSON & Co.* C. A. 10th Cir. [Certiorari granted, 484 U. S. 895.] Motion of petitioner to direct the Clerk to file reply brief out of time denied.

No. 87-578. *BANK OF NOVA SCOTIA v. UNITED STATES*; and

No. 87-602. *KILPATRICK ET AL. v. UNITED STATES.* C. A. 10th Cir. [Certiorari granted, 484 U. S. 1003.] Motion of petitioners for divided argument denied.

No. 87-620. *KRUPKIN ET AL. v. DOW CHEMICAL CO. ET AL.* C. A. 2d Cir. Motion of respondents to expedite consideration of the petition for writ of certiorari denied.

No. 87-821. *PITTSTON COAL GROUP ET AL. v. SEBBEN ET AL.*; and

No. 87-827. *MCLAUGHLIN, SECRETARY OF LABOR, ET AL. v. SEBBEN ET AL.* C. A. 8th Cir. [Certiorari granted, 484 U. S. 1058.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 87-1152. *PUBLIC UTILITIES COMMISSION OF HAWAII ET AL. v. HAWAIIAN TELEPHONE Co.* C. A. 9th Cir.; and

No. 87-1302. *GUSHIKEN ET AL. v. FUJIKAWA.* C. A. 9th Cir. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 87-1277. *LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION v. NELSON.* C. A. 8th Cir. [Certiorari granted, *ante*, p. 904.] Motion for appointment of counsel granted, and it is ordered that John Wesley Hall, Jr., Esq., of Little Rock, Ark., be appointed to serve as counsel for respondent in this case.

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No. 87-1279. MORRISON, INDEPENDENT COUNSEL *v.* OLSON ET AL. C. A. D. C. Cir. [Probable jurisdiction noted, 484 U. S. 1058.] Motions of Burton D. Linne et al. and Lawrence E. Walsh, Independent Counsel, for leave to file briefs as *amici curiae* granted. JUSTICE KENNEDY took no part in the consideration or decision of these motions.

No. 87-5468. JOHNSON *v.* MISSISSIPPI. Sup. Ct. Miss. [Certiorari granted, 484 U. S. 1003.] Motion of Mississippi Public Defenders' Association for leave to file a brief as *amicus curiae* granted.

No. 87-6116. PENSON *v.* OHIO. Ct. App. Ohio, Montgomery County. [Certiorari granted, 484 U. S. 1059.] Motion for appointment of counsel granted, and it is ordered that Gregory L. Ayers, Esq., of Columbus, Ohio, be appointed to serve as counsel for petitioner in this case.

No. 87-6320. MACKAY *v.* MERCEDES BENZ OF NORTH AMERICA ET AL. C. A. 3d Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until April 11, 1988, within which to pay the docketing fee required by Rule 45(a) and to submit a petition for writ of certiorari 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*.

No. 87-1316. IN RE COOPER, DBA LARRY N. COOPER THE PROPRIETORSHIP. Petition for writ of mandamus and/or prohibition denied.

Probable Jurisdiction Noted

No. 87-717. FIRST FAMILY MORTGAGE CORPORATION OF FLORIDA *v.* DURHAM ET AL. Appeal from Sup. Ct. N. J.; and

No. 87-937. ATTORNEY GENERAL OF NEW JERSEY *v.* FIRST FAMILY MORTGAGE CORPORATION OF FLORIDA ET AL. Sup. Ct. N. J. Probable jurisdiction noted in No. 87-717. Certiorari granted in No. 87-937. Cases consolidated and a total of one hour

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allotted for oral argument. Reported below: 108 N. J. 277, 528 A. 2d 1288.

No. 87-1245. TEXAS MONTHLY, INC. *v.* BULLOCK, COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS, ET AL. Appeal from Ct. App. Tex., 3d Dist. Motions of Magazine Publishers of America, Inc., and American Booksellers Association, Inc., for leave to file briefs as *amici curiae* granted. Probable jurisdiction noted. Reported below: 731 S. W. 2d 160.

Certiorari Granted. (See also No. 87-937, *supra*.)

No. 87-56. OWENS ET AL. *v.* OKURE. C. A. 2d Cir. *Certiorari* granted. Reported below: 816 F. 2d 45.

No. 87-154. DESHANEY, A MINOR, BY HIS GUARDIAN AD LITEM, ET AL. *v.* WINNEBAGO COUNTY DEPARTMENT OF SOCIAL SERVICES ET AL. C. A. 7th Cir. *Certiorari* granted. Reported below: 812 F. 2d 298.

No. 87-163. UNITED STATES ARMY CORPS OF ENGINEERS ET AL. *v.* AMERON, INC., ET AL. C. A. 3d Cir. *Certiorari* granted. Reported below: 809 F. 2d 979.

No. 87-271. HARBISON-WALKER REFRACTORIES, A DIVISION OF DRESSER INDUSTRIES, INC. *v.* BRIECK. C. A. 3d Cir. *Certiorari* granted. Reported below: 822 F. 2d 52.

No. 87-1043. UNITED STATES *v.* RON PAIR ENTERPRISES, INC. C. A. 6th Cir. *Certiorari* granted. Reported below: 828 F. 2d 367.

No. 87-1241. PENNSYLVANIA *v.* UNION GAS CO. C. A. 3d Cir. *Certiorari* granted. Reported below: 832 F. 2d 1343.

No. 87-1252. H. J. INC. ET AL. *v.* NORTHWESTERN BELL TELEPHONE CO. ET AL. C. A. 8th Cir. *Certiorari* granted. Reported below: 829 F. 2d 648.

No. 86-1940. SHEET METAL WORKERS' INTERNATIONAL ASSN. ET AL. *v.* LYNN. C. A. 9th Cir. *Certiorari* granted. JUSTICE KENNEDY took no part in the consideration or decision of this petition. Reported below: 804 F. 2d 1472.

No. 87-548. TRANS WORLD AIRLINES, INC. *v.* INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS. C. A. 8th Cir. *Certio-*

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rari granted limited to Question 1 presented by the petition. Reported below: 819 F. 2d 839.

Certiorari Denied. (See also Nos. 87-1266, 87-1320, 87-6227, 87-6259, and 87-6285, *supra*.)

No. 87-113. HERCEG ET AL. *v.* HUSTLER MAGAZINE, INC. C. A. 5th Cir. *Certiorari denied.* Reported below: 814 F. 2d 1017.

No. 87-303. DOCUTEL/OLIVETTI CORP. ET AL. *v.* FINKEL; and
No. 87-494. FINKEL *v.* DOCUTEL/OLIVETTI CORP. ET AL. C. A. 5th Cir. *Certiorari denied.* Reported below: 817 F. 2d 356.

No. 87-603. MIERA ET AL. *v.* GARCIA, A MINOR, BY HER NEXT FRIENDS, GARCIA ET AL. C. A. 10th Cir. *Certiorari denied.* Reported below: 817 F. 2d 650.

No. 87-628. BRANCH *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. *Certiorari denied.* Reported below: 262 U. S. App. D. C. 310, 824 F. 2d 37.

No. 87-671. CONNECTICUT ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. *Certiorari denied.* Reported below: 262 U. S. App. D. C. 244, 823 F. 2d 1554.

No. 87-835. ROBINSON HUMPHREY/AMERICAN EXPRESS, INC., ET AL. *v.* SANDERS ET AL.;

No. 87-836. PAINEWEBBER GROUP, INC. *v.* PARKER, AS CUSTODIAN FOR PARKER, ET AL.; and

No. 87-932. J. C. BRADFORD & CO. *v.* KIRKPATRICK ET AL. C. A. 11th Cir. *Certiorari denied.* Reported below: 827 F. 2d 718.

No. 87-860. WOODS ET AL. *v.* FEDERAL HOME LOAN BANK BOARD ET AL. C. A. 5th Cir. *Certiorari denied.* Reported below: 826 F. 2d 1400.

No. 87-902. BETHEL BAPTIST CHURCH ET AL. *v.* UNITED STATES. C. A. 3d Cir. *Certiorari denied.* Reported below: 822 F. 2d 1334.

No. 87-911. CONTINENTAL GROUP, INC., ET AL. *v.* MCLENDON ET AL. C. A. 3d Cir. *Certiorari denied.*

No. 87-930. JAMES D. *v.* CALIFORNIA. Sup. Ct. Cal. *Certiorari denied.* Reported below: 43 Cal. 3d 903, 741 P. 2d 161.

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No. 87-967. *PRICE ET AL. v. PIERCE, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL.* C. A. 7th Cir. Certiorari denied. Reported below: 823 F. 2d 1114.

No. 87-982. *HOLLEY v. UNITED STATES.* C. A. 5th Cir. Certiorari denied. Reported below: 826 F. 2d 331.

No. 87-986. *BREIER v. UNITED STATES.* C. A. 9th Cir. Certiorari denied. Reported below: 813 F. 2d 212.

No. 87-1018. *WOLF v. UNITED STATES.* C. A. 9th Cir. Certiorari denied. Reported below: 820 F. 2d 1499.

No. 87-1039. *JUARBE ANGUEIRA v. ARIAS, DIRECTOR OF THE PUBLIC BUILDING AUTHORITY.* C. A. 1st Cir. Certiorari denied. Reported below: 831 F. 2d 11.

No. 87-1048. *LEMAIRE ET AL. v. UNITED STATES ET AL.* C. A. 5th Cir. Certiorari denied. Reported below: 826 F. 2d 387.

No. 87-1079. *PALUMBO v. UNITED STATES.* C. A. 6th Cir. Certiorari denied. Reported below: 829 F. 2d 39.

No. 87-1084. *RAMEY v. GENERAL ACCOUNTING OFFICE.* C. A. D. C. Cir. Certiorari denied.

No. 87-1093. *BOERENVEEN v. UNITED STATES.* C. A. 11th Cir. Certiorari denied. Reported below: 830 F. 2d 1130.

No. 87-1142. *ILLINOIS DEPARTMENT OF REVENUE ET AL. v. ANDRAS ET AL.* App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 154 Ill. App. 3d 37, 506 N. E. 2d 439.

No. 87-1154. *WILSON v. TENNESSEE.* Ct. Crim. App. Tenn. Certiorari denied.

No. 87-1184. *CURRY ET AL. v. UNITED STATES.* C. A. 6th Cir. Certiorari denied. Reported below: 835 F. 2d 879.

No. 87-1193. *MIAMI HERALD PUBLISHING Co. v. GRIDLEY, CIRCUIT JUDGE OF FLORIDA, ORANGE COUNTY, ET AL.* Sup. Ct. Fla. Certiorari denied. Reported below: 510 So. 2d 884.

No. 87-1197. *DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS v. THOMPSON.* Sup. Ct. Fla. Certiorari denied. Reported below: 515 So. 2d 173.

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No. 87-1199. ABACUS MORTGAGE INVESTMENT CO. *v.* SUTTON PLACE DEVELOPMENT CO. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 826 F. 2d 637.

No. 87-1203. HORNSBY *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 517 So. 2d 631.

No. 87-1205. FLEISHER *v.* CITY OF SIGNAL HILL, CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 829 F. 2d 1491.

No. 87-1209. BROWN ET AL. *v.* ALABAMA ET AL. Sup. Ct. Ala. Certiorari denied. Reported below: 514 So. 2d 836.

No. 87-1215. E & T REALTY ET AL. *v.* STRICKLAND ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 830 F. 2d 1107.

No. 87-1216. ARTHUR YOUNG & CO. *v.* BURULL ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 831 F. 2d 788.

No. 87-1218. ADAMS ET AL. *v.* PAN AMERICAN WORLD AIRWAYS, INC., ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 264 U. S. App. D. C. 174, 828 F. 2d 24.

No. 87-1220. ROCKLAND INDUSTRIES, INC. *v.* CHUMBLEY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 829 F. 2d 1119.

No. 87-1223. GER-SHEP, INC. *v.* UNITED STATES; KLP, INC. *v.* UNITED STATES; MCMINN'S ASPHALT CO., INC. *v.* UNITED STATES; MCMINN'S ASPHALT PRODUCTS, INC. *v.* UNITED STATES; SCHELL *v.* UNITED STATES; and SWEIGART *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 833 F. 2d 308.

No. 87-1228. PENNWALT CORP. *v.* DURAND-WAYLAND, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 833 F. 2d 931.

No. 87-1230. PRICE, ADMINISTRATOR OF THE ESTATE OF PRICE *v.* SCOTT, EXECUTRIX OF THE ESTATE OF SCOTT. C. A. 11th Cir. Certiorari denied. Reported below: 831 F. 2d 1069.

No. 87-1239. BLOOR ET AL. *v.* MONTGOMERY COUNTY, MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 70 Md. App. 733.

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No. 87-1248. *RONEK ET AL. v. GALLATIN COUNTY, MONTANA*. Sup. Ct. Mont. Certiorari denied. Reported below: 227 Mont. 514, 740 P. 2d 1115.

No. 87-1250. *BICOY v. HAWAII*. Sup. Ct. Haw. Certiorari denied.

No. 87-1253. *CANSLER v. GROVE MANUFACTURING CO. ET AL.* C. A. 6th Cir. Certiorari denied. Reported below: 826 F. 2d 1507.

No. 87-1254. *KILGROE v. ARABIAN ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 825 F. 2d 413.

No. 87-1257. *SOBONY v. TILBERRY*. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 87-1258. *PLATIS v. E. F. HUTTON & CO., INC.* C. A. 6th Cir. Certiorari denied. Reported below: 829 F. 2d 13.

No. 87-1259. *KING v. GLOBE NEWSPAPER CO. ET AL.* Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 400 Mass. 705, 512 N. E. 2d 241.

No. 87-1264. *HILBUN v. GOLDBERG*. C. A. 5th Cir. Certiorari denied. Reported below: 823 F. 2d 881.

No. 87-1265. *UMANSKY ET AL. v. MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., ET AL.* C. A. 2d Cir. Certiorari denied. Reported below: 831 F. 2d 284.

No. 87-1267. *MABEY v. OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS OF A. H. ROBINS CO., INC., ET AL.* C. A. 4th Cir. Certiorari denied. Reported below: 832 F. 2d 299.

No. 87-1271. *INTERNATIONAL ORGANIZATION OF MASTERS, MATES & PILOTS, PACIFIC MARITIME REGION, ET AL. v. ANDREWS, COMMISSIONER OF ADMINISTRATION OF ALASKA, ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 831 F. 2d 843.

No. 87-1282. *TEAGUE ET AL., DBA GOLDEN CABLE CO. v. B. E. & K. COMMUNICATIONS, INC., ET AL.* C. A. 4th Cir. Certiorari denied. Reported below: 831 F. 2d 1058.

No. 87-1286. *ALLEN-SHERMAN-HOFF CO., INC., ET AL. v. CALLOWHILL ET AL.* C. A. 3d Cir. Certiorari denied. Reported below: 832 F. 2d 269.

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No. 87-1290. *MCCORKLE v. MARYLAND*. Ct. Sp. App. Md. Certiorari denied. Reported below: 71 Md. App. 736.

No. 87-1297. *ABLE, A MINOR UNDER THE AGE OF FOURTEEN YEARS, BY HIS GUARDIAN AD LITEM, DAY v. UPJOHN CO., INC., ET AL.* C. A. 4th Cir. Certiorari denied. Reported below: 829 F. 2d 1330.

No. 87-1322. *ROLLESTON v. ELDRIDGE, JUDGE, FULTON SUPERIOR COURT OF GEORGIA*. C. A. 11th Cir. Certiorari denied.

No. 87-1328. *TOCCO v. ARIZONA*. Ct. App. Ariz. Certiorari denied.

No. 87-1329. *BROWNING v. CHEVRON U. S. A. INC. ET AL.* C. A. 10th Cir. Certiorari denied.

No. 87-1335. *BRAVERMAN v. UNITED STATES*. C. A. 6th Cir. Certiorari denied. Reported below: 829 F. 2d 1126.

No. 87-1396. *PERRY v. UNITED STATES PAROLE COMMISSION ET AL.* C. A. 8th Cir. Certiorari denied. Reported below: 831 F. 2d 811.

No. 87-1399. *WADE v. UNITED STATES DEPARTMENT OF JUSTICE*. C. A. Fed. Cir. Certiorari denied. Reported below: 835 F. 2d 872.

No. 87-5425. *ROBERTS v. ROBERTS*. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 151 Ill. App. 3d 65, 503 N. E. 2d 363.

No. 87-5686. *HUDSON v. JAGO, SUPERINTENDENT, LONDON CORRECTIONAL INSTITUTION*. C. A. 6th Cir. Certiorari denied. Reported below: 822 F. 2d 59.

No. 87-5713. *SIMPSON v. NORTH CAROLINA*. Sup. Ct. N. C. Certiorari denied. Reported below: 320 N. C. 313, 357 S. E. 2d 332.

No. 87-5787. *STUART v. OREGON*. Ct. App. Ore. Certiorari denied. Reported below: 86 Ore. App. 538, 739 P. 2d 74.

No. 87-5815. *SNYDER v. KANSAS*. Ct. App. Kan. Certiorari denied. Reported below: 12 Kan. App. 2d lxxi, 761 P. 2d 1278.

No. 87-5819. *WARD v. MCNAMARA, FORMER DIRECTOR, DIVISION OF PRISONS, NORTH CAROLINA DEPARTMENT OF CORREC-*

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TIONS, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 829 F. 2d 37.

No. 87-5826. PARHAM *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 830 F. 2d 194.

No. 87-5833. WILLIAMS *v.* WELDON, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 826 F. 2d 1018.

No. 87-5880. MCCLINE *v.* KEENEY, SUPERINTENDENT, OREGON STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied. Reported below: 829 F. 2d 40.

No. 87-5915. SLAUGHTER *v.* DISTRICT OF COLUMBIA ET AL. Ct. App. D. C. Certiorari denied.

No. 87-5921. BETTISTEA ET AL. *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied. Reported below: 428 Mich. 917.

No. 87-5972. OSPINA *v.* UNITED STATES; and

No. 87-6011. RAMOS ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 823 F. 2d 429.

No. 87-5980. BURTON *v.* OHIO STATE ADULT PAROLE AUTHORITY. C. A. 6th Cir. Certiorari denied. Reported below: 830 F. 2d 193.

No. 87-5983. WATSON *v.* MISSOURI ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 831 F. 2d 300.

No. 87-5987. GATES *v.* SAN QUENTIN WARDEN. C. A. 9th Cir. Certiorari denied.

No. 87-5990. RAY *v.* UNITED STATES; and

No. 87-6162. MAY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 828 F. 2d 399.

No. 87-5999. COZAD *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 158 Ill. App. 3d 664, 511 N. E. 2d 211.

No. 87-6010. TINSLEY *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 87-6028. DRYDEN *v.* MUSTAIN ET AL. C. A. 10th Cir. Certiorari denied.

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No. 87-6062. *STINCER v. KENTUCKY*. Sup. Ct. Ky. Certiorari denied.

No. 87-6074. *ROBINSON v. AMTRAK RAILROAD CORPORATION ET AL.* C. A. 7th Cir. Certiorari denied.

No. 87-6092. *RODRIGUEZ v. UNITED STATES*. C. A. 7th Cir. Certiorari denied. Reported below: 831 F. 2d 162.

No. 87-6110. *SHIFLET v. LANE, DIRECTOR, ILLINOIS DEPARTMENT OF CORRECTIONS, ET AL.* C. A. 7th Cir. Certiorari denied. Reported below: 815 F. 2d 457.

No. 87-6115. *CARLIN v. UNITED STATES*. C. A. 3d Cir. Certiorari denied. Reported below: 833 F. 2d 307.

No. 87-6139. *HUNTER v. UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON*. C. A. 9th Cir. Certiorari denied.

No. 87-6216. *MARRERO v. DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS*. C. A. 11th Cir. Certiorari denied. Reported below: 823 F. 2d 1468.

No. 87-6231. *CASELL v. MOUNT JOY MENNONITE CHURCH ET AL.* Sup. Ct. Pa. Certiorari denied. Reported below: 516 Pa. 638, 533 A. 2d 710.

No. 87-6232. *CASELL v. CHARLES*. Sup. Ct. Pa. Certiorari denied. Reported below: 517 Pa. 597, 535 A. 2d 1056.

No. 87-6241. *DRAPER v. MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS*. C. A. 4th Cir. Certiorari denied. Reported below: 829 F. 2d 1119.

No. 87-6243. *DEERING v. MEESE, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.* C. A. 11th Cir. Certiorari denied.

No. 87-6244. *DEERING v. GEORGIA ET AL.* C. A. 11th Cir. Certiorari denied.

No. 87-6250. *PUSHARD v. RUSSELL*. C. A. 1st Cir. Certiorari denied. Reported below: 815 F. 2d 1.

No. 87-6251. *MCNEIL v. LOWNEY ET AL.* C. A. 7th Cir. Certiorari denied. Reported below: 831 F. 2d 1368.

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No. 87-6253. *VIGIL v. ABOUREZK ET AL.* Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 87-6255. *JAMES v. LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS.* C. A. 5th Cir. Certiorari denied. Reported below: 834 F. 2d 1024.

No. 87-6262. *MCCARTHY v. LOPES, COMMISSIONER, CONNECTICUT DEPARTMENT OF CORRECTION, ET AL.* C. A. 2d Cir. Certiorari denied.

No. 87-6264. *AFIFI v. HODEL, SECRETARY OF THE INTERIOR.* C. A. 4th Cir. Certiorari denied. Reported below: 829 F. 2d 34.

No. 87-6265. *STRICKLER v. UNITED STATES.* C. A. 3d Cir. Certiorari denied. Reported below: 833 F. 2d 308.

No. 87-6272. *LEMBECK v. ASHCROFT ET AL.* C. A. 8th Cir. Certiorari denied.

No. 87-6273. *FELDERS v. DUCKWORTH ET AL.* C. A. 7th Cir. Certiorari denied.

No. 87-6274. *LOFTIS v. LEEKE, COMMISSIONER, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, ET AL.* C. A. 4th Cir. Certiorari denied. Reported below: 833 F. 2d 310.

No. 87-6278. *D'AMARIO v. RHODE ISLAND.* Sup. Ct. R. I. Certiorari denied.

No. 87-6283. *KIDD v. UNITED STATES.* C. A. 9th Cir. Certiorari denied. Reported below: 831 F. 2d 304.

No. 87-6292. *SMITH v. NORRELL ET AL.* C. A. 4th Cir. Certiorari denied. Reported below: 825 F. 2d 408.

No. 87-6294. *TOWNES v. TEST, ASSISTANT COMMONWEALTH ATTORNEY, ET AL.* C. A. 4th Cir. Certiorari denied. Reported below: 838 F. 2d 468.

No. 87-6297. *STARKS v. TEXAS.* Ct. Crim. App. Tex. Certiorari denied.

No. 87-6299. *PEARL v. APEL ET AL.* C. A. 8th Cir. Certiorari denied. Reported below: 831 F. 2d 300.

No. 87-6300. *TATUM v. ARMONTROUT, WARDEN, ET AL.* C. A. 8th Cir. Certiorari denied.

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No. 87-6301. *ZUSCHLAG v. TRETTIS ET AL.* C. A. 11th Cir. Certiorari denied.

No. 87-6304. *YANCEY v. UNITED STATES.* C. A. 7th Cir. Certiorari denied. Reported below: 827 F. 2d 83.

No. 87-6307. *HENDERSON v. INTERNAL REVENUE SERVICE.* C. A. 1st Cir. Certiorari denied.

No. 87-6310. *DOOLEY v. DUCKWORTH.* C. A. 7th Cir. Certiorari denied. Reported below: 832 F. 2d 445.

No. 87-6312. *BRICKHOUSE v. LONG ET AL.* C. A. 5th Cir. Certiorari denied. Reported below: 835 F. 2d 1431.

No. 87-6314. *HUGHES v. GRANT ET AL.* C. A. 6th Cir. Certiorari denied. Reported below: 833 F. 2d 1012.

No. 87-6316. *HUSSMANN v. ZIMMERMAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AND DIAGNOSTIC AND CLASSIFICATION CENTER AT GRATERFORD, ET AL.* C. A. 3d Cir. Certiorari denied.

No. 87-6318. *REUMAYR v. SCOTT, WARDEN, ET AL.* C. A. 9th Cir. Certiorari denied.

No. 87-6319. *WILLIAMS v. ARTHUR ET AL.* C. A. 7th Cir. Certiorari denied.

No. 87-6321. *BREWER v. CALIFORNIA.* Sup. Ct. Cal. Certiorari denied.

No. 87-6330. *LITTLE v. FULCOMER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON.* C. A. 3d Cir. Certiorari denied.

No. 87-6332. *FLORES v. CALIFORNIA.* Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 87-6334. *GRATTON v. LECUREUX, WARDEN.* C. A. 6th Cir. Certiorari denied.

No. 87-6336. *PETERS v. TROWELL ET AL.* C. A. 4th Cir. Certiorari denied. Reported below: 833 F. 2d 1005.

No. 87-6339. *WILLIAMS v. ZIMMERMAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AND DIAGNOSTIC AND CLASSIFICATION CENTER AT GRATERFORD, ET AL.* C. A. 3d Cir. Certiorari denied.

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C. A. 3d Cir. Certiorari denied.

No. 87-6342. GILES *v.* WING ET AL. C. A. 11th Cir. Certiorari denied.

No. 87-6346. BALAWAJDER *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, ET AL. C. A. 5th Cir. Certiorari denied.

No. 87-6349. JONES *v.* UNITED STATES ET AL. C. A. 8th Cir. Certiorari denied.

No. 87-6358. YOUNG *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 87-6364. KERTESZ *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 835 F. 2d 880.

No. 87-6370. TAYLOR *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 831 F. 2d 124.

No. 87-6376. MARIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 835 F. 2d 289.

No. 87-6377. GARCIA-NIETO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 835 F. 2d 1431.

No. 87-6378. REIGH ET AL. *v.* SCHLEIGH ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 829 F. 2d 1334.

No. 87-6380. MATIAS *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 25 M. J. 356.

No. 87-6385. PENDLETON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 829 F. 2d 41.

No. 87-6390. GALLAGHER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 835 F. 2d 1431.

No. 87-6394. AURIEMMA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 833 F. 2d 1019.

No. 87-6399. ESPINOSA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 827 F. 2d 604.

No. 87-6400. CROOM *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 837 F. 2d 479.

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No. 87-6408. *ROGERS v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 830 F. 2d 1574.

No. 87-6412. *JACKSON v. UNITED STATES*. C. A. 7th Cir. Certiorari denied. Reported below: 835 F. 2d 1195.

No. 87-6413. *GIRALDO v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 835 F. 2d 289.

No. 87-6428. *SANTIAGO v. UNITED STATES*. C. A. 1st Cir. Certiorari denied. Reported below: 828 F. 2d 866.

No. 87-6429. *QUINTERO-GONZALEZ v. UNITED STATES*. C. A. 2d Cir. Certiorari denied. Reported below: 834 F. 2d 280.

No. 87-6432. *SMITH v. UNITED STATES*. C. A. 3d Cir. Certiorari denied. Reported below: 838 F. 2d 463.

No. 87-6435. *KAESTEL v. SARGENT, WARDEN*. C. A. 8th Cir. Certiorari denied.

No. 87-6440. *SAMEL v. LECUREUX, WARDEN*. C. A. 6th Cir. Certiorari denied.

No. 87-6451. *BARTLE v. UNITED STATES*. C. A. 6th Cir. Certiorari denied. Reported below: 835 F. 2d 646.

No. 87-6454. *GREEN v. UNITED STATES*. C. A. 5th Cir. Certiorari denied.

No. 87-6457. *TUMERMAN v. NEW YORK*. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 133 App. Div. 2d 714, 519 N. Y. S. 2d 880.

No. 87-6463. *AKBAR v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 833 F. 2d 1006.

No. 87-789. *GONZALES v. SECRETARY OF THE AIR FORCE ET AL.* C. A. 5th Cir. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 824 F. 2d 392.

No. 87-1208. *OBERG ET AL. v. AETNA CASUALTY & SURETY CO. ET AL.* C. A. 4th Cir. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 828 F. 2d 1023.

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No. 87-915. GUY F. ATKINSON COMPANY OF CALIFORNIA ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. JUSTICE KENNEDY took no part in the consideration or decision of this petition. Reported below: 814 F. 2d 1388.

No. 87-1236. NASSER ET AL. *v.* FEDERAL HOME LOAN BANK BOARD ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE KENNEDY took no part in the consideration or decision of this petition. Reported below: 823 F. 2d 1553.

No. 87-1280. LUNGLEY *v.* COUNTY OF LOS ANGELES ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE KENNEDY took no part in the consideration or decision of this petition. Reported below: 827 F. 2d 772.

No. 87-6185. BRIGHT *v.* SHIMODA ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE KENNEDY took no part in the consideration or decision of this petition. Reported below: 819 F. 2d 227.

No. 87-942. SPEER *v.* OTTAWAY NEWSPAPERS, INC. C. A. 8th Cir. Certiorari denied. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 828 F. 2d 475.

No. 87-1014. FOLTZ *v.* BLACKBURN. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 828 F. 2d 1177.

No. 87-1155. DUGGER, SECRETARY, FLORIDA DEPARTMENT OF OFFENDER REHABILITATION *v.* MARRERO. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 823 F. 2d 1468.

No. 87-1226. KEMP, WARDEN *v.* BOWEN. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 832 F. 2d 546.

No. 87-1102. SCHLEIGH ET AL. *v.* REIGH ET AL. C. A. 4th Cir. Motion of respondents Esther Reigh and Ivery Mae Simpkins to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 829 F. 2d 1334.

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No. 87-1276. *H-CHH ASSOCIATES ET AL., DBA PLAZA PASADENA v. CITIZENS FOR REPRESENTATIVE GOVERNMENT, DBA PASADENA CITIZENS FOR REPRESENTATIVE GOVERNMENT, ET AL.* Ct. App. Cal., 2d App. Dist. Motions of Pacific Legal Foundation and International Council of Shopping Centers, Inc., et al. for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 193 Cal. App. 3d 1193, 238 Cal. Rptr. 841.

No. 87-1304. *ROSEE v. COMMODITY FUTURES TRADING COMMISSION ET AL.* C. A. 7th Cir. Certiorari denied. JUSTICE WHITE took no part in the consideration or decision of this petition. Reported below: 830 F. 2d 196.

No. 87-1308. *BARRY, MAYOR OF THE DISTRICT OF COLUMBIA, ET AL. v. GRANO ET AL.* C. A. D. C. Cir. Certiorari denied. Reported below: 266 U. S. App. D. C. 60, 832 F. 2d 1298.

JUSTICE WHITE, with whom THE CHIEF JUSTICE joins, dissenting.

This case presents the difficult issue whether attorney's fees may be awarded under 42 U. S. C. § 1988 when the defendant has involuntarily acquiesced in the plaintiff's demands—due to a preliminary injunction, for example—but the case is later mooted prior to completion of the appeal process. For the reasons given in my dissent from denial of certiorari in *Kay v. David Douglas School District*, 484 U. S. 1032 (1988), I would grant certiorari in this case.

No. 87-6284. *CASTRO v. OKLAHOMA.* Ct. Crim. App. Okla.;

No. 87-6295. *TOWNES v. VIRGINIA.* Sup. Ct. Va.; and

No. 87-6368. *SMITH v. FLORIDA.* Sup. Ct. Fla. Certiorari denied. Reported below: No. 87-6284, 745 P. 2d 394; No. 87-6295, 234 Va. 307, 362 S. E. 2d 650; No. 87-6368, 515 So. 2d 182.

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. 87-6058. *SPENCER v. UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*, 484 U. S. 1071. Petition for rehearing denied.

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No. 84-1801. *INUPIAT COMMUNITY OF THE ARCTIC SLOPE ET AL. v. UNITED STATES ET AL.*, 474 U. S. 820. Motion for leave to file petition for rehearing denied. JUSTICE SCALIA and JUSTICE KENNEDY took no part in the consideration or decision of this petition.

No. 86-595. *UNITED STATES v. FAUSTO*, 484 U. S. 439;
No. 87-809. *BULLARD v. NORTHCUTT ET AL.*, 484 U. S. 1010;
No. 87-922. *IN RE BROWN*, 484 U. S. 1041;
No. 87-1005. *IN RE ARLT ET UX.*, 484 U. S. 1041;
No. 87-5527. *RADEMAKER v. TEACHERS COLLEGE, COLUMBIA UNIVERSITY*, 484 U. S. 932;
No. 87-5699. *JONES v. BUTLER, WARDEN*, 484 U. S. 1047;
No. 87-5821. *JESTER v. OHIO*, 484 U. S. 1047;
No. 87-5847. *LYONS v. DEPARTMENT OF THE ARMY ET AL.*, 484 U. S. 1029;
No. 87-5901. *RONSON v. COMMISSIONER OF CORRECTION OF NEW YORK ET AL.*, 484 U. S. 1029;
No. 87-5968. *MORALES v. OHIO*, 484 U. S. 1047;
No. 87-5985. *ZUERN v. OHIO*, 484 U. S. 1047;
No. 87-6002. *BYRD v. OHIO*, 484 U. S. 1037; and
No. 87-6016. *TAYLOR v. HENRY VOGT MACHINE CO.*, 484 U. S. 1046. Petitions for rehearing denied. JUSTICE KENNEDY took no part in the consideration or decision of these petitions.

No. 87-5298. *FINESTONE v. UNITED STATES*, 484 U. S. 948. Motion for leave to file petition for rehearing denied. JUSTICE KENNEDY took no part in the consideration or decision of this motion.

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Appeals Dismissed

No. 87-1298. *BEPPLER v. TOWNSHIP OF WASHINGTON ET AL.* Appeal from Super. Ct. N. J., App. Div., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 87-6407. *DANIELSON v. ILLINOIS*. Appeal from App. Ct. Ill., 2d Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 153 Ill. App. 3d 1163, 517 N. E. 2d 353.

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Certiorari Granted—Vacated and Remanded

No. 86-1151. FRINK ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Commissioner v. Bollinger*, ante, p. 340. Reported below: 798 F. 2d 106.

No. 86-1152. GEORGE ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Commissioner v. Bollinger*, ante, p. 340. Reported below: 803 F. 2d 144.

Miscellaneous Orders. (See also No. 65, Orig., ante, at 394.)

No. D-658. IN RE DISBARMENT OF ROBINSON. Disbarment entered. [For earlier order herein, see 484 U. S. 893.]

No. D-660. IN RE DISBARMENT OF SCHULER. Disbarment entered. [For earlier order herein, see 484 U. S. 940.]

No. D-666. IN RE DISBARMENT OF KEEHAN. Disbarment entered. [For earlier order herein, see 484 U. S. 999.]

No. D-669. IN RE DISBARMENT OF WADE. Disbarment entered. [For earlier order herein, see 484 U. S. 1039.]

No. D-684. IN RE DISBARMENT OF SCHULTZ. It is ordered that Marc G. Schultz, of North Woodmere, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-685. IN RE DISBARMENT OF STRAUSS. It is ordered that Stephen N. Strauss, of Selden, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-686. IN RE DISBARMENT OF WARREN. It is ordered that David Warren, of Irvine, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-687. IN RE DISBARMENT OF NAHOOM. It is ordered that Kerry J. Nahoom, Sr., of Winter Park, Fla., be suspended

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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-688. *IN RE DISBARMENT OF MAGEDMAN*. It is ordered that Nelson Samuel Magedman, of Canoga Park, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-689. *IN RE DISBARMENT OF TRILLING*. It is ordered that Michael P. Trilling, of Gaithersburg, 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-690. *IN RE DISBARMENT OF DORSEY*. It is ordered that Thomas Joseph Dorsey, of Miami, 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. 86-492. *BOYLE, PERSONAL REPRESENTATIVE OF THE HEIRS AND ESTATE OF BOYLE v. UNITED TECHNOLOGIES CORP.* C. A. 4th Cir. [Certiorari granted, 479 U. S. 1029.] Motion of Joan Tozer for leave to participate in oral argument as *amicus curiae* and for divided argument denied.

No. 86-957. *LILJEBERG v. HEALTH SERVICES ACQUISITION CORP.* C. A. 5th Cir. [Certiorari granted, 480 U. S. 915.] Case restored to calendar for reargument on April 25, 1988.

No. 87-519. *MAYNARD, WARDEN, ET AL. v. CARTWRIGHT*. C. A. 10th Cir. [Certiorari granted, 484 U. S. 1003.] Motion of Roger Dale Hayes for leave to file a brief as *amicus curiae* granted.

No. 87-5677. *HARRIS v. REED, WARDEN, ET AL.* C. A. 7th Cir. [Certiorari granted, *ante*, p. 934.] Motion for appointment of counsel granted, and it is ordered that Kimball R. Anderson, Esq., of Chicago, Ill., be appointed to serve as counsel for petitioner in this case.

No. 87-6343. *HENSLEE v. SYKES, DIRECTOR, DEPARTMENT OF ADMINISTRATIVE SERVICES*. Sup. Ct. Ohio. Motion of peti-

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tioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until April 18, 1988, within which to pay the docketing fee required by Rule 45(a) and to submit a petition for writ of certiorari 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. 87-6382. RANDOLPH *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until April 18, 1988, within which to pay the docketing fee required by Rule 45(a) and to submit a petition for writ of certiorari in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN and JUSTICE MARSHALL, 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. 87-6397. GUINN *v.* GUINN. Sup. Ct. Va. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until April 18, 1988, within which to pay the docketing fee required by Rule 45(a) and to submit a petition for writ of certiorari 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*.

No. 87-6536. IN RE CORLEY. Petition for writ of habeas corpus denied.

No. 87-1296. IN RE EXXON CORP. ET AL.; and

No. 87-6359. IN RE SPRADLEY. Petitions for writs of mandamus denied.

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Probable Jurisdiction Postponed

No. 87-1318. VOLT INFORMATION SCIENCES, INC. *v.* BOARD OF TRUSTEES OF LELAND STANFORD JUNIOR UNIVERSITY. Appeal from Ct. App. Cal., 6th App. Dist. Further consideration of question of jurisdiction postponed to hearing of case on the merits. JUSTICE O'CONNOR took no part in the consideration or decision of this case.

Certiorari Granted

No. 87-1303. ALLEGHENY PITTSBURGH COAL CO. *v.* COUNTY COMMISSION OF WEBSTER COUNTY, WEST VIRGINIA; and

No. 87-1310. EAST KENTUCKY ENERGY CORP. ET AL. *v.* COUNTY COMMISSION OF WEBSTER COUNTY, WEST VIRGINIA. Sup. Ct. App. W. Va. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: — W. Va. —, 360 S. E. 2d 560.

No. 87-6325. PERRY *v.* LEEKE, COMMISSIONER, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 832 F. 2d 837.

Certiorari Denied. (See also Nos. 87-1298 and 87-6407, *supra*.)

No. 87-892. ARRANT *v.* ALABAMA ET AL. Ct. Crim. App. Ala. Certiorari denied. Reported below: 511 So. 2d 271.

No. 87-1000. WATTAWA *v.* WISCONSIN DEPARTMENT OF HEALTH AND SOCIAL SERVICES-PROBATION. C. A. 7th Cir. Certiorari denied. Reported below: 828 F. 2d 21.

No. 87-1038. CITY OF AURORA, BY AND THROUGH ITS MAYOR AND CITY COUNCIL, ET AL. *v.* NEPHEW ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 830 F. 2d 1547.

No. 87-1062. FARAH *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 513 So. 2d 146.

No. 87-1070. FOREIGN CREDIT INSURANCE ASSN. *v.* NU-AIR MANUFACTURING CO. C. A. 11th Cir. Certiorari denied. Reported below: 822 F. 2d 987.

No. 87-1092. ONE 1984 LINCOLN MARK VII TWO-DOOR ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 829 F. 2d 532.

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No. 87-1159. *CNA FINANCIAL CORP. ET AL. v. McLAUGHLIN, SECRETARY OF LABOR, ET AL.* C. A. D. C. Cir. Certiorari denied. Reported below: 265 U. S. App. D. C. 248, 830 F. 2d 1132.

No. 87-1192. *INSCOE v. ACTON CORP. ET AL.* C. A. D. C. Cir. Certiorari denied. Reported below: 265 U. S. App. D. C. 304, 830 F. 2d 1188.

No. 87-1246. *ARIZONA v. FELD ET AL.* Ct. App. Ariz. Certiorari denied. Reported below: 155 Ariz. 88, 745 P. 2d 146.

No. 87-1260. *JOHNSON v. McLAUGHLIN, SECRETARY OF LABOR.* C. A. D. C. Cir. Certiorari denied. Reported below: 260 U. S. App. D. C. 358, 819 F. 2d 318.

No. 87-1268. *WORTH v. SELCHOW & RIGHTER CO. ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 827 F. 2d 569.

No. 87-1299. *COLONY SQUARE CO. v. PRUDENTIAL INSURANCE COMPANY OF AMERICA.* C. A. 11th Cir. Certiorari denied. Reported below: 819 F. 2d 272.

No. 87-1301. *HOLLAND v. DISTRICT COURT, COUNTY OF DOUGLAS, COLORADO, ET AL.* C. A. 10th Cir. Certiorari denied. Reported below: 831 F. 2d 940.

No. 87-1313. *DAYTON POWER & LIGHT CO, v. OHIO CIVIL RIGHTS COMMISSION ET AL.* Sup. Ct. Ohio. Certiorari denied. Reported below: 33 Ohio St. 3d 73, 514 N. E. 2d 1132.

No. 87-1315. *DEASY, PERSONAL REPRESENTATIVE OF THE ESTATE OF DEASY v. HILL.* C. A. 4th Cir. Certiorari denied. Reported below: 833 F. 2d 38.

No. 87-1319. *ESPOSITO v. NEW YORK TIMES CO. ET AL.* (three cases). C. A. 2d Cir. Certiorari denied. Reported below: 828 F. 2d 110 (first case); 834 F. 2d 1152 (second case); 837 F. 2d 599 (third case).

No. 87-1326. *DYDYN v. CONNECTICUT DEPARTMENT OF LIQUOR CONTROL.* App. Ct. Conn. Certiorari denied. Reported below: 12 Conn. App. 455, 531 A. 2d 170.

No. 87-1333. *DENT, INDIVIDUALLY AND ON BEHALF OF DENT, A MINOR v. CITY OF DALLAS ET AL.* Ct. App. Tex., 5th Dist. Certiorari denied. Reported below: 729 S. W. 2d 114.

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No. 87-1371. *RIVERA v. TEXAS*. Ct. App. Tex., 14th Dist. Certiorari denied. Reported below: 730 S. W. 2d 824.

No. 87-1395. *LEADY ET VIR v. UNITED STATES ET AL.* C. A. 3d Cir. Certiorari denied.

No. 87-1402. *CLODFELTER v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 831 F. 2d 1069.

No. 87-1442. *AUDI v. UNITED STATES*. C. A. 1st Cir. Certiorari denied. Reported below: 835 F. 2d 943.

No. 87-5843. *PROSDOCIMO v. UNITED STATES*. C. A. 3d Cir. Certiorari denied. Reported below: 826 F. 2d 1057.

No. 87-5917. *SIMDRAM v. UNITED STATES*. Ct. App. D. C. Certiorari denied.

No. 87-6094. *MCCOY v. CREST*. C. A. 4th Cir. Certiorari denied. Reported below: 829 F. 2d 36.

No. 87-6108. *JAMES v. LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS*. C. A. 5th Cir. Certiorari denied.

No. 87-6118. *BEST v. MARYLAND*. Ct. Sp. App. Md. Certiorari denied. Reported below: 71 Md. App. 422, 526 A. 2d 75.

No. 87-6145. *TURNER v. LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION, ET AL.* C. A. 8th Cir. Certiorari denied. Reported below: 837 F. 2d 478.

No. 87-6164. *CALICCHIO v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 829 F. 2d 1130.

No. 87-6209. *BROWN v. UNITED STATES*. Ct. App. D. C. Certiorari denied. Reported below: 518 A. 2d 415.

No. 87-6277. *BEATTIE v. UNITED STATES*. Ct. Mil. App. Certiorari denied. Reported below: 25 M. J. 198.

No. 87-6326. *VEALE ET AL. v. EGGERT*. Sup. Ct. N. H. Certiorari denied.

No. 87-6328. *SCOTT v. GARRAGHTY, WARDEN, ET AL.* C. A. 4th Cir. Certiorari denied. Reported below: 828 F. 2d 17.

No. 87-6333. *ROBERTS v. SCULLY, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY, ET AL.* C. A. 2d Cir. Certiorari denied.

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No. 87-6348. *CRAWFORD v. FOLTZ, WARDEN*. C. A. 6th Cir. Certiorari denied.

No. 87-6350. *BILAL v. MONTGOMERY WARD & Co.* C. A. 8th Cir. Certiorari denied.

No. 87-6351. *BESPALCHENKO v. GERMAN FEDERAL GOVERNMENT ET AL.* C. A. D. C. Cir. Certiorari denied.

No. 87-6362. *HOLT v. CASTANEDA*. C. A. 9th Cir. Certiorari denied. Reported below: 832 F. 2d 123.

No. 87-6369. *MALFATTO v. UNITED STATES*. C. A. 3d Cir. Certiorari denied. Reported below: 817 F. 2d 753.

No. 87-6373. *CALO v. McMACKIN, SUPERINTENDENT, MARION CORRECTIONAL INSTITUTION*. C. A. 6th Cir. Certiorari denied.

No. 87-6374. *WOODLIFF v. LYLES, WARDEN*. C. A. 4th Cir. Certiorari denied. Reported below: 833 F. 2d 1006.

No. 87-6375. *WILLIAMS v. SNOW, CHAIRMAN, BOARD OF PAR-
DONS AND PAROLES, ET AL.* C. A. 11th Cir. Certiorari denied.

No. 87-6387. *SMITH v. LYNAUGH, DIRECTOR, TEXAS DEPART-
MENT OF CORRECTIONS*. C. A. 5th Cir. Certiorari denied. Re-
ported below: 836 F. 2d 1344.

No. 87-6388. *WHITTINGTON v. CUNNAGIN, LAUREL COUNTY
ATTORNEY, ON BEHALF OF ENGLERT, ET AL.* Sup. Ct. Ky. Certiorari denied. Reported below: 737 S. W. 2d 676.

No. 87-6392. *DIGGS v. OWENS, SUPERINTENDENT, PENNSYL-
VANIA DEPARTMENT OF CORRECTIONS, ET AL.* C. A. 3d Cir. Certiorari denied. Reported below: 833 F. 2d 439.

No. 87-6398. *LIPSEY v. FEDERAL DEPOSIT INSURANCE COR-
PORATION ET AL.* App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 152 Ill. App. 3d 1162, 515 N. E. 2d 1066.

No. 87-6401. *LOVE v. DUGGER, SECRETARY, FLORIDA DE-
PARTMENT OF CORRECTIONS, ET AL.* C. A. 11th Cir. Certiorari denied. Reported below: 832 F. 2d 1266.

No. 87-6402. *GENTILE v. MONTEFIORE HOSPITAL, INC., ET AL.* C. A. 3d Cir. Certiorari denied. Reported below: 831 F. 2d 286.

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No. 87-6403. *LAY v. FORD ET AL.* C. A. 5th Cir. Certiorari denied. Reported below: 836 F. 2d 1345.

No. 87-6404. *SMITH v. BRIGHAM*. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 534 A. 2d 1293.

No. 87-6409. *MASTERS v. UNITED STATES*. C. A. 3d Cir. Certiorari denied.

No. 87-6411. *BEAM v. FOLTZ, WARDEN*. C. A. 6th Cir. Certiorari denied. Reported below: 832 F. 2d 1401.

No. 87-6442. *THOMAS v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 828 F. 2d 774.

No. 87-6445. *DEVEAUX v. SCULLY, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY*. C. A. 2d Cir. Certiorari denied.

No. 87-6452. *ESTRADA v. UNITED STATES*. C. A. 3d Cir. Certiorari denied. Reported below: 835 F. 2d 285.

No. 87-6465. *AGOSTINO v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 834 F. 2d 915.

No. 87-6467. *STAMPS v. PARKE, WARDEN*. C. A. 6th Cir. Certiorari denied. Reported below: 834 F. 2d 1269.

No. 87-6470. *COLON v. UNITED STATES*. C. A. 2d Cir. Certiorari denied. Reported below: 835 F. 2d 27.

No. 87-6474. *GRAVATT v. UNITED STATES*. C. A. 3d Cir. Certiorari denied.

No. 87-6483. *SELTENRICH v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 831 F. 2d 304.

No. 87-6488. *HILL v. LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS*. C. A. 5th Cir. Certiorari denied.

No. 87-6506. *MITTLEIDER, AKA WYMAN v. UNITED STATES*. C. A. 10th Cir. Certiorari denied. Reported below: 835 F. 2d 769.

No. 87-6510. *NIGRO v. BEYER, ADMINISTRATOR, NEW JERSEY STATE PRISON*. C. A. 3d Cir. Certiorari denied. Reported below: 838 F. 2d 462.

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No. 87-482. EASTER SEAL SOCIETY FOR CRIPPLED CHILDREN & ADULTS OF LOUISIANA, INC. *v.* PLAYBOY ENTERPRISES, INC., ET AL. C. A. 5th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 815 F. 2d 323.

No. 87-849. ALABAMA BOARD OF PARDONS AND PAROLES ET AL. *v.* ELLARD. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 824 F. 2d 937.

No. 87-1176. DON'S PORTA SIGNS, INC., ET AL. *v.* CITY OF CLEARWATER, FLORIDA. C. A. 11th Cir. Certiorari denied. Reported below: 829 F. 2d 1051.

JUSTICE WHITE, dissenting.

This case presents the question whether the standard of review articulated in *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U. S. 485 (1984), applies to trial courts' findings of fact in cases striking down governmental restrictions on speech as contrary to the First Amendment.

The Federal District Court held in this case that a municipal regulation effectively banning portable signs violated the First Amendment. The court found that the regulation did not directly advance respondent's concededly substantial interest in esthetics and that this interest could be served equally well by less intrusive measures. See *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of N. Y.*, 447 U. S. 557 (1980). The Court of Appeals for the Eleventh Circuit reversed. 829 F. 2d 1051 (1987). The appellate court interpreted our decision in *Bose* as mandating an independent examination of the whole record in all cases involving First Amendment claims. 829 F. 2d, at 1053-1054, n. 9. Accordingly, the court concluded that it was not bound by the "clearly erroneous" standard in reviewing whether the regulation directly advanced respondent's esthetic goals and was more extensive than necessary. The Eleventh Circuit's view that an independent examination of the record must be undertaken when a trial court has found a First Amendment violation, as well as when a trial court has rejected a First Amendment claim, is shared by the Fifth Circuit. See *Lindsay v. San Antonio*, 821 F. 2d 1103, 1107 (1987), cert. denied, 484 U. S. 1010 (1988).

Two other Circuits have concluded, however, that *de novo* review is required only where the trial court has rejected a First

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Amendment claim. See *Daily Herald Co. v. Munro*, 838 F. 2d 380, 383 (CA9 1988); *Planned Parenthood Assn./Chicago Area v. Chicago Transit Authority*, 767 F. 2d 1225, 1228-1229 (CA7 1985). These Circuits have reasoned that no special solicitude need be accorded "the government's claim that it has been wrongly prevented from restricting speech." *Id.*, at 1229. Hence, if a trial court has held that the government unconstitutionally restricted speech, these Circuits will review the trial court's findings of fact only for clear error.

I would grant certiorari to resolve this conflict among the Federal Courts of Appeals as to the standard of review to be applied to trial courts' findings of fact in cases holding that the First Amendment has been violated.

No. 87-1340. *CITY OF PHILADELPHIA v. DISTRICT COUNCIL 33, AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES, AFL-CIO, BY STOUT, AS TRUSTEE AD LITEM, ET AL.* Sup. Ct. Pa. Motion of petitioner to defer consideration of the petition for writ of certiorari denied. Certiorari denied. Reported below: 517 Pa. 620, 538 A. 2d 874.

No. 87-6079. *FREEMAN v. RIDEOUT*. C. A. 2d Cir. Certiorari denied. JUSTICE BLACKMUN would grant certiorari. Reported below: 808 F. 2d 949.

No. 87-6113. *BOOKER v. MISSISSIPPI*. Sup. Ct. Miss.;

No. 87-6286. *HARRISON v. GEORGIA*. Sup. Ct. Ga.;

No. 87-6340. *COHEN v. GEORGIA*. Sup. Ct. Ga.; and

No. 87-6360. *CLARK v. DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL.* C. A. 11th Cir. Certiorari denied. Reported below: No. 87-6113, 511 So. 2d 1329; No. 87-6286, 257 Ga. 528, 361 S. E. 2d 149; No. 87-6340, 257 Ga. 544, 361 S. E. 2d 373; No. 87-6360, 834 F. 2d 1561.

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. 87-6072. *MARTIN v. PENNSYLVANIA BOARD OF LAW EXAMINERS ET AL.*, 484 U. S. 1071. Petition for rehearing denied.

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No. 86-5963. *TAYLOR v. ILLINOIS*, 484 U. S. 400. Petition for rehearing denied. JUSTICE KENNEDY took no part in the consideration or decision of this petition.

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Miscellaneous Order

No. A-741 (87-6700). *SELVAGE v. LYNAUGH, 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, granted pending the disposition by this Court of the petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay terminates automatically. In the event the petition for writ of certiorari is granted, this stay shall continue pending the sending down of the judgment of this Court. THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE O'CONNOR would deny the application for stay and the petition for writ of certiorari.

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Dismissal Under Rule 53

No. 87-1042. *ZERINGUE ET AL. v. LOUISIANA DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT*. Ct. App. La., 5th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 505 So. 2d 1152.

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Appeals Dismissed

No. 87-609. *SHELL OIL CO. v. DIRECTOR OF REVENUE OF MISSOURI*. Appeal from Sup. Ct. Mo. dismissed for want of substantial federal question. Reported below: 732 S. W. 2d 178.

No. 87-1212. *GREENE ET AL. v. MIRABEL, DEPUTY COMMISSIONER, NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL, ET AL.* Appeal from App. Div., Sup. Ct. N. Y., 1st Jud. Dept., dismissed for want of substantial federal question. Reported below: 129 App. Div. 2d 1018, 513 N. Y. S. 2d 905.

No. 87-1345. *LEAVELLE v. CALIFORNIA*. 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.

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No. 87-1357. *ANGEL ET UX. v. FROEHLICH, JUDGE, SAN DIEGO NORTH COUNTY SUPERIOR COURT, 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: 838 F. 2d 473.

No. 87-6417. *REISZNER v. REISZNER.* Appeal from Sup. Ct. La. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 512 So. 2d 1186.

No. 87-1471. *FRANKLIN v. OFFICE OF PERSONNEL MANAGEMENT.* Appeal from C. A. Fed. Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. JUSTICE BRENNAN, JUSTICE BLACKMUN, JUSTICE O'CONNOR, and JUSTICE SCALIA would affirm the judgment. Reported below: 824 F. 2d 979.

No. 87-6438. *MANTER v. TOWN OF FAYETTE, MAINE.* Appeal from Sup. Jud. Ct. Me. dismissed for want of properly presented federal question. Reported below: 528 A. 2d 887.

Miscellaneous Orders

No. — — ——. *EVANS v. UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.* Motion to direct the Clerk to file a petition for writ of certiorari that does not comply with the Rules of this Court denied.

No. D-691. *IN RE DISBARMENT OF NEWHOUSE.* It is ordered that Richard Glenn Newhouse, of Fort Lauderdale, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-692. *IN RE DISBARMENT OF KALK.* It is ordered that Joseph Kalk, of Beachwood, Ohio, be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-693. *IN RE DISBARMENT OF GOLDMAN.* It is ordered that Ronald Laurence Goldman, of Marina Del Rey, Cal., be suspended from the practice of law in this Court and that a rule issue,

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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-694. IN RE DISBARMENT OF SMITH. It is ordered that Moreland G. Smith, Jr., of Dallas, Tex., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-695. IN RE DISBARMENT OF BALTIMORE. It is ordered that Richard L. Baltimore, Jr., of New York, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-696. IN RE DISBARMENT OF HUST. It is ordered that William J. Hust, III, of New York, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-697. IN RE DISBARMENT OF REDDAN. It is ordered that John D. Reddan, of West Hempstead, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-698. IN RE DISBARMENT OF MCCOY. It is ordered that Joseph R. McCoy, III, of Seaford, 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. 87-352. SUN OIL CO. *v.* WORTMAN ET AL. Sup. Ct. Kan. [Certiorari granted, 484 U. S. 912.] Motion of petitioner for leave to file a supplemental brief after argument granted.

No. 87-498. BERKOVITZ ET AL. *v.* UNITED STATES. C. A. 3d Cir. [Certiorari granted, 484 U. S. 1003.] Motion of Lederle Laboratories for leave to file a brief as *amicus curiae* granted.

No. 87-1279. MORRISON, INDEPENDENT COUNSEL *v.* OLSON ET AL. C. A. D. C. Cir. [Probable jurisdiction noted, 484 U. S. 1058.] Motion of Lawrence E. Walsh, Independent Counsel, for leave to participate in oral argument as *amicus curiae*, for divided

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argument, and for additional time for oral argument denied. Motion of Michael K. Deaver for leave to participate in oral argument as *amicus curiae*, for divided argument, and for additional time for oral argument denied. Joint motion for additional time for oral argument, for divided argument, and for *amici curiae* to participate in oral argument granted in part and denied in part. An additional 30 minutes is allotted for oral argument to be divided as follows: appellant, 30 minutes; the United States Senate as *amicus curiae*, 15 minutes; one counsel for appellees, 30 minutes; and the Solicitor General as *amicus curiae*, 15 minutes. JUSTICE KENNEDY took no part in the consideration or decision of these motions.

No. 87-1337. BOERSMA, PERSONAL REPRESENTATIVE OF THE ESTATES OF BOERSMA ET AL. *v.* KARNES, NEBRASKA STATE TAX COMMISSIONER, ET AL. Appeal from Sup. Ct. Neb.; and

No. 87-1350. O. N. E. SHIPPING, LTD. *v.* FLOTA MERCANTE GRANCOLOMBIANA, S. A., ET AL. C. A. 2d Cir. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 87-1389. IN RE THOMAS. Petition for writ of habeas corpus and/or petition for writ of certiorari denied.

No. 87-6420. IN RE McDONALD. Petition for writ of mandamus denied.

Probable Jurisdiction Noted

No. 87-1022. BOARD OF ESTIMATE OF CITY OF NEW YORK ET AL. *v.* MORRIS ET AL.; and

No. 87-1112. PONTERIO *v.* MORRIS ET AL. Appeals from C. A. 2d Cir. Probable jurisdiction noted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 831 F. 2d 384.

Certiorari Granted

No. 87-1054. FIRESTONE TIRE & RUBBER CO. ET AL. *v.* BRUCH ET AL. C. A. 3d Cir. Certiorari granted. Reported below: 828 F. 2d 134.

No. 87-1055. CHAN ET AL. *v.* KOREAN AIR LINES, LTD. C. A. D. C. Cir. Certiorari granted. Reported below: 265 U. S. App. D. C. 39, 829 F. 2d 1171.

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No. 87-1095. DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR *v.* BROYLES ET AL. C. A. 4th Cir. Motion of respondents Charlie Broyles and Lisa Kay Colley for leave to proceed *in forma pauperis* granted. Certiorari granted, case consolidated with No. 87-821, *Pittston Coal Group et al. v. Sebben et al.* [certiorari granted, 484 U. S. 1058], and No. 87-827, *McLaughlin, Secretary of Labor, et al. v. Sebben et al.* [certiorari granted, 484 U. S. 1058], and a total of one hour allotted for oral argument. Reported below: 824 F. 2d 327.

Certiorari Denied. (See also Nos. 87-1345, 87-1357, 87-6417, 87-1471, and 87-1389, *supra.*)

No. 87-781. ATKINSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 825 F. 2d 202.

No. 87-943. CITY OF ST. LOUIS *v.* JAMISON. C. A. 8th Cir. Certiorari denied. Reported below: 828 F. 2d 1280.

No. 87-985. FINA OIL & CHEMICAL CO. ET AL. *v.* EL PASO NATURAL GAS CO. Sup. Ct. Tex. Certiorari denied.

No. 87-992. MCNEIL *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 261 U. S. App. D. C. 162, 820 F. 2d 1341.

No. 87-1015. MONAHAN ET AL. *v.* FEDERAL TRADE COMMISSION. C. A. 1st Cir. Certiorari denied. Reported below: 832 F. 2d 688.

No. 87-1049. AIR FLORIDA SYSTEM, INC., ET AL. *v.* FEDERAL DEPOSIT INSURANCE CORPORATION. C. A. 9th Cir. Certiorari denied. Reported below: 822 F. 2d 833.

No. 87-1069. ARCOREN *v.* PETERS ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 829 F. 2d 671.

No. 87-1077. MILLANG *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 817 F. 2d 533.

No. 87-1139. GAGLIARDI *v.* ZIEGLER ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 826 F. 2d 1055.

No. 87-1140. PURCELL *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. Reported below: 826 F. 2d 470.

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No. 87-1157. ALASKA FEDERATION OF NATIVES ET AL. *v.* ALASKA FISH & WILDLIFE FEDERATION & OUTDOOR COUNCIL, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 829 F. 2d 933.

No. 87-1169. BEAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 831 F. 2d 297.

No. 87-1191. MESSERLIAN ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 832 F. 2d 778.

No. 87-1219. G. & T. TERMINAL PACKAGING CO., INC., ET AL. *v.* CONSOLIDATED RAIL CORPORATION. C. A. 3d Cir. Certiorari denied. Reported below: 830 F. 2d 1230.

No. 87-1261. HONIG, SUPERINTENDENT OF PUBLIC INSTRUCTION FOR THE STATE OF CALIFORNIA, ET AL. *v.* BENNETT, SECRETARY OF EDUCATION. C. A. 9th Cir. Certiorari denied. Reported below: 831 F. 2d 875.

No. 87-1336. BENNETT *v.* INTERNATIONAL BANK OF MIAMI, N. A. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 513 So. 2d 1294.

No. 87-1348. CHICAGO & NORTH WESTERN TRANSPORTATION CO. *v.* BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES. C. A. 8th Cir. Certiorari denied. Reported below: 827 F. 2d 330.

No. 87-1351. UBEROI *v.* UNIVERSITY OF COLORADO ET AL. C. A. 10th Cir. Certiorari denied.

No. 87-1353. KING ET UX. *v.* RELIANCE INSURANCE CO. C. A. 11th Cir. Certiorari denied. Reported below: 831 F. 2d 1069.

No. 87-1355. HAYES *v.* COOK, JUDGE, EDMONSON CIRCUIT COURT, EDMONSON COUNTY, KENTUCKY, ET AL. Sup. Ct. Ky. Certiorari denied.

No. 87-1356. HARKRIDER, EXECUTOR OF THE ESTATE OF CORY, ET AL. *v.* LAFAYETTE BANK & TRUST CO. ET AL. Sup. Ct. Ind. Certiorari denied. Reported below: 512 N. E. 2d 155.

No. 87-1378. EVANS *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 205 Conn. 528, 534 A. 2d 1159.

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No. 87-1385. *RAMPP ET UX. v. LUZERNE COUNTY ASSESSMENT AND VALUATION BOARD*. Pa. Commw. Ct. Certiorari denied.

No. 87-1388. *ATONIO ET AL. v. WARDS COVE PACKING CO., INC., ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 827 F. 2d 439.

No. 87-1397. *PYRO MINING CO. v. SMITH*. C. A. 6th Cir. Certiorari denied. Reported below: 827 F. 2d 1081.

No. 87-1407. *CITY OF PHILADELPHIA ET AL. v. DISABLED IN ACTION OF PENNSYLVANIA ET AL.* C. A. 3d Cir. Certiorari denied. Reported below: 833 F. 2d 1113.

No. 87-1411. *NEW ENGLAND INSURANCE CO. v. INTERNATIONAL BANK OF MIAMI, N. A.* Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 514 So. 2d 390.

No. 87-1429. *SOUTHWESTERN BELL TELEPHONE CO. v. ARKANSAS PUBLIC SERVICE COMMISSION ET AL.* C. A. 8th Cir. Certiorari denied. Reported below: 824 F. 2d 672.

No. 87-1436. *SAMPSON v. WEIDELL ET AL.* C. A. 7th Cir. Certiorari denied. Reported below: 822 F. 2d 1090.

No. 87-1443. *LONSDALE ET UX. v. CAGLE ET AL.* C. A. 5th Cir. Certiorari denied. Reported below: 817 F. 2d 755.

No. 87-1470. *COLE ET UX. v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 829 F. 2d 1128.

No. 87-1475. *ANCHOR ESTATES, INC., ET AL. v. UNITED STATES*. C. A. Fed. Cir. Certiorari denied. Reported below: 835 F. 2d 871.

No. 87-5962. *BRYANT v. MARSH, SECRETARY OF THE ARMY*. C. A. 4th Cir. Certiorari denied. Reported below: 825 F. 2d 406.

No. 87-6075. *CONARD v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 829 F. 2d 1121.

No. 87-6080. *BURR v. NEW YORK*. Ct. App. N. Y. Certiorari denied. Reported below: 70 N. Y. 2d 354, 514 N. E. 2d 1363.

No. 87-6186. *SANTISTEVAN v. CALIFORNIA*. Ct. App. Cal., 1st App. Dist. Certiorari denied.

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No. 87-6194. *ALEVRAS v. EDMISTON, SUPERINTENDENT, SOUTHERN STATE CORRECTIONAL FACILITY, ET AL.* C. A. 3d Cir. Certiorari denied.

No. 87-6237. *COFIELD v. BURFORD ET AL.; and COFIELD v. HUGHES ET AL.* C. A. D. C. Cir. Certiorari denied.

No. 87-6341. *CHIPPS v. UNITED STATES DEPARTMENT OF EDUCATION ET AL.* C. A. 3d Cir. Certiorari denied.

No. 87-6344. *JONES v. OITKER ET AL.* C. A. 8th Cir. Certiorari denied. Reported below: 837 F. 2d 480.

No. 87-6357. *BENJAMIN v. UNITED STATES POSTAL SERVICE.* C. A. Fed. Cir. Certiorari denied. Reported below: 831 F. 2d 305.

No. 87-6396. *ENGELHARTSON v. DEPARTMENT OF AGRICULTURE.* C. A. Fed. Cir. Certiorari denied. Reported below: 835 F. 2d 870.

No. 87-6414. *ROMERO v. COLORADO.* Sup. Ct. Colo. Certiorari denied. Reported below: 745 P. 2d 1003.

No. 87-6415. *CULBERT v. YOUNG.* C. A. 7th Cir. Certiorari denied. Reported below: 834 F. 2d 624.

No. 87-6419. *MARSHALL v. MARSHALL.* Ct. App. Ga. Certiorari denied. Reported below: 184 Ga. App. XXXI.

No. 87-6424. *HANNIVIG v. REAGAN, PRESIDENT OF THE UNITED STATES.* C. A. 3d Cir. Certiorari denied.

No. 87-6427. *PETERS v. MCCUTCHEON ET AL.* C. A. 4th Cir. Certiorari denied. Reported below: 836 F. 2d 547.

No. 87-6461. *PULEIO v. VOSE, DEPUTY COMMISSIONER, MASSACHUSETTS DEPARTMENT OF CORRECTION.* C. A. 1st Cir. Certiorari denied. Reported below: 830 F. 2d 1197.

No. 87-6466. *SHORT v. UNITED STATES.* C. A. 4th Cir. Certiorari denied. Reported below: 836 F. 2d 1343.

No. 87-6469. *ARMIJO v. UNITED STATES.* C. A. 8th Cir. Certiorari denied. Reported below: 834 F. 2d 132.

No. 87-6477. *WILLIAMS v. UNITED STATES.* C. A. 10th Cir. Certiorari denied.

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No. 87-6496. *PARKER v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 824 F. 2d 1418.

No. 87-6500. *KISTNER v. UNITED STATES*. C. A. 8th Cir. Certiorari denied. Reported below: 834 F. 2d 132.

No. 87-6507. *SHEA v. UNITED STATES*. C. A. 3d Cir. Certiorari denied. Reported below: 838 F. 2d 463.

No. 87-6514. *GONZALEZ v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 835 F. 2d 1438.

No. 87-6524. *WILLIAMS v. BURLINGTON NORTHERN INC.* C. A. 7th Cir. Certiorari denied. Reported below: 832 F. 2d 100.

No. 87-6529. *BORING ET AL. v. KOZAKIEWICZ, WARDEN, ET AL.* C. A. 3d Cir. Certiorari denied. Reported below: 833 F. 2d 468.

No. 87-6530. *BROWNE v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 829 F. 2d 760.

No. 87-6531. *BRICE v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 836 F. 2d 547.

No. 87-6542. *BOWEN v. UNITED STATES*. C. A. 6th Cir. Certiorari denied. Reported below: 836 F. 2d 1348.

No. 87-6543. *ESCH v. UNITED STATES*. C. A. 10th Cir. Certiorari denied. Reported below: 832 F. 2d 531.

No. 87-6545. *TOBIAS v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 836 F. 2d 449.

No. 87-6547. *MOORE v. UNITED STATES*. Ct. App. D. C. Certiorari denied.

No. 87-6550. *RICHARDS v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 837 F. 2d 1088.

No. 87-6551. *OLSOBY v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 836 F. 2d 439.

No. 87-6552. *SHAW v. UNITED STATES*. C. A. 2d Cir. Certiorari denied. Reported below: 841 F. 2d 1117.

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No. 87-6563. *WARD v. UNITED STATES*. C. A. 6th Cir. Certiorari denied. Reported below: 833 F. 2d 1014.

No. 87-6572. *CEDAR v. UNITED STATES*. C. A. 6th Cir. Certiorari denied. Reported below: 833 F. 2d 1014.

No. 87-993. *MISSOURI v. CARPENTER*. Sup. Ct. Mo. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 736 S. W. 2d 406.

No. 87-1010. *TAYLOR v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 821 F. 2d 1428.

JUSTICE WHITE, dissenting.

Petitioner's husband was left comatose when he was disconnected from his ventilator while in a military hospital. She brought suit against the Government under the Federal Tort Claims Act for personal injury as a result of negligence, and won a judgment of \$500,000 for emotional distress and loss of consortium. In a postjudgment motion, the Government argued for the first time that Cal. Civ. Code Ann. § 3333.2 (West Supp. 1988) limits non-economic damages to \$250,000 in this case. The District Court rejected this claim, which it noted had not been raised before or during the trial. The Ninth Circuit reversed, holding that the Government had not waived the application of the state statute by failing to plead it, and therefore the damages recovered by petitioner must be limited to \$250,000. 821 F. 2d 1428 (1987).

Under the accepted interpretation of Rule 8(c) of the Federal Rules of Civil Procedure, any matter "constituting an avoidance or affirmative defense" to the matters raised in the plaintiff's complaint must be pleaded in a timely manner or it is deemed to be waived. As a matter of California law, the state statute at issue in this case is understood to be an affirmative defense. The Ninth Circuit held, however, that this determination is not binding on a federal court because the proper characterization of the statute in this case, which was brought in federal court, is a matter of federal procedural law. The court ruled that this statute is a mere limitation of liability, rather than an avoidance or an affirmative defense. This conclusion conflicts with the decisions of two other Courts of Appeals. In *Ingraham v. United States*, 808 F. 2d 1075, 1078-1079 (1987), the Fifth Circuit held that an identical statutory limitation on damages recoverable in the State of Texas is an affirmative defense that is waived under the Fed-

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eral Rules by failure to plead it in a timely manner. And in *Jakobsen v. Massachusetts Port Authority*, 520 F. 2d 810, 813 (1975), the First Circuit held that a statutory limitation on liability is an affirmative defense under Rule 8(c). Both courts also ruled that any such statute is deemed to be waived when the application of the statute is not raised during the trial but instead is raised for the first time after the trial, on appeal. I would grant certiorari to resolve this conflict among the Courts of Appeals.

No. 87-1032 (A-489). *TEXAS v. LONG*. Ct. Crim. App. Tex. Application for continuance of stay, addressed to JUSTICE O'CONNOR and referred to the Court, denied. Certiorari denied. Reported below: 742 S. W. 2d 302.

No. 87-1213. *BAJA CONTRACTORS, INC., ET AL. v. CITY OF CHICAGO ET AL.* C. A. 7th Cir. Motion of respondents to disqualify counsel for petitioners denied. Certiorari denied. Reported below: 830 F. 2d 667.

No. 87-1343. *SHIMODA, ADMINISTRATOR, OAHU COMMUNITY CORRECTIONAL CENTER, ET AL. v. AKAO ET AL.* C. A. 9th Cir. Certiorari denied. JUSTICE KENNEDY took no part in the consideration or decision of this petition. Reported below: 832 F. 2d 119.

No. 87-1347. *ZIMMERMAN, ATTORNEY GENERAL OF PENNSYLVANIA, ET AL. v. PARA-PROFESSIONAL LAW CLINIC ET AL.* C. A. 3d Cir. Motion of respondents Jabbar, Williams, and Clifton for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 835 F. 2d 285.

No. 87-1354. *CBS INC. ET AL. v. BROWN & WILLIAMSON TOBACCO CORP.* C. A. 7th Cir. Motion of Capital Cities/ABC, Inc., et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 827 F. 2d 1119.

No. 87-1430. *LOU v. BELZBERG ET AL.* C. A. 9th Cir. Certiorari denied. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 834 F. 2d 730.

No. 87-5920. *BOGGS v. BAIR, WARDEN*. Sup. Ct. Va.;

No. 87-6367. *HILL v. FLORIDA*. Sup. Ct. Fla.;

No. 87-6416. *SANDLES v. MISSOURI*. Sup. Ct. Mo.; and

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No. 87-6458. *JOHNSON v. TENNESSEE*. Sup. Ct. Tenn. Certiorari denied. Reported below: No. 87-6367, 515 So. 2d 176; No. 87-6416, 740 S. W. 2d 169; No. 87-6458, 743 S. W. 2d 154.

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. 87-5891. *SLATER ET UX. v. DELAWARE TRUST CO. ET AL.*, 484 U. S. 1069;

No. 87-6021. *DEAN v. GEORGIA DEPARTMENT OF TRANSPORTATION ET AL.*, 484 U. S. 1070; and

No. 87-6081. *EMBREY v. UNITED STATES*, 484 U. S. 1072. Petitions for rehearing denied.

No. 87-5757. *CAMPOS v. LEFEVRE, SUPERINTENDENT, CLINTON CORRECTIONAL FACILITY, ET AL.*, 484 U. S. 1014; and

No. 87-5918. *TERRY v. MORGAN ET AL.*, 484 U. S. 1030. Petitions for rehearing denied. JUSTICE KENNEDY took no part in the consideration or decision of these petitions.

APRIL 5, 1988

Dismissal Under Rule 53

No. 87-1146. *PRATT & WHITNEY CANADA INC. v. RAINEY ET AL.* C. A. 11th Cir. [Certiorari granted, *ante*, p. 904.] Writ of certiorari dismissed under this Court's Rule 53.

APRIL 6, 1988

Miscellaneous Order

No. 87-1615. *TEXACO INC. v. PENNZOIL Co.* Ct. App. Tex., 1st Dist. Motion of Thomas R. Berner et al. for leave to intervene denied.

APRIL 7, 1988

Dismissal Under Rule 53

No. 87-1615. *TEXACO INC. v. PENNZOIL Co.* Ct. App. Tex., 1st Dist. Certiorari dismissed under this Court's Rule 53. Reported below: 729 S. W. 2d 768.

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APRIL 11, 1988

Dismissal Under Rule 53

No. 87-1285. UDOLF *v.* PLAN AND ZONING COMMISSION OF THE TOWN OF WEST HARTFORD ET AL. Appeal from Super. Ct. Conn., Hartford/New Britain Jud. Dist., dismissed under this Court's Rule 53.

APRIL 13, 1988

Miscellaneous Order

No. A-792 (87-6780). LOWENFIELD *v.* BUTLER, WARDEN. 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. JUSTICE BLACKMUN and JUSTICE STEVENS would grant the application.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

Petitioner Leslie Lowenfield has been sentenced to death. The law of the State that is about to execute him entitles him to "rais[e] at any time" the issue of his "mental incapacity to proceed" with the execution. La. Code Crim. Proc. Ann., Art. 642 (West 1981). See *State v. Perry*, 502 So. 2d 543, 564 (La. 1986). If there is a "reasonable ground to doubt" petitioner's sanity, the court "shall order a mental examination," La. Code Crim. Proc. Ann., Art. 643 (West 1981), and may permit "no further steps" in his punishment until he "is found to have the mental capacity to proceed," Art. 642. In any event, state law affords petitioner the right to pre-execution review by a sanity commission if he can "show by a preponderance of evidence that he lacks the present capacity to undergo execution." *Perry, supra*, at 564.

Petitioner moved for review by a sanity commission, presenting evidence that he is currently insane. The evidence consisted of a sworn affidavit by Dr. Marc L. Zimmerman, a duly licensed clinical psychologist who interviewed and tested petitioner for five hours on March 26, 1988, and concluded that "it is highly probable that Mr. Lowenfield is suffering from paranoid schizophrenia. . . . A study has found that 85% of persons who obtain the same profile as Mr. Lowenfield . . . are diagnosed as paranoid schizophrenics." App. to Pet. for Cert. 2 (citation omitted). Dr. Zimmerman continued: "As a paranoid schizophrenic, Mr. Lowenfield's capacity to understand the death penalty would be impaired. Indeed, my

clinical interview with Mr. Lowenfield indicated that *he is currently unable to understand the death penalty.*" *Id.*, at 3 (emphasis added). The State presented no evidence either to refute Dr. Zimmerman's conclusions or to question his credentials. In the face of that unrefuted evidence, the Louisiana trial court, and then the Louisiana Supreme Court, denied the motion without explanation.

Petitioner thereafter filed an application for habeas relief with the District Court. The District Court denied on the basis of an "extended conversation" with Dr. Zimmerman. Civ. Action No. 88-1549, p. 3 (ED La., Apr. 12, 1988). From that conversation, which the District Court conducted without any notice to petitioner's counsel and apparently before petitioner's application was filed, the District Court concluded that, contrary to Dr. Zimmerman's affidavit, "petitioner has the capacity to understand the realities of the pending execution. Petitioner, though [a] paranoid schizophrenic, is apparently able to understand that the execution is going forward in accordance with law." *Ibid.* A divided panel of the Court of Appeals affirmed in an opinion that reached this chambers a mere 15 minutes before the scheduled execution. 843 F. 2d 183 (CA5 1988).

Every court that has considered petitioner's insanity claim has made a mockery of this Court's precedent and of the most fundamental principles of ordered justice. In *Ford v. Wainwright*, 477 U. S. 399, 409-410 (1986), we held that "the Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane." In the course of the opinion, we characterized any such execution as "savage and inhuman," *id.*, at 406 (citation omitted); "a miserable spectacle, both against Law, and of extream inhumanity and cruelty," *id.*, at 407 (citation omitted); "cruel and inhumane," *id.*, at 408, n. 1 (citation omitted); and "abhorren[t]," *id.*, at 409.

A majority of this Court did not agree on the precise procedures that the Constitution requires when the question is raised of a prisoner's sanity for execution. A majority did, however, hold that due process demands a hearing at least once the prisoner has made some "threshold showing" that he has become insane since his trial. *Id.*, at 417 (opinion of MARSHALL, J., joined by BRENNAN, BLACKMUN, and STEVENS, JJ.); *id.*, at 426 (Powell, J., concurring in part and concurring in judgment). Justice Powell, pro-

viding a fifth vote for that proposition, stated that "[t]he State . . . may properly presume that petitioner remains sane at the time sentence is to be carried out, and may require a substantial threshold showing of insanity merely to trigger the hearing process." *Ibid.* (footnote omitted). See also *id.*, at 429-430 (O'CONNOR, J., joined by WHITE, J., concurring in result in part and dissenting in part) (where state law prohibits execution of the insane, the State must provide a hearing).

The Louisiana Legislature has set the requisite "threshold showing" at that level of evidence that would constitute a "reasonable ground to doubt" the prisoner's sanity. La. Code Crim. Proc. Ann., Art. 643 (West 1981). It is beyond me why Dr. Zimmerman's unrefuted affidavit did not meet that threshold. For that matter, I am at a loss to explain why the affidavit, which was the sole evidence before the courts, did not establish petitioner's insanity by a preponderance of the evidence, entitling petitioner not merely to a hearing but to the relief he seeks. Neither state court furnished any explanation. In fact, neither court so much as articulated the standard it was applying. For all we know, the state courts defaulted entirely on their obligation to consider petitioner's claim. The Louisiana courts, by declining to provide any explanation for their denial of relief, as a practical matter have required petitioner to meet not "a substantial threshold showing of insanity" but an insurmountable one. The effect extends far beyond this case, for the state courts have challenged all death-row inmates to a harrowing game of Russian roulette, in which each must take a wild guess at the "threshold" or suffer the consequences. Where, as here, there is no way to discern whether the state courts' "fact-finding procedure . . . was not adequate for reaching reasonably correct results," *Townsend v. Sain*, 372 U. S. 293, 316 (1963), their bare denial of relief is entitled to no presumption of correctness. See 28 U. S. C. § 2254(d).

Even more outrageous was the injustice perpetrated by the federal courts to which petitioner resorted upon the state courts' default of their constitutional responsibilities. The District Court expressly adopted Dr. Zimmerman's conclusion that petitioner was a "paranoid schizophrenic." Civ. Action No. 88-1549, *supra*, at 3. That conclusion should have compelled the District Court, at the very least, to "receive evidence and argument from [petitioner's] counsel" on whether petitioner is "aware that his death is

approaching" and "perceives the connection between his crime and his punishment." *Ford, supra*, at 427, 422 (opinion of Powell, J.). Instead, the District Court excluded counsel entirely and conducted its own *ex parte* investigation in which it managed to extract from Dr. Zimmerman a concession ("Petitioner . . . is apparently able to understand that the execution is going forward in accordance with law," Civ. Action No. 88-1549, *supra*, at 3) that contradicted his sworn affidavit dated three days earlier ("[H]e is currently unable to understand the death penalty," App. to Pet. for Cert. 3). The District Court's consideration of petitioner's insanity claim fell far short of the *de novo* review that it was obliged to provide upon the state courts' default. See *Ford*, 477 U. S., at 418. Instead, its review was functionally equivalent to the "policy of excluding all advocacy on the part of the condemned," which we have held unconstitutional. *Id.*, at 412-413 (citations omitted).

Worse yet, petitioner alleges—and the State does not deny—that the District Court conducted its *ex parte* investigation before it even had jurisdiction over the case; as Judge Johnson, dissenting from the Court of Appeals' judgment, observed, "the district court failed to make any finding on the record." 843 F. 2d, at 188. "Procedural shortcuts are always dangerous. Greater—surely not lesser—care should be taken to avoid the risk of error when its consequences are irreversible." *Autry v. Estelle*, 464 U. S. 1, 6 (1983) (footnote omitted).

The Court of Appeals, for its part, compounded the District Court's abuse by ignoring it entirely and proceeding to address the sufficiency of Dr. Zimmerman's affidavit as an original matter, without a proper District Court predicate. Even that determination hopelessly conflated the principles articulated in *Ford*. From Justice Powell's observation that the "State . . . may require a substantial threshold showing of insanity merely to trigger the hearing process," *Ford, supra*, at 426 (emphasis added), the Court of Appeals supposed that the State *must* do so, see 843 F. 2d, at 187 ("[P]etitioner has not made a substantial threshold showing"), and overlooked the State's decision to require merely a showing of a "reasonable ground to doubt" in order to trigger further examination.

The abuses and mistakes in every court that has considered this case are no doubt attributable, at least in part, to the haste with which they proceeded:

1. On the afternoon of April 11, petitioner filed in Louisiana state court a petition for postconviction relief raising the claims that are now before us.

2. Later that afternoon the state trial court denied relief.

3. At 6 p.m. (eastern daylight time) the next day, April 12, the Louisiana Supreme Court denied relief and petitioner applied to the District Court for a writ of habeas corpus. 843 F. 2d, at 184-185.

4. At 8:30 p.m. the District Court denied petitioner's application. *Id.*, at 185.

5. At 12:10 a.m. that same night the Court of Appeals affirmed.

6. At 12:45 a.m. (15 minutes before the scheduled execution) the Court of Appeals' opinions were circulated to this Court.

7. At 1:05 a.m., with petitioner already strapped in the electric chair, this Court denied his application for a stay of execution.

8. At 1:25 a.m. petitioner was pronounced dead. N. Y. Times, Apr. 14, 1988, p. A28, col. 1. Time ran out before we voted on the certiorari petition that accompanied petitioner's stay application.

The haste that attended disposition of this case is reprehensible. It is hardly surprising that a case scudding through the state courts in 24 hours should yield orders devoid of law or logic—the ones in this case simply read, “DENIED”—for which the description “terse” would be charitable. If the federal courts are intent on accelerating the pace at any cost, as they were in this case, their only choice is to take procedural shortcuts and give short shrift to substance. And simple arithmetic suggests grave injustice when the Court of last resort takes 15 minutes to read and analyze 17 pages of opinions from the court below and cast a vote on life or death.

Due process means little if it requires the courts to provide an “opportunity to be heard,” *Grannis v. Ordean*, 234 U. S. 385, 394 (1914), without imposing on them a concomitant duty to listen—and, at least when a life is at stake, to listen very carefully. Pre-

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sumably, it was in recognition of the injustice that four of us (one less than the requisite five) voted to stay petitioner's execution, so as to consider his insanity claim in an atmosphere that was not itself lunatic.

Regrettably, this case is not atypical. It is the natural product of a penal system conducive to inaccurate factfinding and shoddy analysis. And I doubt that any system could be devised to cure the evil, so long as States continue to impose punishments so severe as to be irrevocable. Even were I not convinced that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth Amendment, see *Gregg v. Georgia*, 428 U. S. 153, 227 (1976) (dissenting opinion), I would have no part of a penal system that permits a State's interest in meting out death on schedule to convert our constitutional duty to dispense justice into a license to dispense with it.

I dissent.

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Certiorari Denied

No. 87-6787 (A-797). CLANTON *v.* MUNCY, WARDEN, ET AL. C. A. 4th Cir. Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. Certiorari denied. Reported below: 845 F. 2d 1238.

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.

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Appeals Dismissed

No. 87-1366. DUBISH *v.* KANSAS. Appeal from Ct. App. Kan. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 12 Kan. App. 2d lii, 763 P. 2d 18.

No. 87-1400. CLAUSELL ET UX. *v.* HOBART CORP. Appeal from Sup. Ct. Fla. dismissed for want of jurisdiction. Treating

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the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 515 So. 2d 1275.

No. 87-1457. HURLEY ET AL. *v.* WEST AMERICAN INSURANCE CO. OF OHIO CASUALTY GROUP ET AL. Appeal from Ct. App. Ohio, Franklin County, dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 87-6485. BOLES *v.* ELLIS ET AL. Appeal from D. C. M. D. N. C. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 87-1392. FIRST AMERICAN NATIONAL BANK OF KNOXVILLE *v.* TAYLOR, COMMISSIONER OF REVENUE FOR THE STATE OF TENNESSEE. Appeal from Sup. Ct. Tenn. dismissed for want of substantial federal question. JUSTICE BLACKMUN would note probable jurisdiction and set case for oral argument. Reported below: 751 S. W. 2d 417.

No. 87-1435. BLUME *v.* GREGERSEN, CHIEF, BUREAU OF OCCUPATIONAL LICENSES, DEPARTMENT OF SELF-GOVERNING AGENCIES OF IDAHO, ET AL. Appeal from Ct. App. Idaho dismissed for want of substantial federal question. Reported below: 113 Idaho 220, 743 P. 2d 88.

No. 87-6444. NUNLEY *v.* OKLAHOMA. Appeal from Ct. Crim. App. Okla. dismissed for want of jurisdiction.

Miscellaneous Orders

No. — — —. EISEN *v.* SACKMAN-GILLILAND CORP. Motion to direct the Clerk to file a petition for writ of certiorari out of time denied.

No. A-738. RAPP *v.* UNITED STATES. Application for bail, addressed to JUSTICE WHITE and referred to the Court, denied.

No. A-788. HASTINGS, JUDGE, UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA *v.* COMMITTEE ON THE JUDICIARY OF THE UNITED STATES HOUSE OF REPRESENTATIVES ET AL. C. A. 11th Cir. Application to continue the stay of mandate, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. THE CHIEF JUSTICE took no part in the consideration or decision of this application.

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No. D-668. IN RE DISBARMENT OF RUBINO. Disbarment entered. [For earlier order herein, see 484 U. S. 1039.]

No. D-670. IN RE DISBARMENT OF LEWIS. Disbarment entered. [For earlier order herein, see 484 U. S. 1040.]

No. D-673. IN RE DISBARMENT OF SIMON. Disbarment entered. [For earlier order herein, see 484 U. S. 1040.]

No. D-674. IN RE DISBARMENT OF DOZORYST. Nicholas George Dozoryst II, of Chicago, Ill., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on January 25, 1988 [484 U. S. 1040], is hereby discharged.

No. D-693. IN RE DISBARMENT OF GOLDMAN. Due to mistaken identity, the order entered April 4, 1988 [*ante*, p. 984], suspending Ronald Laurence Goldman, of Marina Del Rey, Cal., from the practice of law in this Court is vacated and the rule to show cause issued on that date is discharged.

No. D-699. IN RE DISBARMENT OF HOPKINS. It is ordered that Richard J. Hopkins, of Silver Spring, 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-700. IN RE DISBARMENT OF CULMER. It is ordered that Harold Churchill Culmer, of Miami, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-701. IN RE DISBARMENT OF MEROS. It is ordered that George Nicholas Meros, of St. Petersburg, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-702. IN RE DISBARMENT OF SIERRA. It is ordered that Michael Sierra, of Tampa, 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.

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No. 86-495. K MART CORP. *v.* CARTIER, INC., ET AL.;

No. 86-624. 47TH STREET PHOTO, INC. *v.* COALITION TO PRESERVE THE INTEGRITY OF AMERICAN TRADEMARKS ET AL.; and

No. 86-625. UNITED STATES ET AL. *v.* COALITION TO PRESERVE THE INTEGRITY OF AMERICAN TRADEMARKS ET AL. C. A. D. C. Cir. [Certiorari granted, 479 U. S. 1005.] Motion of respondents for leave to file a supplemental brief on reargument granted. Motion of American Free Trade Association for leave to file a supplemental brief as *amicus curiae* on reargument denied.

No. 86-1650. TRANS WORLD AIRLINES, INC. *v.* INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS, *ante*, p. 175. Respondent invited to file a response to the petition for rehearing within 30 days.

No. 87-751. CARLUCCI, SECRETARY OF DEFENSE, ET AL. *v.* DOE. C. A. D. C. Cir. [Certiorari granted, *ante*, p. 904.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 87-1043. UNITED STATES *v.* RON PAIR ENTERPRISES, INC. C. A. 6th Cir. [Certiorari granted, *ante*, p. 958.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 87-920. MEYER, COLORADO SECRETARY OF STATE, ET AL. *v.* GRANT ET AL. C. A. 10th Cir. [Probable jurisdiction noted, 484 U. S. 1024.] Motion of Washington Legal Foundation et al. for leave to file a brief as *amici curiae* granted.

No. 87-999. MCQUILLEN *v.* WISCONSIN EDUCATION ASSOCIATION COUNCIL ET AL., *ante*, p. 914. Respondents are invited to file a response to the petition for rehearing within 30 days.

No. 87-1160. DUQUESNE LIGHT CO. ET AL. *v.* BARASCH ET AL. Sup. Ct. Pa. [Probable jurisdiction noted, *ante*, p. 933.] Motion of appellants to dispense with printing the joint appendix granted.

No. 87-1193. MIAMI HERALD PUBLISHING CO. *v.* GRIDLEY, CIRCUIT JUDGE OF FLORIDA, ORANGE COUNTY, ET AL., *ante*, p. 960. Motion of respondents Paula Hawkins and W. E. Hawkins for damages denied.

No. 87-6325. PERRY *v.* LEEKE, COMMISSIONER, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 4th Cir.

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[Certiorari granted, *ante*, p. 976.] Motion for appointment of counsel granted, and it is ordered that W. Gaston Fairey, Esq., of Columbia, S. C., be appointed to serve as counsel for petitioner in this case.

No. 87-6453. *ECONOMOU ET UX. v. SECURITIES AND EXCHANGE COMMISSION*. C. A. 2d Cir. Motion of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until May 9, 1988, within which to pay the docketing fee required by Rule 45(a) and to submit a petition for writ of certiorari in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN, 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. 87-6459. *RYDELL v. CITY OF ATLANTIC CITY, NEW JERSEY*. Super. Ct. N. J., App. Div.; and

No. 87-6489. *HOWARD v. CITY OF FORT MYERS, FLORIDA, ET AL.* C. A. 11th Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until May 9, 1988, within which to pay the docketing fee required by Rule 45(a) and to submit petitions for writs of certiorari 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 petitions for writs of certiorari without reaching the merits of the motions to proceed *in forma pauperis*.

No. 87-6605. *IN RE SYME*. Petition for writ of habeas corpus denied.

No. 87-6317. *IN RE AMEN-RA, AKA TASBY*. Petition for writ of mandamus denied.

Probable Jurisdiction Noted or Postponed

No. 87-1269. *EU, SECRETARY OF STATE OF CALIFORNIA, ET AL. v. SAN FRANCISCO COUNTY DEMOCRATIC CENTRAL COM-*

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MITTEE ET AL. Appeal from C. A. 9th Cir. Probable jurisdiction noted. THE CHIEF JUSTICE took no part in the consideration or decision of this order. Reported below: 826 F. 2d 814.

No. 87-1327. COTTON PETROLEUM CORP. ET AL. *v.* NEW MEXICO ET AL. Appeal from Ct. App. N. M. Probable jurisdiction noted. The parties are also invited to brief and argue the following question: "Does the Commerce Clause require that an Indian Tribe be treated as a State for purposes of determining whether a state tax on nontribal activities conducted on an Indian Reservation must be apportioned to account for taxes imposed on those same activities by the Indian Tribe?" Reported below: 106 N. M. 517, 745 P. 2d 1170.

No. 87-5840. MCNAMARA *v.* COUNTY OF SAN DIEGO DEPARTMENT OF SOCIAL SERVICES. Appeal from Ct. App. Cal., 4th App. Dist. Further consideration of question of jurisdiction postponed to hearing of case on the merits.

Certiorari Granted

No. 87-1207. WILL *v.* MICHIGAN DEPARTMENT OF STATE POLICE ET AL. Sup. Ct. Mich. Certiorari granted. Reported below: 428 Mich. 540, 410 N. W. 2d 749.

No. 87-1372. ARGENTINE REPUBLIC *v.* AMERADA HESS SHIPPING CORP. ET AL. C. A. 2d Cir. Certiorari granted. Reported below: 830 F. 2d 421.

No. 87-1379. UNITED STATES DEPARTMENT OF JUSTICE ET AL. *v.* REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS ET AL. C. A. D. C. Cir. Certiorari granted. Reported below: 259 U. S. App. D. C. 426, 816 F. 2d 730, and 265 U. S. App. D. C. 365, 831 F. 2d 1124.

No. 87-963. HERNANDEZ *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 1st Cir. Certiorari granted. JUSTICE BRENNAN and JUSTICE KENNEDY took no part in the consideration or decision of this petition. Reported below: 819 F. 2d 1212.

No. 87-1104. ZANT, WARDEN *v.* MOORE. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 824 F. 2d 847.

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Certiorari Denied. (See also Nos. 87-1366, 87-1400, 87-1457, and 87-6485, *supra*.)

No. 87-333. DELTA AIR LINES, INC. *v.* PORT AUTHORITY OF NEW YORK AND NEW JERSEY. C. A. 2d Cir. *Certiorari denied.* Reported below: 817 F. 2d 222.

No. 87-683. GALLOWAY, SHERIFF, HOLMES COUNTY, FLORIDA *v.* JOSEY. Sup. Ct. Fla. *Certiorari denied.* Reported below: 507 So. 2d 590.

No. 87-711. MUNN *v.* DUCK. C. A. 9th Cir. *Certiorari denied.* Reported below: 823 F. 2d 1296.

No. 87-854. COLANESE ET AL. *v.* NEW PRAIRIE CLASSROOM TEACHERS ASSN. Ct. App. Ind. *Certiorari denied.* Reported below: 503 N. E. 2d 638.

No. 87-976. INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA *v.* FEDERAL ENERGY REGULATORY COMMISSION ET AL.;

No. 87-977. TEXAS EASTERN TRANSMISSION CORP. *v.* FEDERAL ENERGY REGULATORY COMMISSION;

No. 87-978. SHELL OFFSHORE INC. ET AL. *v.* ASSOCIATED GAS DISTRIBUTORS ET AL.;

No. 87-979. CITY OF WILLCOX, ARIZONA, ET AL. *v.* FEDERAL ENERGY REGULATORY COMMISSION ET AL.; and

No. 87-1091. SOUTHERN CALIFORNIA GAS CO. *v.* FEDERAL ENERGY REGULATORY COMMISSION ET AL. C. A. D. C. Cir. *Certiorari denied.* Reported below: 263 U. S. App. D. C. 1, 824 F. 2d 981.

No. 87-1011. ILLINOIS *v.* WHITE. Sup. Ct. Ill. *Certiorari denied.* Reported below: 117 Ill. 2d 194, 512 N. E. 2d 677.

No. 87-1130. BEATTIE ET AL., BY AND THROUGH THEIR NEXT FRIEND, BEATTIE *v.* UNITED STATES; and

No. 87-1244. GREISEN *v.* UNITED STATES. C. A. 9th Cir. *Certiorari denied.* Reported below: 831 F. 2d 916.

No. 87-1194. COSMETIC, TOILETRY & FRAGRANCE ASSN. *v.* PUBLIC CITIZEN ET AL. C. A. D. C. Cir. *Certiorari denied.* Reported below: 265 U. S. App. D. C. 349, 831 F. 2d 1108.

No. 87-1222. HOUSTON *v.* UNITED STATES POSTAL SERVICE ET AL. C. A. 5th Cir. *Certiorari denied.* Reported below: 823 F. 2d 896.

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No. 87-1240. GENERAL COFFEE CORP. ET AL. *v.* CITY NATIONAL BANK OF MIAMI ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 828 F. 2d 699.

No. 87-1270. WEST ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 830 F. 2d 1044.

No. 87-1278. TOWN OF NORTH BONNEVILLE, WASHINGTON *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 833 F. 2d 1024.

No. 87-1284. TRANS WORLD AIRLINES, INC., ET AL. *v.* KRONFELD. C. A. 2d Cir. Certiorari denied. Reported below: 832 F. 2d 726.

No. 87-1288. CRESPO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 834 F. 2d 267.

No. 87-1309. SCALLIO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 829 F. 2d 37.

No. 87-1360. NORTHERN VIRGINIA LAW SCHOOL, INC., ET AL. *v.* SOUTHERN NEW ENGLAND SCHOOL OF LAW, INC. C. A. 1st Cir. Certiorari denied.

No. 87-1362. KING *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 833 F. 2d 305.

No. 87-1374. COSTON *v.* PLITT THEATRES, INC. C. A. 7th Cir. Certiorari denied. Reported below: 831 F. 2d 1321.

No. 87-1393. LISAK *v.* MERCANTILE NATIONAL BANK OF INDIANA ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 834 F. 2d 668.

No. 87-1394. BLOCK DRUG CO., INC., ET AL. *v.* HODOSH ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 833 F. 2d 1575.

No. 87-1398. JOHNSON *v.* HELMUS. Sup. Ct. Ohio. Certiorari denied.

No. 87-1405. GONZALES *v.* LEAL ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 831 F. 2d 1060.

No. 87-1406. SHIPCO 2295, INC., ET AL. *v.* AVONDALE SHIPYARDS, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 825 F. 2d 925.

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No. 87-1408. *AIELLO v. MARTIN ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 833 F. 2d 1015.

No. 87-1410. *BANKS v. MISSISSIPPI.* Sup. Ct. Miss. Certiorari denied. Reported below: 516 So. 2d 240.

No. 87-1417. *KLEIN INDEPENDENT SCHOOL DISTRICT ET AL. v. MATTOX, ATTORNEY GENERAL OF TEXAS.* C. A. 5th Cir. Certiorari denied. Reported below: 830 F. 2d 576.

No. 87-1418. *TICKLE ET AL. v. SHELBY COUNTY, TENNESSEE, ET AL.* Sup. Ct. Tenn. Certiorari denied.

No. 87-1423. *E & S DESIGN & DEVELOPMENT, LTD., ET AL. v. MONTGOMERY, DISTRICT DIRECTOR, UNITED STATES DEPARTMENT OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE.* C. A. 6th Cir. Certiorari denied. Reported below: 825 F. 2d 1084.

No. 87-1426. *DEVON BANK v. MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.* C. A. 7th Cir. Certiorari denied. Reported below: 832 F. 2d 1005.

No. 87-1427. *SCHROEDER v. UNITED STATES ET AL.* C. A. 10th Cir. Certiorari denied.

No. 87-1432. *A. C. ET AL. v. IOWA.* Sup. Ct. Iowa. Certiorari denied. Reported below: 415 N. W. 2d 609.

No. 87-1438. *J. K. AND SUSIE L. WADLEY RESEARCH INSTITUTE & BLOOD BANK, DBA THE BLOOD BANK AT WADLEY v. HOUSTON, JUDGE, 211TH JUDICIAL DISTRICT COURT OF DENTON COUNTY, TEXAS.* Ct. App. Tex., 2d Dist. Certiorari denied.

No. 87-1440. *SAN DIEGO AND IMPERIAL COUNTIES BUTCHERS' AND FOOD EMPLOYERS' PENSION TRUST FUND v. CUYAMACA MEATS, INC., ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 827 F. 2d 491.

No. 87-1444. *GENDRON ET AL. v. PAN AMERICAN WORLD AIRWAYS, INC.* C. A. 5th Cir. Certiorari denied. Reported below: 835 F. 2d 287.

No. 87-1447. *YOUNG ET AL. v. NEW HAMPSHIRE.* Sup. Ct. N. H. Certiorari denied. Reported below: 130 N. H. 175, 536 A. 2d 1252.

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No. 87-1450. *DURAND-WAYLAND, INC. v. PENNWALT CORP.* C. A. Fed. Cir. Certiorari denied. Reported below: 833 F. 2d 931.

No. 87-1453. *ROBERTS v. APPELLATE DEPARTMENT, SUPERIOR COURT OF CALIFORNIA, LOS ANGELES COUNTY (GUBLER ET AL., REAL PARTIES IN INTEREST).* Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 87-1461. *CHECKER MOTORS CORP. v. NATIONAL PRODUCTION WORKERS UNION ET AL.* C. A. 7th Cir. Certiorari denied. Reported below: 834 F. 2d 173.

No. 87-1473. *HANSON v. TRINIDAD CORP.* C. A. 3d Cir. Certiorari denied. Reported below: 822 F. 2d 53.

No. 87-1474. *BROOKS v. ALABAMA.* Ct. Crim. App. Ala. Certiorari denied. Reported below: 502 So. 2d 397.

No. 87-1476. *SNEAD ET AL. v. CITY OF ALBUQUERQUE.* C. A. 10th Cir. Certiorari denied. Reported below: 841 F. 2d 1131.

No. 87-1477. *COCHRAN v. TAYLOR.* C. A. 8th Cir. Certiorari denied. Reported below: 830 F. 2d 900.

No. 87-1488. *SCHWARTZ v. CUOMO, GOVERNOR OF NEW YORK, ET AL.* App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 129 App. Div. 2d 800, 514 N. Y. S. 2d 791.

No. 87-1491. *HOWARD v. CARLUCCI, SECRETARY OF DEFENSE, ET AL.* C. A. D. C. Cir. Certiorari denied. Reported below: 265 U. S. App. D. C. 304, 830 F. 2d 1188.

No. 87-1492. *SPIEGEL v. CONTINENTAL ILLINOIS NATIONAL BANK & TRUST COMPANY OF CHICAGO ET AL.* App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 154 Ill. App. 3d 450, 507 N. E. 2d 58.

No. 87-1496. *RACHELLE LABORATORIES, INC. v. OSBURN, INDIVIDUALLY AND AS INDEPENDENT EXECUTRIX OF THE ESTATE OF OSBURN.* C. A. 5th Cir. Certiorari denied. Reported below: 825 F. 2d 908.

No. 87-1511. *NEECE v. UNITED STATES.* C. A. 10th Cir. Certiorari denied.

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No. 87-1519. BOARD OF OPERATIVES OF THE AMERICAN CAST IRON PIPE CO. ET AL. *v.* BOARD OF MANAGEMENT OF THE AMERICAN CAST IRON PIPE CO. ET AL. Sup. Ct. Ala. Certiorari denied. Reported below: 516 So. 2d 528.

No. 87-1538. STEIN *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 532 A. 2d 641.

No. 87-1571. SCRAPP INVESTMENT CO., INC. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 818 F. 2d 29.

No. 87-5957. JACKSON *v.* MORRIS, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY. C. A. 6th Cir. Certiorari denied.

No. 87-6017. SHIEL *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 515 A. 2d 405.

No. 87-6187. KERNEY *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 510 So. 2d 334.

No. 87-6211. SENJUDO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 831 F. 2d 1060.

No. 87-6257. ALMEIDA-BIFFI *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 825 F. 2d 830.

No. 87-6282. GRAVATT *v.* UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA. C. A. 3d Cir. Certiorari denied.

No. 87-6306. LYONS *v.* CARLSON, DIRECTOR, BUREAU OF PRISONS, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 833 F. 2d 305.

No. 87-6311. DAVIS *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 141 Wis. 2d 986, 416 N. W. 2d 297.

No. 87-6329. ARMSTRONG *v.* RISLEY, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 823 F. 2d 1552.

No. 87-6353. BRAILEY *v.* AUTOTHORITY, INC. Sup. Ct. Va. Certiorari denied.

No. 87-6386. ODLE *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied.

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No. 87-6391. *HUNZIKER ET AL. v. GERMAN-AMERICAN STATE BANK*. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 154 Ill. App. 3d 1161, 519 N. E. 2d 729.

No. 87-6418. *PARIS v. STATE DIVISION OF CORRECTION ET AL.* Ct. Sp. App. Md. Certiorari denied. Reported below: 71 Md. App. 738.

No. 87-6423. *BRECHSEISEN v. MONDRAGON, WARDEN, ET AL.* C. A. 10th Cir. Certiorari denied. Reported below: 833 F. 2d 238.

No. 87-6434. *RAY v. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.* C. A. 11th Cir. Certiorari denied. Reported below: 812 F. 2d 675.

No. 87-6439. *NICOLAU v. MURESANU*. C. A. 2d Cir. Certiorari denied.

No. 87-6441. *STRONG v. HUCKABAY*. C. A. 5th Cir. Certiorari denied. Reported below: 833 F. 2d 1009.

No. 87-6446. *ROSBERG v. GOERES ET AL.* Sup. Ct. Neb. Certiorari denied. Reported below: 225 Neb. 811, 408 N. W. 2d 302.

No. 87-6447. *THACKER v. BUMGARNER, SUPERINTENDENT, NORTH CAROLINA SOUTHERN CORRECTIONAL CENTER*. C. A. 4th Cir. Certiorari denied. Reported below: 833 F. 2d 1005.

No. 87-6448. *PERRY v. MATHEWS ET AL.* C. A. 11th Cir. Certiorari denied. Reported below: 834 F. 2d 1026.

No. 87-6449. *McGOVERN v. MEKO*. C. A. 11th Cir. Certiorari denied. Reported below: 831 F. 2d 1069.

No. 87-6455. *HARRIS v. IVEY ET AL.* C. A. 11th Cir. Certiorari denied.

No. 87-6456. *WRIGHT v. MINNESOTA ET AL.* C. A. 8th Cir. Certiorari denied. Reported below: 833 F. 2d 746.

No. 87-6473. *GUINN v. MAASS, SUPERINTENDENT, OREGON STATE PENITENTIARY, ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 831 F. 2d 302.

No. 87-6478. *BIGHAM v. ILLINOIS*. App. Ct. Ill., 4th Dist. Certiorari denied.

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No. 87-6479. *GRIGOROV v. NEW YORK*. App. Term, Sup. Ct. N. Y., 9th and 10th Jud. Dists. Certiorari denied.

No. 87-6480. *LOWE v. GREEN, SUPERINTENDENT, RIVERS CORRECTIONAL INSTITUTION*. C. A. 11th Cir. Certiorari denied.

No. 87-6484. *WALLACE v. UPSHUR*. C. A. 4th Cir. Certiorari denied. Reported below: 829 F. 2d 1121.

No. 87-6494. *TYLER v. PEART ET AL.* C. A. 8th Cir. Certiorari denied. Reported below: 837 F. 2d 478.

No. 87-6498. *ELLIOTT v. CALIFORNIA*. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 87-6501. *LA RUE v. MCCARTHY ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 833 F. 2d 140.

No. 87-6503. *ENNIS v. HOKE, SUPERINTENDENT, EASTERN CORRECTIONAL FACILITY, ET AL.* C. A. 2d Cir. Certiorari denied. Reported below: 838 F. 2d 1202.

No. 87-6504. *ELLIOTT v. MYERS, SUPERINTENDENT, CORRECTIONAL TRAINING FACILITY, ET AL.* C. A. 9th Cir. Certiorari denied.

No. 87-6505. *REED v. UNITED STATES*. C. A. 6th Cir. Certiorari denied. Reported below: 836 F. 2d 551.

No. 87-6508. *YOUNG v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 825 F. 2d 60.

No. 87-6512. *MASTERS v. UNITED STATES*. C. A. 3d Cir. Certiorari denied.

No. 87-6513. *MOODY v. BOYLES*. C. A. 5th Cir. Certiorari denied. Reported below: 836 F. 2d 1344.

No. 87-6515. *CONLEY v. ESTATE OF CONLEY*. C. A. 9th Cir. Certiorari denied.

No. 87-6516. *PRITCHETT v. BOUTWELL, ACTING WARDEN, ET AL.* C. A. 11th Cir. Certiorari denied. Reported below: 835 F. 2d 1439.

No. 87-6517. *MONROE v. MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS*. C. A. 4th Cir. Certiorari denied. Reported below: 833 F. 2d 1005.

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No. 87-6519. *RIAL v. JERISHA ET AL.* C. A. 7th Cir. Certiorari denied.

No. 87-6525. *CORDEIRO v. CONNER ET AL.* Ct. App. Ariz. Certiorari denied.

No. 87-6526. *GREEN ET AL. v. EVATT, COMMISSIONER, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, ET AL.* C. A. 4th Cir. Certiorari denied. Reported below: 836 F. 2d 546.

No. 87-6528. *BRAAN v. DISTRICT OF COLUMBIA PUBLIC DEFENDER SERVICE.* C. A. D. C. Cir. Certiorari denied.

No. 87-6532. *FIELDS v. HARRISON ET AL.* C. A. 11th Cir. Certiorari denied. Reported below: 838 F. 2d 1220.

No. 87-6534. *VALENZUELA GAMEZ v. UNITED STATES.* C. A. 9th Cir. Certiorari denied. Reported below: 829 F. 2d 1129.

No. 87-6535. *CRAWFORD v. JABE, WARDEN.* C. A. 6th Cir. Certiorari denied.

No. 87-6537. *GAINS v. SCULLY, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY.* App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 87-6541. *ALSTON v. MARINE MIDLAND BANK, N. A.* Ct. App. N. Y. Certiorari denied. Reported below: 70 N. Y. 2d 610, 516 N. E. 2d 1223.

No. 87-6566. *WATKINS v. JONES, SUPERINTENDENT, BOSTICK CORRECTIONAL CENTER.* C. A. 11th Cir. Certiorari denied. Reported below: 831 F. 2d 1069.

No. 87-6591. *BRADBERRY v. UNITED STATES.* C. A. 5th Cir. Certiorari denied. Reported below: 837 F. 2d 1088.

No. 87-6592. *ESTUS v. AZZARELLI.* C. A. 3d Cir. Certiorari denied.

No. 87-6595. *HERNANDEZ v. UNITED STATES.* C. A. 10th Cir. Certiorari denied. Reported below: 829 F. 2d 988.

No. 87-6603. *SMITH v. UNITED STATES.* C. A. 4th Cir. Certiorari denied. Reported below: 838 F. 2d 468.

No. 87-6608. *GOLDSBOROUGH v. UNITED STATES.* C. A. 3d Cir. Certiorari denied. Reported below: 838 F. 2d 1207.

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No. 87-6620. HERNANDEZ-BELTRAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 837 F. 2d 1094.

No. 87-6641. DALE ET UX. *v.* JANKLOW, GOVERNOR OF SOUTH DAKOTA, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 828 F. 2d 481.

No. 87-6666. LAURENCO *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 4th Cir. Certiorari denied. Reported below: 838 F. 2d 466.

No. 87-6780. LOWENFIELD *v.* BUTLER, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 843 F. 2d 183.

No. 87-1187. HASTINGS, JUDGE, UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA *v.* JUDICIAL CONFERENCE OF THE UNITED STATES ET AL. C. A. D. C. Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. Reported below: 264 U. S. App. D. C. 306, 829 F. 2d 91.

No. 87-1221. MISSISSIPPI *v.* PARKER. Sup. Ct. Miss. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 514 So. 2d 767.

No. 87-1234. DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS *v.* ELLEDGE. C. A. 11th Cir. Motion of William Duane Elledge to direct the Clerk to file a cross-petition for writ of certiorari out of time denied. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 823 F. 2d 1439 and 833 F. 2d 250.

No. 87-1401. CARGILL, INC. *v.* CHARTER INTERNATIONAL OIL Co. C. A. 11th Cir. Motion of petitioner for leave to submit Rule 28.1 material under seal granted. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this motion and this petition. Reported below: 829 F. 2d 1054.

No. 87-1484. INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, DISTRICT LODGE 751 *v.* BOEING Co. ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE KENNEDY took no part in the consideration or decision of this petition. Reported below: 833 F. 2d 165.

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No. 87-6254. CUEVAS *v.* TEXAS. Ct. Crim. App. Tex.;
No. 87-6487. BOOKER *v.* DUGGER, SECRETARY, FLORIDA DE-
PARTMENT OF CORRECTIONS. C. A. 11th Cir.;
No. 87-6493. POPE *v.* VIRGINIA. Sup. Ct. Va.; and
No. 87-6495. SIMMONS *v.* LOCKHART, DIRECTOR, ARKANSAS
DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari de-
nied. Reported below: No. 87-6254, 742 S. W. 2d 331; No. 87-
6487, 825 F. 2d 281; No. 87-6493, 234 Va. 114, 360 S. E. 2d 352;
No. 87-6495, 814 F. 2d 504.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circum-
stances 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. 87-815. CORACE *v.* UNITED STATES, 484 U. S. 1060;
No. 87-865. GREGORY LUMBER Co., INC. *v.* UNITED STATES,
484 U. S. 1061;
No. 87-1025. MORGAN *v.* OHIO, 484 U. S. 1064;
No. 87-1050. IN RE GOLDSTEIN, 484 U. S. 1057;
No. 87-1086. DAMASCUS *v.* BORGIA ET AL., 484 U. S. 1066;
No. 87-1145. POTTER *v.* WACKENHUT CORP. ET AL., *ante*,
p. 902;
No. 87-1149. REAGIN *v.* TERRY ET AL., *ante*, p. 906;
No. 87-1162. CLISSURAS *v.* CITY OF NEW YORK ET AL., 484
U. S. 1053;
No. 87-5449. ANDREWS *v.* SHULSEN, WARDEN, ET AL., *ante*,
p. 919;
No. 87-5454. WRENN *v.* GOULD ET AL., 484 U. S. 1067;
No. 87-5647. THOMPSON *v.* PFEIFFER ET AL., *ante*, p. 907;
No. 87-5807. JOHNSON *v.* ARMONTROUT, WARDEN, 484 U. S.
1068;
No. 87-5873. WILSON *v.* BUTLER, WARDEN, 484 U. S. 1079;
No. 87-5961. LATSHAW *v.* FELDER ET AL., 484 U. S. 1069;
No. 87-5975. HOWES *v.* UNITED STATES, 484 U. S. 1069;
No. 87-6014. SHURN *v.* ILLINOIS, 484 U. S. 1079;
No. 87-6019. STUMPF *v.* OHIO, 484 U. S. 1079;
No. 87-6050. WILLIAMS *v.* LYNAUGH, DIRECTOR, TEXAS DE-
PARTMENT OF CORRECTIONS, 484 U. S. 1071;

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- No. 87-6127. *POST v. OHIO*, 484 U. S. 1079;
No. 87-6161. *TEMPEL v. ALASKA ET AL.*, 484 U. S. 1075;
No. 87-6166. *LASHLEY ET UX. v. FIRST NATIONAL BANK OF LIVE OAK*, 484 U. S. 1075;
No. 87-6181. *OLIM v. OKLAHOMA DEPARTMENT OF PUBLIC SAFETY*, 484 U. S. 1076;
No. 87-6201. *THOMAS v. RAFFERTY, WARDEN, ET AL.*, 484 U. S. 1076;
No. 87-6204. *MILTON v. WORLD SAVINGS & LOAN ASSN.*, *ante*, p. 908;
No. 87-6207. *MEHAR v. C & P TELEPHONE COMPANY OF MARYLAND*, 484 U. S. 1077; and
No. 87-6214. *MURPHY v. SISCO ET AL.*, *ante*, p. 937. Petitions for rehearing denied.

No. 86-1065. *O'SULLIVAN ET AL. v. UNITED STATES ET AL.*, 484 U. S. 1041. Petition for rehearing denied. JUSTICE KENNEDY took no part in the consideration or decision of this petition.

No. 86-5237. *CRIM v. COMMISSIONER OF INTERNAL REVENUE*, 479 U. S. 866. Motion for leave to file petition for rehearing denied. JUSTICE SCALIA and JUSTICE KENNEDY took no part in the consideration or decision of this motion.

Assignment Order

An order of THE CHIEF JUSTICE designating and assigning Justice Powell (retired) to perform judicial duties in the United States Court of Appeals for the Fourth Circuit during the period of June 6 through June 10, 1988, and for such further time as may be required to complete unfinished business, pursuant to 28 U. S. C. § 294(a), is ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

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Certiorari Denied

No. 87-6753 (A-786). *LAWSON v. NORTH CAROLINA*. Gen. Ct. Justice, Super. Ct. Div., Cabarrus County, N. C. Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. *Certiorari* 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

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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.

APRIL 22, 1988

Dismissals Under Rule 53

No. 87-1413. *GONDA v. FEDERAL DEPOSIT INSURANCE CORPORATION*. C. A. 6th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 832 F. 2d 959.

No. 86-1786. *UNITED METAL PRODUCTS CORP. v. NATIONAL BANK OF DETROIT*. C. A. 6th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 811 F. 2d 297.

APRIL 25, 1988

Dismissal Under Rule 53

No. 86-648. *WISCONSIN DEPARTMENT OF HEALTH AND SOCIAL SERVICES v. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES*. C. A. 7th Cir. [Certiorari granted, 479 U. S. 1053.] Writ of certiorari dismissed under this Court's Rule 53.

Affirmed on Appeal

No. 87-1117. *CITY OF MANASSAS, VIRGINIA, ET AL. v. UNITED STATES*. Affirmed on appeal from C. A. 4th Cir. Reported below: 830 F. 2d 530.

Appeals Dismissed

No. 87-1462. *ROGERS v. CITY OF CHEYENNE*. Appeal from Sup. Ct. Wyo. dismissed for want of substantial federal question. Reported below: 747 P. 2d 1137.

No. 87-1463. *BROWN v. BROWN & ROOT U. S. A. INC. ET AL.* Appeal from C. A. 5th Cir. Motion of appellant for a free white Christian male bench denied. Appeal dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 833 F. 2d 1009.

No. 87-1503. *SHIPPS v. STOUGHTON POLICE DEPARTMENT ET AL.* Appeal from C. A. 1st Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a

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petition for writ of certiorari, certiorari denied. Reported below: 836 F. 2d 1341.

No. 87-1539. *BRANSON v. CALIFORNIA*. Appeal from App. Dept., Super. Ct. Cal., Los Angeles County, dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 87-6539. *WHITAKER v. PETERSON 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: 827 F. 2d 773.

No. 87-6544. *WHITAKER v. PASCARELLA 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: 829 F. 2d 41.

Certiorari Granted—Vacated and Remanded

No. 86-1986. *NORTH BROWARD HOSPITAL DISTRICT v. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES*. C. A. 11th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Bethesda Hospital Assn. v. Bowen*, ante, p. 399. Reported below: 808 F. 2d 1405.

No. 87-57. *UNIVERSITY OF CINCINNATI, DBA UNIVERSITY HOSPITAL v. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES*. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Bethesda Hospital Assn. v. Bowen*, ante, p. 399. Reported below: 809 F. 2d 307.

No. 87-443. *BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES v. ADAMS HOUSE HEALTH CARE ET AL.* C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Bethesda Hospital Assn. v. Bowen*, ante, p. 399. Reported below: 817 F. 2d 587.

Miscellaneous Orders. (See also No. 87-107, ante, at 617.)*

No. — — —. *KING v. KAPLAN ET AL.* Motion to direct the Clerk to file a jurisdictional statement which does not comply with the Rules of this Court and for other relief denied.

*For the Court's orders prescribing amendments to the Federal Rules of Civil Procedure, see post, p. 1045; amendments to the Federal Rules of Evidence, see post, p. 1051; and amendments to the Federal Rules of Criminal Procedure, see post, p. 1059.

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No. A-779. *ROGGIO v. UNITED STATES*. Application for release on bond, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. A-814 (87-1625). *FLORIDA v. LONG*. Sup. Ct. Fla. Application for stay, presented to JUSTICE KENNEDY, and by him referred to the Court, denied.

No. D-661. *IN RE DISBARMENT OF SULLIVAN*. Disbarment entered. [For earlier order herein, see 484 U. S. 941.]

No. D-671. *IN RE DISBARMENT OF CLINTON*. Disbarment entered. [For earlier order herein, see 484 U. S. 1040.]

No. D-703. *IN RE DISBARMENT OF GUSSOW*. It is ordered that Irving B. Gussow, of Fern Park, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-704. *IN RE DISBARMENT OF PACIONE*. It is ordered that Albert P. Pacione, Jr., of Newburgh, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-705. *IN RE DISBARMENT OF SEAMAN*. It is ordered that Roger George Seaman, of Chicago, Ill., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 86-495. *K MART CORP. v. CARTIER, INC., ET AL.*;

No. 86-624. *47TH STREET PHOTO, INC. v. COALITION TO PRESERVE THE INTEGRITY OF AMERICAN TRADEMARKS ET AL.*; and

No. 86-625. *UNITED STATES ET AL. v. COALITION TO PRESERVE THE INTEGRITY OF AMERICAN TRADEMARKS ET AL.* C. A. D. C. Cir. [Certiorari granted, 479 U. S. 1005.] Motions of the Solicitor General and petitioners K mart Corp. and 47th Street Photo, Inc., for leave to file supplemental briefs on reargument granted.

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No. 87-1279. MORRISON, INDEPENDENT COUNSEL *v.* OLSON ET AL. C. A. D. C. Cir. [Probable jurisdiction noted, 484 U. S. 1058.] Motion of Whitney North Seymour, Jr., Independent Counsel, for leave to file a reply brief as *amicus curiae* denied. JUSTICE KENNEDY took no part in the consideration or decision of this motion.

No. 87-5894. BENTLY *v.* UNITED STATES, 484 U. S. 1017. Motion of petitioner to direct the Clerk to file petition for rehearing out of time denied. JUSTICE KENNEDY took no part in the consideration or decision of this motion.

Certiorari Granted

No. 87-1165. CALIFORNIA ET AL. *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 830 F. 2d 139.

No. 87-1344. MEESE, ATTORNEY GENERAL OF THE UNITED STATES, ET AL. *v.* ABBOTT ET AL. C. A. D. C. Cir. Certiorari granted. Reported below: 263 U. S. App. D. C. 186, 824 F. 2d 1166.

No. 87-1467. EXXON CO., U. S. A. *v.* BANQUE DE PARIS ET DES PAYS-BAS. C. A. 5th Cir. Certiorari granted. Reported below: 828 F. 2d 1121.

Certiorari Denied. (See also Nos. 87-1463, 87-1503, 87-1539, 87-6539, and 87-6544, *supra*.)

No. 87-380. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. *v.* TALLAHASSEE MEMORIAL REGIONAL MEDICAL CENTER ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 815 F. 2d 1435.

No. 87-605. DEDMAN ET AL. *v.* HAWAII BOARD OF LAND AND NATURAL RESOURCES ET AL. Sup. Ct. Haw. Certiorari denied. Reported below: 69 Haw. 255, 740 P. 2d 28.

No. 87-913. LOCAL 825, INTERNATIONAL UNION OF OPERATING ENGINEERS, ET AL. *v.* CATALYTIC, INC. C. A. 3d Cir. Certiorari denied. Reported below: 829 F. 2d 430.

No. 87-1013. HORNE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 823 F. 2d 556.

No. 87-1214. NATIONAL COTTONSEED PRODUCTS ASSN. *v.* McLAUGHLIN, SECRETARY OF LABOR, ET AL. C. A. D. C. Cir.

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Certiorari denied. Reported below: 263 U. S. App. D. C. 345, 825 F. 2d 482.

No. 87-1235. *ABBAMONTE v. UNITED STATES*. C. A. 2d Cir. Certiorari denied. Reported below: 831 F. 2d 373.

No. 87-1305. *KOONS FORD OF ANNAPOLIS, INC. v. NATIONAL LABOR RELATIONS BOARD ET AL.* C. A. 4th Cir. Certiorari denied. Reported below: 833 F. 2d 310.

No. 87-1306. *SOUTH CENTRAL ENTERPRISES, INC., ET AL. v. FARRINGTON, TRUSTEE*. C. A. 8th Cir. Certiorari denied. Reported below: 829 F. 2d 651.

No. 87-1415. *MISSOURI HIGHWAY AND TRANSPORTATION COMMISSION ET AL. v. CATLETT ET AL.*; and

No. 87-1416. *CATLETT ET AL. v. MISSOURI HIGHWAY AND TRANSPORTATION COMMISSION ET AL.* C. A. 8th Cir. Certiorari denied. Reported below: 828 F. 2d 1260.

No. 87-1455. *FLORIDA POWER & LIGHT CO. v. WESTINGHOUSE ELECTRIC CORP.* C. A. 4th Cir. Certiorari denied. Reported below: 826 F. 2d 239.

No. 87-1459. *IN RE ALEXANDER*. C. A. D. C. Cir. Certiorari denied. Reported below: 266 U. S. App. D. C. 120, 833 F. 2d 370.

No. 87-1464. *AGNEW ET AL. v. ALICANTO, S. A., ET AL.* C. A. 2d Cir. Certiorari denied. Reported below: 838 F. 2d 1202.

No. 87-1468. *PHILLIPS v. MINER*. Ct. App. La., 3d Cir. Certiorari denied.

No. 87-1480. *WINNEBAGO TRIBE OF NEBRASKA v. DEPARTMENT OF REVENUE OF IOWA ET AL.* C. A. 8th Cir. Certiorari denied. Reported below: 831 F. 2d 790.

No. 87-1482. *MASTELOTTO ET AL. v. EXXON CO., U. S. A.* C. A. 9th Cir. Certiorari denied. Reported below: 823 F. 2d 373.

No. 87-1486. *JURISICH v. LOUISIANA DEPARTMENT OF WILDLIFE AND FISHERIES ET AL.* Ct. App. La., 4th Cir. Certiorari denied. Reported below: 508 So. 2d 588.

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No. 87-1489. *TRENTON ET AL. v. SCOTT PAPER CO. ET AL.* C. A. 3d Cir. Certiorari denied. Reported below: 832 F. 2d 806.

No. 87-1523. *MORRIS v. COMPAGNIE MARITIME DES CHARGEURS REUNIS, S. A., ET AL.* C. A. 5th Cir. Certiorari denied. Reported below: 832 F. 2d 67.

No. 87-1537. *CROWLEY v. NEW HAMPSHIRE PERSONNEL COMMISSION.* Sup. Ct. N. H. Certiorari denied.

No. 87-1544. *DRESSER INDUSTRIES, INC. v. FAHY.* Sup. Ct. Mo. Certiorari denied. Reported below: 740 S. W. 2d 635.

No. 87-1570. *WARD v. UNITED STATES.* C. A. 11th Cir. Certiorari denied. Reported below: 833 F. 2d 1538.

No. 87-1588. *KING ET AL. v. UNITED STATES.* C. A. 6th Cir. Certiorari denied. Reported below: 834 F. 2d 109.

No. 87-6053. *SHEPARD v. MARSHALL, WARDEN.* C. A. 6th Cir. Certiorari denied. Reported below: 829 F. 2d 39.

No. 87-6084. *SHAW v. UNITED STATES.* C. A. 9th Cir. Certiorari denied. Reported below: 829 F. 2d 714.

No. 87-6105. *ELLIS v. WEST ET AL.* C. A. 6th Cir. Certiorari denied. Reported below: 826 F. 2d 1063.

No. 87-6170. *CATALDO v. UNITED STATES.* C. A. 5th Cir. Certiorari denied. Reported below: 832 F. 2d 869.

No. 87-6198. *SMITH v. EADS.* C. A. 8th Cir. Certiorari denied.

No. 87-6225. *HOCHMAN ET AL. v. RAFFERTY, SUPERINTENDENT, NEW JERSEY STATE PRISON, ET AL.* C. A. 3d Cir. Certiorari denied. Reported below: 831 F. 2d 1199.

No. 87-6279. *LASTEED v. UNITED STATES.* C. A. 11th Cir. Certiorari denied. Reported below: 832 F. 2d 1240.

No. 87-6462. *SELTENRICH v. TITUS ET AL.* C. A. 9th Cir. Certiorari denied.

No. 87-6464. *LAWRENCE v. UNITED STATES ARMY TANK-AUTOMOTIVE COMMAND ET AL.* C. A. 6th Cir. Certiorari denied. Reported below: 833 F. 2d 1012.

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No. 87-6492. *ADAMS v. DEPARTMENT OF THE NAVY*. C. A. Fed. Cir. Certiorari denied. Reported below: 833 F. 2d 1024.

No. 87-6497. *JONES v. RALSTON ET AL.* C. A. 6th Cir. Certiorari denied. Reported below: 835 F. 2d 880.

No. 87-6523. *MARCH v. BREWSTER ET AL.* C. A. 11th Cir. Certiorari denied. Reported below: 831 F. 2d 1069.

No. 87-6533. *DREW v. CARROLL ET AL.* C. A. 5th Cir. Certiorari denied.

No. 87-6538. *BRECK v. ULMER ET AL.* Sup. Ct. Alaska. Certiorari denied. Reported below: 745 P. 2d 66.

No. 87-6540. *VINSON v. JOHNSON ET AL.* C. A. 5th Cir. Certiorari denied.

No. 87-6546. *MCCRAY v. TEXAS*. Ct. Crim. App. Tex. Certiorari denied.

No. 87-6548. *SEN GUPTA v. METCO, INC.* C. A. 2d Cir. Certiorari denied. Reported below: 814 F. 2d 653.

No. 87-6555. *LEON v. DUGGER ET AL.* C. A. 11th Cir. Certiorari denied. Reported below: 835 F. 2d 1438.

No. 87-6556. *HOPKINS v. OFFICE OF PERSONNEL MANAGEMENT*. C. A. Fed. Cir. Certiorari denied. Reported below: 845 F. 2d 1033.

No. 87-6557. *GRAYS v. CABANA ET AL.* C. A. 5th Cir. Certiorari denied. Reported below: 840 F. 2d 13.

No. 87-6561. *RICHARDS ET AL. v. PETERSON*. C. A. 5th Cir. Certiorari denied.

No. 87-6562. *TROVE v. CULBERTSON*. C. A. 5th Cir. Certiorari denied. Reported below: 836 F. 2d 1344.

No. 87-6564. *SISCO v. COUNTY OF LOS ANGELES ET AL.* Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 87-6565. *RHODEN v. TENNESSEE*. Ct. Crim. App. Tenn. Certiorari denied.

No. 87-6583. *ALLEN v. ESTELLE, WARDEN*. C. A. 9th Cir. Certiorari denied.

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No. 87-6594. *WESSELMAN v. SEABOLD, WARDEN*. C. A. 6th Cir. Certiorari denied. Reported below: 834 F. 2d 99.

No. 87-6604. *LEWIS v. UNITED STATES*. Ct. App. D. C. Certiorari denied.

No. 87-6619. *WILLIAMS v. WATER ET AL.* C. A. 6th Cir. Certiorari denied. Reported below: 838 F. 2d 472.

No. 87-6630. *GONZALEZ v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 837 F. 2d 1093.

No. 87-6645. *CLARK v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 838 F. 2d 468.

No. 87-6647. *JOCHIM v. UNITED STATES*. C. A. 10th Cir. Certiorari denied.

No. 87-6652. *SOTELLO v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 835 F. 2d 1432.

No. 87-6669. *IBRAHIM v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 838 F. 2d 1212.

No. 87-6676. *KHAN v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 842 F. 2d 1295.

No. 87-6685. *CALLE-CARDENAS ET AL. v. UNITED STATES*. C. A. 1st Cir. Certiorari denied. Reported below: 837 F. 2d 30.

No. 87-1017. *MONROE v. BUTLER, WARDEN*. Crim. Dist. Ct., Orleans Parish, La. Certiorari denied.

JUSTICE BRENNAN, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg v. Georgia*, 428 U. S. 153, 227 (1976), I would grant certiorari and vacate the death sentence in this case.

JUSTICE MARSHALL, dissenting.

I continue to believe 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, 231-241 (1976) (MARSHALL, J., dissenting). But even if I did not hold this view, I would grant this petition for certiorari because the state courts refused to grant petitioner appropriate relief for

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the State's violation of his rights under *Brady v. Maryland*, 373 U. S. 83 (1963). In so doing, the state courts countenanced impermissible official conduct and left the victim of this conduct without effective constitutional protection.

I

In 1980, petitioner Ronald Monroe was brought to trial in New Orleans for the murder of Lenora Collins, a neighbor. The State's case against petitioner consisted solely of eyewitness identifications by the victim's two children, both of whom were present when an assailant broke into their mother's bedroom and stabbed her. There was no physical evidence linking petitioner to the offense. The jury, apparently crediting the testimony of the two children, who at the time of the murder were aged 12 and 11, found petitioner guilty of first-degree murder and unanimously recommended the death sentence.

Six months after Monroe's conviction, Detective Joseph Gallardo of the Pontiac, Michigan, Police Department contacted a member of the New Orleans Police Department to relate information pertinent to the murder of Lenora Collins. While investigating one George Stinson's murder of his common-law wife, Detective Gallardo had received a tip suggesting that Stinson also may have murdered Collins, who was Stinson's previous wife. This tip appeared plausible because both women had died from stab wounds to the neck and chest. Two months after imparting this information, Gallardo again called the New Orleans police. This time, Gallardo told Sergeant John McKenzie about a recent interview he had conducted with Stinson's cellmate. In the interview, the cellmate had quoted Stinson as first confessing to the Michigan murder and then stating that "the same thing happened" to Collins. The cellmate also had reported that Stinson had confessed to threatening his stepchildren into identifying petitioner as their mother's killer. According to Gallardo, the Michigan case also contained a suggestion of witness intimidation.

All of this information was transmitted to the New Orleans detectives who had handled the investigation of Collins' murder. These detectives did not make any further inquiries relating to the Collins case. Neither did the detectives inform petitioner or his counsel of Gallardo's communications. Not until two years later did petitioner's counsel discover, through independent investiga-

tion, that Gallardo had made these statements to the New Orleans police.

Petitioner thereupon filed a motion in the Orleans Parish Criminal District Court seeking release or retrial. Petitioner alleged that the State had violated his constitutional rights by failing to disclose the information Gallardo had given to the New Orleans police. The Criminal District Court denied petitioner's motion without an evidentiary hearing, asserting that the new evidence was not sufficiently material to support relief. The Louisiana Supreme Court denied review. *State ex rel. Monroe v. Maggio*, 444 So. 2d 606 (1984).

Approximately two months later, the United States District Court for the Eastern District of Louisiana granted petitioner's application for habeas corpus relief. Relying in part on testimony given at an evidentiary hearing, the District Court held that the State had violated petitioner's constitutional rights under *Brady v. Maryland*, *supra*, and *United States v. Agurs*, 427 U. S. 97 (1976), by failing to disclose the information obtained from Gallardo. The District Court found that this evidence "create[d] a reasonable doubt as to Monroe's guilt that did not previously exist." App. to Pet. for Cert. 5c. The court further found that the State's responsibility to disclose such evidence continued past the point of conviction. The court explained that "it is fundamentally unfair and contrary to society's notions of justice for a prosecutor to withhold material exculpatory evidence which he acquires while the defendant is entitled to file a motion for a new trial." *Id.*, at 3c. Having found a *Brady* violation, the District Court nonetheless refused petitioner's request for an order directing immediate release or retrial. The court instead remitted the case to the state courts so that they could provide appropriate postconviction relief. Petitioner appealed from the remedial aspect of this judgment, but the United States Court of Appeals for the Fifth Circuit affirmed. *Monroe v. Blackburn*, 748 F. 2d 958 (1984). This Court denied petitioner's application for a writ of certiorari. I dissented then from the Court's failure to review the relief afforded petitioner. See *Monroe v. Blackburn*, 476 U. S. 1145 (1986).

On remand, the Orleans Parish Criminal District Court once again denied petitioner's motion for release or retrial. The state court first expressly rejected the Federal District Court's prior determination that a *Brady* violation had occurred. The state

court reasoned that *Brady* did not apply to evidence obtained by state officials after a defendant's trial: in the words of the state court, "it is impossible to accuse the prosecution of 'suppressing' this material since it did not exist at the time of trial and therefore could not have been suppressed." App. to Pet. for Cert. 2a. The court then held that the new evidence did not entitle petitioner to a new trial under state law. A new trial is required under Louisiana law whenever newly discovered evidence, if introduced at the prior trial, would probably have changed the verdict of guilty. The state court found that the new evidence in this case, which it termed an "ambiguous utterance by Stinson," would not have changed the jury verdict. *Id.*, at 3a. The Louisiana Supreme Court denied review of the Criminal District Court's decision, and petitioner again applied for certiorari.

II

The Criminal District Court's pronouncement that no *Brady* violation occurred in this case is insupportable. On application for habeas corpus relief, a Federal District Court previously had determined that the State's failure to disclose the exculpatory information received from Detective Gallardo constituted a *Brady* violation. The state court had no authority to reconsider or redecide this issue. Once a federal court has determined a federal question in a case, a state court must recognize and give effect to that determination. As this Court stated decades ago:

"[A] right claimed under the Federal Constitution, finally adjudicated in the Federal courts, can never be taken away or impaired by state decisions.

"... Any other conclusion strikes down the very foundation of the doctrine of *res judicata*, and permits the state court to deprive a party of the benefit of its most important principle, and is a virtual abandonment of the final power of the Federal courts to protect all who come before them relying upon rights guaranteed by the Federal Constitution and established by the judgments of the Federal courts." *Deposit Bank v. Frankfort*, 191 U. S. 499, 517, 520 (1903).

See also *Stoll v. Gottlieb*, 305 U. S. 165, 170-171 (1938); *Myers v. International Trust Co.*, 263 U. S. 64, 69, 73 (1923). I would have thought this rule too long established to require reiteration.

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By flouting it here, and ignoring the determination of the Federal District Court that state officials had committed a *Brady* violation, the state court acted beyond the scope of its authority and in disregard of settled law.

Given the finding of the Federal District Court that state officials had committed a *Brady* violation when they suppressed the evidence suggesting that George Stinson rather than petitioner had murdered Lenora Collins, the state court was required to order the release or retrial of petitioner. Until now, the invariable remedy for a prosecutor's or police officer's suppression of material exculpatory evidence has been an order directing release or retrial. The State has not pointed to a single case involving a different remedy, and I am aware of none. Still, the State argues that because the *Brady* violation at issue here occurred after petitioner's conviction, the state courts fully remedied the violation by giving petitioner an opportunity to demonstrate that the new evidence entitled him to a second trial under normal principles of state law. This approach, however, disregards one of the most fundamental aspects of this Court's *Brady* jurisprudence. This Court consistently has drawn a sharp distinction between newly discovered evidence suppressed by the State and newly discovered evidence obtained from a neutral source; the Court has reasoned that if these two categories of evidence were treated in the same manner, "there would be no special significance to the prosecutor's obligation to serve the cause of justice." *United States v. Agurs*, *supra*, at 111. To "remedy" a postconviction *Brady* violation merely by evaluating the suppressed evidence under the state-law standard governing motions for a new trial is to violate this established principle; such a remedy treats the evidence as if it had derived from a neutral source and thereby ignores the dereliction of state officials. In so doing, this remedy removes from the State any incentive to disclose material exculpatory evidence gained after conviction and trivializes the constitutional right recognized by *Brady* and its progeny. Because I do not believe that this Court should tolerate such a dilution of the *Brady* rule, especially in the context of a capital case in which the withheld evidence is strongly exculpatory, I dissent from the denial of certiorari.

No. 87-1287. HUMPHRIES *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF

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LABOR, ET AL. C. A. 4th Cir. Motion of International Longshoremen's Association, AFL-CIO, for leave to file a brief as *amicus curiae* granted. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this motion and this petition. Reported below: 834 F. 2d 372.

No. 87-1452. WISE ET AL. *v.* ARLINGTON COUNTY, VIRGINIA, ET AL. C. A. 4th Cir. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant certiorari.

No. 87-1472. OWENS-ILLINOIS, INC., ET AL. *v.* DANFIELD ET UX. C. A. 3d Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 829 F. 2d 1233.

No. 87-1479. CARLIN COMMUNICATIONS, INC., ET AL. *v.* MOUNTAIN STATES TELEPHONE & TELEGRAPH CO. C. A. 9th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 827 F. 2d 1291.

No. 87-6087. POLIAK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. JUSTICE KENNEDY took no part in the consideration or decision of this petition. Reported below: 823 F. 2d 371.

No. 87-6260. ROUGEAU *v.* TEXAS. Ct. Crim. App. Tex.;

No. 87-6522. MESSER *v.* ZANT, WARDEN. C. A. 11th Cir.;
and

No. 87-6554. OLIVER *v.* NORTH CAROLINA. Gen. Ct. Justice, Super. Ct. Div., Robeson County, N. C. Certiorari denied. Reported below: No. 87-6260, 738 S. W. 2d 651; No. 87-6522, 831 F. 2d 946.

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. 87-6570. BRENNAN *v.* CITY OF MOUNT DORA, FLORIDA, ET AL. D. C. M. D. Fla. Certiorari before judgment denied.
Rehearing Denied

No. 87-317. BEMIS PENTECOSTAL CHURCH ET AL. *v.* TENNESSEE ET AL., *ante*, p. 930. Petition for rehearing denied.

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No. 87-1166. *MENDEZ v. MENDEZ*, ante, p. 942;
No. 87-5323. *STEFFEN v. OHIO*, ante, p. 916;
No. 87-5888. *IN RE ROY*, ante, p. 932;
No. 87-6236. *ALDERMAN v. GEORGIA*, ante, p. 943;
No. 87-6266. *FORD v. GEORGIA*, ante, p. 943;
No. 87-6308. *EAKINS v. FOLTZ, WARDEN*, ante, p. 938; and
No. 87-6336. *PETERS v. TROWELL ET AL.*, ante, p. 967. Petitions for rehearing denied.

No. 87-616. *BECK ET AL. v. MANUFACTURERS HANOVER TRUST CO. ET AL.*, 484 U. S. 1005. Motion for leave to file petition for rehearing denied. JUSTICE KENNEDY took no part in the consideration or decision of this motion.

APRIL 27, 1988

Certiorari Denied

No. 87-6823 (A-817). *SMITH v. NORTH CAROLINA*. Gen. Ct. Justice, Super. Ct. Div., Halifax County, N. C. Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. Certiorari 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 and the petition for writ of certiorari and would vacate the death sentence in this case.

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Appeals Dismissed

No. 87-1526. *CHRISTENSEN v. UTAH STATE TAX COMMISSION*. Appeal from Sup. Ct. Utah dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 87-6568. *SPELLMAN v. UNITED STATES ET AL.* 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.

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No. 87-6589. *MINGLEDOLPH v. MCKEAN ET AL.* Appeal from D. C. N. D. Ill. dismissed for want of jurisdiction.

Certiorari Granted—Vacated and Remanded

No. 87-1414. *MARINO v. UNITED STATES.* C. A. 3d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Mathews v. United States, ante*, p. 58. Reported below: 838 F. 2d 463.

Miscellaneous Orders

No. — — —. *HODGES v. UNITED STATES ET AL.* Motion to direct the Clerk to file the petition for writ of certiorari out of time denied.

No. A-761 (87-1320). *ROSENBAUM v. ROSENBAUM.* Application to suspend the effect of the order entered March 21, 1988 [*ante*, p. 950], addressed to JUSTICE SCALIA and referred to the Court, denied.

No. A-763. *MODJESKI & MASTERS v. CARTER ET AL.* Application for stay, filed with JUSTICE WHITE, and referred by him to the Court, is hereby granted, and the temporary stay entered by JUSTICE WHITE on April 15, 1988, is vacated.

The judgments of the Louisiana Court of Appeal for the Fourth Circuit and the Louisiana Civil District Court for the Parish of Orleans are stayed pending the timely docketing of an appeal by appellant in the above-entitled case. Should such an appeal be so timely docketed, this order is to continue pending this Court's action on the jurisdictional statement or further disposition of such appeal.

This order is conditioned upon the timely posting with the Louisiana Civil District Court for the Parish of Orleans of a good and sufficient bond in the amount of \$700,000 plus interest from April 15, 1988, by appellant Modjeski & Masters, covering any potential obligations under the judgment of the Louisiana Civil District Court for the Parish of Orleans. Unless and until Modjeski & Masters posts said bond, the stay is expressly conditioned on appellant's taking no action to reduce its current net worth and, in particular, not:

- (A) distributing any earnings of the firm to its partners who continue to work for the firm, except as they have been

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receiving heretofore in salary and benefits or as provided in (B) and (D) below, or

- (B) distributing any earnings of the firm to its partners for so long as the net worth of the firm is below \$700,000, or
- (C) transferring or encumbering any existing assets, funds, or existing contracts of the partnership to or on behalf of any other parties, beyond security interests or liens already in existence, except as is necessary in the ordinary course of its business, for the defense or settlement or both of the pending actions against it, or for payment to associates and employees in accordance with with existing employment contracts;

And further provided that

- (D) Profits accumulated after the payment of salaries and other expenses shall be distributed as follows:
 - (1) If the net worth of the firm is between \$700,000 and \$1.1 million, then up to 50% of accumulated profits may be distributed to the partners; the remainder will be accumulated in the partnership,
 - (2) If the net worth of the firm is above \$1.1 million, then all profits above that amount may be distributed to the partners; and
- (E) Appellant shall furnish to appellees within 30 days of the end of each quarter:
 - (1) a statement from the managing partner of Modjeski & Masters and from its certified public accountants that all provisions of this order have been complied with, and
 - (2) balance sheet and income statements for each such quarter; and
- (F) Within 120 days of the end of the calendar year, appellant shall provide annual balance and income statements to appellees; and
- (G) Appellees shall keep confidential all financial data provided under this order; and
- (H) If the net worth of Modjeski & Masters falls below \$700,000, appellees may apply to the Court for further relief; and
- (I) Appellees shall have the right to select an independent auditor to inspect any and all records of the appellant to

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ascertain whether appellant is complying with the provisions of this stay.

- (J) Should appellees find it necessary to seek additional relief to enforce the terms of this order, they shall apply to the Louisiana Civil District Court for the Parish of Orleans.

No. A-811. *MITCHELL ET AL. v. UNITED STATES*. Application for release pending appeal, presented to JUSTICE MARSHALL, and by him referred to the Court, denied. JUSTICE MARSHALL took no part in the consideration or decision of this application.

No. D-706. *IN RE DISBARMENT OF PURVIS*. It is ordered that Charles M. Purvis, of Birmingham, Ala., 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. 86-1904. *ARIZONA v. YOUNGBLOOD*. Ct. App. Ariz. [Certiorari granted, *ante*, p. 903.] Motion of petitioner to dispense with printing the joint appendix granted.

No. 87-1095. *DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR v. BROYLES ET AL.* C. A. 4th Cir. [Certiorari granted, *ante*, p. 987.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 87-6618. *IN RE HARRIS*. Petition for writ of mandamus denied.

Certiorari Granted

No. 87-1064. *UNITED STATES v. STUART ET AL.* C. A. 9th Cir. Certiorari granted. Reported below: 813 F. 2d 243.

Certiorari Denied. (See also Nos. 87-1526 and 87-6568, *supra*.)

No. 87-1040. *MILLER v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 830 F. 2d 1073.

No. 87-1291. *STOKWITZ v. UNITED STATES ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 831 F. 2d 893.

No. 87-1317. *GUSTE, ATTORNEY GENERAL OF LOUISIANA, ET AL. v. UNITED STATES ET AL.* C. A. 5th Cir. Certiorari denied. Reported below: 832 F. 2d 935.

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No. 87-1352. BOARD OF TRUSTEES OF THE UNIVERSITY OF ARKANSAS ET AL. *v.* LEGRAND ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 821 F. 2d 478.

No. 87-1363. KELLY, CHIEF STATE'S ATTORNEY, ET AL. *v.* WILKINSON ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 832 F. 2d 1330.

No. 87-1381. MARGOLIN *v.* BOARD OF EDUCATION, COMMACK UNION FREE SCHOOL DISTRICT. Ct. App. N. Y. Certiorari denied. Reported below: 70 N. Y. 2d 501, 517 N. E. 2d 509.

No. 87-1390. MAKAH TRIBE ET AL. *v.* WASHINGTON ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 813 F. 2d 1020.

No. 87-1421. CITY OF COLUMBUS, OHIO, ET AL. *v.* BRUNET ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 826 F. 2d 1062.

No. 87-1466. AINSWORTH ET UX. *v.* SHELL OFFSHORE INC. C. A. 5th Cir. Certiorari denied. Reported below: 829 F. 2d 548.

No. 87-1483. TENG *v.* ALABAMA AGRICULTURAL AND MECHANICAL UNIVERSITY. C. A. 11th Cir. Certiorari denied. Reported below: 823 F. 2d 556.

No. 87-1500. SCHUYT *v.* ROWE PRICE PRIME RESERVE FUND, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 835 F. 2d 45.

No. 87-1501. FARWEST STEEL CORP. *v.* BARGE SEA-SPAN 241, AKA BARGE CERES, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 828 F. 2d 522.

No. 87-1502. GORDON *v.* GORDON. Ct. App. Mo., Southern Dist. Certiorari denied. Reported below: 739 S. W. 2d 728.

No. 87-1504. LOENGARD ET AL. *v.* SANTA FE INDUSTRIES, INC., ET AL. C. A. 2d Cir. Certiorari denied.

No. 87-1508. BEAN DREDGING CORP. *v.* OLSEN, COMMISSIONER OF REVENUE OF TENNESSEE. Sup. Ct. Tenn. Certiorari denied. Reported below: 742 S. W. 2d 259.

No. 87-1512. DORITY *v.* OREGON. Ct. App. Ore. Certiorari denied. Reported below: 86 Ore. App. 540, 739 P. 2d 75.

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No. 87-1517. *ST. JOHNS COUNTY, FLORIDA v. LUCAS ET AL.* C. A. 11th Cir. Certiorari denied. Reported below: 831 F. 2d 232.

No. 87-1524. *HONEYWELL, INC., ET AL. v. LUZADDER, EXECUTRIX OF THE ESTATE OF LUZADDER, ET AL.* C. A. 3d Cir. Certiorari denied. Reported below: 834 F. 2d 355.

No. 87-1527. *CHRISTENSEN v. UNITED STATES.* C. A. 9th Cir. Certiorari denied. Reported below: 831 F. 2d 303.

No. 87-1528. *GEORGE V. v. STATE BAR OF CALIFORNIA.* Sup. Ct. Cal. Certiorari denied.

No. 87-1531. *CRUZ v. ILLINOIS.* App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 158 Ill. App. 3d 1100, 525 N. E. 2d 599.

No. 87-1534. *GUFFEY v. CITY OF KIRKSVILLE, MISSOURI.* Ct. App. Mo., Western Dist. Certiorari denied. Reported below: 740 S. W. 2d 227.

No. 87-1540. *MCKINSEY ET AL. v. DONIVAN ET AL.* C. A. 3d Cir. Certiorari denied. Reported below: 835 F. 2d 486.

No. 87-1554. *ROCKEFELLER GROUP, INC., ET AL. v. 48TH STREET STEAKHOUSE, INC.* C. A. 2d Cir. Certiorari denied. Reported below: 835 F. 2d 427.

No. 87-1580. *LOESCHNIG v. CHRYSLER CREDIT CORP. ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 829 F. 2d 1128.

No. 87-1583. *VERMONT DEPARTMENT OF TAXES v. KEYS ET UX.* Sup. Ct. Vt. Certiorari denied. Reported below: 149 Vt. 658, 552 A. 2d 418.

No. 87-1604. *KANE v. UNITED STATES.* C. A. 3d Cir. Certiorari denied. Reported below: 838 F. 2d 1207.

No. 87-1623. *SZTAN v. DEPARTMENT OF THE NAVY.* C. A. Fed. Cir. Certiorari denied. Reported below: 837 F. 2d 1097.

No. 87-1645. *KALVANS v. DEPARTMENT OF ATTORNEY GENERAL OF MICHIGAN.* Ct. App. Mich. Certiorari denied.

No. 87-1673. *ILLINOIS CENTRAL GULF RAILROAD CO. v. MISTER.* C. A. 7th Cir. Certiorari denied. Reported below: 832 F. 2d 1427.

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No. 87-6119. *BRANCH v. UTAH*. Sup. Ct. Utah. Certiorari denied. Reported below: 743 P. 2d 1187.

No. 87-6343. *HENSLEE v. SYKES, DIRECTOR, DEPARTMENT OF ADMINISTRATIVE SERVICES*. Sup. Ct. Ohio. Certiorari denied.

No. 87-6421. *FRAZIER v. SEABOLD, WARDEN*. C. A. 6th Cir. Certiorari denied. Reported below: 833 F. 2d 1012.

No. 87-6509. *TAYLOR v. NEW JERSEY*. Super. Ct. N. J., App. Div. Certiorari denied.

No. 87-6567. *PARKS v. ALLSBROOK, SUPERINTENDENT, ODOM COMPLEX, ET AL.* C. A. 4th Cir. Certiorari denied. Reported below: 836 F. 2d 1343.

No. 87-6569. *WALLS v. ADULT PAROLE AUTHORITY OF OHIO*. C. A. 6th Cir. Certiorari denied. Reported below: 835 F. 2d 880.

No. 87-6576. *BAGLEY v. NORTH CAROLINA*. Sup. Ct. N. C. Certiorari denied. Reported below: 321 N. C. 201, 362 S. E. 2d 244.

No. 87-6577. *LARACUENTE v. CONNECTICUT*. Sup. Ct. Conn. Certiorari denied. Reported below: 205 Conn. 515, 534 A. 2d 882.

No. 87-6578. *BUSH v. PETSOCK, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AND DIAGNOSTIC AND CLASSIFICATION CENTER AT PITTSBURGH*. C. A. 3d Cir. Certiorari denied.

No. 87-6579. *JAMES v. ALFORD, WARDEN, ET AL.* C. A. 5th Cir. Certiorari denied. Reported below: 835 F. 2d 605.

No. 87-6585. *LOSEY v. DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL.* C. A. 11th Cir. Certiorari denied. Reported below: 837 F. 2d 1093.

No. 87-6586. *WALLMULLER v. CALIFORNIA*. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 87-6587. *PRYOR v. TEXAS*. Ct. App. Tex., 5th Dist. Certiorari denied. Reported below: 719 S. W. 2d 628.

No. 87-6590. *MORRIS v. DOAN ET AL.* C. A. 6th Cir. Certiorari denied. Reported below: 829 F. 2d 39.

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No. 87-6599. *MOORE v. FULCOMER*, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON. C. A. 3d Cir. Certiorari denied.

No. 87-6600. *BROWN v. DIAZ ET AL.* Ct. App. Ga. Certiorari denied. Reported below: 184 Ga. App. 409, 361 S. E. 2d 490.

No. 87-6614. *BENNETT v. WESTFALL*, SHERIFF OF JACKSON COUNTY, WEST VIRGINIA, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 836 F. 2d 1342.

No. 87-6662. *OGLESBY v. INDIANA.* Sup. Ct. Ind. Certiorari denied. Reported below: 513 N. E. 2d 638.

No. 87-6679. *GOROD v. DEMONG ET AL.* C. A. 1st Cir. Certiorari denied. Reported below: 836 F. 2d 1340.

No. 87-6694. *KOTYK v. WARD*, POLICE COMMISSIONER OF THE CITY OF NEW YORK, ET AL. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 134 App. Div. 2d 967, 520 N. Y. S. 2d 890.

No. 87-725. *CUTILLO ET AL. v. CINELLI.* C. A. 1st Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 820 F. 2d 474.

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

In *Weatherford v. Bursey*, 429 U. S. 545, 558 (1977), we held that establishing a violation of a defendant's Sixth Amendment right to counsel requires a showing of "at least a realistic possibility" of prejudice to the defendant or benefit to the prosecution. See also *United States v. Morrison*, 449 U. S. 361, 365-366 (1981). This case presents the issue of who bears the burden of persuasion for establishing prejudice or lack thereof when the Sixth Amendment violation involves the transmission of confidential defense strategy information. The First Circuit held that where confidential defense strategy information is transmitted to the prosecution and the defendant makes a *prima facie* showing of prejudice, the burden then shifts to the prosecution to prove that there was no prejudice to the defendant from the disclosure. *Cinelli v. City of Revere*, 820 F. 2d 474, 478, 480 (1987); accord, *United States v. Mastroianni*, 749 F. 2d 900, 907-908 (CA1 1984). This position conflicts with the approach of other Circuits of requiring the

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defendant to prove prejudice. *United States v. Steele*, 727 F. 2d 580, 586-587 (CA6), cert. denied *sub nom. Scarborough v. United States*, 467 U. S. 1209 (1984); *United States v. Irwin*, 612 F. 2d 1182, 1186-1189 (CA9 1980). It also conflicts with a third position that once a defendant shows that the prosecution has improperly obtained confidential defense strategy information or has intentionally placed an informer in the defense camp then no showing of prejudice is required, for those acts constitute a *per se* violation of the Sixth Amendment. *United States v. Costanzo*, 740 F. 2d 251, 254-255 (CA3 1984), cert. denied, 472 U. S. 1017 (1985). Because of these conflicting approaches among the Circuits, I would grant certiorari.

No. 87-1274. UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, ET AL. *v.* CHEROKEE ELECTRIC COOPERATIVE. C. A. 11th Cir. Certiorari denied. Reported below: 829 F. 2d 1131.

JUSTICE WHITE, dissenting.

This case presents the question whether labor and management may be compelled to arbitrate a grievance that indisputably was filed outside the time limits provided by their collective-bargaining agreement.

The parties to this action entered into a collective-bargaining agreement that provided that "[a]ny grievance not reported within five (5) working days of first knowledge of the occurrence causing the grievance shall be deemed waived [*sic*] and non-existent." The grievance at issue here was not reported within the 5-day period. The employer therefore refused to submit the grievance to arbitration.

The union brought an action to compel arbitration in the District Court for the Northern District of Alabama. The court dismissed the action on summary judgment on the ground that the employer "did not agree to submit to arbitration grievances which on their face are untimely and to which the timeliness issue is not disputed." The court rejected the union's contention that the timeliness issue ought to have been submitted to the arbitrator. "To permit an arbitrator to arbitrate the issue of timeliness where there is no dispute over the facts bearing on the timeliness issue would be to waste the time of the arbitrator and of the parties," reasoned the court, "and if an arbitrator should erroneously find that this particular grievance was timely filed, the finding would be so manifestly arbitrary and capricious as to require a reviewing

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court to set it aside." The Court of Appeals for the Eleventh Circuit affirmed summarily. 829 F. 2d 1131 (1987).

The decision in this case conflicts with decisions of several other Federal Courts of Appeals. Those courts have construed our decision in *John Wiley & Sons, Inc. v. Livingston*, 376 U. S. 543 (1964), as requiring that the arbitrator resolve all procedural objections to arbitration so long as the subject matter of the grievance is covered by an arbitration agreement. See, e. g., *Niro v. Fearn Int'l, Inc.*, 827 F. 2d 173, 175-176 (CA7 1987); *Washington Hospital Center v. Service Employees Int'l Union, Local 722*, 241 U. S. App. D. C. 186, 189-191, 746 F. 2d 1503, 1506-1508 (1984); *Automotive, Petroleum & Allied Industries Employees Union, Local 618 v. Town & Country Ford, Inc.*, 709 F. 2d 509, 511-514 (CA8 1983).

In *Washington Hospital Center*, for example, the union failed to give notice that a grievance had been referred to arbitration within the time specified by the collective-bargaining agreement. It was nonetheless held that the arbitrability of the grievance had to be decided by the arbitrator rather than the courts. The District of Columbia Circuit reasoned that a dispute over "the significance of a default in literal compliance with a contractual procedural requirement," like a dispute over a substantive contractual provision, requires "a determination of the intention of the parties to the contract" that must be made by the arbitrator. 241 U. S. App. D. C., at 191, 746 F. 2d, at 1508 (quoting *Chauffeurs, Teamsters & Helpers, Local 765 v. Stroehmann Bros. Co.*, 625 F. 2d 1092, 1093 (CA3 1980)).

I would grant certiorari to resolve the conflict among the Courts of Appeals on this question of federal labor law.

No. 87-1341. *BROWN CO. ET AL. v. NATIONAL LABOR RELATIONS BOARD*. C. A. 9th Cir. Certiorari denied. JUSTICE KENNEDY took no part in the consideration or decision of this petition. Reported below: 833 F. 2d 1015.

No. 87-6593. *FERGUSON v. DONALDSON*, JUDGE, SAN FRANCISCO MUNICIPAL COURT. C. A. 9th Cir. Certiorari denied. JUSTICE KENNEDY took no part in the consideration or decision of this petition. Reported below: 829 F. 2d 40.

No. 87-1342. *ARAMBULO v. UNITED STATES*. C. A. 2d Cir. Motion of petitioner for leave to file transcript of proceeding in the

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District Court under seal granted. Certiorari denied. Reported below: 835 F. 2d 437.

No. 87-1558. OHIO *v.* MURPHY. Ct. App. Ohio, Summit County. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied.

No. 87-6138. MODDEN *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 721 S. W. 2d 859.

JUSTICE BRENNAN, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg v. Georgia*, 428 U. S. 153, 227 (1976), I would grant the petition for writ of certiorari and vacate the death sentence in this case.

JUSTICE MARSHALL, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, see *Gregg v. Georgia*, 428 U. S. 153, 231-241 (1976) (MARSHALL, J., dissenting), I would grant the petition for certiorari and vacate petitioner's death sentence. But even if I did not hold this view, I would grant the petition for certiorari and remand this case for a hearing to consider petitioner's claim that the prosecutor improperly used peremptory challenges to exclude black persons from the jury in violation of the Equal Protection Clause.

The Equal Protection Clause of the Fourteenth Amendment forbids the prosecution's exercise of peremptory challenges against prospective jurors "solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." *Batson v. Kentucky*, 476 U. S. 79, 89 (1986). Recognizing the "crippling burden" that up to then had been placed on defendants claiming discrimination, *id.*, at 92, this Court in *Batson* dramatically altered the evidentiary burden facing defendants who claim that a prosecutor has improperly used peremptory challenges to exclude members of their racial group from a jury panel. Under *Batson*, a defendant makes a prima facie showing of purposeful discrimination in the selection of the venire by showing that he is a mem-

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MARSHALL, J., dissenting

ber of a cognizable racial group, that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race, and that these facts, along with any other relevant circumstances, raise an inference that the prosecutor used peremptory challenges to exclude venirepersons on account of their race. *Id.*, at 96. Once the defendant makes such a prima facie showing, the burden shifts to the prosecution to come forward with a race-neutral explanation for challenging the prospective jurors. *Id.*, at 97.

In this case, petitioner, a black man, was charged with murdering a white woman in the course of committing a robbery. During jury selection, the prosecution exercised three peremptory strikes to exclude black jurors from the venire. The prosecution also challenged for cause five other black venirepersons. Although petitioner complained about the exclusion of black persons from the jury, the trial court apparently never asked the prosecutor to explain the exercise of peremptory challenges to exclude black venirepersons, and no explanation was given. As a result of the prosecutor's use of peremptory challenges and exclusions for cause, only one black person was ultimately selected to serve on the jury that convicted petitioner and sentenced him to death. Although the record is sparse, in my view petitioner has made a prima facie showing under *Batson* of the discriminatory exercise of peremptory challenges.

Because petitioner has made a prima facie showing of discrimination, the burden falls on the prosecution to give a race-neutral explanation for its use of peremptory challenges. Petitioner's trial concluded before this Court decided *Batson*, so it is not surprising that the trial court failed to determine whether the prosecutor could proffer a race-neutral explanation for the challenges.* Under these circumstances, I would vacate the judgment of the Texas Court of Criminal Appeals and remand with instructions that a hearing be held to consider petitioner's claim that the prosecution's use of peremptory challenges violated his rights under the Equal Protection Clause.

*In *Griffith v. Kentucky*, 479 U. S. 314, 328 (1987), this Court ruled that the holding of *Batson v. Kentucky*, 476 U. S. 79 (1986), "is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final." When *Batson* was decided, petitioner's case was still pending on direct review of his conviction and sentence.

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*Rehearing Denied*No. 87-972. *SCHARRER v. UNITED STATES*, ante, p. 935;No. 87-1237. *YEE v. SMITH ET AL.*, ante, p. 936;No. 87-1334. *BELL ET AL. v. UNITED STATES*, ante, p. 934;
andNo. 87-6351. *BESPALCHENKO v. GERMAN FEDERAL GOVERNMENT ET AL.*, ante, p. 979. Petitions for rehearing denied.

MAY 4, 1988

Miscellaneous Order

No. A-800. *FW/PBS, INC., DBA PARIS ADULT BOOKSTORE II, ET AL. v. CITY OF DALLAS ET AL.* Application for stay, filed with JUSTICE WHITE, has been referred to the Court. JUSTICE WHITE's temporary stay is hereby vacated. Application for stay is granted, and judgment of the United States Court of Appeals for the Fifth Circuit is stayed, except for its holding that the provisions of the ordinance regulating the location of sexually oriented businesses do not violate the Federal Constitution, pending the timely filing and disposition of a petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay is to terminate automatically. In the event the petition for writ of certiorari is granted, this stay is to continue in effect pending the sending down of the judgment of this Court.

MAY 10, 1988

Miscellaneous Order

No. A-858 (87-6927). *HAMILTON, AS NATURAL MOTHER AND NEXT FRIEND OF SMITH v. TEXAS*. Ct. Crim. App. Tex. Application for stay of execution of sentence of death, presented to JUSTICE WHITE, and by him referred to the Court, granted pending the disposition by this Court of the petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay terminates automatically. In the event the petition for writ of certiorari is granted, this stay shall continue pending the issuance of the mandate of this Court.

MAY 13, 1988

Dismissal Under Rule 53

No. 87-1339. *USMAN v. IMMIGRATION AND NATURALIZATION SERVICE*. C. A. 6th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 826 F. 2d 1066.

AMENDMENTS TO FEDERAL RULES OF CIVIL PROCEDURE

The following amendments to the Federal Rules of Civil Procedure were prescribed by the Supreme Court of the United States on April 25, 1988, pursuant to 28 U. S. C. § 2072, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 1044. The Judicial Conference Report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. § 2072, such amendments do not take effect until so reported to Congress and until the expiration of 90 days thereafter. Moreover, Congress may defer the effective date to a later date or until approved by Act of Congress, or may modify such amendments.

For earlier publication of the Federal Rules of Civil Procedure and amendments thereto, see 308 U. S. 645, 308 U. S. 642, 329 U. S. 839, 335 U. S. 919, 341 U. S. 959, 368 U. S. 1009, 374 U. S. 861, 383 U. S. 1029, 389 U. S. 1121, 398 U. S. 977, 401 U. S. 1017, 419 U. S. 1133, 446 U. S. 995, 456 U. S. 1013, 461 U. S. 1095, 471 U. S. 1153, and 480 U. S., Pt. 3, p. 953.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 25, 1988

*To the Senate and House of Representatives of the United
States of America in Congress Assembled:*

By direction of the Supreme Court of the United States, I have the honor to submit to the Congress amendments to the Federal Rules of Civil Procedure which have been adopted by the Supreme Court pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules amendments is an excerpt from the report of the Judicial Conference of the United States containing the Advisory Committee notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

(Signed) WILLIAM H. REHNQUIST
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

MONDAY, APRIL 25, 1988

ORDERED:

1. That the Federal Rules of Civil Procedure be, and they hereby are, amended by including therein amendments to Civil Rules 17 and 71A, as hereinafter set forth:

[See *infra*, pp. 1047-1048.]

2. That the foregoing amendments to the Federal Rules of Civil Procedure shall take effect on August 1, 1988.

3. That THE CHIEF JUSTICE be, and he hereby is, authorized to transmit to the Congress the foregoing amendments in accordance with the provisions of Section 2072 of Title 28, United States Code.

Rule 71A. Conservation of property.

(a) *Appearance or answer.*— If a defendant has no objection or defense to the taking of the defendant's property, the defendant may serve a notice of appearance designating the property in which the defendant claims to be interested. Thereafter, the defendant shall receive notice of all proceedings affecting it. If a defendant has any objection or defense to the taking of the property, the defendant shall serve an

AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

Rule 17. Parties plaintiff and defendant; capacity.

(a) *Real party in interest.*—Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in that person's own name without joining the party for whose benefit the action is brought; and when a statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

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Rule 71A. Condemnation of property.

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(e) *Appearance or answer.*—If a defendant has no objection or defense to the taking of the defendant's property, the defendant may serve a notice of appearance designating the property in which the defendant claims to be interested. Thereafter, the defendant shall receive notice of all proceedings affecting it. If a defendant has any objection or defense to the taking of the property, the defendant shall serve an an-

swer within 20 days after the service of notice upon the defendant. The answer shall identify the property in which the defendant claims to have an interest, state the nature and extent of the interest claimed, and state all the defendant's objections and defenses to the taking of the property. A defendant waives all defenses and objections not so presented, but at the trial of the issue of just compensation, whether or not the defendant has previously appeared or answered, the defendant may present evidence as to the amount of the compensation to be paid for the property, and the defendant may share in the distribution of the award. No other pleading or motion asserting any additional defense or objection shall be allowed.

AMENDMENTS TO FEDERAL RULES OF EVIDENCE

The following amendments to the Federal Rules of Evidence were prescribed by the Supreme Court of the United States on April 25, 1988, pursuant to 28 U. S. C. § 2076, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 1050. The Judicial Conference Report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. § 2076, such an amendment does not take effect until so reported to Congress and until the expiration of 180 days thereafter, and if Congress disapproves an amendment so reported it does not take effect. Moreover, Congress may defer the effective date to a later date or until approved by Act of Congress, or may modify such an amendment.

For earlier reference to the Federal Rules of Evidence, see 409 U. S. 1132. For earlier publication of the Federal Rules of Evidence, and amendments thereto, see 441 U. S. 1005, and 480 U. S., Pt. 3, p. 1023.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 25, 1988

*To the Senate and House of Representatives of the United
States of America in Congress Assembled:*

By direction of the Supreme Court of the United States, I have the honor to submit to the Congress amendments to the Federal Rules of Evidence which have been adopted by the Supreme Court pursuant to Section 2076 of Title 28, United States Code.

Accompanying these rules is an excerpt from the report of the Judicial Conference of the United States containing the Advisory Committee notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

(Signed) WILLIAM H. REHNQUIST
Chief Justice of the United States

AMENDMENTS TO THE FEDERAL RULES
OF EVIDENCE

SUPREME COURT OF THE UNITED STATES

MONDAY, APRIL 25, 1988

ORDERED:

1. That the Federal Rules of Evidence be, and they hereby are, amended by including therein amendments to Rules 101, 602, 608, 613, 615, 902, and 1101, as hereinafter set forth:

[See *infra*, pp. 1053-1056.]

2. That the foregoing changes in the Federal Rules of Evidence shall take effect on November 1, 1988.

3. That THE CHIEF JUSTICE be, and he hereby is, authorized to transmit to the Congress the foregoing changes in the rules of evidence in accordance with the provisions of Section 2076 of Title 28, United States Code.

SUPREME COURT OF THE UNITED STATES

MONDAY, APRIL 22, 1952

ORIGIN:

1. That the Federal Judicial System be and they hereby are amended by including the amendments to Rules 101, 602, 603, 612, 613, 602, and 1101, as hereinafter set forth.

2. That the following changes in the Federal Rules of Civil Procedure shall take effect on November 1, 1952, to wit:

3. That the Court Justice be and he hereby is authorized to transmit to the Congress the proposed changes in the rules in accordance with the provisions of Section 1 of Article III of the United States Constitution.

United States Code

Any and all amendments to the Federal Rules of Civil Procedure shall be transmitted to the Congress by the Chief Justice of the United States in accordance with the provisions of Section 1 of Article III of the United States Constitution.

Sincerely,

WILLIAM H. RICHMOND
Chief Justice of the United States

AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE

Rule 101. Scope.

These rules govern proceedings in the courts of the United States and before United States bankruptcy judges and United States magistrates, to the extent and with the exceptions stated in rule 1101.

Rule 602. Lack of personal knowledge.

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of rule 703, relating to opinion testimony by expert witnesses.

Rule 608. Evidence of character and conduct of witness.

(b) *Specific instances of conduct.*—Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's

or the witness' privilege against self-incrimination when examined with respect to matters which relate only to credibility.

Rule 613. Prior statements of witnesses.

(b) *Extrinsic evidence of prior inconsistent statement of witness.*—Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2).

Rule 615. Exclusion of witnesses.

At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause.

Rule 902. Self-authentication.

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(3) *Foreign public documents.*—A document purporting to be executed or attested in an official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of

genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of an embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

Rule 1101. Applicability of rules.

(a) *Courts and magistrates.*—These rules apply to the United States district courts, the District Court of Guam, the District Court of the Virgin Islands, the District Court for the Northern Mariana Islands, the United States Courts of Appeals, the United States Claims Court, and to United States bankruptcy judges and United States magistrates, in the actions, cases, and proceedings and to the extent hereinafter set forth. The terms “judge” and “court” in these rules include United States bankruptcy judges and United States magistrates.

(e) *Rules applicable in part.*—In the following proceedings these rules apply to the extent that matters of evidence are not provided for in the statutes which govern procedure therein or in other rules prescribed by the Supreme Court pursuant to statutory authority: the trial of minor and petty offenses by United States magistrates; review of agency actions when the facts are subject to trial de novo under section 706(2)(F) of title 5, United States Code; review of orders of the Secretary of Agriculture under section 2 of the Act enti-

tled "An Act to authorize association of producers of agricultural products" approved February 18, 1922 (7 U. S. C. 292), and under sections 6 and 7(c) of the Perishable Agricultural Commodities Act, 1930 (7 U. S. C. 499f, 499g(c)); naturalization and revocation of naturalization under sections 310-318 of the Immigration and Nationality Act (8 U. S. C. 1421-1429); prize proceedings in admiralty under sections 7651-7681 of title 10, United States Code; review of orders of the Secretary of the Interior under section 2 of the Act entitled "An Act authorizing associations of producers of aquatic products" approved June 25, 1934 (15 U. S. C. 522); review of orders of petroleum control boards under section 5 of the Act entitled "An Act to regulate interstate and foreign commerce in petroleum and its products by prohibiting the shipment in such commerce of petroleum and its products produced in violation of State law, and for other purposes", approved February 22, 1935 (15 U. S. C. 715d); actions for fines, penalties, or forfeitures under part V of title IV of the Tariff Act of 1930 (19 U. S. C. 1581-1624), or under the Anti-Smuggling Act (19 U. S. C. 1701-1711); criminal libel for condemnation, exclusion of imports, or other proceedings under the Federal Food, Drug, and Cosmetic Act (21 U. S. C. 301-392); disputes between seamen under sections 4079, 4080, and 4081 of the Revised Statutes (22 U. S. C. 256-258); habeas corpus under sections 2241-2254 of title 28, United States Code; motions to vacate, set aside or correct sentence under section 2255 of title 28, United States Code; actions for penalties for refusal to transport destitute seamen under section 4578 of the Revised Statutes (46 U. S. C. 679); actions against the United States under the Act entitled "An Act authorizing suits against the United States in admiralty for damage caused by and salvage service rendered to public vessels belonging to the United States, and for other purposes", approved March 3, 1925 (46 U. S. C. 781-790), as implemented by section 7730 of title 10, United States Code.

AMENDMENTS TO FEDERAL RULES OF CRIMINAL PROCEDURE

The following amendments to the Federal Rules of Criminal Procedure were prescribed by the Supreme Court of the United States on April 25, 1988, pursuant to 18 U. S. C. §§ 3771 and 3772, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 1058. The Judicial Conference Report referred to in that letter is not reproduced herein.

Note that under 18 U. S. C. § 3771, such amendments do not take effect until so reported to Congress and until the expiration of 90 days thereafter. Moreover, Congress may defer the effective date to a later date or until approved by Act of Congress, or may modify such amendments.

For earlier publication of the Federal Rules of Criminal Procedure, and the amendments thereto, see 327 U. S. 821, 335 U. S. 917, 949, 346 U. S. 941, 350 U. S. 1017, 383 U. S. 1087, 389 U. S. 1125, 401 U. S. 1025, 406 U. S. 979, 415 U. S. 1056, 416 U. S. 1001, 419 U. S. 1136, 425 U. S. 1157, 441 U. S. 985, 456 U. S. 1021, 461 U. S. 1117, 471 U. S. 1167, and 480 U. S., Pt. 3, p. 1041.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 25, 1988

*To the Senate and House of Representatives of the United
States of America in Congress Assembled:*

By direction of the Supreme Court of the United States, I have the honor to submit to the Congress amendments to the Federal Rules of Criminal Procedure which have been adopted by the Supreme Court pursuant to Sections 3771 and 3772 of Title 18, United States Code.

Accompanying these rules is an excerpt from the report of the Judicial Conference of the United States containing the Advisory Committee notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

(Signed) WILLIAM H. REHNQUIST
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

MONDAY, APRIL 25, 1988

ORDERED:

1. That the Federal Rules of Criminal Procedure for the United States District Courts be, and they hereby are, amended by including therein amendments to Criminal Rules 30 and 56, as hereinafter set forth:

[See *infra*, pp. 1061-1062.]

2. That the foregoing amendments to the Federal Rules of Criminal Procedure shall take effect on August 1, 1988 and shall govern all proceedings in criminal cases thereafter commenced and, insofar as just and practicable, all proceedings in criminal cases then pending.

3. That THE CHIEF JUSTICE be, and he hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Criminal Procedure in accordance with the provisions of Sections 3771 and 3772 of Title 18, United States Code.

SUPPLEMENTARY PROVISIONS

WEDNESDAY, APRIL 22, 1908

CONSIDERED

1. That the Federal Rules of Criminal Procedure for the United States District Courts be, and they hereby are, amended by including therein amendments to Criminal Rules 30 and 31, as hereinafter set forth:

[Section 101-102]
2. That the foregoing amendments to the Federal Rules of Criminal Procedure shall take effect on August 1, 1908 and shall govern all proceedings in criminal cases thereafter commenced and, insofar as just and practicable, all proceedings in criminal cases then pending, except in cases in which the Court shall determine that the amendments should not be applied. The amendments shall be applied to the Government's existing amendments to the Federal Rules of Criminal Procedure in accordance with the provisions of Sections 371 and 372 of Title 18, United States Code, which sections are hereby amended, and shall be so applied in the manner of amending a statute.

THE SENATE, at Washington,

April 22, 1908.

AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 30. Instructions.

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to all parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury. The court may instruct the jury before or after the arguments are completed or at both times. No party may assign as error any portion of the charge or omission therefrom unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which that party objects and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury.

Rule 56. Courts and clerks.

The district court shall be deemed always open for the purpose of filing any proper paper, of issuing and returning process and of making motions and orders. The clerk's office with the clerk or a deputy in attendance shall be open during business hours on all days except Saturdays, Sundays, and legal holidays, but a court may provide by local rule or order that its clerk's office shall be open for specified hours on Saturdays or particular legal holidays other than New Year's Day, Birthday of Martin Luther King, Jr., Washington's

Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, and Christmas Day.

AMENDMENTS TO THE FEDERAL RULES
OF CRIMINAL PROCEDURE

Rule 29. Instructions.

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to all parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury. The court may instruct the jury before or after the arguments are completed or at both times. No party may assign as error any portion of the charge or omission therefrom unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which that party objects and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury.

Rule 26. Courts and clerk.

The district court shall be deemed always open for the purpose of filing any proper paper, of hearing and returning process and of making motions and orders. The clerk's office with the clerk or a deputy in attendance shall be open during business hours on all days except Saturdays, Sundays, and legal holidays, but a court may provide by local rule or order that its clerk's office shall be open for specified hours on Saturdays or particular legal holidays other than New Year's Day, Birthday of Martin Luther King, Jr., Washington's

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- ACTUAL NOTICE TO CREDITORS IN PROBATE PROCEEDINGS.** See Constitutional Law, 1, 2.
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I. Due Process.

1. *Contempt of court order to pay child support.*—Where respondent was adjudged in contempt of state-court child support order and was put on probation and ordered to pay an arrearage, question whether legislative presumption that shifted to respondent burden of proving financial inability to pay violated Due Process Clause is remanded, since disposition of case turns on whether relief afforded is criminal or—if payment of arrearage would purge respondent's contempt judgment—civil in nature. *Hicks v. Feiock*, p. 624.

2. *Probate code—Nonclaim statute—Actual notice required.*—Oklahoma's nonclaim statute—which provides that creditors' claims against an estate are generally barred unless they are presented to executor or executrix within two months of publication of notice of commencement of probate proceedings—is not a self-executing statute of limitations but operates in conjunction with state probate proceedings to "adversely affect" appellant creditor's property interest; thus, Due Process Clause of Fourteenth Amendment requires that appellant be given actual notice by mail or other such means if appellant's identity was known or was "reasonably ascertainable" by appellee executrix. *Tulsa Professional Collection Services, Inc. v. Pope*, p. 478.

3. *Rent control ordinance—Fixing reasonable rent.*—Provision in city's rent control ordinance allowing a hearing officer to consider a tenant's hardship in fixing a reasonable rent does not render ordinance facially invalid under Due Process Clause because ordinance's scheme represents a rational attempt to accommodate conflicting interests of protecting tenants from burdensome rent increases while insuring that landlords are guaranteed a fair return on their investment. *Pennell v. San Jose*, p. 1.

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2. *Rent control ordinance—Rational relationship to legitimate state purpose.*—City's rent control ordinance allowing a hearing officer to consider a tenant's hardship in fixing reasonable rent, on its face, does not violate Equal Protection Clause where its scheme is rationally related to legitimate purpose of protecting tenants, and it is not irrational to treat landlords differently on basis of whether or not they have hardship tenants. *Pennell v. San Jose*, p. 1.

3. *Striking workers—Eligibility for food stamps.*—Section 109 of Omnibus Budget Reconciliation Act of 1981—which provides that no household may become eligible to participate in food stamp program while any of its members is on strike or may receive an increase in food stamp allotment because of decrease in striking member's income—does not violate equal protection component of Fifth Amendment, since it is rationally related to legitimate governmental objective of avoiding undue favoritism in private labor disputes. *Lyng v. Automobile Workers*, p. 360.

III. Freedom of Assembly.

Foreign embassies—Congregating and refusing to disperse.—Congregation clause of District of Columbia Code § 22-1115—which prohibits three or more persons from congregating within 500 feet of an embassy and refusing to obey a police dispersal order—is not facially violative of First Amendment under Court of Appeals' narrowing construction that clause permits dispersal only of congregations that are directed at an embassy and only when police reasonably believe that embassy's "security or peace" is threatened. *Boos v. Barry*, p. 312.

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IV. Freedom of Association and Expression.

Striking workers—Eligibility for food stamps.—Section 109 of Omnibus Budget Reconciliation Act of 1981—which provides that no household may become eligible to participate in food stamp program while any of its members is on strike or may receive an increase in food stamp allotment because of decrease in striking member's income—(1) does not violate First Amendment right of appellees, striking workers, to associate with their families or associational rights of appellees and their unions, and (2) does not abridge appellees' right to express themselves about union matters free of coercion by Government. *Lyng v. Automobile Workers*, p. 360.

V. Freedom of Religion.

1. *Indians' rights—Effect of road building and timber harvesting on religious sites.*—Free Exercise Clause does not prohibit Forest Service from constructing a road or permitting timber harvesting in part of Six Rivers National Forest used by Indians for spiritual activities, especially where Government has taken steps to minimize impact of construction on Indian religious activities in accordance with American Indian Religious Freedom Act. *Lyng v. Northwest Indian Cemetery Protective Assn.*, p. 439.

2. *Unemployment compensation benefits—Religious use of peyote.*—Where respondent drug and alcohol rehabilitation counselors were discharged for having ingested peyote, a hallucinogenic, during a religious ceremony of Native American Church, Oregon Supreme Court must make definitive ruling whether religious use of peyote is legal when, under state law, peyote possession is a felony, before federal constitutional issue—whether denial of unemployment compensation unduly burdened respondents' religious freedom under First Amendment—can be decided. *Employment Division, Oregon Dept. of Human Resources v. Smith*, p. 660.

VI. Freedom of Speech.

Foreign embassies—Displaying signs.—Display clause of District of Columbia Code § 22-1115—which makes it unlawful to display any sign within 500 feet of an embassy that tends to bring foreign government into "public odium" or "public disrepute"—is facially violative of First Amendment, since it is a content-based restriction on political speech in a public forum which is not narrowly tailored to serve a compelling state interest. *Boos v. Barry*, p. 312.

VII. Freedom of the Press.

Intentional infliction of emotional distress—"Actual malice" standard.—In order to protect free flow of ideas and opinions on matters of public interest and concern, First and Fourteenth Amendments prohibit public figures and public officials from recovering damages for tort of intentional infliction of emotional distress by reason of publication of a caricature such

CONSTITUTIONAL LAW—Continued.

as ad parody at issue without showing that publication contains a false statement of fact which was made with "actual malice." *Hustler Magazine, Inc. v. Falwell*, p. 46.

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Tax Equity and Fiscal Responsibility Act of 1982—Federal income tax on state bond interest.—Section 310(b)(1) of TEFRA—which permits Federal Government to tax as income interest earned on unregistered state and local government bonds—does not violate doctrine of intergovernmental tax immunity. *South Carolina v. Baker*, p. 505.

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Tax Equity and Fiscal Responsibility Act of 1982—Federal income tax exemption for bonds.—Section 310(b)(1) of TEFRA—which removes federal income tax exemption for interest earned on publicly offered long-term bonds issued by state and local governments unless those bonds are issued in registered rather than bearer form—does not violate Tenth Amendment or constitutional principles of federalism by effectively compelling States to issue bonds in registered form. *South Carolina v. Baker*, p. 505.

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Entrapment defense—Effect of denial of element of crime.—Even if a defendant in a federal criminal case denies one or more elements of a crime, he is entitled to an entrapment instruction whenever there is sufficient evidence from which a reasonable jury could find entrapment. Mathews v. United States, p. 58.

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Denaturalization of citizen—Materiality requirement for false testimony.—Where § 1451(a) of Act provides for denaturalization of citizens whose citizenship orders and certificates of naturalization “were illegally procured or were procured by concealment of a material fact or by willful misrepresentation,” test of whether concealments or misrepresentations are “material” is whether they can be shown by clear, unequivocal, and convincing evidence to have been predictably capable of affecting Immigration and Naturalization Service’s decisions, and § 1101(f)(6)—which provides that a person be deemed not to be of good moral character if he “has given false testimony for the purpose of obtaining” immigration or naturalization benefits—does not impose a materiality requirement for false testimony for purposes of “illegally procured” provision. *Kungys v. United States*, p. 759.

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IMPORTS. See **Jurisdiction, 1.**

INCOME TAXES. See also **Constitutional Law, VIII; X; Estate Taxes.**

1. *Agency—Relationship between corporation and partnership.*—Where, in order to avoid Kentucky’s usury law limit on annual interest rate for noncorporate borrowers, partnerships formed to develop apartment complexes each entered into an agreement with respondent’s corporation providing (1) that corporation would hold title to property as partnership’s nominee and agent solely to secure financing, (2) that partnership would have sole control of and responsibility for complex, and (3) that partnership was principal landowner of property during financing, construction, and operation, partnerships were owners of complexes for federal income tax purposes, since in each instance their relationship with corporation was, in both form and substance, an agency with partnership as principal. *Commissioner v. Bollinger*, p. 340.

2. *Capital assets—Taxpayer’s motivation for purchasing.*—A taxpayer’s motivation in purchasing an asset is irrelevant to question whether asset is a “capital asset” within meaning of 26 U. S. C. § 1221. *Arkansas Best Corp. v. Commissioner*, p. 212.

INCOME UNDER AID TO FAMILIES WITH DEPENDENT CHILDREN PROGRAM. See **Social Security Act, 1.**

INDIANS. See Constitutional Law, V; Supreme Court, 4.

INSTRUCTIONS TO JURY. See Criminal Law.

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS. See Constitutional Law, VII.

INTERGOVERNMENTAL TAX IMMUNITY. See Constitutional Law, VIII.

INTERLOCUTORY ORDERS. See Appeals, 1.

INTERNAL REVENUE CODE. See Estate Taxes; Income Taxes.

INTERNATIONAL TRADE. See Jurisdiction, 1.

INVALID JUDGMENT. See Constitutional Law, I, 4.

JUDGMENTS. See Constitutional Law, I, 4; Supreme Court, 4.

JUDICIAL REVIEW. See also Veterans' Benefits.

1. *Abuse-of-discretion standard—Board of Immigration Appeals.*—Abuse-of-discretion standard of judicial review is appropriate where Board of Immigration Appeals' denial of a motion to reopen deportation proceedings is based on its finding that movant has not introduced previously unavailable material evidence or, in an asylum application case, has not reasonably explained his failure to apply for asylum initially. *INS v. Abudu*, p. 94.

2. *Administrative action by Veterans' Administration (VA)—Conflict with Rehabilitation Act.*—38 U. S. C. § 211(a)—which bars judicial review of VA Administrator's decisions on any questions of law or fact under any VA-administered law providing benefits for veterans—does not foreclose from judicial review question whether VA's alcoholism regulation—which classifies alcoholism as "willful misconduct"—violates Rehabilitation Act. *Traynor v. Turnage*, p. 535.

JURISDICTION.

1. *Challenge of trademark regulations.*—In a suit claiming that trademark regulation regulating imports of "gray-market" goods is inconsistent with § 526 of Tariff Act of 1930, District Court had jurisdiction under 28 U. S. C. § 1331, and Court of International Trade did not have exclusive jurisdiction under 28 U. S. C. § 1581(i)(3) or § 1581(i)(4). *K mart Corp. v. Cartier, Inc.*, p. 176.

2. *Dismissal of writ of certiorari—Special prosecutor's authority.*—Where Solicitor General has denied a special prosecutor authority to represent United States before Supreme Court in a case seeking reinstatement of a criminal contempt judgment, prosecutor lacked such authority and writ of certiorari is dismissed for want of jurisdiction. *United States v. Providence Journal Co.*, p. 693.

JURISDICTION—Continued.

3. *Provider Reimbursement Review Board—Medicare regulation challenge.*—Provider Reimbursement Review Board may not decline to hear a health care services provider's challenge to a Medicare regulation on ground that provider failed to contest regulation's validity in cost report submitted to its fiscal intermediary. *Bethesda Hospital Assn. v. Bowen*, p. 399.

JURY INSTRUCTIONS. See **Criminal Law**.

JUSTICIABILITY.

Rent control ordinance—Assertion of takings claim.—In an action challenging constitutionality of a city's rent control ordinance, issue whether ordinance's tenant hardship provision violates Takings Clause—by reducing, because of hardship, rent that would otherwise be reasonable, thus transferring landlord's property to hardship tenants—is premature, since there is no evidence that hardship provision has ever been used to reduce rent below reasonable level and since provision does not require that hearing officer reduce rent on grounds of tenant hardship. *Pennell v. San Jose*, p. 1.

LABOR PICKETING. See **Constitutional Law**, II, 1.

LABOR UNIONS. See **Civil Service Reform Act of 1978**.

LANDLORD AND TENANTS. See **Constitutional Law**, I, 3; II, 2; **Justiciability**; **Standing to Sue**.

LOCAL GOVERNMENT BONDS. See **Constitutional Law**, VIII; X.

LUMP-SUM PAYMENTS AS INCOME UNDER AID TO FAMILIES WITH DEPENDENT CHILDREN PROGRAM. See **Social Security Act**, 1.

MAIL DELIVERY. See **Private Express Statutes**.

MANDAMUS.

Abuse of discretion—Exceptional circumstances.—District Court's refusal to order a stay or dismissal of suit did not constitute an abuse of discretion sufficient to warrant extraordinary remedy of mandamus in Court of Appeals, since a party's decision to spurn removal of pending state suit, choosing instead to bring a separate federal-court suit, does not invariably constitute "exceptional" circumstances warranting stay or dismissal under standard of *Colorado River Water Conservation Dist. v. United States*, 424 U. S. 800. *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, p. 271.

MATERIALITY REQUIREMENT. See **Securities Regulation**.

MEDICAID. See **Mootness**.

MEDICARE. See **Jurisdiction**, 3.

MICHIGAN PUBLIC SERVICE COMMISSION. See *Pre-emption of State Law by Federal Law*.

MISSISSIPPI. See *State Boundaries*.

MOOTNESS.

Approval of Medicaid plan amendment.—Petitioner Secretary of Health and Human Services' compliance with § 4106 of Omnibus Budget Reconciliation Act of 1987, which required that he retroactively approve a California Medicaid plan amendment, renders moot controversy regarding Secretary's original rejection of amendment. *Bowen v. Kizer*, p. 386.

MOTION FOR COSTS. See *Appeals*, 2.

MOTION TO REOPEN DEPORTATION PROCEEDINGS. See *Board of Immigration Appeals*; *Judicial Review*, 1.

MUNICIPAL BONDS. See *Constitutional Law*, VIII; X.

NATIONAL FORESTS. See *Constitutional Law*, V, 1; *Supreme Court*, 4.

NATIONAL LABOR RELATIONS ACT.

Unfair labor practices—Union's handbilling at shopping center.—Where a construction company building a department store in petitioner's mall allegedly paid substandard wages, § 8(b)(4)(ii) of Act did not proscribe union's peaceful handbilling, unaccompanied by picketing, urging a consumer boycott of stores in mall until petitioner promised that all mall construction would be done by contractors paying fair wages; this construction of Act makes it unnecessary to address serious First Amendment questions that would be raised by NLRB's contrary interpretation. *DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council*, p. 568.

NATIVE AMERICAN CHURCH. See *Constitutional Law*, V, 2.

NATURAL GAS ACT OF 1938. See *Pre-emption of State Law by Federal Law*.

NEW MEXICO. See *Compacts Between States*.

NONCLAIM PROVISION OF PROBATE CODE. See *Constitutional Law*, I, 2.

NONPRICE RESTRAINT OF TRADE. See *Antitrust Acts*.

NOTICE OF APPEAL. See *Appeals*, 2.

NOTICE REGULATION CONCERNING ELIGIBILITY REQUIREMENTS FOR AID TO FAMILIES WITH DEPENDENT CHILDREN PROGRAM. See *Social Security Act*, 1.

NOTICE TO CREDITORS IN PROBATE PROCEEDINGS. See Constitutional Law, I, 2.

OBRA. See Constitutional Law, II, 3; IV.

OIL ALLOCATION AND PRICE REGULATION. See Pre-emption of Puerto Rico Law by Federal Law.

OKLAHOMA. See Constitutional Law, I, 2.

OMNIBUS BUDGET RECONCILIATION ACT OF 1981. See Constitutional Law, II, 3; IV.

OMNIBUS BUDGET RECONCILIATION ACT OF 1987. See Mootness.

OREGON. See Constitutional Law, V, 2.

PARTNERSHIPS. See Income Taxes, 1.

PAST-DUE SUPPLEMENTAL SECURITY INCOME BENEFITS. See Social Security Act, 2.

PECOS RIVER COMPACT. See Compacts Between States.

PERSONAL SERVICE. See Constitutional Law, I, 4.

PETROLEUM ALLOCATION AND PRICE REGULATION. See Pre-emption of Puerto Rico Law by Federal Law.

PEYOTE USE AS BASIS FOR DENIAL OF UNEMPLOYMENT COMPENSATION BENEFITS. See Constitutional Law, V, 2.

PICKETING. See Constitutional Law, II, 1.

POLITICAL SPEECH IN PUBLIC FORUM. See Constitutional Law, VI.

POSTAL SERVICE. See Private Express Statutes.

PRE-EMPTION OF PUERTO RICO LAW BY FEDERAL LAW.

Petroleum regulations—Energy Policy and Conservation Act.—Puerto Rico Department of Consumer Affairs' regulations governing petroleum allocation and pricing are not pre-empted by Congress' decision to decontrol oil prices in Energy Policy and Conservation Act, since fact that Federal Government terminates or reduces its regulation of a field of commerce does not announce a new rule of burden shifting replacing normal need to find a federal intent to pre-empt with a need to find a federal intent to retransfer authority to States; test for pre-emption of Puerto Rico law is same as test for pre-emption of a State's law. Puerto Rico Dept. of Consumer Affairs v. Isla Petroleum Corp., p. 495.

PRE-EMPTION OF STATE LAW BY FEDERAL LAW.

Public utilities—Natural Gas Act of 1938.—Michigan Public Service Commission regulation of respondent natural gas companies, under Michigan's Public Utilities Securities Act, impinges on a field that Congress, through Natural Gas Act of 1938, intended Federal Energy Regulatory Commission to regulate exclusively; and Michigan Act, therefore, is pre-empted. *Schneidewind v. ANR Pipeline Co.*, p. 293.

PRICE RESTRAINT. See *Antitrust Acts*.

PRISONERS' RIGHTS. See *Constitutional Law*, XI.

PRIVATE EXPRESS STATUTES.

Delivery of unstamped letters through internal mail system.—State university's delivery of union's unstamped letters to university's employees, as required by California Higher Education Employer-Employee Relations Act, would violate Private Express Statutes, which generally prohibit private carriage of letters over postal routes without payment of postage to United States Postal Service. *Regents of University of California v. Public Employment Relations Bd.*, p. 589.

PRIVILEGE AGAINST SELF-INCRIMINATION. See *Constitutional Law*, IX.

PROBATE CODE. See *Constitutional Law*, I, 2.

PROJECT NOTES ISSUED UNDER HOUSING ACT OF 1937. See *Estate Taxes*.

PROVIDER REIMBURSEMENT REVIEW BOARD. See *Jurisdiction*, 3.

PUBLIC FIGURES AND PUBLIC OFFICIALS. See *Constitutional Law*, VII.

PUBLIC FORUM. See *Constitutional Law*, VI.

PUBLIC HOUSING AGENCIES. See *Estate Taxes*.

PUBLIC UTILITIES. See *Pre-emption of State Law by Federal Law*.

PUERTO RICO. See *Pre-emption of Puerto Rico Law by Federal Law*.

RAILWAY LABOR ACT.

Union representation at company-level proceedings.—Act does not entitle a railroad employee to be represented at company-level grievance or disciplinary proceedings by a union other than his collective-bargaining representative. *Landers v. National Railroad Passenger Corp.*, p. 652.

REGISTERED BONDS. See *Constitutional Law*, VIII; X.

REHABILITATION ACT. See *Judicial Review*, 2; *Veterans' Benefits*.

RENT CONTROL. See Constitutional Law, I, 3; II, 2; Standing to Sue.

REOPENING DEPORTATION PROCEEDINGS. See Board of Immigration Appeals; Judicial Review, 1.

REORGANIZATION PLAN. See Bankruptcy Code.

RESTRAINT OF TRADE. See Antitrust Acts.

RETROACTIVE SOCIAL SECURITY PAYMENTS AS INCOME UNDER AID TO FAMILIES WITH DEPENDENT CHILDREN PROGRAM. See Social Security Act, 1.

RIPENESS FOR ADJUDICATION. See Justiciability.

RIVER MASTER. See Compacts Between States.

RULE 10b-5. See Securities Regulation.

SEABED. See State Boundaries.

SECTION 1981. See Civil Rights Act of 1866.

SECTION 1983. See Civil Rights Act of 1871.

SECURITIES AND EXCHANGE ACT OF 1934. See Securities Regulation.

SECURITIES REGULATION.

Shareholders' suit—Rule 10b-5—Materiality test.—In a suit by shareholders alleging that they had sold stock at prices artificially depressed by company's false or misleading statements denying ongoing merger negotiations, *TSCY Industries, Inc. v. Northway, Inc.* standard—whereby an omitted fact is material if there is a substantial likelihood that its disclosure would have been considered significant by a reasonable investor—is adopted for the § 10(b) and Rule 10b-5 context; both “agreement-in-principle” test and view that information concerning otherwise insignificant developments becomes material solely because of affirmative denial of their existence are rejected; materiality in a merger context depends on facts and is to be determined on a case-by-case basis; it is appropriate to apply a rebuttable presumption of reliance, supported in part by fraud-on-the-market theory. *Basic Inc. v. Levinson*, p. 224.

SERVICE OF PROCESS. See Constitutional Law, I, 4.

SHAREHOLDERS' SUIT. See Securities Regulation.

SHERMAN ACT. See Antitrust Acts.

SIX RIVERS NATIONAL FOREST. See Constitutional Law, V, 1; Supreme Court, 4.

SOCIAL SECURITY ACT. See also **Constitutional Law**, XI; **Jurisdiction**, 3.

1. *Aid to Families with Dependent Children program—Eligibility requirements—Federal notice regulation.*—Federal notice regulation—which requires that individuals be given information about conditions of AFDC eligibility—was not violated where respondent was not given notice of a new lump-sum rule under which her family was ruled ineligible for AFDC for number of months that lump-sum income from a retroactive social security payment would satisfy her family's needs, since regulations simply require State to publish a general description of AFDC program's basic structure and availability. *Gardebring v. Jenkins*, p. 415.

2. *Supplemental security income—Payment of attorney's fees from past-due benefits.*—District Court does not have authority to order Secretary of Health and Human Services to withhold a portion of past-due supplemental security income benefits for payment of attorney's fees received in judicial proceedings under Title XVI of Social Security Act. *Bowen v. Galbreath*, p. 74.

SOLICITOR GENERAL. See **Jurisdiction**, 2.

SPECIAL PROSECUTOR. See **Jurisdiction**, 2.

STANDARD OF JUDICIAL REVIEW. See **Judicial Review**, 1.

STANDING TO SUE.

Challenge to rent control ordinance—Necessity for allegation that landlords have "hardship tenants."—Since, when standing is challenged on basis of pleadings, all material allegations in complaint must be taken as true and construed in favor of complaining party, appellants—a landlord and an association of owners and lessors of real property who alleged that they were subject to a city's rent control ordinance—had standing to challenge ordinance even though they did not allege that either landlord or association members had "hardship tenants" who might trigger ordinance's hearing process or that they had been or would be aggrieved by a hearing officer's decision that a proposed rent increase is unreasonable on ground of tenant hardship. *Pennell v. San Jose*, p. 1.

STATE AND LOCAL GOVERNMENT BONDS. See **Constitutional Law**, VIII; X.

STATE BOUNDARIES.

Mississippi's interest south of Mississippi Sound—Agreement on Mississippi Sound.—On present record in litigation concerning Alabama and Mississippi coastlines, extent of Mississippi's interest in seabed south of Mississippi Sound—not a subject of current phase of litigation—is not determined, but leave is granted to parties to file complaints advancing such claims as they may have with respect to area south of Mississippi Sound

STATE BOUNDARIES—Continued.

and in vicinity of Chandeleur Sound; parties are in agreement as to Mississippi Sound and its boundaries. *Alabama and Mississippi Boundary Case*, p. 88.

STATES' POWERS. See *Constitutional Law*, X.

STAYS. See *Appeals*, 1; *Mandamus*.

STRIKING WORKERS' ELIGIBILITY FOR FOOD STAMPS. See *Constitutional Law*, II, 3; IV.

SUPPLEMENTAL SECURITY INCOME. See *Social Security Act*, 2.

SUPREMACY CLAUSE. See *Constitutional Law*, XI.

SUPREME COURT. See also *Civil Rights Act of 1866*; *Jurisdiction*, 2.

1. Amendments to Federal Rules of Civil Procedure, p. 1043.
2. Amendments to Federal Rules of Criminal Procedure, p. 1057.
3. Amendments to Federal Rules of Evidence, p. 1049.

4. *First Amendment claim—Necessity for reaching constitutional issue.*—In a suit challenging, on both First Amendment and statutory grounds, a Forest Service decision to construct a road and permit timber harvesting in a part of Six Rivers National Forest used for Indians' spiritual activities, it would be inadvisable for this Court to vacate and remand without addressing constitutional claim on its merits because, although courts below did not articulate necessity for their constitutional holdings in keeping with principle requiring that courts reach such questions only when necessary, it appears reasonably likely that First Amendment issue was necessary to decisions below to support all of relief granted, and Government represented that it could cure statutory defects identified below. *Lyng v. Northwest Indian Cemetery Protective Assn.*, p. 439.

TAKING OF PROPERTY. See *Justiciability*.

TARIFF ACT OF 1930. See *Jurisdiction*, 1.

TAX EQUITY AND FISCAL RESPONSIBILITY ACT OF 1982. See *Constitutional Law*, VIII; X.

TAXES. See *Estate Taxes*; *Income Taxes*.

TAX IMMUNITY. See *Constitutional Law*, VIII.

TEFRA. See *Constitutional Law*, VIII; X.

TENTH AMENDMENT. See *Constitutional Law*, X.

TEXAS. See *Compacts Between States*; *Constitutional Law*, I, 4.

TIMELY NOTICE OF APPEAL. See *Appeals*, 2.

TITLE XIII OF SOCIAL SECURITY ACT. See *Jurisdiction*, 3.

TITLE XVI OF SOCIAL SECURITY ACT. See Social Security Act, 2.

TORT OF INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS. See Constitutional Law, VII.

TRADEMARKS. See Jurisdiction, 1.

TRADE RESTRAINTS. See Antitrust Acts.

UNEMPLOYMENT COMPENSATION. See Constitutional Law, V, 2.

UNFAIR LABOR PRACTICE CHARGE. See Civil Service Reform Act of 1978.

UNIONS. See National Labor Relations Act; Private Express Statutes; Railway Labor Act.

UNITED STATES FOREST SERVICE. See Constitutional Law, V, 1; Supreme Court, 4.

UNITED STATES POSTAL SERVICE. See Private Express Statutes.

UNREGISTERED BONDS. See Constitutional Law, VIII.

UNSECURED CREDITORS. See Bankruptcy Code.

VERTICAL RESTRAINT OF TRADE. See Antitrust Acts.

VETERANS' ADMINISTRATION. See Judicial Review, 2; Veterans' Benefits.

VETERANS' BENEFITS.

Educational assistance—Alcoholism as "willful misconduct"—Conflict with Rehabilitation Act.—Where time limit for exhausting GI Bill educational assistance benefits cannot be extended if veterans were prevented from using benefits by a physical or mental disorder resulting from their own "willful misconduct," Veterans' Administration's characterization of alcoholism as "willful misconduct" does not violate § 504 of Rehabilitation Act. *Traynor v. Turnage*, p. 535.

WATERS. See Compacts Between States; State Boundaries.

WORDS AND PHRASES.

1. "*Dissatisfied with a final determination of . . . its fiscal intermediary.*" 42 U. S. C. § 1395oo(a). *Bethesda Hospital Assn. v. Bowen*, p. 399.

2. "*Exempt from all taxation.*" § 5(e), Housing Act of 1937, 42 U. S. C. § 1437i(b). *United States v. Wells Fargo Bank*, p. 351.

3. "*False testimony.*" Immigration and Nationality Act, 8 U. S. C. § 1101(f)(6). *Kungys v. United States*, p. 759.

WORDS AND PHRASES—Continued.

4. "*Restraint of trade.*" Sherman Act, 15 U. S. C. § 1. Business Electronics Corp. v. Sharp Electronics Corp., p. 717.

WORKERS' ELIGIBILITY FOR FOOD STAMPS WHILE ON STRIKE. See **Constitutional Law**, II, 3; IV.

WRIT OF CERTIORARI. See **Jurisdiction**, 2.

WRIT OF MANDAMUS. See **Mandamus**.







