UNITED STATES REPORTS

VOLUME 487

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1987

JUNE 20 THROUGH SEPTEMBER 30, 1988

END OF TERM

FRANK D. WAGNER

REPORTER OF DECISIONS

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WILLIAM H. REHNQUIST, Chief Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
BYRON R. WHITE, Associate Justice.
THURGOOD MARSHALL, Associate Justice.
HARRY A. BLACKMUN, Associate Justice.
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.

OFFICERS OF THE COURT

EDWIN MEESE III, Attorney General.[1]
RICHARD L. THORNBURGH, Attorney General.[2]
CHARLES FRIED, Solicitor General.
JOSEPH F. SPANIOL, Jr., Clerk.
FRANK D. WAGNER, Reporter of Decisions.
ALFRED WONG, Marshal.
STEPHEN G. MARGETON, Librarian.

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[1] Attorney General Meese resigned effective August 12, 1988.

[2] The Honorable Richard L. Thornburgh, of Pennsylvania, was nominated to be Attorney General by President Reagan on July 12, 1988; the nomination was confirmed by the Senate on August 11, 1988; he was commissioned on the same date and took the oath of office on August 12, 1988.

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

NEW YORK STATE CLUB ASSOCIATION, INC. *v.* CITY OF NEW YORK ET AL.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK

No. 86–1836. Argued February 23, 1988—Decided June 20, 1988

New York City's Human Rights Law forbids discrimination based on race, creed, sex, and other grounds by any "place of public accommodation, resort or amusement," but specifically exempts "any institution, club or place of accommodation which is in its nature distinctly private." However, a 1984 amendment (Local Law 63) provides that any "institution, club or place of accommodation," other than a benevolent order or a religious corporation, "shall not be considered in its nature distinctly private" if it "has more than four hundred members, provides regular meal service and regularly receives payment . . . directly or indirectly from or on behalf of nonmembers for the furtherance of trade or business." Immediately after Local Law 63 became effective, appellant association filed a state-court suit against the city and some of its officials, seeking, *inter alia*, a declaration that the Law is unconstitutional on its face under the First and Fourteenth Amendments. The trial court entered a judgment upholding the Law, and the intermediate state appellate court and the Court of Appeals of New York affirmed.

Held:

1. Appellant, a nonprofit association consisting of a consortium of 125 other private New York clubs and associations, has standing to challenge Local Law 63's constitutionality in this Court on behalf of its members, since those members "would otherwise have standing to sue in their own right" under *Hunt* v. *Washington Apple Advertising Comm'n*, 432 U. S. 333, 343. Appellees' contention that appellant's member associa-

tions must have standing to sue only on behalf of themselves, and not on behalf of their own members, misreads *Hunt*, which simply requires that members have standing to bring the same suit. Here, appellant's member associations would have standing to bring this same challenge to Local Law 63 on behalf of their own individual members, since those individuals "are suffering immediate or threatened injury" to their associational rights as a result of the Law's enactment. *Warth* v. *Seldin*, 422 U. S. 490, 511. Pp. 8–10.

2. Appellant's facial First Amendment attack cannot prevail. That attack must fail insofar as it is based on the claim that Local Law 63 is invalid in all of its applications. As appellant concedes, the Human Rights Law's antidiscrimination provisions may be constitutionally applied to at least some of the large covered clubs under *Roberts* v. *United States Jaycees*, 468 U. S. 609, and *Board of Directors of Rotary Int'l* v. *Rotary Club*, 481 U. S. 537. In finding that clubs comparable in size to, or smaller than, clubs covered by the Human Rights Law were not protected private associations, *Roberts* and *Rotary* emphasized the regular participation of strangers at club meetings, a factor that is no more significant to defining a club's nonprivate nature than are Local Law 63's requirements that covered clubs provide "regular meal service" and receive regular nonmember payments "for the furtherance of trade or business." Similarly, Local Law 63 cannot be said to infringe upon every club member's right of expressive association, since, in the absence of specific evidence on the characteristics of *any* covered club, it must be assumed that many of the large clubs would be able to effectively advance their desired viewpoints without confining their membership to persons having, for example, the same sex or religion. Nor has appellant proved its claim that the Law is overbroad in that it applies to "distinctively private" clubs, since there is no evidence of any club, let alone a substantial number of clubs, for whom the Law impairs the ability to associate or to advocate public or private viewpoints. Thus, it must be assumed that the administrative and judicial opportunities available for individual associations to contest the Law's constitutionality as it may be applied against them are adequate to assure that any overbreadth will be curable through case-by-case analysis of specific facts. Pp. 10–15.

3. Appellant's facial equal protection attack on Local Law 63's exemption deeming benevolent orders and religious corporations to be "distinctly private" must also fail. The City Council could have reasonably believed that the exempted organizations are different in kind from appellant's members, in the crucial respect of whether business activity (and therefore business opportunities for minorities and women) is prevalent among them. Cf. *Bryant* v. *Zimmerman*, 278 U. S. 63. More-

1 Syllabus

over, New York state law indicates that benevolent orders and religious corporations are unique and thus that a rational basis exists for their exemption here. Appellant has failed to carry its considerable burden of showing that this view is erroneous and that the issue is not truly debatable, since there is no evidence that a detailed examination of the practices, purposes, and structures of the exempted organizations would show them to be identical to the private clubs covered by the Law in the critical respect of whether business activity is prevalent among them. Pp. 15–18.

69 N. Y. 2d 211, 505 N. E. 2d 915, affirmed.

WHITE, J., delivered the opinion for a unanimous Court with respect to Parts I, II, and III, and an opinion of the Court with respect to Part IV, in which REHNQUIST, C. J., and BRENNAN, MARSHALL, BLACKMUN, STEVENS, O'CONNOR, and KENNEDY, JJ., joined. O'CONNOR, J., filed a concurring opinion, in which KENNEDY, J., joined, *post*, p. 18. SCALIA, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 20.

Alan Mansfield argued the cause for appellant. With him on the briefs were *Angelo T. Cometa* and *Louis J. Lefkowitz.*

Peter L. Zimroth argued the cause for appellees. With him on the brief were *Leonard J. Koerner* and *Fay Leoussis.**

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*Briefs of *amici curiae* urging reversal were filed for the Conference of Private Organizations by *Thomas P. Ondeck;* for the Club Managers Association of America by *John M. Wood* and *David Ferber;* and for the Francisca Club et al. by *Michael H. Salinsky* and *Kevin M. Fong.*

Briefs of *amici curiae* urging affirmance were filed for the State of New York et al. by *Robert Abrams*, Attorney General of New York, *O. Peter Sherwood*, Solicitor General, and *Suzanne M. Lyon* and *Elvia Rosales Arriola*, Assistant Attorneys General, joined by the Attorneys General for their respective States as follows: *John Van de Kamp* of California, *W. Cary Edwards* of New Jersey, *Donald J. Hanaway* of Wisconsin, *J. Joseph Curran, Jr.*, of Maryland, *Neil F. Hartigan* of Illinois, *Hubert H. Humphrey III* of Minnesota, *Dave Frohnmayer* of Oregon, *James M. Shannon* of Massachusetts, *Frank J. Kelley* of Michigan, and *Charles Brown* of West Virginia; for the city of Chicago by *Judson H. Miner* and *Ruth M. Moscovitch;* for the city of Los Angeles et al. by *Pamela A. Albers*, and *Vanessa Place;* for the city and county of San Francisco by *Louise H. Renne;* for the Licensing Board of the city of Boston by *Barbara A. H. Smith;* for the American Bar Association by *Robert MacCrate* and *Stark Ritchie;* for the Anti-Defamation League of B'Nai B'rith et al. by *Jill L.*

JUSTICE WHITE delivered the opinion of the Court.

New York City has adopted a local law that forbids discrimination by certain private clubs. The New York Court of Appeals rejected a facial challenge to this law based on the First and Fourteenth Amendments. We sit in review of that judgment.

I

In 1965, New York City adopted a Human Rights Law that prohibits discrimination by any "place of public accommodation, resort or amusement."[1] This term is defined broadly

Kahn, Justin J. Finger, and *Jeffrey P. Sinensky;* for the Committees on Civil Rights and Sex and Law of the Association of the Bar of the city of New York by *Robert M. Kaufman, Jonathan Lang, Arthur Leonard, Evelyn F. Cohn,* and *Kay C. Murray;* for the NOW Legal Defense and Education Fund et al. by *Sarah E. Burns, Judith I. Avner,* and *Beverly Gross;* and for the U. S. Conference of Mayors et al. by *Benna Ruth Solomon, Beate Bloch,* and *Nancy J. Bregstein.*

Briefs of *amici curiae* were filed for the American Civil Liberties Union Foundation et al. by *Burt Neuborne, John A. Powell, Steven R. Shapiro, Isabelle Katz Pinzler, Arthur N. Eisenberg, Paul L. Hoffman,* and *Judith Resnik;* and for the Lawyer's Committee for Civil Rights Under Law by *Lloyd N. Cutler, James Robertson, Conrad K. Harper, Stuart J. Land, Norman Redlich, William L. Robinson,* and *Judith Winston.*

[1] The Human Rights Law (Local Law No. 97 of 1965) makes it "an unlawful discriminatory practice for any person, being the owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation, resort or amusement, because of the race, creed, color, national origin or sex of any person directly or indirectly, to refuse, withhold from or deny to such person any of the accommodations, advantages, facilities or privileges thereof, or, directly or indirectly, to publish, circulate, issue, display, post or mail any written or printed communication, notice or advertisement, to the effect that any of the accommodations, advantages, facilities and privileges of any such place shall be refused, withheld from or denied to any person on account of race, creed, color, national origin or sex or that the patronage or custom thereat of any person belonging to or purporting to be of any particular race, creed, color, national origin, or sex is unwelcome, objectionable or not acceptable, desired or solicited." N. Y. C. Admin. Code § 8–107(2) (1986). The city has also extended the Law's coverage to discrimination against "an otherwise qualified person who is physically or mentally handicapped," § 8–108, and to discrimination

in the Law to cover such various places as hotels, restaurants, retail stores, hospitals, laundries, theaters, parks, public conveyances, and public halls, in addition to numerous other places that are specifically listed. N. Y. C. Admin. Code § 8–102(9) (1986). Yet the Law also exempted from its coverage various public educational facilities and "any institution, club or place of accommodation which proves that it is in its nature distinctly private." *Ibid.* The city adopted this Law soon after the Federal Government adopted civil rights legislation to bar discrimination in places of public accommodation, Civil Rights Act of 1964, Title II, 78 Stat. 243, 42 U. S. C. § 2000a(e).

In 1984, New York City amended its Human Rights Law. The basic purpose of the amendment is to prohibit discrimination in certain private clubs that are determined to be sufficiently "public" in nature that they do not fit properly within the exemption for "any institution, club or place of accommodation which is in its nature distinctly private." As the City Council stated at greater length:

> "It is hereby found and declared that the city of New York has a compelling interest in providing its citizens an environment where all persons, regardless of race, creed, color, national origin or sex, have a fair and equal opportunity to participate in the business and professional life of the city, and may be unfettered in availing themselves of employment opportunities. Although city, state and federal laws have been enacted to eliminate discrimination in employment, women and minority group members have not attained equal opportunity in business and the professions. One barrier to the advancement of women and minorities in the business and professional life of the city is the discriminatory practices of certain membership organizations where business

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against "individuals because of their actual or perceived sexual orientation," § 8–108.1.

> deals are often made and personal contacts valuable for business purposes, employment and professional advancement are formed. While such organizations may avowedly be organized for social, cultural, civic or educational purposes, and while many perform valuable services to the community, the commercial nature of some of the activities occurring therein and the prejudicial impact of these activities on business, professional and employment opportunities of minorities and women cannot be ignored." Local Law No. 63 of 1984, § 1, App. 14–15.

For these reasons, the City Council found that "the public interest in equal opportunity" outweighs "the interest in private association asserted by club members." *Ibid.* It cautioned, however, that it did not purpose "to interfere in club activities or subject club operations to scrutiny beyond what is necessary in good faith to enforce the human rights law," and the amendments were not intended as an attempt "to dictate the manner in which certain private clubs conduct their activities or select their members, except insofar as is necessary to ensure that clubs do not automatically exclude persons from consideration for membership or enjoyment of club accommodations and facilities and the advantages and privileges of membership, on account of invidious discrimination." *Ibid.*

The specific change wrought by the amendment is to extend the antidiscrimination provisions of the Human Rights Law to any "institution, club or place of accommodation [that] has more than four hundred members, provides regular meal service and regularly receives payment for dues, fees, use of space, facilities, services, meals or beverages directly or indirectly from or on behalf of nonmembers for the furtherance of trade or business." N. Y. C. Admin. Code § 8–102(9) (1986). Any such club "shall not be considered in its nature distinctly private." *Ibid.* Nonetheless, the city also stated that any such club "shall be deemed to be in its nature distinctly private" if it is "a corporation incorporated

under the benevolent orders law or described in the benevolent orders law but formed under any other law of this state, or a religious corporation incorporated under the education law or the religious corporations law." *Ibid.* The City Council explained that it drafted the amendment in this way so as to meet the specific problem confronting women and minorities in the city's business and professional world: "Because small clubs, benevolent orders and religious corporations have not been identified in testimony before the Council as places where business activity is prevalent, the Council has determined not to apply the requirements of this local law to such organizations." Local Law No. 63, § 1, App. 15.

Immediately after the 1984 Law became effective, the New York State Club Association filed suit against the city and some of its officers in state court, seeking a declaration that the Law is invalid on various state grounds and is unconstitutional on its face under the First and Fourteenth Amendments and requesting that defendants be enjoined from enforcing it. On cross-motions for summary judgment, the trial court upheld the Law against all challenges, including the federal constitutional challenges. The intermediate state appellate court affirmed this judgment on appeal; one judge dissented, however, concluding that the exemption for benevolent orders violates the Equal Protection Clause because it fails to accord equal protection to similarly situated persons. 118 App. Div. 2d 392, 505 N. Y. S. 2d 152 (1986).

The State Club Association appealed this decision to the New York Court of Appeals, which affirmed in a unanimous opinion. 69 N. Y. 2d 211, 505 N. E. 2d 915 (1987). The court rejected the First Amendment challenge to Local Law 63, relying heavily on the decisions in *Roberts* v. *United States Jaycees*, 468 U. S. 609 (1984), and *Board of Directors of Rotary Int'l* v. *Rotary Club*, 481 U. S. 537 (1987). It ruled that any infringement on associational rights is amply justified by the city's compelling interest in eliminating discrimination against women and minorities. In addition, the

Law employs the least restrictive means to achieve its ends because it interferes with the policies and activities of private clubs only "to the extent necessary to ensure that they do not automatically exclude persons from membership or use of the facilities on account of invidious discrimination." 69 N. Y. 2d, at 223, 505 N. E. 2d, at 921. The court denied relief on the equal protection claim without discussing it.

The State Club Association appealed to this Court. We noted probable jurisdiction, 484 U. S. 812 (1987), and we now affirm the judgment below, upholding Local Law 63 against appellant's facial attack on its constitutionality.

II

The initial question in this case is whether appellant has standing to challenge the constitutionality of Local Law 63 in this Court.[2] We hold that it does.

Appellant is a nonprofit corporation, which essentially consists of a consortium of 125 other private clubs and associations in the State of New York, many of which are located in

[2] The state trial court found that appellant has standing to challenge the validity of the Law, and neither of the other state courts addressed this issue on appeal. Nonetheless, an independent determination of the question of standing is necessary in this Court, for the special limitations that Article III of the Constitution imposes on the jurisdiction of the federal courts are not binding on the state courts. See *Pennell* v. *San Jose*, 485 U. S. 1, 8 (1988). The States are thus left free as a matter of their own procedural law to determine whether their courts may issue advisory opinions or to determine matters that would not satisfy the more stringent requirement in the federal courts that an actual "case" or "controversy" be presented for resolution. U. S. Const., Art. III, § 2. Accordingly, this Court has dismissed cases on appeal from state courts when it appeared that the complaining party lacked standing to contest the law's validity in the federal courts. *Tileston* v. *Ullman*, 318 U. S. 44 (1943) *(per curiam)*; *Braxton County Court* v. *West Virginia ex rel. Tax Comm'rs*, 208 U. S. 192 (1908). And the statement that "[b]y exercising their jurisdiction, state courts cannot determine the jurisdiction to be exercised by this Court," is perhaps all the more applicable to actions brought in state court for declaratory relief. *Poe* v. *Ullman*, 367 U. S. 497, 506 (1961) (plurality opinion).

New York City. In *Hunt* v. *Washington Apple Advertising Comm'n*, 432 U. S. 333, 343 (1977), we held that an association has standing to sue on behalf of its members "when (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." See also *Automobile Workers* v. *Brock*, 477 U. S. 274 (1986). Appellees focus on the first part of this test; they read the requirement that the association's members "would otherwise have standing to sue in their own right" as meaning that appellant's member associations must have standing to sue only on behalf of themselves, and not on behalf of anyone else, such as their own individual members.

This reading of *Hunt* is incorrect. Under *Hunt*, an association has standing to sue on behalf of its members when those members would have standing to bring the same suit. It does not matter what specific analysis is necessary to determine that the members could bring the same suit, for the purpose of the first part of the *Hunt* test is simply to weed out plaintiffs who try to bring cases, which could not otherwise be brought, by manufacturing allegations of standing that lack any real foundation. Here, however, the appellant consortium has standing to sue on behalf of its member associations as long as those associations would have standing to bring the same challenge to Local Law 63.[3] In this regard, it is sufficient to note that appellant's member associations would have standing to bring this same suit on behalf of their

[3] Appellees' argument to the contrary, based on a footnote in the *Rotary* opinion, is unavailing. The footnote states that Rotary International, "an association of thousands of local Rotary Clubs, can claim no constitutionally protected right of private association." *Board of Directors of Rotary Int'l* v. *Rotary Club*, 481 U. S. 537, 545, n. 4 (1987). But there the larger association had brought suit in its own right *against* one of its member clubs, and was not suing *on behalf of* any of its members, so the passage is inapposite to the situation here.

own individual members, since those individuals "are suffering immediate or threatened injury" to their associational rights as a result of the Law's enactment. *Warth* v. *Seldin*, 422 U. S. 490, 511 (1975); see App. 10, 32, 34–35, 38.[4] Thus the case is properly before us.

III

New York City's Human Rights Law authorizes the city's Human Rights Commission or any aggrieved individual to initiate a complaint against any "place of public accommodation, resort or amusement" that is alleged to have discriminated in violation of the Law. N. Y. C. Admin. Code § 8–109(1) (1986). The Commission investigates the complaint and determines whether probable cause exists to find a violation. When probable cause is found, the Commission may settle the matter by conciliatory measures, if possible; if the matter is not settled, the Commission schedules a hearing in which the defending party may present evidence and answer the charges against it. After the hearing is concluded, the Commission states its findings of fact and either dismisses the complaint or issues a cease-and-desist order. § 8–109(2). Any person aggrieved by an order of the Com-

[4] In light of the foregoing analysis, it is not necessary to consider also whether appellant consortium would have standing to sue directly on behalf of its member associations because those associations themselves are suffering some immediate or threatened injury from the Law. In addition, though appellees do not contest either of the other two parts of the *Hunt* test, those requirements clearly are met in this case. Here the associational interests that the consortium seeks to protect are germane to its purpose: appellant's certificate of incorporation states that its purpose is "to promote the common business interests of its [member clubs]." App. 38. Moreover, appellant's facial challenge to the Law does not require the participation of individual members, since there is complete identity between the interests of the consortium and those of its member associations with respect to the issues raised in this suit, and the necessary proof could be presented "in a group context." *Hunt* v. *Washington Apple Advertising Comm'n*, 432 U. S. 333, 344 (1977). See also *Automobile Workers* v. *Brock*, 477 U. S. 274, 287–288 (1986).

mission is entitled to seek judicial review of the order, and the Commission may seek enforcement of its orders in judicial proceedings. § 8–110.

None of these procedures has come into play in this case, however, for appellant brought this suit challenging the constitutionality of the 1984 Law on its face before any enforcement proceedings were initiated against any of its member associations. Although such facial challenges are sometimes permissible and often have been entertained, especially when speech protected by the First Amendment is at stake, to prevail on a facial attack the plaintiff must demonstrate that the challenged law either "could never be applied in a valid manner" or that even though it may be validly applied to the plaintiff and others, it nevertheless is so broad that it "may inhibit the constitutionally protected speech of third parties." *City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U. S. 789, 798 (1984). Properly understood, the latter kind of facial challenge is an exception to ordinary standing requirements, and is justified only by the recognition that free expression may be inhibited almost as easily by the potential or threatened use of power as by the actual exercise of that power. *Thornhill* v. *Alabama*, 310 U. S. 88, 97–98 (1940). Both exceptions, however, are narrow ones: the first kind of facial challenge will not succeed unless the court finds that "every application of the statute created an impermissible risk of suppression of ideas," *Taxpayers for Vincent*, *supra*, at 798, n. 15, and the second kind of facial challenge will not succeed unless the statute is "substantially" overbroad, which requires the court to find "a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court." 466 U. S., at 801.

We are unpersuaded that appellant is entitled to make either one of these two distinct facial challenges. Appellant conceded at oral argument, understandably we think, that the antidiscrimination provisions of the Human Rights Law

certainly could be constitutionally applied at least to some of the large clubs, under this Court's decisions in *Rotary* and *Roberts*. Tr. of Oral Arg. 11–12. The clubs that are covered under the Law contain at least 400 members. They thus are comparable in size to the local chapters of the Jaycees that we found not to be protected private associations in *Roberts*, and they are considerably larger than many of the local clubs that were found to be unprotected in *Rotary*, some which included as few as 20 members. See *Roberts*, 468 U. S., at 621; *Rotary*, 481 U. S., at 546. Cf. *Village of Belle Terre* v. *Boraas*, 416 U. S. 1, 7–8 (1974). The clubs covered by Local Law 63 also provide "regular meal service" and receive regular payments "directly or indirectly from or on behalf of nonmembers for the furtherance of trade or business." N. Y. C. Admin. Code § 8–102(9) (1986). The city found these two characteristics to be significant in pinpointing organizations which are "commercial" in nature, "where business deals are often made and personal contacts valuable for business purposes, employment and professional advancement are formed." Local Law 63, § 1, App. 15.

These characteristics are at least as significant in defining the nonprivate nature of these associations, because of the kind of role that strangers play in their ordinary existence, as is the regular participation of strangers at meetings, which we emphasized in *Roberts* and *Rotary*. See *Roberts*, *supra*, at 621; *Rotary*, *supra*, at 547. It may well be that a considerable amount of private or intimate association occurs in such a setting, as is also true in many restaurants and other places of public accommodation, but that fact alone does not afford the entity as a whole any constitutional immunity to practice discrimination when the government has barred it from doing so. *Hishon* v. *King & Spalding*, 467 U. S. 69, 78 (1984). Although there may be clubs that would be entitled to constitutional protection despite the presence of these characteristics, surely it cannot be said that Local Law 63 is invalid on its face because it infringes the private associational rights of each and every club covered by it.

The same may be said about the contention that the Law infringes upon every club member's right of expressive association. The ability and the opportunity to combine with others to advance one's views is a powerful practical means of ensuring the perpetuation of the freedoms the First Amendment has guaranteed to individuals as against the government. "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly." *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449, 460 (1958). This is not to say, however, that in every setting in which individuals exercise some discrimination in choosing associates, their selective process of inclusion and exclusion is protected by the Constitution. *Hishon*, *supra*, at 78; *Norwood* v. *Harrison*, 413 U. S. 455, 470 (1973); *Railway Mail Assn.* v. *Corsi*, 326 U. S. 88, 93–94 (1945).

On its face, Local Law 63 does not affect "in any significant way" the ability of individuals to form associations that will advocate public or private viewpoints. *Rotary*, 481 U. S., at 548. It does not require the clubs "to abandon or alter" any activities that are protected by the First Amendment. *Ibid.* If a club seeks to exclude individuals who do not share the views that the club's members wish to promote, the Law erects no obstacle to this end. Instead, the Law merely prevents an association from using race, sex, and the other specified characteristics as shorthand measures in place of what the city considers to be more legitimate criteria for determining membership. It is conceivable, of course, that an association might be able to show that it is organized for specific expressive purposes and that it will not be able to advocate its desired viewpoints nearly as effectively if it cannot confine its membership to those who share the same sex, for example, or the same religion. In the case before us, however, it seems sensible enough to believe that many of the large clubs covered by the Law are not of this kind. We

could hardly hold otherwise on the record before us, which contains no specific evidence on the characteristics of *any* club covered by the Law.

The facial attack based on the claim that Local Law 63 is invalid in all of its applications must therefore fail. Appellant insists, however, that there are some clubs within the reach of the Law that are "distinctively private" and that the Law is therefore overbroad and invalid on its face. But as we have indicated, this kind of facial challenge also falls short.

The overbreadth doctrine is "strong medicine" that is used "sparingly and only as a last resort." *Broadrick* v. *Oklahoma*, 413 U. S. 601, 613 (1973). A law is constitutional unless it is "substantially overbroad." *Id.*, at 615. To succeed in its challenge, appellant must demonstrate from the text of Local Law 63 and from actual fact that a substantial number of instances exist in which the Law cannot be applied constitutionally. Yet appellant has not identified those clubs for whom the antidiscrimination provisions will impair their ability to associate together or to advocate public or private viewpoints. No record was made in this respect, we are not informed of the characteristics of any particular clubs, and hence we cannot conclude that the Law threatens to undermine the associational or expressive purposes of any club, let alone a substantial number of them. We therefore cannot conclude that the Law is substantially overbroad and must assume that "whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." *Id.*, at 615–616.[5]

Appellant claims, however, that the Law erects an "irrebuttable" presumption that the clubs covered under it are not

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[5] In making this case-by-case inquiry into the constitutionality of Local Law 63 as applied to particular associations, it is relevant to note that the Court has recognized the State's "compelling interest" in combating invidious discrimination. See, *e. g.*, *Rotary*, 481 U. S., at 549.

private in nature, and contends that its member associations will not be permitted to raise the constitutionality of the Law in individual administrative and judicial proceedings. Cf. *Rotary*, *supra*, at 547–548, n. 6. Even if this were a correct interpretation of what the Law says—and the decisions below at least suggest the contrary view[6]—it does not affect our analysis. Although the city's Human Rights Commission may not be empowered to consider the constitutionality of the statute under which it operates, under accepted legal principles it would be quite unusual if the Commission "could not construe its own statutory mandate in the light of federal constitutional principles." *Ohio Civil Rights Comm'n* v. *Dayton Christian Schools*, 477 U. S. 619, 629 (1986). And even if this were also true, nothing in the Law purports to preclude judicial review of constitutional claims that may be raised on appeal from the administrative enforcement proceedings. N. Y. C. Admin. Code §8–110 (1986); *Dayton Christian Schools*, *supra*, at 629. These opportunities for individual associations to contest the constitutionality of the Law as it may be applied against them are adequate to assure that any overbreadth under the Law will be curable through case-by-case analysis of specific facts.

IV

Appellant also contends that the exemption in Local Law 63 for benevolent and religious corporations, which deems them to be "distinctly private" in nature, violates the Equal Protection Clause.[7] Since, as just discussed, it has not been demonstrated that the Law affects "in any significant way"

[6] In its opinion, the Court of Appeals suggested that the three criteria identified in Local Law 63 are not exclusive but are to be considered in conjunction with other relevant characteristics. 69 N. Y. 2d, at 222, 505 N. E. 2d, at 920–921, citing *United States Power Squadrons* v. *State Human Rights Appeal Bd.*, 59 N. Y. 2d 401, 412–413, 452 N. E. 2d 1199, 1204 (1983).

[7] The Court of Appeals did not separately address the equal protection question other than by affirming the decision of the Appellate Division.

the fundamental interests of any clubs covered by the Law, heightened scrutiny does not apply. See *Lyng* v. *Automobile Workers*, 485 U. S. 360, 365, 366 (1988); *Rotary*, 481 U. S., at 548. On this state of the record, the equal protection challenge must fail unless the city could not reasonably believe that the exempted organizations are different in relevant respects from appellant's members.

As written, the legislative classification on its face is not manifestly without reasoned support. The City Council explained that it limited the Law's coverage to large clubs and excluded smaller clubs, benevolent orders, and religious corporations because the latter associations "have not been identified in testimony before the Council as places where business activity is prevalent." Local Law No. 63, § 1, App. 15. This explanation echoes the logic of the decision in *New York ex rel. Bryant* v. *Zimmerman*, 278 U. S. 63 (1928), which upheld a New York law that exempted benevolent orders from having to file certain documents with the State that must be filed by most other corporations and associations. See N. Y. Civ. Rights Law § 53 (McKinney 1976). The Court rejected a claim that the statute violated the Equal Protection Clause, finding on the evidence before it that the legislative distinction was justified because benevolent orders were judged not to pose the same dangers as other groups that were required to file the documents. *Bryant*, *supra*, at 73–77. In addition, New York State law indicates that benevolent orders and religious corporations are unique and thus that a rational basis exists for their exemption here. For well over a century, the State has extended special treatment in the law to these associations, and each continues to be treated in a separate body of legislation. See N. Y. Ben. Ord. Law §§ 1–14 (McKinney 1951 and Supp. 1988); N. Y. Relig. Corp. Law §§ 1–437 (McKinney 1952 and Supp. 1988). It is plausible that these associations differ in their practices and purposes from other private clubs that are now covered under Local Law 63. As the Appellate Division in this case pointed out,

the benevolent orders are organized under the relevant law "'solely for the benefit of [their] membership and their beneficiaries,'" and thus are not "public" organizations. 118 App. Div. 2d, at 394, 505 N. Y. S. 2d, at 154, quoting N. Y. Ins. Law § 4501(a) (McKinney 1985). Similarly, religious organizations are "'created for religious purposes'" and are "patently not engaged in commercial activity for the benefit of non-members." 118 App. Div. 2d, at 394–395, 505 N. Y. S. 2d, at 154, quoting N. Y. Relig. Corp. Law § 2 (McKinney 1952).

Appellant contends, however, that the benevolent and religious corporations exempted in the Law are in fact no different in nature from the other clubs and associations that are now made subject to the city's antidiscrimination restrictions. Because the Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike," *Cleburne* v. *Cleburne Living Center, Inc.*, 473 U. S. 432, 439 (1985), appellant contends that the exemption violates the Clause.

In support of its argument, appellant observes that appellees offered no evidence to support the city's position that benevolent and religious groups are actually different from other private associations. Legislative classifications, however, are presumed to be constitutional, and the burden of showing a statute to be unconstitutional is on the challenging party, *not* on the party defending the statute: "those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." *Vance* v. *Bradley*, 440 U. S. 93, 111 (1979). In a case such as this, the plaintiff can carry this burden by submitting evidence to show that the asserted grounds for the legislative classification lack any reasonable support in fact, but this burden is nonetheless a considerable one. *United States* v. *Carolene Products Co.*, 304 U. S. 144, 154 (1938).

The City Council's explanation for exempting benevolent orders and religious corporations from Local Law 63's coverage reflects a view that these associations are different in kind, at least in the crucial respect of whether business activity is prevalent among them, from the associations on whose behalf appellant has brought suit. Appellant has the burden of showing that this view is erroneous and that the issue is not truly debatable, a burden that appellant has failed to carry. There is no evidence in the record to indicate that a detailed examination of the practices, purposes, and structures of benevolent orders and religious corporations would show them to be identical in this and other critical respects to the private clubs that are covered under the city's antidiscrimination provisions. Without any such showing, appellant's facial attack on the Law under the Equal Protection Clause must founder.

We therefore affirm the judgment below.

So ordered.

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

I agree with the Court's conclusion that the facial challenge to Local Law 63 must fail. I write separately only to note that nothing in the Court's opinion in any way undermines or denigrates the importance of any associational interests at stake.

The Court reaffirms the "power of States to pursue the profoundly important goal of ensuring nondiscriminatory access to commercial opportunities in our society." *Roberts* v. *United States Jaycees*, 468 U. S. 609, 632 (1984) (O'CONNOR, J., concurring in part and concurring in judgment). But our cases also recognize an "association's First Amendment right to control its membership," acknowledging, of course, that the strength of any such right varies with the nature of the organization. *Id.*, at 635. Balancing these two important interests calls for sensitive tools. As it has been interpreted, Local Law 63 is such a device.

The Law identifies three factors to be used to determine whether a particular club is "distinctly private" for purposes of applying the city's antidiscrimination laws. As the Court notes, however, *ante*, at 15, n. 6, the court below has suggested that the factors identified in Local Law 63 are not exclusive, but are to be considered along with other considerations such as "'size, purpose, policies, selectivity, congeniality, and other characteristics.'" 69 N. Y. 2d 211, 222, 505 N. E. 2d 915, 920–921 (1987) (quoting *Roberts*, *supra*, at 620). See also *United States Power Squadrons* v. *State Human Rights Appeal Bd.*, 59 N. Y. 2d 401, 412–413, 452 N. E. 2d 1199, 1204 (1983). An association or club thus is permitted to demonstrate that its particular characteristics qualify it for constitutional protection, despite the presence of the three factors specified in Local Law 63. *University Club* v. *City of New York*, 842 F. 2d 37, 41 (CA2 1988) (noting that the three factors in Local Law 63 are not "the only ones relevant to the constitutionality of applying the new definition to [a particular club]"). Moreover, such organizations are provided with an adequate opportunity to raise any constitutional claims in the administrative proceedings through which Local Law 63 is applied. See *ibid.* See also *ante*, at 15.

In a city as large and diverse as New York City, there surely will be organizations that fall within the potential reach of Local Law 63 and yet are deserving of constitutional protection. For example, in such a large city a club with over 400 members may still be relatively intimate in nature, so that a constitutional right to control membership takes precedence. Similarly, there may well be organizations whose expressive purposes would be substantially undermined if they were unable to confine their membership to those of the same sex, race, religion, or ethnic background, or who share some other such common bond. The associational rights of such organizations must be respected.

But as the Court points out, *ante*, at 11–12, 13–14, and indeed, as appellant conceded, Tr. of Oral Arg. 11–12, the ex-

istence of such protected clubs does not mean that Local Law 63 cannot be applied to other clubs. Predominately commercial organizations are not entitled to claim a First Amendment associational or expressive right to be free from the anti-discrimination provisions triggered by the law. Because Local Law 63 may be applied constitutionally to these organizations, I agree with the Court that it is not invalid on its face.

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

I concur in the judgment of the Court, and join all except Part IV of its opinion. I note that Part III assumes for purposes of its analysis, but does not hold, the existence of a constitutional right of private association for other than expressive or religious purposes.

With respect to the equal protection issue discussed in Part IV of the opinion, I do not believe that the mere fact that benevolent orders "are unique," *ante*, at 16, suffices to establish that a rational basis exists for their exemption. As forgiving as the rational-basis test is, it does not go that far. There must at least be some plausible connection between the respect in which they are unique and the purpose of the law.

It is true, as appellant urges, that under the New York State statute to which Local Law 63 technically refers, no characteristic *must* be possessed in order to qualify as a "benevolent order" except the characteristic of being listed by the legislature in §2.* See N. Y. Ben. Ord. Law §2

*The Court, *ante*, at 17, relies upon the Appellate Division's statement that benevolent orders are organized "'"solely for the benefit of [their] membership and their beneficiaries."'" If I thought this to be an interpretation of New York law, I would honor it. In fact, however, it seems plain to me that the Appellate Division was not interpreting one section but misciting another. The language is quoted (with appropriate citation) from a provision of New York law dealing not with benevolent orders but with "fraternal benefit societies." N. Y. Ins. Law §4501(a) (McKinney

(McKinney 1951 and Supp. 1988). In fact, however, all the organizations that have been listed—or at least all I am familiar with—share the characteristic of being what might be called lodges or fraternal organizations. They include, for example, the American Legion, the Jewish War Veterans of the United States, the Catholic War Veterans, the Disabled American Veterans, AMVETS, the Veterans of Foreign Wars, various orders of Masons, the Independent Order of Odd Fellows, the Loyal Order of Moose, the Knights of Columbus, the Improved Benevolent and Protective Order of Elks of the World, the Nobles of the Mystic Shrine, the Ancient Order of Hibernians, and the Knights of Malta. When the City Council stated that it had heard no testimony that "benevolent orders" were "places where business activity is prevalent," Local Law No. 63, § 1, App. 15, I think it meant by "benevolent orders" organizations of that sort. While the fit between lodge and fraternal type organizations and the present or future content of § 2 of the New York State law may not be perfect, we do not require that for ordinary equal protection analysis. See, *e. g.*, *Vance* v. *Bradley*, 440 U. S. 93, 108 (1979). I am content that it was rational to refer to that law as a means of identifying a category composed almost entirely of such associations; and that it was rational to think that such organizations did not significantly contribute to the problem the City Council was addressing. A lodge is not likely to be a club where men dine with clients and conduct business. Appellant introduced no evidence to the contrary.

1985). The two are quite different, although an organization can qualify as both. See §§ 4501, 4502. In any event, even if benevolent orders were required to possess the characteristic of being "solely for the benefit of [their] membership and of their beneficiaries," that would not distinguish them from appellant's organizations. *All* of the clubs covered by Local Law 63 seemingly meet that description, since it establishes an exception to the "distinctly private" exemption of the New York City Human Rights Law (Local Law No. 97 of 1965), N. Y. C. Admin. Code § 8–107(2) (1986).

STEWART ORGANIZATION, INC., ET AL. *v.* RICOH CORP. ET AL.

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

No. 86–1908. Argued February 29, 1988—Decided June 20, 1988

Petitioner company, an Alabama corporation, entered into a dealership agreement to market copier products of respondent, a nationwide manufacturer with its principal place of business in New Jersey. The agreement contained a clause providing that any dispute arising out of the contract could be brought only in a court located in Manhattan in New York City. Petitioner company (and the individual stockholder petitioners) filed a diversity action in the United States District Court for the Northern District of Alabama, alleging, *inter alia*, that respondent had breached the agreement. Relying on the contractual forum-selection clause, respondent filed a motion seeking, *inter alia*, the transfer of the case to the Southern District of New York under 28 U. S. C. § 1404(a), which provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." The court denied the motion, holding that Alabama law controlled and that Alabama looks unfavorably upon contractual forum-selection clauses. On interlocutory appeal, the Court of Appeals reversed and remanded with instructions to transfer the case, holding that venue is a matter of federal procedure and that, under the standards articulated in the admiralty case of *The Bremen* v. *Zapata Off-Shore Co.*, 407 U. S. 1, the forum-selection clause was in all respects enforceable generally as a matter of federal law.

Held:

1. When a federal law sought to be applied in a diversity action is a congressional statute, the chief question for the district court's determination is whether the statute is sufficiently broad to control the issue before the court. If so, the court then must inquire whether the statute represents a valid exercise of Congress' authority under the Constitution. If Congress intended to reach the issue before the court, and if it enacted its intention into law in a manner that abides with the Constitution, that is the end of the matter; federal courts are bound to apply laws enacted by Congress with respect to matters over which it has legislative power. Pp. 25–27.

2. In this case, federal law, specifically § 1404(a), governs the decision whether to give effect to the parties' forum-selection clause and to transfer the case to a court in Manhattan. Pp. 28–32.

(a) Although the Court of Appeals properly noted that the *Bremen* case—which held that federal courts sitting in admiralty generally should enforce forum-selection clauses absent a showing that to do so would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching—may prove "instructive" in resolving the parties' dispute, the court erred in its articulation of the relevant inquiry as being whether the forum-selection clause in this case was unenforceable under the *Bremen* standards. The first question for consideration should have been whether § 1404(a) itself controls respondent's request to give effect to the contractual choice of venue and to transfer the case to a Manhattan court. Pp. 28–29.

(b) Section 1404(a) is sufficiently broad to control the forum-selection issue. The statute is intended to place discretion in the district courts to adjudicate motions for transfer according to an individualized, case-by-case consideration of convenience and fairness. A motion to transfer under § 1404(a) calls on the district court to weigh in the balance a number of case-specific factors, and the presence of a forum-selection clause will figure centrally in the calculus. A forum-selection clause should receive neither dispositive consideration nor no consideration, but rather the consideration for which Congress provided in § 1404(a). Section 1404(a) must be applied since it represents a valid exercise of Congress' authority under Article III as augmented by the Necessary and Proper Clause. In this case, the District Court should determine in the first instance the appropriate effect under federal law of the parties' forum-selection clause on respondent's § 1404(a) motion. Pp. 29–32.

810 F. 2d 1066, affirmed and remanded.

MARSHALL, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BRENNAN, WHITE, BLACKMUN, STEVENS, O'CONNOR, and KENNEDY, JJ., joined. KENNEDY, J., filed a concurring opinion, in which O'CONNOR, J., joined, *post*, p. 33. SCALIA, J., filed a dissenting opinion, *post*, p. 33.

F. A. Flowers III argued the cause for petitioners. With him on the briefs was *Joseph W. Letzer*.

Scott M. Phelps argued the cause and filed a brief for respondents.

JUSTICE MARSHALL delivered the opinion of the Court.

This case presents the issue whether a federal court sitting in diversity should apply state or federal law in adjudicating a motion to transfer a case to a venue provided in a contractual forum-selection clause.

I

The dispute underlying this case grew out of a dealership agreement that obligated petitioner company, an Alabama corporation, to market copier products of respondent, a nationwide manufacturer with its principal place of business in New Jersey. The agreement contained a forum-selection clause providing that any dispute arising out of the contract could be brought only in a court located in Manhattan.[1] Business relations between the parties soured under circumstances that are not relevant here. In September 1984, petitioner brought a complaint in the United States District Court for the Northern District of Alabama. The core of the complaint was an allegation that respondent had breached the dealership agreement, but petitioner also included claims for breach of warranty, fraud, and antitrust violations.

Relying on the contractual forum-selection clause, respondent moved the District Court either to transfer the case to the Southern District of New York under 28 U. S. C. § 1404(a) or to dismiss the case for improper venue under 28 U. S. C. § 1406. The District Court denied the motion. Civ. Action No. 84–AR–2460–S (Jan. 29, 1985). It reasoned that the transfer motion was controlled by Alabama law and that Alabama looks unfavorably upon contractual forum-selection clauses. The court certified its ruling for interlocutory appeal,

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[1] Specifically, the forum-selection clause read: "Dealer and Ricoh agree that any appropriate state or federal district court located in the Borough of Manhattan, New York City, New York, shall have exclusive jurisdiction over any case or controversy arising under or in connection with this Agreement and shall be a proper forum in which to adjudicate such case or controversy." App. 38–39.

see 28 U. S. C. § 1292(b) (1982 ed., Supp. IV), and the Court of Appeals for the Eleventh Circuit accepted jurisdiction.

On appeal, a divided panel of the Eleventh Circuit reversed the District Court. The panel concluded that questions of venue in diversity actions are governed by federal law, and that the parties' forum-selection clause was enforceable as a matter of federal law. 779 F. 2d 643 (1986). The panel therefore reversed the order of the District Court and remanded with instructions to transfer the case to a Manhattan court. After petitioner successfully moved for rehearing en banc, 785 F. 2d 896 (1986), the full Court of Appeals proceeded to adopt the result, and much of the reasoning, of the panel opinion. 810 F. 2d 1066 (1987).[2] The en banc court, citing Congress' enactment or approval of several rules to govern venue determinations in diversity actions, first determined that "[v]enue is a matter of federal procedure." *Id.*, at 1068. The Court of Appeals then applied the standards articulated in the admiralty case of *The Bremen* v. *Zapata Off-Shore Co.*, 407 U. S. 1 (1972), to conclude that "the choice of forum clause in this contract is in all respects enforceable generally as a matter of federal law . . . ." 810 F. 2d, at 1071. We now affirm under somewhat different reasoning.

II

Both the panel opinion and the opinion of the full Court of Appeals referred to the difficulties that often attend "the sticky question of which law, state or federal, will govern various aspects of the decisions of federal courts sitting in

[2] Judge Tjoflat, in a special concurrence joined by two other judges, argued that the District Court should have taken account of, and ultimately should have enforced, the forum-selection clause in its evaluation of the factors of justice and convenience that govern the transfer of cases under 28 U. S. C. § 1404(a). 810 F. 2d, at 1071–1076. There also was a dissenting opinion by five members of the Eleventh Circuit, who argued that state law should govern the dispute and warned that the application of federal law would encourage forum shopping and improperly undermine Alabama policy. *Id.*, at 1076–1077.

diversity." 779 F. 2d, at 645. A district court's decision whether to apply a federal statute such as § 1404(a) in a diversity action,[3] however, involves a considerably less intricate analysis than that which governs the "relatively unguided *Erie* choice." *Hanna* v. *Plumer*, 380 U. S. 460, 471 (1965) (referring to *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938)). Our cases indicate that when the federal law sought to be applied is a congressional statute, the first and chief question for the district court's determination is whether the statute is "sufficiently broad to control the issue before the Court." *Walker* v. *Armco Steel Corp.*, 446 U. S. 740, 749–750 (1980); *Burlington Northern R. Co.* v. *Woods*, 480 U. S. 1, 4–5 (1987). This question involves a straightforward exercise in statutory interpretation to determine if the statute covers the point in dispute. See *Walker* v. *Armco Steel Corp.*, *supra*, at 750, and n. 9.[4] See also *Burlington Northern R.*

[3] Respondent points out that jurisdiction in this case was alleged to rest both on the existence of an antitrust claim, see 28 U. S. C. § 1337, and diversity of citizenship, see 28 U. S. C. § 1332. Respondent does not suggest how the presence of a federal claim should affect the District Court's analysis of applicable law. The Court of Appeals plurality likewise did not address this issue, and indeed characterized this case simply as a diversity breach-of-contract action. See 810 F. 2d 1066, 1067, 1068 (1987). Our conclusion that federal law governs transfer of this case, see Part III, *infra*, makes this issue academic for purposes of this case, because the presence of a federal question could cut only in favor of the application of federal law. We therefore are not called on to decide, nor do we decide, whether the existence of federal-question as well as diversity jurisdiction necessarily alters a district court's analysis of applicable law.

[4] Our cases at times have referred to the question at this stage of the analysis as an inquiry into whether there is a "direct collision" between state and federal law. See, e. g., *Walker* v. *Armco Steel Corp.*, 446 U. S., at 749; *Hanna* v. *Plumer*, 380 U. S. 460, 472 (1965). Logic indicates, however, and a careful reading of the relevant passages confirms, that this language is not meant to mandate that federal law and state law be perfectly coextensive and equally applicable to the issue at hand; rather, the "direct collision" language, at least where the applicability of a federal statute is at issue, expresses the requirement that the federal statute be sufficiently broad to cover the point in dispute. See *Hanna* v. *Plumer*, *supra*, at

Co. v. *Woods*, *supra*, at 7 (identifying inquiry as whether a Federal Rule "occupies [a state rule's] field of operation").

If the district court determines that a federal statute covers the point in dispute, it proceeds to inquire whether the statute represents a valid exercise of Congress' authority under the Constitution. See *Hanna* v. *Plumer*, *supra*, at 471 (citing *Erie R. Co.* v. *Tompkins*, *supra*, at 77–79).[5] If Congress intended to reach the issue before the district court, and if it enacted its intention into law in a manner that abides with the Constitution, that is the end of the matter; "[f]ederal courts are bound to apply rules enacted by Congress with respect to matters . . . over which it has legislative power." *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U. S. 395, 406 (1967); cf. *Hanna* v. *Plumer*, *supra*, at 471 ("When a situation is covered by one of the Federal Rules . . . the court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions").[6] Thus, a district court sitting in diversity must apply a federal statute that controls the issue before the court and that represents a valid exercise of Congress' constitutional powers.

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470. It would make no sense for the supremacy of federal law to wane precisely because there is no state law directly on point.

[5] *Hanna* v. *Plumer*, *supra*, identifies an additional inquiry where the applicability of a Federal Rule of Civil Procedure is in question. Federal Rules must be measured against the statutory requirement of the Rules Enabling Act that they not "abridge, enlarge or modify any substantive right . . . ." 28 U. S. C. § 2072.

[6] If no federal statute or Rule covers the point in dispute, the district court then proceeds to evaluate whether application of federal judge-made law would disserve the so-called "twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws." *Hanna* v. *Plumer*, *supra*, at 468. If application of federal judge-made law would disserve these two policies, the district court should apply state law. See *Walker* v. *Armco Steel Corp.*, *supra*, at 752–753.

III

Applying the above analysis to this case persuades us that federal law, specifically 28 U. S. C. § 1404(a), governs the parties' venue dispute.

A

At the outset we underscore a methodological difference in our approach to the question from that taken by the Court of Appeals. The en banc court determined that federal law controlled the issue based on a survey of different statutes and judicial decisions that together revealed a significant federal interest in questions of venue in general, and in choice-of-forum clauses in particular. The Court of Appeals then proceeded to apply the standards announced in our opinion in *The Bremen* v. *Zapata Off-Shore Co.*, 407 U. S. 1 (1972),[7] to determine that the forum-selection clause in this case was enforceable. But the immediate issue before the District Court was whether to grant respondent's motion to transfer the action under § 1404(a),[8] and as Judge Tjoflat properly noted in his special concurrence below, the immediate issue before the Court of Appeals was whether the District Court's denial of the § 1404(a) motion constituted an abuse of discretion. Although we agree with the Court of Appeals that the *Bremen* case may prove "instructive" in resolving the parties' dispute, 810 F. 2d, at 1069; but cf. *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U. S. 630, 641–642 (1981) (federal common law developed under admiralty jurisdiction not freely transferable to diversity setting), we disagree with the

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[7] In *The Bremen*, this Court held that federal courts sitting in admiralty generally should enforce forum-selection clauses absent a showing that to do so "would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching." 407 U. S., at 15.

[8] The parties do not dispute that the District Court properly denied the motion to dismiss the case for improper venue under 28 U. S. C. § 1406(a) because respondent apparently does business in the Northern District of Alabama. See 28 U. S. C. § 1391(c) (venue proper in judicial district in which corporation is doing business).

court's articulation of the relevant inquiry as "whether the forum selection clause in this case is unenforceable under the standards set forth in *The Bremen*." 810 F. 2d, at 1069. Rather, the first question for consideration should have been whether § 1404(a) itself controls respondent's request to give effect to the parties' contractual choice of venue and transfer this case to a Manhattan court. For the reasons that follow, we hold that it does.

B

Section 1404(a) provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." Under the analysis outlined above, we first consider whether this provision is sufficiently broad to control the issue before the court. That issue is whether to transfer the case to a court in Manhattan in accordance with the forum-selection clause. We believe that the statute, fairly construed, does cover the point in dispute.

Section 1404(a) is intended to place discretion in the district court to adjudicate motions for transfer according to an "individualized, case-by-case consideration of convenience and fairness." *Van Dusen* v. *Barrack*, 376 U. S. 612, 622 (1964). A motion to transfer under § 1404(a) thus calls on the district court to weigh in the balance a number of case-specific factors. The presence of a forum-selection clause such as the parties entered into in this case will be a significant factor that figures centrally in the district court's calculus. In its resolution of the § 1404(a) motion in this case, for example, the District Court will be called on to address such issues as the convenience of a Manhattan forum given the parties' expressed preference for that venue, and the fairness of transfer in light of the forum-selection clause and the parties' relative bargaining power. The flexible and individualized analysis Congress prescribed in § 1404(a) thus encom-

passes consideration of the parties' private expression of their venue preferences.

Section 1404(a) may not be the only potential source of guidance for the District Court to consult in weighing the parties' private designation of a suitable forum. The premise of the dispute between the parties is that Alabama law may refuse to enforce forum-selection clauses providing for out-of-state venues as a matter of state public policy.[9] If that is so, the District Court will have either to integrate the factor of the forum-selection clause into its weighing of considerations as prescribed by Congress, or else to apply, as it did in this case, Alabama's categorical policy disfavoring forum-selection clauses. Our cases make clear that, as between these two choices in a single "field of operation," *Burlington Northern R. Co.* v. *Woods*, 480 U. S., at 7, the instructions of Congress are supreme. Cf. *ibid.* (where federal law's "discretionary mode of operation" conflicts with the nondiscretionary provision of Alabama law, federal law applies in diversity).

It is true that § 1404(a) and Alabama's putative policy regarding forum-selection clauses are not perfectly coextensive. Section 1404(a) directs a district court to take account of factors other than those that bear solely on the parties' private ordering of their affairs. The district court also must weigh in the balance the convenience of the witnesses and those public-interest factors of systemic integrity and fairness that, in addition to private concerns, come under the heading of "the interest of justice." It is conceivable in

[9] In its application of the standards set forth in *The Bremen* to this case, the Court of Appeals concluded that the Alabama policy against the enforcement of forum-selection clauses is intended to apply only to protect the jurisdiction of the state courts of Alabama and therefore would not come into play in this case, in which case this dispute might be much ado about nothing. See 810 F. 2d, at 1069–1070. Our determination that § 1404(a) governs the parties' dispute notwithstanding any contrary Alabama policy makes it unnecessary to address the contours of state law. See n. 4, *supra*.

a particular case, for example, that because of these factors a district court acting under § 1404(a) would refuse to transfer a case notwithstanding the counterweight of a forum-selection clause, whereas the coordinate state rule might dictate the opposite result.[10] See 15 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3847, p. 371 (2d ed. 1986). But this potential conflict in fact frames an additional argument for the supremacy of federal law. Congress has directed that multiple considerations govern transfer within the federal court system, and a state policy focusing on a single concern or a subset of the factors identified in § 1404(a) would defeat that command. Its application would impoverish the flexible and multifaceted analysis that Congress intended to govern motions to transfer within the federal system. The forum-selection clause, which represents the parties' agreement as to the most proper forum, should receive neither dispositive consideration (as respondent might have it) nor no consideration (as Alabama law might have it), but rather the consideration for which Congress provided in § 1404(a). Cf. *Norwood* v. *Kirkpatrick*, 349 U. S. 29, 32 (1955) (§ 1404(a) accords broad discretion to district court, and plaintiff's choice of forum is only one relevant factor for its consideration). This is thus not a case in which state and federal rules "can exist side by side . . . each controlling its own intended sphere of coverage without conflict." *Walker* v. *Armco Steel Corp.*, 446 U. S., at 752.

Because § 1404(a) controls the issue before the District Court, it must be applied if it represents a valid exercise of

[10] The dissent does not dispute this point, but rather argues that if the forum-selection clause would be *unenforceable* under state law, then the clause cannot be accorded any weight by a federal court. See *post*, at 35. Not the least of the problems with the dissent's analysis is that it makes the applicability of a federal statute depend on the content of state law. See n. 4, *supra*. If a State cannot pre-empt a district court's consideration of a forum-selection clause by holding that the clause is automatically enforceable, it makes no sense for it to be able to do so by holding the clause automatically void.

Congress' authority under the Constitution. The constitutional authority of Congress to enact § 1404(a) is not subject to serious question. As the Court made plain in *Hanna*, "the constitutional provision for a federal court system . . . carries with it congressional power to make rules governing the practice and pleading in those courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either." 380 U. S., at 472. See also *id.*, at 473 ("*Erie* and its offspring cast no doubt on the long-recognized power of Congress to prescribe housekeeping rules for federal courts"). Section 1404(a) is doubtless capable of classification as a procedural rule, and indeed, we have so classified it in holding that a transfer pursuant to § 1404(a) does not carry with it a change in the applicable law. See *Van Dusen* v. *Barrack*, 376 U. S., at 636–637 ("[B]oth the history and purposes of § 1404(a) indicate that it should be regarded as a federal judicial housekeeping measure"). It therefore falls comfortably within Congress' powers under Article III as augmented by the Necessary and Proper Clause. See *Burlington Northern R. Co.* v. *Woods*, *supra*, at 5, n. 3.

We hold that federal law, specifically 28 U. S. C. § 1404(a), governs the District Court's decision whether to give effect to the parties' forum-selection clause and transfer this case to a court in Manhattan.[11] We therefore affirm the Eleventh Circuit order reversing the District Court's application of Alabama law. The case is remanded so that the District Court may determine in the first instance the appropriate effect under federal law of the parties' forum-selection clause on respondent's § 1404(a) motion.

It is so ordered.

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[11] Because a validly enacted Act of Congress controls the issue in dispute, we have no occasion to evaluate the impact of application of federal judge-made law on the "twin aims" that animate the *Erie* doctrine.

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

I concur in full. I write separately only to observe that enforcement of valid forum-selection clauses, bargained for by the parties, protects their legitimate expectations and furthers vital interests of the justice system. Although our opinion in *The Bremen* v. *Zapata Off-Shore Co.*, 407 U. S. 1, 10 (1972), involved a Federal District Court sitting in admiralty, its reasoning applies with much force to federal courts sitting in diversity. The justifications we noted in *The Bremen* to counter the historical disfavor forum-selection clauses had received in American courts, *id.*, at 9, should be understood to guide the District Court's analysis under § 1404(a).

The federal judicial system has a strong interest in the correct resolution of these questions, not only to spare litigants unnecessary costs but also to relieve courts of time-consuming pretrial motions. Courts should announce and encourage rules that support private parties who negotiate such clauses. Though state policies should be weighed in the balance, the authority and prerogative of the federal courts to determine the issue, as Congress has directed by § 1404(a), should be exercised so that a valid forum-selection clause is given controlling weight in all but the most exceptional cases. See *The Bremen*, *supra*, at 10.

JUSTICE SCALIA, dissenting.

I agree with the opinion of the Court that the initial question before us is whether the validity between the parties of a contractual forum-selection clause falls within the scope of 28 U. S. C. § 1404(a). See *ante*, at 26–27, 29. I cannot agree, however, that the answer to that question is yes. Nor do I believe that the federal courts can, consistent with the twin-aims test of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938), fashion a judge-made rule to govern this issue of contract validity.

I

When a litigant asserts that state law conflicts with a federal procedural statute or formal Rule of Procedure, a court's first task is to determine whether the disputed point in question in fact falls within the scope of the federal statute or Rule. In this case, the Court must determine whether the scope of § 1404(a) is sufficiently broad to cause a direct collision with state law or implicitly to control the issue before the Court, *i. e.*, validity between the parties of the forum-selection clause, thereby leaving no room for the operation of state law. See *Burlington Northern R. Co.* v. *Woods*, 480 U. S. 1, 4–5 (1987). I conclude that it is not.

Although the language of § 1404(a) provides no clear answer, in my view it does provide direction. The provision vests the district courts with authority to transfer a civil action to another district "[f]or the convenience of parties and witnesses, in the interest of justice." This language looks to the present and the future. As the specific reference to convenience of parties and witnesses suggests, it requires consideration of what is likely to be just in the future, when the case is tried, in light of things as they now stand. Accordingly, the courts in applying § 1404(a) have examined a variety of factors, each of which pertains to facts that currently exist or will exist: *e. g.*, the forum actually chosen by the plaintiff, the current convenience of the parties and witnesses, the current location of pertinent books and records, similar litigation pending elsewhere, current docket conditions, and familiarity of the potential courts with governing state law. See 15 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure §§ 3848–3849, 3851, 3853–3854 (2d ed. 1986). In holding that the validity between the parties of a forum-selection clause falls within the scope of § 1404(a), the Court inevitably imports, in my view without adequate textual foundation, a new *retrospective* element into the court's deliberations, requiring examination of what the

facts were concerning, among other things, the bargaining power of the parties and the presence or absence of overreaching at the time the contract was made. See *ante*, at 28, and n. 7, 29.

The Court largely attempts to avoid acknowledging the novel scope it gives to § 1404(a) by casting the issue as how much *weight* a district court should give a forum-selection clause as against other factors when it makes its determination under § 1404(a). I agree that if the weight-among-factors issue were before us, it would be governed by § 1404(a). That is because, while the parties may decide who between them should bear any inconvenience, only a court can decide how much weight should be given under § 1404(a) to the factor of the parties' convenience as against other relevant factors such as the convenience of witnesses. But the Court's description of the issue begs the question: what law governs whether the forum-selection clause is a *valid* or *invalid* allocation of any inconvenience between the parties. If it is invalid, *i. e.*, should be voided, between the parties, it cannot be entitled to any weight in the § 1404(a) determination. Since under Alabama law the forum-selection clause should be voided, see *Redwing Carriers, Inc.* v. *Foster*, 382 So. 2d 554, 556 (Ala. 1980), in this case the question of what weight should be given the forum-selection clause can be reached only if as a preliminary matter federal law controls the issue of the validity of the clause between the parties.*

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*Contrary to the opinion of the Court, there is nothing unusual about having "the applicability of a federal statute depend on the content of state law." *Ante*, at 31, n. 10. We have recognized that precisely this is required when the application of the federal statute depends, as here, on resolution of an underlying issue that is fundamentally one of state law. See *Commissioner* v. *Estate of Bosch*, 387 U. S. 456, 457, 464–465 (1967); cf. *Budinich* v. *Becton Dickinson & Co.*, 486 U. S. 196, 199 (1988) (dictum). Nor is the approach I believe is required undermined by the fact that there would still be some situations where the state-law rule on the validity of a forum-selection clause would not be dispositive of the issue of transfer between federal courts. When state law would hold a forum-

Second, § 1404(a) was enacted against the background that issues of contract, including a contract's validity, are nearly always governed by state law. It is simply contrary to the practice of our system that such an issue should be wrenched from state control in absence of a clear conflict with federal law or explicit statutory provision. It is particularly instructive in this regard to compare § 1404(a) with another provision, enacted by the same Congress a year earlier, that *did* pre-empt state contract law, and in precisely the same field of agreement regarding forum selection. Section 2 of the Federal Arbitration Act, 9 U. S. C. § 2, provides:

> "A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

We have said that an arbitration clause is a "kind of forum-selection clause," *Scherk* v. *Alberto-Culver Co.*, 417 U. S. 506, 519 (1974), and the contrast between this explicit pre-

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selection clause invalid the federal court could nonetheless order transfer to another federal court under § 1404(a), but it could do so only if such transfer was warranted without regard to the forum-selection clause. This is not at all remarkable since whether to transfer a case from one federal district court to another for reasons other than the contractual agreement of the parties is plainly made a matter of federal law by § 1404(a). When, on the other hand, state law would hold a forum-selection clause valid, I agree with JUSTICE KENNEDY's concurrence that under § 1404(a) such a valid forum-selection clause is to be "given controlling weight in all but the most exceptional cases." *Ante*, at 33. And even in those exceptional cases where a forum-selection clause is valid under state law but transfer is unwarranted because of some factor other than the convenience of the parties, the district court should give effect to state contract law by dismissing the suit.

emption of state contract law on the subject and § 1404(a) could not be more stark. Section 1404(a) is simply a venue provision that nowhere mentions contracts or agreements, much less that the validity of certain contracts or agreements will be matters of federal law. It is difficult to believe that state contract law was meant to be pre-empted by this provision that we have said "should be regarded as a federal judicial housekeeping measure," *Van Dusen* v. *Barrack*, 376 U. S. 612, 636–637 (1964), that we have said did not change "the relevant factors" which federal courts used to consider under the doctrine of *forum non conveniens*, *Norwood* v. *Kirkpatrick*, 349 U. S. 29, 32 (1955), and that we have held can be applied retroactively because it is procedural, *Ex parte Collett*, 337 U. S. 55, 71 (1949). It seems to me the generality of its language—"[f]or the convenience of parties and witnesses, in the interest of justice"—is plainly insufficient to work the great change in law asserted here.

Third, it has been common ground in this Court since *Erie*, 304 U. S., at 74–77, that when a federal procedural statute or Rule of Procedure is not on point, substantial uniformity of predictable outcome between federal and state courts in adjudicating claims should be striven for. See also *Klaxon Co.* v. *Stentor Electric Mfg. Co.*, 313 U. S. 487, 496 (1941). This rests upon a perception of the constitutional and congressional plan underlying the creation of diversity and pendent jurisdiction in the lower federal courts, which should quite obviously be carried forward into our interpretation of ambiguous statutes relating to the exercise of that jurisdiction. We should assume, in other words, when it is fair to do so, that Congress is just as concerned as we have been to avoid significant differences between state and federal courts in adjudicating claims. Cf. *Southland Corp.* v. *Keating*, 465 U. S. 1, 15 (1984) (interpreting Federal Arbitration Act to apply to claims brought in state courts in order to discourage forum shopping). Thus, in deciding whether a federal procedural statute or Rule of Procedure encompasses a par-

ticular issue, a broad reading that would create significant disuniformity between state and federal courts should be avoided if the text permits. See, *e. g.*, *Walker* v. *Armco Steel Corp.*, 446 U. S. 740, 750–751 (1980); *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, 556 (1949); *Palmer* v. *Hoffman*, 318 U. S. 109, 117 (1943); cf. P. Bator, D. Meltzer, P. Mishkin, & D. Shapiro, Hart and Wechsler's The Federal Courts and the Federal System 828 (3d ed. 1988) ("The Supreme Court has continued since Hanna to interpret the federal rules to avoid conflict with important state regulatory policies"). As I have shown, the interpretation given § 1404(a) by the Court today is neither the plain nor the more natural meaning; at best, § 1404(a) is ambiguous. I would therefore construe it to avoid the significant encouragement to forum shopping that will inevitably be provided by the interpretation the Court adopts today.

II

Since no federal statute or Rule of Procedure governs the validity of a forum-selection clause, the remaining issue is whether federal courts may fashion a judge-made rule to govern the question. If they may not, the Rules of Decision Act, 28 U. S. C. § 1652, mandates use of state law. See *Erie*, *supra*, at 72–73; *Hanna* v. *Plumer*, 380 U. S. 460, 471–472 (1965) (if federal courts lack authority to fashion a rule, "state law must govern because there can be no other law"); *DelCostello* v. *Teamsters*, 462 U. S. 151, 174, n. 1 (1983) (O'CONNOR, J., dissenting) (Rules of Decision Act "simply requires application of state law unless federal law applies"); see also *id.*, at 159, n. 13.

In general, while interpreting and applying substantive law is the essence of the "judicial Power" created under Article III of the Constitution, that power does not encompass the making of substantive law. Cf. *Erie*, *supra*, at 78–79. Whatever the scope of the federal courts' authority to create federal common law in other areas, it is plain that the mere

fact that petitioner company here brought an antitrust claim, *ante*, at 24, does not empower the federal courts to make common law on the question of the validity of the forum-selection clause. See *Campbell* v. *Haverhill*, 155 U. S. 610, 616 (1895) (Rules of Decision Act "itself neither contains nor suggests . . . a distinction" between federal-question cases and diversity cases); *DelCostello*, *supra*, at 173, n. 1 (STEVENS, J., dissenting) (same); cf. *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U. S. 630 (1981). The federal courts do have authority, however, to make procedural rules that govern the practice before them. See 28 U. S. C. § 2071 (federal courts may make rules "for the conduct of their business"); Fed. Rule Civ. Proc. 83 (districts courts have authority to "regulate their practice"); see generally *Sibbach* v. *Wilson & Co.*, 312 U. S. 1, 9–10 (1941).

In deciding what is substantive and what is procedural for these purposes, we have adhered to a functional test based on the "twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws." *Hanna*, *supra*, at 468; see also *ante*, at 27, n. 6; *Walker* v. *Armco Steel Corp.*, *supra*, at 747. Moreover, although in reviewing the validity of a federal procedural statute or Rule of Procedure we inquire only whether Congress or the rulemakers have trespassed beyond the wide latitude given them to determine that a matter is procedural, see *Burlington Northern R. Co.* v. *Woods*, 480 U. S., at 5; *Hanna*, *supra*, at 471–474, in reviewing the lower courts' application of the twin-aims test we apply our own judgment as a matter of law.

Under the twin-aims test, I believe state law controls the question of the validity of a forum-selection clause between the parties. The Eleventh Circuit's rule clearly encourages forum shopping. Venue is often a vitally important matter, as is shown by the frequency with which parties contractually provide for and litigate the issue. Suit might well not be pursued, or might not be as successful, in a significantly less

convenient forum. Transfer to such a less desirable forum is, therefore, of sufficient import that plaintiffs will base their decisions on the likelihood of that eventuality when they are choosing whether to sue in state or federal court. With respect to forum-selection clauses, in a State with law unfavorable to validity, plaintiffs who seek to avoid the effect of a clause will be encouraged to sue in state court, and nonresident defendants will be encouraged to shop for more favorable law by removing to federal court. In the reverse situation—where a State has law favorable to enforcing such clauses—plaintiffs will be encouraged to sue in federal court. This significant encouragement to forum shopping is alone sufficient to warrant application of state law. Cf. *Walker* v. *Armco Steel Corp.*, *supra*, at 753 (failure to meet one part of the twin-aims test suffices to warrant application of state law).

I believe creating a judge-made rule fails the second part of the twin-aims test as well, producing inequitable administration of the laws. The best explanation of what constitutes inequitable administration of the laws is that found in *Erie* itself: allowing an unfair discrimination between noncitizens and citizens of the forum state. 304 U. S., at 74–75; see also *Hanna*, 380 U. S., at 468, n. 9. Whether discrimination is unfair in this context largely turns on how important is the matter in question. See *id.*, at 467–468, and n. 9. The decision of an important legal issue should not turn on the accident of diversity of citizenship, see, *e. g.*, *Walker*, *supra*, at 753, or the presence of a federal question unrelated to that issue. It is difficult to imagine an issue of more importance, other than one that goes to the very merits of the lawsuit, than the validity of a contractual forum-selection provision. Certainly, the *Erie* doctrine has previously been held to require the application of state law on subjects of similar or obviously lesser importance. See, *e. g.*, *Walker*, *supra* (whether filing of complaint or service tolls statute of limitations); *Bernhardt* v. *Polygraphic Co. of America*, 350 U. S.

198, 202–204 (1956) (arbitrability); *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S., at 555–556 (indemnity bond for litigation expenses). Nor can or should courts ignore that issues of contract validity are traditionally matters governed by state law.

For the reasons stated, I respectfully dissent.

WEST *v.* ATKINS

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

No. 87–5096. Argued March 28, 1988—Decided June 20, 1988

Respondent, a private physician under contract with North Carolina to provide orthopedic services at a state-prison hospital on a part-time basis, treated petitioner for a leg injury sustained while petitioner was incarcerated in state prison. Petitioner was barred by state law from employing or electing to see a physician of his own choosing. Alleging that he was given inadequate medical treatment, petitioner sued respondent in Federal District Court under 42 U. S. C. § 1983 for violation of his Eighth Amendment right to be free from cruel and unusual punishment, relying on *Estelle* v. *Gamble*, 429 U. S. 97. The court entered summary judgment for respondent, holding that, as a "contract physician," respondent was not acting "under color of state law," a jurisdictional prerequisite for a § 1983 action. The Court of Appeals ultimately affirmed.

Held: A physician who is under contract with the State to provide medical services to inmates at a state-prison hospital on a part-time basis acts "under color of state law," within the meaning of § 1983, when he treats an inmate. Pp. 48–57.

(a) If a defendant's alleged infringement of the plaintiff's constitutional rights satisfies the state-action requirement of the Fourteenth Amendment, the defendant's conduct also constitutes action "under color of state law" for § 1983's purposes, since it is "fairly attributable to the State." *Lugar* v. *Edmondson Oil Co.*, 457 U. S. 922, 935, 937. Thus, a state employee generally acts under color of state law when, while performing in his official capacity or exercising his official responsibilities, he abuses the position given to him by the State. *Polk County* v. *Dodson*, 454 U. S. 312, distinguished. Pp. 49–50.

(b) The Court of Appeals erred in concluding that defendants are removed from § 1983's purview if they are professionals acting in accordance with professional discretion and judgment and that professionals may be liable under § 1983 only if exercising custodial or supervisory authority. The court's analogy between respondent and the public defender in *Polk County*, *supra*, is unpersuasive. Pp. 50–54.

(c) Respondent's conduct in treating petitioner is fairly attributable to the State. The State has an obligation, under the Eighth Amendment

and state law, to provide adequate medical care to those whom it has incarcerated. *Estelle*, *supra*, at 104; *Spicer* v. *Williamson*, 191 N. C. 487, 490, 132 S. E. 291, 293. The State has delegated that function to physicians such as respondent, and defers to their professional judgment. This analysis is not altered by the fact that respondent was paid by contract and was not on the state payroll nor by the fact that respondent was not required to work exclusively for the prison. It is the physician's function within the state system, not the precise terms of his employment, that is determinative. Pp. 54–57.

815 F. 2d 993, reversed and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BRENNAN, WHITE, MARSHALL, STEVENS, O'CONNOR, and KENNEDY, JJ., joined. SCALIA, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 58.

Adam Stein argued the cause for petitioner. With him on the brief was *Richard E. Giroux*.

Jacob L. Safron, Special Deputy Attorney General of North Carolina, argued the cause for respondent. With him on the brief was *Lacy H. Thornburg*, Attorney General.*

JUSTICE BLACKMUN delivered the opinion of the Court.

This case presents the question whether a physician who is under contract with the State to provide medical services to inmates at a state-prison hospital on a part-time basis acts "under color of state law," within the meaning of 42 U. S. C. § 1983, when he treats an inmate.

I

Petitioner, Quincy West, tore his left Achilles tendon in 1983 while playing volleyball at Odom Correctional Center, the Jackson, N. C., state prison in which he was incarcerated. A physician under contract to provide medical care to Odom inmates examined petitioner and directed that he be

*Briefs of *amici curiae* urging reversal were filed for the American Civil Liberties Union Foundation et al. by *John Powell*, *Norman Smith*, *Elizabeth Alexander*, *Edward I. Koren*, and *Alvin J. Bronstein;* and for the American Public Health Association by *William J. Rold.*

transferred to Raleigh for orthopedic consultation at Central Prison Hospital, the acute-care medical facility operated by the State for its more than 17,500 inmates. Central Prison Hospital has one full-time staff physician, and obtains additional medical assistance under "Contracts for Professional Services" between the State and area physicians.

Respondent, Samuel Atkins, M. D., a private physician, provided orthopedic services to inmates pursuant to one such contract. Under it, Doctor Atkins was paid approximately $52,000 annually to operate two "clinics" each week at Central Prison Hospital, with additional amounts for surgery.[1] Over a period of several months, he treated West's injury by placing his leg in a series of casts. West alleges that although the doctor acknowledged that surgery would be necessary, he refused to schedule it, and that he eventually discharged West while his ankle was still swollen and painful, and his movement still impeded. Because West was a prisoner in "close custody," he was not free to employ or elect to see a different physician of his own choosing.[2]

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[1] Doctor Atkins' contractual duties included the following: to provide two orthopedic clinics per week; to see all orthopedic and neurological referrals; to perform orthopedic surgery as scheduled; to conduct rounds as often as necessary for his surgical and other orthopedic patients; to coordinate with the Physical Therapy Department; to request the assistance of neurosurgical consultants on spinal surgical cases; and to provide emergency on-call orthopedic services 24 hours per day. His contract required him to furnish two days of professional service each week in fulfillment of these duties. App. 24–25. Atkins also had supervisory authority over Department of Correction nurses and physician's assistants, who were subject to his orders. *Id.*, at 28.

Apparently, respondent maintained a private practice apart from his work at the prison. Atkins' submissions on his motion for summary judgment, however, do not reflect the extent of his nonprison practice or the extent to which he depended upon the prison work for his livelihood.

[2] North Carolina law bars all but minimum-security prisoners from exercising an option to go outside the prison and obtain medical care of their choice at their own expense or funded by family resources or private health insurance. See North Carolina Division of Prisons Health Care Procedure

Pursuant to 42 U. S. C. § 1983,[3] West, proceeding *pro se*, commenced this action against Doctor Atkins[4] in the United States District Court for the Eastern District of North Carolina for violation of his Eighth Amendment right to be free from cruel and unusual punishment.[5] West alleged that Atkins was deliberately indifferent to his serious medical needs, by failing to provide adequate treatment.

Relying on a decision of its controlling court in *Calvert* v. *Sharp*, 748 F. 2d 861 (CA4 1984), cert. denied, 471 U. S. 1132 (1985), the District Court granted Doctor Atkins' motion for summary judgment. In *Calvert*, the Fourth Circuit held that a private orthopedic specialist, employed by a nonprofit professional corporation which provided services under contract to the inmates at the Maryland House of Corrections

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Manual §§ 710.1–710.2 (1980), App. to Brief for Petitioner 15a–16a (promulgated pursuant to 5 N. C. Admin. Code § 02E.0203 (1987) and N. C. Gen. Stat. §§ 148–11, 148–19 (1987)). Petitioner is not a minimum-security prisoner.

[3] Section 1983 provides in relevant part:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, 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."

[4] Doctor Atkins is represented here by the Attorney General of North Carolina. By statute, the State provides for representation and protection from liability for any person who provides medical services to inmates and who is sued pursuant to § 1983. See N. C. Gen. Stat. § 143–300.7 (1987). The State has informed its contract physicians, however, that it will not provide them with representation and indemnification in malpractice actions.

[5] West also named as defendants James B. Hunt, then Governor of the State of North Carolina, and Rae McNamara, Director of the Division of Prisons of the North Carolina Department of Correction. The District Court's dismissal of West's claims against Hunt and McNamara was affirmed on appeal. See 815 F. 2d 993, 996 (CA4 1987). West has not pursued his actions against those defendants before this Court.

and the Maryland Penitentiary, did not act "under color of state law," a jurisdictional requisite for a § 1983 action. Because Doctor Atkins was a "contract physician," the District Court concluded that he, too, was not acting under color of state law when he treated West's injury. App. 37.

A panel of the United States Court of Appeals for the Fourth Circuit vacated the District Court's judgment. 799 F. 2d 923 (1986). Rather than considering if *Calvert* could be distinguished, the panel remanded the case to the District Court for an assessment whether the record permitted a finding of deliberate indifference to a serious medical need, a showing necessary for West ultimately to prevail on his Eighth Amendment claim. See *Estelle* v. *Gamble*, 429 U. S. 97, 104 (1976).

On en banc rehearing, however, a divided Court of Appeals affirmed the District Court's dismissal of West's complaint. 815 F. 2d 993 (1987). In declining to overrule its decision in *Calvert*, the majority concluded:

> "Thus the clear and practicable principle enunciated by the Supreme Court [in *Polk County* v. *[Dodson,]* 454 U. S. 312 (1981)], and followed in *Calvert*, is that a professional, when acting within the bounds of traditional professional discretion and judgment, does not act under color of state law, even where, as in *Dodson*, the professional is a full-time employee of the state. Where the professional exercises custodial or supervisory authority, which is to say that he is not acting in his professional capacity, then a § 1983 claim can be established, provided the requisite nexus to the state is proved." 815 F. 2d, at 995 (footnote omitted).

The Court of Appeals acknowledged that this rule limits "the range of professionals subject to an *Estelle* action." *Ibid.*[6]

[6] In addition, the Court of Appeals rejected petitioner's contention that the provision of medical services to inmates is an "exclusive state function." The court explained: "Decisions made in the day-to-day rendering of medical services by a physician are not the kind of decisions traditionally

The dissent in the Court of Appeals offered three grounds for holding that service rendered by a prison doctor—whether a permanent member of a prison medical staff, or under limited contract with the prison—constitutes action under color of state law for purposes of § 1983. First, the dissent concluded that prison doctors are as much "state actors" as are other prison employees, finding no significant difference between Doctor Atkins and the physician-employees assumed to be state actors in *Estelle*, and in *O'Connor* v. *Donaldson*, 422 U. S. 563 (1975). See 815 F. 2d, at 997–998. Second, the dissent concluded that the "public function" rationale applied because, in the prison context, medical care is within "the exclusive prerogative of the State," in that the State is obligated to provide medical services for its inmates and has complete control over the circumstances and sources of a prisoner's medical treatment. *Id.*, at 998–999, citing *Blum* v. *Yaretsky*, 457 U. S. 991, 1011 (1982). Finally, the dissent reasoned that the integral role the prison physician plays within the prison medical system qualifies his actions as under color of state law. 815 F. 2d, at 999, citing *United States* v. *Price*, 383 U. S. 787, 794 (1966) ("[W]illful participant in joint activity with the State or its agents" may be liable under § 1983); *Lugar* v. *Edmondson Oil Co.*, 457 U. S. 922, 931–932 (1982); and *Tower* v. *Glover*, 467 U. S. 914 (1984).

The Fourth Circuit's ruling conflicts with decisions of the Court of Appeals for the Eleventh Circuit, *Ancata* v. *Prison Health Services, Inc.*, 769 F. 2d 700 (1985), and *Ort* v. *Pinchback*, 786 F. 2d 1105 (1986), which are to the effect that a physician who contracts with the State to provide medical care to prison inmates, even if employed by a private entity, acts under color of state law for purposes of § 1983.[7] We

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and exclusively made by the sovereign for and on behalf of the public." *Id.*, at 996, n. 2, citing *Blum* v. *Yaretsky*, 457 U. S. 991, 1012 (1982).

[7] In their resolution of § 1983 cases, other Courts of Appeals implicitly have concluded that prison physicians act under color of state law when

granted certiorari to resolve the conflict. 484 U. S. 912 (1987).

II

To state a claim under § 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law. *Parratt* v. *Taylor*, 451 U. S. 527, 535 (1981) (overruled in part on other grounds, *Daniels* v. *Williams*, 474 U. S. 327, 330–331 (1986)); *Flagg Bros., Inc.* v. *Brooks*, 436 U. S. 149, 155 (1978). Petitioner West sought to fulfill the first requirement by alleging a violation of his rights secured by the Eighth Amendment under *Estelle* v. *Gamble*, 429 U. S. 97 (1976). There the Court held that deliberate indifference to a prisoner's serious medical needs, whether by a prison doctor or a prison guard, is prohibited by the Eighth Amendment. *Id.*, at 104–105. The adequacy of West's allegation and the sufficiency of his showing on this element of his § 1983 cause of action are not contested here.[8] The only issue be-

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treating incarcerated persons. See, *e. g.*, *Miranda* v. *Munoz*, 770 F. 2d 255 (CA1 1985) (upholding jury verdict in § 1983 action against physician under contract with State to work eight hours per week at jail); *Norris* v. *Frame*, 585 F. 2d 1183 (CA3 1978) (pretrial detainee's § 1983 claim against, among others, a prison physician); *Murrell* v. *Bennett*, 615 F. 2d 306 (CA5 1980) (reinstating inmate's § 1983 action against state prison physician); *Byrd* v. *Wilson*, 701 F. 2d 592 (CA6 1983) (reinstating § 1983 action against medical staff, including two physicians, at state penitentiary); *Duncan* v. *Duckworth*, 644 F. 2d 653 (CA7 1981) (allowing § 1983 action against prison hospital administrator to proceed until identity of responsible members of medical staff was determined); *Kelsey* v. *Ewing*, 652 F. 2d 4 (CA8 1981) (upholding § 1983 action against contract physician at state prison).

[8] In his brief and at oral argument, respondent insisted that West had failed to state a cause of action under *Estelle*. He maintains that petitioner's allegations "amount to no more than a claim of medical malpractice" or "a negligence based claim," which, under *Estelle*, 429 U. S., at 105–106, are not sufficient to make out a claim of cruel and unusual punishment. No court has undertaken the necessary factfinding, let alone passed upon this Eighth Amendment issue. We decline to address it here

fore us is whether petitioner has established the second essential element—that respondent acted under color of state law in treating West's injury.

A

The traditional definition of acting under color of state law requires that the defendant in a § 1983 action have exercised power "possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *United States* v. *Classic*, 313 U. S. 299, 326 (1941). Accord, *Monroe* v. *Pape*, 365 U. S. 167, 187 (1961) (adopting *Classic* standard for purposes of § 1983) (overruled in part on other grounds, *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658, 695–701 (1978)); *Polk County* v. *Dodson*, 454 U. S. 312, 317–318 (1981); *id.*, at 329 (dissenting opinion). In *Lugar* v. *Edmondson Oil Co.*, *supra*, the Court made clear that if a defendant's conduct satisfies the state-action requirement of the Fourteenth Amendment, "that conduct [is] also action under color of state law and will support a suit under § 1983." *Id.*, at 935. Accord, *Rendell-Baker* v. *Kohn*, 457 U. S. 830, 838 (1982); *United States* v. *Price*, 383 U. S., at 794, n. 7. In such circumstances, the defendant's alleged infringement of the plaintiff's federal rights is "fairly attributable to the State." *Lugar*, 457 U. S., at 937.

To constitute state action, "the deprivation must be caused by the exercise of some right or privilege created by the State . . . or by a person for whom the State is responsible," and "the party charged with the deprivation must be a person who may fairly be said to be a state actor." *Ibid.* "[S]tate employment is generally sufficient to render the defendant a state actor." *Id.*, at 936, n. 18; see *id.*, at 937. It is firmly

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in the first instance, particularly in light of settled doctrine that we avoid constitutional questions whenever possible. See *Spector Motor Service, Inc.* v. *McLaughlin*, 323 U. S. 101, 105 (1944); *Jean* v. *Nelson*, 472 U. S. 846, 854 (1985).

established that a defendant in a § 1983 suit acts under color of state law when he abuses the position given to him by the State. See *Monroe* v. *Pape*, 365 U. S., at 172. Thus, generally, a public employee acts under color of state law while acting in his official capacity or while exercising his responsibilities pursuant to state law. See, *e. g.*, *Parratt* v. *Taylor*, 451 U. S., at 535–536; *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144, 152 (1970). See also *Flagg Bros., Inc.* v. *Brooks*, 436 U. S., at 157, n. 5.

Indeed, *Polk County* v. *Dodson*, relied upon by the Court of Appeals, is the only case in which this Court has determined that a person who is employed by the State and who is sued under § 1983 for abusing his position in the performance of his assigned tasks was not acting under color of state law. The Court held that "a public defender does not act under color of state law when performing a lawyer's traditional functions as counsel to a defendant in a criminal proceeding." 454 U. S., at 325. In this capacity, the Court noted, a public defender differs from the typical government employee and state actor. While performing his duties, the public defender retains all of the essential attributes of a private attorney, including, most importantly, his "professional independence," which the State is constitutionally obliged to respect. *Id.*, at 321–322. A criminal lawyer's professional and ethical obligations require him to act in a role independent of and in opposition to the State. *Id.*, at 318–319, 320. The Court accordingly concluded that when representing an indigent defendant in a state criminal proceeding, the public defender does not act under color of state law for purposes of § 1983 because he "is not acting on behalf of the State; he is the State's adversary." *Id.*, at 323, n. 13. See also *Lugar* v. *Edmondson Oil Co.*, 457 U. S., at 936, n. 18.

B

We disagree with the Court of Appeals and respondent that *Polk County* dictates a conclusion that respondent did

not act under color of state law in providing medical treatment to petitioner. In contrast to the public defender, Doctor Atkins' professional and ethical obligation to make independent medical judgments did not set him in conflict with the State and other prison authorities. Indeed, his relationship with other prison authorities was cooperative. "Institutional physicians assume an obligation to the mission that the State, through the institution, attempts to achieve." *Polk County*, 454 U. S., at 320. The Manual governing prison health care in North Carolina's institutions, which Doctor Atkins was required to observe, declares: "The provision of health care is a joint effort of correctional administrators and health care providers, and can be achieved only through mutual trust and cooperation."[9] Similarly, the American Medical Association Standards for Health Services in Prisons (1979) provide that medical personnel and other prison officials are to act in "close cooperation and coordination" in a "joint effort." Preface, at i; Standard 102, and Discussion. Doctor Atkins' professional obligations certainly did not oblige him to function as "the State's adversary." *Polk County*, 454 U. S., at 323, n. 13. We thus find the proffered analogy between respondent and the public defender in *Polk County* unpersuasive.

Of course, the Court of Appeals did not perceive the adversarial role the defense lawyer plays in our criminal justice system as the decisive factor in the *Polk County* decision. The court, instead, appears to have misread *Polk County* as establishing the general principle that professionals do not act under color of state law when they act in their professional capacities. The court considered a professional not to be subject to suit under § 1983 unless he was exercising "custodial or supervisory" authority. 815 F. 2d, at 995. To the extent this Court in *Polk County* relied on the fact that the public defender is a "professional" in concluding that he

[9] North Carolina Division of Prisons Health Care Procedure Manual § 100.5. See App. to Brief for Petitioner 8a.

was not engaged in state action, the case turned on the particular professional obligation of the criminal defense attorney to be an adversary of the State, not on the independence and integrity generally applicable to professionals as a class. Indeed, the Court of Appeals' reading would be inconsistent with cases, decided before and since *Polk County*, in which this Court either has identified professionals as state actors, see, *e. g.*, *Tower* v. *Glover*, 467 U. S. 914 (1984) (state public defenders), or has assumed that professionals are state actors in § 1983 suits, see, *e. g.*, *Estelle* v. *Gamble*, 429 U. S. 97 (1976) (medical director of state prison who was also the treating physician). See also *Youngberg* v. *Romeo*, 457 U. S. 307, 322–323, and n. 30 (1982) (establishing standards to determine whether decisions of "professional" regarding treatment of involuntarily committed can create liability for a due process violation). Defendants are not removed from the purview of § 1983 simply because they are professionals acting in accordance with professional discretion and judgment.[10]

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[10] We do not suggest that this factor is entirely irrelevant to the state-action inquiry. Where the issue is whether a *private* party is engaged in activity that constitutes state action, it may be relevant that the challenged activity turned on judgments controlled by professional standards, where those standards are not established by the State. The Court has held that "a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Blum* v. *Yaretsky*, 457 U. S., at 1004 (decisions of physicians and administrators of privately owned and operated nursing home to transfer Medicaid patients not state action); *Rendell-Baker* v. *Kohn*, 457 U. S. 830, 840 (1982) (discharge decisions of privately owned and operated school not state action). In both *Blum* and *Rendell-Baker*, the fact that the private entities received state funding and were subject to state regulation did not, without more, convert their conduct into state action. See *Blum* v. *Yaretsky*, 457 U. S., at 1004; *Rendell-Baker* v. *Kohn*, 457 U. S., at 840–843. The Court suggested that the private party's challenged decisions could satisfy the state-action requirement if they were made on the basis of some rule of decision for which the State is responsible. The Court found, however, that the decisions were based on independent pro-

The Court of Appeals' approach to determining who is subject to suit under § 1983, wholeheartedly embraced by respondent, cannot be reconciled with this Court's decision in *Estelle*, which demonstrates that custodial and supervisory functions are irrelevant to an assessment whether the particular action challenged was performed under color of state law. In *Estelle*, the inmate's Eighth Amendment claim was brought against the physician-employee, Dr. Gray, in his capacity both as treating physician and as medical director of the state prison system. See 429 U. S., at 107. Gray was sued, however, solely on the basis of allegedly substandard medical treatment given to the plaintiff; his supervisory and custodial functions were not at issue. The Court's opinion did not suggest that Gray had not acted under color of state law in treating the inmate.[11] To the contrary, the infer-

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fessional judgments and were not subject to state direction. Thus, the requisite "nexus" to the State was absent.

This determination cannot be transformed into the proposition that no person acts under color of state law where he is exercising independent professional judgment. "[T]he exercise of . . . independent professional judgment," is not, as the Court of Appeals suggested, "the primary test." 815 F. 2d, at 995, n. 1. And *Blum* and *Rendell-Baker* provide no support for respondent's argument that a physician, employed by the State to fulfill the State's constitutional obligations, does not act under color of state law merely because he renders medical care in accordance with professional obligations.

[11] The Court of Appeals, in our view, misunderstood this Court's *Polk County* discussion of *O'Connor* v. *Donaldson*, 422 U. S. 563 (1975), and *Estelle* v. *Gamble*, 429 U. S. 97 (1976). We observed that *O'Connor* involved claims against a psychiatrist who served as the superintendent at a state mental hospital, and that *Estelle* involved a physician who was the medical director of the Texas Department of Corrections and the chief medical officer of a prison hospital. *Polk County*, 454 U. S., at 320. The Court made these observations, however, in the context of contrasting the role of the public defender with that of the physicians in response to the argument that state employment alone is sufficient to fulfill the under-color-of-state-law requirement. See *id.*, at 319–320. We agree with the dissent in the Court of Appeals that the Court discussed these facts "in order to highlight the cooperative relationship between the doctors and the

ence to be drawn from *Estelle* is that the medical treatment of prison inmates by prison physicians is state action. The Court explicitly held that "indifference . . . manifested by prison doctors in their response to the prisoner's needs . . . states a cause of action under § 1983." *Id.*, at 104–105; see *id.*, at 104, n. 10 (citing with approval Courts of Appeals' decisions holding prison doctors liable for Eighth Amendment claims brought under § 1983 without mention of supervisory and custodial duties). The Court of Appeals' rationale would sharply undermine this holding.[12]

C

We now make explicit what was implicit in our holding in *Estelle:* Respondent, as a physician employed by North Carolina to provide medical services to state prison inmates, acted under color of state law for purposes of § 1983 when undertaking his duties in treating petitioner's injury. Such conduct is fairly attributable to the State.

The Court recognized in *Estelle:* "An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met." 429 U. S., at 103. In light of this, the Court held that the State has a constitutional obligation, under the Eighth Amendment, to provide adequate medical care to those whom it has incarcerated. *Id.*, at 104. See also *Spicer* v. *Williamson*, 191 N. C. 487, 490, 132 S. E. 291, 293 (1926) (common law requires

state and thus the absence of an adversarial relationship akin to that existing between public defenders and the state." 815 F. 2d, at 997–998. See *Polk County*, 454 U. S., at 320 ("Institutional physicians assume an obligation to the mission that the State, through the institution, attempts to achieve"). Nothing in the Court's opinion stands for the proposition that a prison physician must be acting in a custodial or supervisory function in order to act under color of state law.

[12] Furthermore, it would greatly diminish the meaning of a prisoner's Eighth Amendment right, since few of those with supervisory and custodial functions are likely to be involved directly in patient care. And § 1983 liability is not available under the doctrine of *respondeat superior*. *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658, 690–695 (1978).

North Carolina to provide medical care to its prison inmates), cited in *Estelle*, 429 U. S., at 104, n. 9. North Carolina employs physicians, such as respondent, and defers to their professional judgment, in order to fulfill this obligation. By virtue of this relationship, effected by state law, Doctor Atkins is authorized and obliged to treat prison inmates, such as West.[13] He does so "clothed with the authority of state law." *United States* v. *Classic*, 313 U. S., at 326. He is "a person who may fairly be said to be a state actor." *Lugar* v. *Edmondson Oil Co.*, 457 U. S., at 937. It is only those physicians authorized by the State to whom the inmate may turn. Under state law, the only medical care West could receive for his injury was that provided by the State. If Doctor Atkins misused his power by demonstrating deliberate indifference to West's serious medical needs, the resultant deprivation was caused, in the sense relevant for state-action inquiry, by the State's exercise of its right to punish West by incarceration and to deny him a venue independent of the State to obtain needed medical care.

The fact that the State employed respondent pursuant to a contractual arrangement that did not generate the same benefits or obligations applicable to other "state employees" does not alter the analysis. It is the physician's function within the state system, not the precise terms of his employment, that determines whether his actions can fairly be at-

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[13] By statute, the North Carolina Department of Correction is required to provide health services to its prisoners. N. C. Gen. Stat. § 148–19 (1987). In compliance with the statute, state regulations charge the Director, Division of Prisons, with the responsibility of providing each prisoner the services necessary to maintain basic health. 5 N. C. Admin. Code § 02E.0201 (1987). State regulations provide that the delivery of health services at each facility is the responsibility of the prison administrator, who must designate a specific health authority "who is charged with the responsibility to provide health services to that facility." § 02E.0202. Pursuant to these provisions, Doctor Atkins was employed by the Director, Division of Prisons, and was paid by the State, to provide orthopedic services to the State's prisoners.

tributed to the State. Whether a physician is on the state payroll or is paid by contract, the dispositive issue concerns the relationship among the State, the physician, and the prisoner. Contracting out prison medical care does not relieve the State of its constitutional duty to provide adequate medical treatment to those in its custody, and it does not deprive the State's prisoners of the means to vindicate their Eighth Amendment rights.[14] The State bore an affirmative obligation to provide adequate medical care to West; the State delegated that function to respondent Atkins; and respondent voluntarily assumed that obligation by contract.

Nor does the fact that Doctor Atkins' employment contract did not require him to work exclusively for the prison make him any less a state actor than if he performed those duties as a full-time, permanent member of the state prison medical staff. It is the physician's function while working for the State, not the amount of time he spends in performance of those duties or the fact that he may be employed by others to perform similar duties, that determines whether he is acting under color of state law.[15] In the State's employ, respondent

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[14] As the dissent in the Court of Appeals explained, if this were the basis for delimiting § 1983 liability, "the state will be free to contract out all services which it is constitutionally obligated to provide and leave its citizens with no means for vindication of those rights, whose protection has been delegated to 'private' actors, when they have been denied." 815 F. 2d, at 998.

[15] Contrary to respondent's intimations, the fact that a state employee's role parallels one in the private sector is not, by itself, reason to conclude that the former is not acting under color of state law in performing his duties. "If an individual is possessed of state authority and purports to act under that authority, his action is state action. It is irrelevant that he might have taken the same action had he acted in a purely private capacity . . . ." *Griffin* v. *Maryland*, 378 U. S. 130, 135 (1964).

Moreover, although the provision of medical services is a function traditionally performed by private individuals, the context in which respondent performs these services for the State (quite apart from the source of remuneration) distinguishes the relationship between respondent and West from the ordinary physician-patient relationship. Cf. *Polk County*, 454

worked as a physician at the prison hospital fully vested with state authority to fulfill essential aspects of the duty, placed on the State by the Eighth Amendment and state law, to provide essential medical care to those the State had incarcerated. Doctor Atkins must be considered to be a state actor.

III

For the reasons stated above, we conclude that respondent's delivery of medical treatment to West was state action fairly attributable to the State, and that respondent therefore acted under color of state law for purposes of § 1983. Accordingly, we reverse the judgment of the Court of Ap-

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U. S., at 318. Respondent carried out his duties at the state prison within the prison hospital. That correctional setting, specifically designed to be removed from the community, inevitably affects the exercise of professional judgment. Unlike the situation confronting free patients, the nonmedical functions of prison life inevitably influence the nature, timing, and form of medical care provided to inmates such as West. By regulation, matters of medical health involving clinical judgment are the prison physician's "sole province." 5 N. C. Admin. Code § 02E.0204 (1987). These same regulations, however, require respondent to provide medical services "in keeping with the security regulations of the facility." *Ibid.* The record is undeveloped as to the specific limitations placed on respondent by the state prison system. But studies of prison health care, and simple common sense, suggest that his delivery of medical care was not unaffected by the fact that the State controlled the circumstances and sources of a prisoner's medical treatment. For one thing, the State's financial resources are limited. Further, prisons and jails are inherently coercive institutions that for security reasons must exercise nearly total control over their residents' lives and the activities within their confines; general schedules strictly regulate work, exercise, and diet. These factors can, and most often do, have a significant impact on the provision of medical services in prisons. See generally Neisser, Is There a Doctor in the Joint? The Search for Constitutional Standards for Prison Health Care, 63 Va. L. Rev. 921, 936–946 (1977) (describing the institutional effects on the delivery of health care services in prisons); M. Wishart & N. Dubler, Health Care in Prisons, Jails and Detention Centers: Some Legal and Ethical Dilemmas 4 (1983) ("[T]he delivery of medical services in the nation's prisons and jails is beset with problems and conflicts which are virtually unknown to other health care services").

peals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

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

I agree with the opinion of the Court that respondent acted under color of state law for purposes of § 1983. I do not believe that a doctor who lacks supervisory or other penological duties can inflict "punishment" within the meaning of that term in the Eighth Amendment. Cf. *Johnson* v. *Glick*, 481 F. 2d 1028, 1031–1032 (CA2) (Friendly, J.), cert. denied *sub nom. John* v. *Johnson*, 414 U. S. 1033 (1973). I am also of the view, however, that a physician who acts on behalf of the State to provide needed medical attention to a person involuntarily in state custody (in prison or elsewhere) and prevented from otherwise obtaining it, and who causes physical harm to such a person by deliberate indifference, violates the Fourteenth Amendment's protection against the deprivation of liberty without due process. See *Youngberg* v. *Romeo*, 457 U. S. 307, 315, 324 (1982) (dictum); see generally *Daniels* v. *Williams*, 474 U. S. 327, 331 (1986); *Ingraham* v. *Wright*, 430 U. S. 651, 672–674, and n. 41 (1977); *Rochin* v. *California*, 342 U. S. 165, 169–174 (1952); *Johnson*, *supra*, at 1032–1033. I note that petitioner's *pro se* complaint merely claimed violation of his rights, and it is the courts that have specified which constitutional provision confers those rights.

Syllabus

SUPREME COURT OF VIRGINIA ET AL. *v.* FRIEDMAN

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

No. 87–399. Argued March 21, 1988—Decided June 20, 1988

Under Virginia Supreme Court Rule 1A:1, qualified lawyers admitted to practice in another State may be admitted to the Virginia Bar "on motion," that is, without taking Virginia's bar examination. The Rule requires, *inter alia*, that the applicant be a permanent resident of Virginia. Appellee attorney, a Maryland resident who practices and maintains her offices at her corporate employer's place of business in Virginia, applied for admission to the Virginia Bar on motion. The Virginia Supreme Court denied the application for failure to satisfy the residency requirement, concluding that, contrary to appellee's contention, the decision in *Supreme Court of New Hampshire* v. *Piper*, 470 U. S. 274, which held that a residency requirement imposed on lawyers who had passed the State's bar examination violated the Privileges and Immunities Clause of Article IV, § 2, of the Federal Constitution, was not applicable in the context of "discretionary" admissions on motion. Appellee then filed suit against the Virginia Supreme Court and its Clerk in Federal District Court, alleging that Rule 1A:1's residency requirement violated the Privileges and Immunities Clause. The court entered summary judgment for appellee, and the Court of Appeals affirmed.

Held: Virginia's residency requirement for admission to the State's bar without examination violates the Privileges and Immunities Clause. Pp. 64–70.

(a) A nonresident's interest in practicing law on terms of substantial equality with those enjoyed by residents is a privilege protected by the Clause. This Court's precedents do not support appellants' contention that so long as an applicant has the alternative of gaining admission to a State's bar, without regard to residence, by passing the bar examination, the State has not discriminated against nonresidents "on a matter of fundamental concern." The Clause is implicated whenever a State does not permit qualified nonresidents to practice law within its borders on terms of substantial equality with its own residents. Cf. *Piper*, *supra*. Appellants' theory that the State could constitutionally require that all bar applicants pass an examination is irrelevant to the question whether the Clause is applicable in the circumstances of this case. The State has burdened the right to practice law, a privilege protected by the

Clause, by discriminating among otherwise equally qualified applicants solely on the basis of citizenship or residency. Pp. 65–67.

(b) The State has failed to show that its discrimination against nonresidents bears a close relation to the achievement of substantial state objectives. Rule 1A:1's residency requirement cannot be justified as assuring, in tandem with the Rule's requirement that the applicant practice full time as a member of the Virginia Bar, that attorneys admitted on motion will have the same commitment to service and familiarity with Virginia law that is possessed by applicants securing admission upon examination. Lawyers who are admitted in other States and seek admission in Virginia are not less likely to respect the bar and further its interests solely because they are nonresidents. To the extent that the State is justifiably concerned with ensuring that its attorneys keep abreast of legal developments, it can protect such interest through other equally or more effective means that do not themselves infringe constitutional protections. Nor can the residency requirement be justified as a necessary aid to the enforcement of Rule 1A:1's full-time practice requirement. Virginia already requires that attorneys admitted on motion maintain an office in Virginia. This requirement facilitates compliance with the full-time practice requirement in nearly the identical manner that the residency restriction does, rendering the latter restriction largely redundant. Pp. 67–70.

822 F. 2d 423, affirmed.

KENNEDY, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, BLACKMUN, STEVENS, and O'CONNOR, JJ., joined. REHNQUIST, C. J., filed a dissenting opinion, in which SCALIA, J., joined, *post*, p. 70.

Gregory E. Lucyk, Assistant Attorney General of Virginia, argued the cause for appellants. With him on the briefs were *Mary Sue Terry*, Attorney General, *Gail Starling Marshall*, Deputy Attorney General, and *William H. Hauser*, Senior Assistant Attorney General.

Cornish F. Hitchcock argued the cause for appellee. With him on the brief were *Alan B. Morrison* and *John J. McLaughlin*.*

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*A brief of *amici curiae* urging reversal was filed for the State of Wyoming et al. by *Joseph B. Meyer*, Attorney General, and *Mary B. Guthrie*, Senior Assistant Attorney General, joined by the Attorneys General for

JUSTICE KENNEDY delivered the opinion of the Court.

Qualified lawyers admitted to practice in other States may be admitted to the Virginia Bar "on motion," that is, without taking the bar examination which Virginia otherwise requires. The State conditions such admission on a showing, among other matters, that the applicant is a permanent resident of Virginia. The question for decision is whether this residency requirement violates the Privileges and Immunities Clause of the United States Constitution, Art. IV, § 2, cl. 1. We hold that it does.

I

Myrna E. Friedman was admitted to the Illinois Bar by examination in 1977 and to the District of Columbia Bar by reciprocity in 1980. From 1977 to 1981, she was employed by the Department of the Navy in Arlington, Virginia, as a civilian attorney, and from 1982 until 1986, she was an attorney in private practice in Washington, D. C. In January 1986, she became associate general counsel for ERC International, Inc., a Delaware corporation. Friedman practices and maintains her offices at the company's principal place of business in Vienna, Virginia. Her duties at ERC International include drafting contracts and advising her employer and its subsidiaries on matters of Virginia law.

From 1977 to early 1986, Friedman lived in Virginia. In February 1986, however, she married and moved to her husband's home in Cheverly, Maryland. In June 1986, Friedman applied for admission to the Virginia Bar on motion.

The applicable rule, promulgated by the Supreme Court of Virginia pursuant to statute, is Rule 1A:1. The Rule permits admission on motion of attorneys who are licensed

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their respective States as follows: *Neil F. Hartigan* of Illinois, *Thomas J. Miller* of Iowa, and *Anthony J. Celebrezze, Jr.*, of Ohio.

Briefs of *amici curiae* urging affirmance were filed for the American Corporate Counsel Association by *Lawrence A. Salibra II;* and for the New York State Bar Association by *Maryann Saccomando Freedman, Monroe H. Freedman,* and *Ronald J. Levine.*

to practice in another jurisdiction, provided the other jurisdiction admits Virginia attorneys without examination. The applicant must have been licensed for at least five years and the Virginia Supreme Court must determine that the applicant:

"(a) Is a proper person to practice law.

"(b) Has made such progress in the practice of law that it would be unreasonable to require him to take an examination.

"(c) Has become a permanent resident of the Commonwealth.

"(d) Intends to practice full time as a member of the Virginia bar."

In a letter accompanying her application, Friedman alerted the Clerk of the Virginia Supreme Court to her change of residence, but argued that her application should nevertheless be granted. Friedman gave assurance that she would be engaged full-time in the practice of law in Virginia, that she would be available for service of process and court appearances, and that she would keep informed of local rules. She also asserted that "there appears to be no reason to discriminate against my petition as a nonresident for admission to the Bar on motion," that her circumstances fit within the purview of this Court's decision in *Supreme Court of New Hampshire* v. *Piper*, 470 U. S. 274 (1985), and that accordingly she was entitled to admission under the Privileges and Immunities Clause of the Constitution, Art. IV, § 2, cl. 1. See App. 34–35.

The Clerk wrote Friedman that her request had been denied. He explained that because Friedman was no longer a permanent resident of the Commonwealth of Virginia, she was not eligible for admission to the Virginia Bar pursuant to Rule 1A:1. He added that the court had concluded that our decision in *Piper*, which invalidated a residency requirement imposed on lawyers who had passed a State's bar examination, was "not applicable" to the "discretionary requirement

in Rule 1A:1 of residence as a condition of admission by reciprocity." App. 51–52.

Friedman then commenced this action, against the Supreme Court of Virginia and its Clerk, in the United States District Court for the Eastern District of Virginia. She alleged that the residency requirement of Rule 1A:1 violated the Privileges and Immunities Clause. The District Court entered summary judgment in Friedman's favor, holding that the requirement of residency for admission without examination violates the Clause.*

The Court of Appeals for the Fourth Circuit unanimously affirmed. 822 F. 2d 423 (1987). The court first rejected appellants' threshold contention that the Privileges and Immunities Clause was not implicated by the residency requirement of Rule 1A:1 because the Rule did not absolutely prohibit the practice of law in Virginia by nonresidents. *Id.*, at 427–428. Turning to the justifications offered for the Rule, the court rejected, as foreclosed by *Piper*, the theory that the different treatment accorded to nonresidents could be justified by the State's interest in enhancing the quality of legal practitioners. The court was also unpersuaded by appellant's contention that the residency requirement promoted compliance with the Rule's full-time practice requirement, an argument the court characterized as an unsupported assertion that "residents are more likely to honor their commitments to practice full-time in Virginia than are nonresidents." *Id.*, at 429. Thus, the court concluded that there was no substantial reason for the Rule's discrimination against nonresidents, and that the discrimination did not bear

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*The District Court did not address Friedman's claims that the residency requirement of Rule 1A:1 also violates the Commerce Clause and the Equal Protection Clause of the Fourteenth Amendment. The Court of Appeals did not pass on these contentions either, and our resolution of Friedman's claim that the residency requirement violates the Privileges and Immunities Clause makes it unnecessary for us to reach them.

a substantial relation to the objectives proffered by appellants.

The Supreme Court of Virginia and its Clerk filed a timely notice of appeal. We noted probable jurisdiction, 484 U. S. 923 (1987), and we now affirm.

II

Article IV, § 2, cl. 1, of the Constitution provides that the "Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." The provision was designed "to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned." *Paul* v. *Virginia*, 8 Wall. 168, 180 (1869). See also *Toomer* v. *Witsell*, 334 U. S. 385, 395 (1948) (the Privileges and Immunities Clause "was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy"). The Clause "thus establishes a norm of comity without specifying the particular subjects as to which citizens of one State coming within the jurisdiction of another are guaranteed equality of treatment." *Austin* v. *New Hampshire*, 420 U. S. 656, 660 (1975).

While the Privileges and Immunities Clause cites the term "Citizens," for analytic purposes citizenship and residency are essentially interchangeable. See *United Building & Construction Trades Council* v. *Mayor and Council of Camden*, 465 U. S. 208, 216 (1984). When examining claims that a citizenship or residency classification offends privileges and immunities protections, we undertake a two-step inquiry. First, the activity in question must be "'sufficiently basic to the livelihood of the Nation' . . . as to fall within the purview of the Privileges and Immunities Clause . . . ." *Id.*, at 221–222, quoting *Baldwin* v. *Montana Fish & Game Comm'n*, 436 U. S. 371, 388 (1978). For it is "'[o]nly with respect to those "privileges" and "immunities" bearing on the vitality of the Nation as a single entity' that a State must ac-

cord residents and nonresidents equal treatment." *Supreme Court of New Hampshire* v. *Piper*, 470 U. S., at 279, quoting *Baldwin*, *supra*, at 383. Second, if the challenged restriction deprives nonresidents of a protected privilege, we will invalidate it only if we conclude that the restriction is not closely related to the advancement of a substantial state interest. *Piper*, *supra*, at 284. Appellants assert that the residency requirement offends neither part of this test. We disagree.

A

Appellants concede, as they must, that our decision in *Piper* establishes that a nonresident who takes and passes an examination prescribed by the State, and who otherwise is qualified for the practice of law, has an interest in practicing law that is protected by the Privileges and Immunities Clause. Appellants contend, however, that the discretionary admission provided for by Rule 1A:1 is not a privilege protected by the Clause for two reasons. First, appellants argue that the bar examination "serves as an adequate, alternative means of gaining admission to the bar." Brief for Appellants 20. In appellants' view, "[s]o long as any applicant may gain admission to a State's bar, without regard to residence, by passing the bar examination," *id.*, at 21, the State cannot be said to have discriminated against nonresidents "as a matter of fundamental concern." *Id.*, at 19. Second, appellants argue that the right to admission on motion is not within the purview of the Clause because, without offense to the Constitution, the State could require all bar applicants to pass an examination. Neither argument is persuasive.

We cannot accept appellants' first theory because it is quite inconsistent with our precedents. We reaffirmed in *Piper* the well-settled principle that "'one of the privileges which the Clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State.'" *Piper*, *supra*, at 280, quoting *Toomer* v. *Witsell*, *supra*, at 396. See also

United Building & Construction Trades Council, *supra*, at 219 ("Certainly, the pursuit of a common calling is one of the most fundamental of those privileges protected by the Clause"). After reviewing our precedents, we explicitly held that the practice of law, like other occupations considered in those cases, is sufficiently basic to the national economy to be deemed a privilege protected by the Clause. See *Piper*, *supra*, at 280–281. The clear import of *Piper* is that the Clause is implicated whenever, as is the case here, a State does not permit qualified nonresidents to practice law within its borders on terms of substantial equality with its own residents.

Nothing in our precedents, moreover, supports the contention that the Privileges and Immunities Clause does not reach a State's discrimination against nonresidents when such discrimination does not result in their total exclusion from the State. In *Ward* v. *Maryland*, 12 Wall. 418 (1871), for example, the Court invalidated a statute under which residents paid an annual fee of $12 to $150 for a license to trade foreign goods, while nonresidents were required to pay $300. Similarly, in *Toomer*, *supra*, the Court held that nonresident fishermen could not be required to pay a license fee 100 times the fee charged to residents. In *Hicklin* v. *Orbeck*, 437 U. S. 518 (1978), the Court invalidated a statute requiring that residents be hired in preference to nonresidents for all positions related to the development of the State's oil and gas resources. Indeed, as the Court of Appeals correctly noted, the New Hampshire rule struck down in *Piper* did not result in the total exclusion of nonresidents from the practice of law in that State. 822 F. 2d, at 427 (citing *Piper*, *supra*, at 277, n. 2).

Further, we find appellants' second theory—that Virginia could constitutionally require that all applicants to its bar take and pass an examination—quite irrelevant to the question whether the Clause is applicable in the circumstances of this case. A State's abstract authority to require from

resident and nonresident alike that which it has chosen to demand from the nonresident alone has never been held to shield the discriminatory distinction from the reach of the Privileges and Immunities Clause. Thus, the applicability of the Clause to the present case no more turns on the legality *vel non* of an examination requirement than it turned on the inherent reasonableness of the fees charged to nonresidents in *Toomer* and *Ward*. The issue instead is whether the State has burdened the right to practice law, a privilege protected by the Privileges and Immunities Clause, by discriminating among otherwise equally qualified applicants solely on the basis of citizenship or residency. We conclude it has.

B

Our conclusion that the residence requirement burdens a privilege protected by the Privileges and Immunities Clause does not conclude the matter, of course; for we repeatedly have recognized that the Clause, like other constitutional provisions, is not an absolute. See, *e. g.*, *Piper*, *supra*, at 284; *United Building & Construction Trades Council*, 465 U. S., at 222; *Toomer*, 334 U. S., at 396. The Clause does not preclude disparity in treatment where substantial reasons exist for the discrimination and the degree of discrimination bears a close relation to such reasons. See *United Building & Construction Trades Council*, *supra*, at 222. In deciding whether the degree of discrimination bears a sufficiently close relation to the reasons proffered by the State, the Court has considered whether, within the full panoply of legislative choices otherwise available to the State, there exist alternative means of furthering the State's purpose without implicating constitutional concerns. See *Piper*, *supra*, at 284.

Appellants offer two principal justifications for the Rule's requirement that applicants seeking admission on motion reside within the Commonwealth of Virginia. First, they contend that the residence requirement assures, in tandem with

the full-time practice requirement, that attorneys admitted on motion will have the same commitment to service and familiarity with Virginia law that is possessed by applicants securing admission upon examination. Attorneys admitted on motion, appellants argue, have "no personal investment" in the jurisdiction; consequently, they "are entitled to no presumption that they will willingly and actively participate in bar activities and obligations, or fulfill their public service responsibilities to the State's client community." Brief for Appellants 26–27. Second, appellants argue that the residency requirement facilitates enforcement of the full-time practice requirement of Rule 1A:1. We find each of these justifications insufficient to meet the State's burden of showing that the discrimination is warranted by a substantial state objective and closely drawn to its achievement.

We acknowledge that a bar examination is one method of assuring that the admitted attorney has a stake in his or her professional licensure and a concomitant interest in the integrity and standards of the bar. A bar examination, as we know judicially and from our own experience, is not a casual or lighthearted exercise. The question, however, is whether lawyers who are admitted in other States and seek admission in Virginia are less likely to respect the bar and further its interests solely because they are nonresidents. We cannot say this is the case. While *Piper* relied on an examination requirement as an indicium of the nonresident's commitment to the bar and to the State's legal profession, see *Piper*, 470 U. S., at 285, it does not follow that when the State waives the examination it may make a distinction between residents and nonresidents.

Friedman's case proves the point. She earns her living working as an attorney in Virginia, and it is of scant relevance that her residence is located in the neighboring State of Maryland. It is indisputable that she has a substantial stake in the practice of law in Virginia. Indeed, despite appellants' suggestion at oral argument that Friedman's case is

"atypical," Tr. of Oral Arg. 51, the same will likely be true of all nonresident attorneys who are admitted on motion to the Virginia Bar, in light of the State's requirement that attorneys so admitted show their intention to maintain an office and a regular practice in the State. See *Application of Brown*, 213 Va. 282, 286, n. 3, 191 S. E. 2d 812, 815, n. 3 (1972) (interpreting full-time practice requirement of Rule 1A:1). This requirement goes a long way toward ensuring that such attorneys will have an interest in the practice of law in Virginia that is at least comparable to the interest we ascribed in *Piper* to applicants admitted upon examination. Accordingly, we see no reason to assume that nonresident attorneys who, like Friedman, seek admission to the Virginia bar on motion will lack adequate incentives to remain abreast of changes in the law or to fulfill their civic duties.

Further, to the extent that the State is justifiably concerned with ensuring that its attorneys keep abreast of legal developments, it can protect these interests through other equally or more effective means that do not themselves infringe constitutional protections. While this Court is not well positioned to dictate specific legislative choices to the State, it is sufficient to note that such alternatives exist and that the State, in the exercise of its legislative prerogatives, is free to implement them. The Supreme Court of Virginia could, for example, require mandatory attendance at periodic continuing legal education courses. See *Piper*, *supra*, at 285, n. 19. The same is true with respect to the State's interest that the nonresident bar member does his or her share of volunteer and *pro bono* work. A "nonresident bar member, like the resident member, could be required to represent indigents and perhaps to participate in formal legal-aid work." *Piper*, *supra*, at 287 (footnote omitted).

We also reject appellants' attempt to justify the residency restriction as a necessary aid to the enforcement of the full-time practice requirement of Rule 1A:1. Virginia already requires, pursuant to the full-time practice restriction of Rule

1A:1, that attorneys admitted on motion maintain an office for the practice of law in Virginia. As the Court of Appeals noted, the requirement that applicants maintain an office in Virginia facilitates compliance with the full-time practice requirement in nearly the identical manner that the residency restriction does, rendering the latter restriction largely redundant. 822 F. 2d, at 429. The office requirement furnishes an alternative to the residency requirement that is not only less restrictive, but also is fully adequate to protect whatever interest the State might have in the full-time practice restriction.

III

We hold that Virginia's residency requirement for admission to the State's bar without examination violates the Privileges and Immunities Clause. The nonresident's interest in practicing law on terms of substantial equality with those enjoyed by residents is a privilege protected by the Clause. A State may not discriminate against nonresidents unless it shows that such discrimination bears a close relation to the achievement of substantial state objectives. Virginia has failed to make this showing. Accordingly, the judgment of the Court of Appeals is affirmed.

It is so ordered.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE SCALIA joins, dissenting.

Three Terms ago the Court invalidated a New Hampshire Bar rule which denied admission to an applicant who had passed the state bar examination because she was not, and would not become, a resident of the State. *Supreme Court of New Hampshire* v. *Piper*, 470 U. S. 274 (1985). In the present case the Court extends the reasoning of *Piper* to invalidate a Virginia Bar rule allowing admission on motion without examination to qualified applicants, but restricting the privilege to those applicants who have become residents of the State.

For the reasons stated in my dissent in *Piper*, I also disagree with the Court's decision in this case. I continue to believe that the Privileges and Immunities Clause of Article IV, § 2, does not require States to ignore residency when admitting lawyers to practice in the way that they must ignore residency when licensing traders in foreign goods, *Ward* v. *Maryland*, 12 Wall. 418 (1871), or when licensing commercial shrimp fishermen, *Toomer* v. *Witsell*, 334 U. S. 385 (1948).

I think the effect of today's decision is unfortunate even apart from what I believe is its mistaken view of the Privileges and Immunities Clause. Virginia's rule allowing admission on motion is an ameliorative provision, recognizing the fact that previous practice in another State may qualify a new resident of Virginia to practice there without the necessity of taking another bar examination. The Court's ruling penalizes Virginia, which has at least gone part way towards accommodating the present mobility of our population, but of course leaves untouched the rules of those States which allow no reciprocal admission on motion.* Virginia may of course retain the privilege of admission on motion without enforcing a residency requirement even after today's decision, but it might also decide to eliminate admission on motion altogether.

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*At present, 28 states do not allow reciprocal admission on motion: Alabama, Arizona, Arkansas, California, Delaware, Florida, Georgia, Hawaii, Idaho, Kansas, Louisiana, Maine, Maryland, Massachusetts, Mississippi, Montana, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Oregon, Rhode Island, South Carolina, South Dakota, Utah, Washington, and Wyoming.

UNITED STATES CATHOLIC CONFERENCE ET AL. *v.* ABORTION RIGHTS MOBILIZATION, INC., ET AL.

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

No. 87–416. Argued April 18, 1988—Decided June 20, 1988

Abortion Rights Mobilization, Inc., and others (ARM) filed suit against Government officials and petitioners, the United States Catholic Conference and the National Conference of Catholic Bishops, to revoke the Roman Catholic Church's tax-exempt status on the ground that the Church had violated the antielectioneering provision of 26 U. S. C. § 501(c)(3) (1988 ed.). After petitioners were dismissed as parties, they refused to comply with ARM's subpoenas seeking extensive documentary evidence, and were held in contempt. The Court of Appeals affirmed the contempt citation, ruling that a nonparty witness' jurisdictional challenge is limited to a claim that the district court lacks even colorable jurisdiction, a standard not met here.

Held: A nonparty witness may defend against a civil contempt adjudication by challenging the district court's subject-matter jurisdiction, and is not limited to the contention that the court lacked even colorable jurisdiction to hear the suit. Since a court's subpoena power cannot be more extensive than its jurisdiction, the subpoenas it issues in aid of determining the merits are void if the court lacks subject-matter jurisdiction over the underlying suit. Moreover, a nonparty witness has an unquestionable right to appeal a contempt adjudication, notwithstanding the absence of a final judgment in the underlying action. The contention that permitting a nonparty to challenge the court's jurisdiction would invite collusion, allowing parties to avoid restrictions on interlocutory appeals and to test jurisdiction by proxy, is not persuasive. Ample protections against collusive appeals exist in the courts of appeals' power to decline to treat the witness as a nonparty for purposes of the jurisdictional question, and in the usual provisions for sanctioning frivolous appeals or abuse of court processes. The rule followed in this case does not apply in criminal contempt proceedings, and does not affect a district court's inherent and legitimate authority to issue binding orders, including discovery orders, to nonparty witnesses, as necessary for the court to determine and rule upon its own jurisdiction, including subject-matter jurisdiction. Here, however, the District Court's order was not issued to aid a jurisdictional inquiry, since the subpoenas were meant to obtain discovery on the merits, and before the contempt order the District

Court twice ruled that it had subject-matter jurisdiction. Accordingly, on remand, the Court of Appeals must determine whether the District Court had such jurisdiction in the underlying action. If not, the subpoenas are void, and the contempt citation must be reversed. Pp. 76–80.

824 F. 2d 156, reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BRENNAN, WHITE, BLACKMUN, STEVENS, O'CONNOR, and SCALIA, JJ., joined. MARSHALL, J., filed a dissenting opinion, *post*, p. 80.

Kevin T. Baine argued the cause for petitioners. With him on the briefs were *Edward Bennett Williams*, *Charles H. Wilson*, *Richard S. Hoffman*, *Mark E. Chopko*, and *Phillip H. Harris*.

Alan I. Horowitz argued the cause for the federal respondents in support of petitioners pursuant to this Court's Rule 19.6. With him on the brief were *Solicitor General Fried*, *Assistant Attorney General Rose*, *Deputy Solicitor General Wallace*, *Robert S. Pomerance*, and *Teresa E. McLaughlin*.

Marshall Beil argued the cause and filed a brief for respondents.*

JUSTICE KENNEDY delivered the opinion of the Court.

The petitioners are the United States Catholic Conference and the National Conference of Catholic Bishops. Both organizations were held in civil contempt for failure to comply with subpoenas *duces tecum* issued by the United States

*Briefs of *amici curiae* urging reversal were filed for the Christian Legal Society by *Michael J. Woodruff* and *Samuel E. Ericsson;* and for the National Council of Churches of Christ in the U. S. A. et al. by *Edward McGlynn Gaffney, Jr.*, and *Douglas Laycock*.

Briefs of *amici curiae* urging affirmance were filed for the National Abortion Rights Action League et al. by *Ellyn R. Weiss;* and for the National Association of Laity by *Cletus P. Lyman*.

Briefs of *amici curiae* were filed for the American Civil Liberties Union Foundation et al. by *Steven R. Shapiro*, *John A. Powell*, *Helen Hershkoff*, *C. Edwin Baker*, and *Arthur N. Eisenberg;* and for the Rutherford Institute by *William Bonner*, *John F. Southworth, Jr.*, *Alfred J. Lindh*, *Ira W. Still III*, *William B. Hollberg*, *Randall A. Pentiuk*, *Thomas W. Strahan*, *James J. Knicely*, *John W. Whitehead*, and *David E. Morris*.

District Court for the Southern District of New York. The Conferences objected to issuance of the process, arguing, *inter alia*, that the District Court lacked subject-matter jurisdiction in the underlying suit. The Court of Appeals for the Second Circuit rejected this argument, ruling that a nonparty witness' jurisdictional challenge is limited to a claim that the District Court lacks even colorable jurisdiction, a standard not met here. We granted certiorari to resolve whether a nonparty witness may defend against a civil contempt adjudication by challenging the subject-matter jurisdiction of the district court. 484 U. S. 975 (1987). We hold the nonparty witness may raise such a claim, and now reverse.

I

In the underlying action, Abortion Rights Mobilization, Inc., and others (ARM) sued to revoke the tax-exempt status of the Roman Catholic Church in the United States. ARM alleged that the Conferences had violated the rules governing their tax-exempt status by participating in political activities.* Specifically, ARM claimed that "the Roman Catholic

*The Internal Revenue Code, 26 U. S. C. § 501(c)(3) (1988 ed.), as amended by Pub. L. 100–203, § 10711(a)(2), 101 Stat. 1330–464, exempts organizations from the payment of income taxes if they meet certain criteria. In pertinent part, that section provides:

"(c) List of exempt organizations.—The following organizations are referred to in subsection (a) [as exempt from taxation]:

. . . . . .

"(3) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office."

Church in the United States . . . , in violation of the clear language and intent of the anti-electioneering provision of 26 U. S. C. § 501(c)(3), has engaged in a persistent and regular pattern of intervening in elections nationwide in favor of candidates who support the Church's position on abortion and in opposition to candidates with opposing views." Brief for Respondents 7–8. The Conferences were originally named as parties to this suit, but were later dismissed, leaving the Secretary of the Treasury and the Commissioner of Internal Revenue as the sole defendants.

ARM served subpoenas on the Conferences in 1983, seeking extensive documentary evidence to support its claims. A series of court orders to produce, intertwined with other procedural motions, were followed by objections and refusals. These matters were extensively reported by the District Court. See *Abortion Rights Mobilization, Inc.* v. *Regan*, 544 F. Supp. 471 (1982) *(ARM I); Abortion Rights Mobilization, Inc.* v. *Regan*, 552 F. Supp. 364 (1982) *(ARM II); Abortion Rights Mobilization, Inc.* v. *Regan*, 603 F. Supp. 970 (1985) *(ARM III); Abortion Rights Mobilization, Inc.* v. *Baker*, 110 F. R. D. 337 (1986) *(ARM IV)*. After the Conferences informed the court that they could not "in conscience, comply with the subpoenas in question," the court, which had made detailed orders including orders limiting discovery at the behest of the Conferences, found the Conferences in civil contempt. *ARM IV*, *supra*, at 337. The court assessed fines of $50,000 against each Conference for each day of further noncompliance. The Court of Appeals affirmed, stating that "the *witnesses* have standing to question only whether the District Court has a colorable basis for exercising subject matter jurisdiction . . . ." *In re United States Catholic Conference*, 824 F. 2d 156, 158 (1987). The order was stayed pending appeal, and the stay remains in effect.

II

We hold that a nonparty witness can challenge the court's lack of subject-matter jurisdiction in defense of a civil contempt citation, notwithstanding the absence of a final judgment in the underlying action. Federal Rule of Civil Procedure 45 grants a district court the power to issue subpoenas as to witnesses and documents, but the subpoena power of a court cannot be more extensive than its jurisdiction. It follows that if a district court does not have subject-matter jurisdiction over the underlying action, and the process was not issued in aid of determining that jurisdiction, then the process is void and an order of civil contempt based on refusal to honor it must be reversed. As we observed in *United States* v. *Morton Salt Co.*, 338 U. S. 632, 642 (1950), "[t]he judicial subpoena power not only is subject to specific constitutional limitations, . . . but also is subject to those limitations inherent in the body that issues them because of the provisions of the Judiciary Article of the Constitution." Therefore, a nonparty witness may attack a civil contempt citation by asserting that the issuing court lacks jurisdiction over the case.

The right of a nonparty to appeal an adjudication of contempt cannot be questioned. The order finding a nonparty witness in contempt is appealable notwithstanding the absence of a final judgment in the underlying action. *United States* v. *Ryan*, 402 U. S. 530, 532 (1971); *Cobbledick* v. *United States*, 309 U. S. 323, 328 (1940). Once the right to appeal a civil contempt order is acknowledged, arguments in its legitimate support should not be so confined that the power of the issuing court remains untested. We are not confronted here with a nonparty witness attempting to challenge its civil contempt by raising matters in which it has no legitimate interest, for instance the District Court's lack of personal jurisdiction over the parties or a limitations statute that would compel dismissal of the action. As to such matters, even if it were ultimately determined that the court

should not have allowed the suit to proceed, the order or process it issued in the conduct of the litigation would still be valid.

The challenge in this case goes to the subject-matter jurisdiction of the court and hence its power to issue the order. The distinction between subject-matter jurisdiction and waivable defenses is not a mere nicety of legal metaphysics. It rests instead on the central principle of a free society that courts have finite bounds of authority, some of constitutional origin, which exist to protect citizens from the very wrong asserted here, the excessive use of judicial power. The courts, no less than the political branches of the government, must respect the limits of their authority.

The Court of Appeals found that our decision in *Blair* v. *United States*, 250 U. S. 273 (1919), controlled its decision, but we think not. *Blair* involved defiant witnesses in a grand jury investigation. The witnesses refused to testify, contending the grand jury lacked jurisdiction because the statute that prohibited the conduct under investigation was unconstitutional. *Id.*, at 277–279. We affirmed the denial of habeas corpus relief to the witnesses and refused to consider their jurisdictional challenge. As this Court was careful to say, the jurisdiction of the grand jury did not depend upon the validity of the statutes attacked by the witnesses. The grand jury's investigative powers included the authority to conduct a wide-ranging investigation of the subject matter and existed independently of the statutes challenged by the witnesses. *Blair*, in effect, addressed the jurisdiction of the grand jury and found it sufficient to support the order of contempt. See *Morton Salt*, *supra*, at 642–643. *Blair* does not hold that the limited subject-matter jurisdiction of an Article III court may not be raised by a nonparty witness whom the court seeks to hold in civil contempt.

Additionally, the Court of Appeals was concerned that permitting the nonparty witness to challenge the jurisdiction of the court would invite collusion, allowing parties to avoid

restrictions on interlocutory appeals and to test jurisdiction by proxy. See *Catlin* v. *United States*, 324 U. S. 229, 236 (1945). We are not persuaded that such considerations should alter the rule we apply in this case. To begin with, the objection does not meet the fundamental premise that the nonparty should not be denied the right to object to the very jurisdictional exercise that causes the injury. Further, we conclude that there are ample protections against collusive appeals. If the Court of Appeals finds that the witness and a party acted in collusion to appeal in order to gain an interlocutory ruling on jurisdiction, it can decline to treat the witness as a nonparty for purposes of the question. Cf. *Karcher* v. *May*, 484 U. S. 72, 78 (1987) (applying "[t]he concept of 'legal personage'" as a "practical means of identifying the real interests at stake in a lawsuit"); *Bender* v. *Williamsport Area School District*, 475 U. S. 534, 548, n. 9 (1986) (assessing the congruence of interests between the "parties" to the appeal). See generally *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 747 F. 2d 1303, 1305 (CA9 1984). Additionally, there remain the usual provisions for sanctioning frivolous appeals or the abuse of court processes. See *Roadway Express, Inc.* v. *Piper*, 447 U. S. 752, 762 (1980); Fed. Rule App. Proc. 38.

The limitations of the rule we follow in this case should be well understood. First, we do not undertake to explore in detail the differences between civil and criminal contempt. It suffices to note that we have distinguished between the two before and have held that a civil contempt order may depend upon the jurisdiction of the court. In *United States* v. *Mine Workers*, 330 U. S. 258 (1947), we noted the different treatment criminal and civil contempt are accorded based on appellate review of the issuing court's jurisdiction.

> "It does not follow, of course, that simply because a defendant may be punished for criminal contempt for disobedience of an order later set aside on appeal, that the plaintiff in the action may profit by way of a fine imposed

> in a simultaneous proceeding for civil contempt based upon a violation of the same order. The right to remedial relief falls with an injunction which events prove was erroneously issued, and *a fortiori* when the injunction or restraining order was beyond the jurisdiction of the court." *Id.*, at 294–295 (citations omitted; footnote omitted).

Though it may seem at first that denying a defense in a criminal case and granting it in a civil one reverses our usual priorities, the distinction is sound; for it rests on the different purposes and necessities of the two types of orders. *Ibid.* If either of the two orders appears efficacious, the better practice is to enter civil contempt to persuade a party to comply, reserving the more drastic, punitive sanction only if disobedience continues. *Yates* v. *United States*, 355 U. S. 66, 74–75 (1957). That course of action is not always available to a court, which at times must assert its authority at once to preserve the status quo or to determine its jurisdiction. See 18 U. S. C. §§ 401, 402. It was available here, however, as the District Court correctly recognized. When a district court elects to apply civil contempt to enforce compliance, it is consistent with that approach to allow full consideration of the court's subject-matter jurisdiction.

The second point is closely related. Nothing we have said puts in question the inherent and legitimate authority of the court to issue process and other binding orders, including orders of discovery directed to nonparty witnesses, as necessary for the court to determine and rule upon its own jurisdiction, including jurisdiction over the subject matter. *United States* v. *Shipp*, 203 U. S. 563, 573 (1906).

Though the concurring opinion in the Court of Appeals indicated that the order of the District Court in the case before us might be sustained as an inquiry in aid of the court's jurisdiction over the subject matter, the record shows that the process was issued to obtain discovery on the merits of the litigation. It is a recognized and appropriate procedure for a

court to limit discovery proceedings at the outset to a determination of jurisdictional matters, see 13A C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3536, and n. 2 (1984 and Supp. 1987), but that was not the objective of this discovery order, even by implication. Before the contempt order, the District Court twice ruled that it had subject-matter jurisdiction of the case.

Accordingly, on remand, the Court of Appeals must determine whether the District Court had subject-matter jurisdiction in the underlying action. If not, then the subpoenas *duces tecum* are void, and the civil contempt citation must be reversed "in its entirety." *Mine Workers*, *supra*, at 295.

III

We hold that the Court of Appeals for the Second Circuit erred in limiting the Conferences' jurisdictional challenge to the argument that the District Court lacked even colorable jurisdiction to hear the suit. The judgment of the Court of Appeals is therefore reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE MARSHALL, dissenting.

I respectfully dissent. I would affirm the judgment of the Court of Appeals for the Second Circuit for much the same reasons set forth in the majority opinion written by Judge Newman.

ROSS *v.* OKLAHOMA

CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF OKLAHOMA

No. 86–5309. Argued January 19, 1988—Reargued April 18, 1988—Decided June 22, 1988

Petitioner was charged with the capital offense of first-degree murder. An Oklahoma statute provides both parties in capital trials with nine peremptory challenges to prospective jurors. After the trial court denied petitioner's motion to remove for cause prospective juror Huling, who had declared that he would vote to impose death automatically if the jury found petitioner guilty, the defense exercised one of its peremptory challenges to remove him. Although the defense used all nine of its challenges, it did not challenge for cause any of the 12 jurors who actually heard the case. At the close of jury selection, the trial court overruled the objection of petitioner, who is black, that the composition of the all-white jury denied him a fair and impartial trial by his peers. The jury found petitioner guilty and sentenced him to death, and the Oklahoma Court of Criminal Appeals affirmed.

Held:

1. Although the trial court erred in failing to remove Huling for cause under *Witherspoon* v. *Illinois*, 391 U. S. 510, and *Wainwright* v. *Witt*, 469 U. S. 412, such failure did not abridge petitioner's Sixth and Fourteenth Amendment right to an impartial jury, since Huling did not sit on the jury that sentenced petitioner to death, petitioner's peremptory challenge having removed him as effectively as if the trial court had done so. The broad language in *Gray* v. *Mississippi*, 481 U. S. 648, 665, that the "relevant inquiry is whether the composition of the *jury panel as a whole* could possibly have been affected by the trial court's error" (internal quotations omitted; emphasis in original), is too sweeping to be applied literally, and should not be extended beyond its context: the erroneous "*Witherspoon* exclusion" of a qualified juror in a capital case. Although the failure to remove Huling may have resulted in a jury panel different from that which would otherwise have decided the case, one of the principal concerns animating *Gray*—the inability to know whether the prosecution could and would have used a peremptory challenge to remove the erroneous excluded juror—is absent here, since Huling was in fact removed. The fact that petitioner had to use a peremptory challenge to cure the court's error does not mean that the Sixth Amendment was violated, since peremptory challenges are not of constitutional dimension

but are merely a means to achieve the end of an impartial jury. Petitioner has failed to establish that the jury that actually sat was not impartial, since he never challenged any of the jurors for cause nor suggested their partiality, and since, in this Court, he neither pressed the claim that the absence of blacks deprived the jury of partiality nor suggested that such absence was in any way related to the court's failure to remove Huling. Pp. 85–88.

2. The trial court's failure to remove Huling for cause did not abridge petitioner's Fourteenth Amendment right to due process by arbitrarily depriving him of his full complement of peremptory challenges. Even assuming that the Constitution renders a State's denial or impairment of the right to exercise such challenges reversible error without a showing of prejudice, cf. *Swain* v. *Alabama*, 380 U. S. 202, that "right" would be "denied or impaired" only if the defendant did not receive that which state law provides, since peremptory challenges are a creature of statute and not constitutionally required, and, accordingly, it is for the State to determine their number and to define their purpose and the manner of their exercise. Although Oklahoma provides a capital defendant with nine peremptory challenges, state law has long qualified this grant with the requirement that the defendant must use those challenges to cure erroneous refusals to excuse jurors for cause. There is nothing arbitrary or irrational about such a requirement, since it subordinates the unfettered discretion to use challenges to the goal of empaneling an impartial jury, and since this Court has sanctioned numerous incursions upon the right to challenge peremptorily. Thus, petitioner's due process challenge must fail, since he received all that Oklahoma law allowed him. *Logan* v. *Zimmerman Brush Co.*, 455 U. S. 422, and *Hicks* v. *Oklahoma*, 447 U. S. 343, distinguished. Pp. 88–91.

717 P. 2d 117, affirmed.

REHNQUIST, C. J., delivered the opinion of the Court, in which WHITE, O'CONNOR, SCALIA, and KENNEDY, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, BLACKMUN, and STEVENS, JJ., joined, *post*, p. 91.

Gary Peterson reargued the cause for petitioner. With him on the briefs was *Thomas G. Smith, Jr.*

Robert A. Nance, Assistant Attorney General of Oklahoma, reargued the cause for respondent. With him on the brief was *Robert H. Henry*, Attorney General.*

**Moses Silverman, John A. Powell, Steven R. Shapiro,* and *Mandy Welch* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging reversal.

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

During the selection of the jury in his capital murder trial, petitioner Bobby Lynn Ross resorted to one of his peremptory challenges to remove a juror whom the trial court should have excused for cause under *Witherspoon* v. *Illinois*, 391 U. S. 510 (1968). He claims that because of that fact the Sixth and Fourteenth Amendments to the United States Constitution require reversal of his conviction and sentence of death. We conclude they do not.

In the course of robbing a motel in Elk City, Oklahoma, petitioner killed a police officer. Petitioner was charged with first-degree murder, Okla. Stat., Tit. 21, § 701.7 (Supp. 1987), a capital offense, Okla. Stat., Tit. 21, § 701.9(A) (Supp. 1987). By statute, Oklahoma provides nine peremptory challenges to both parties in capital trials. Okla. Stat., Tit. 22, § 655 (1981).

The jury selection began with the drawing of 12 names from the 150-person venire. Each of the 12 was examined individually by the court and counsel. Prospective jurors not excused for cause after the *voir dire* were provisionally seated. If a prospective juror was excused for cause, a replacement juror was called and examined. After 12 jurors had been provisionally seated, the parties exercised their peremptory challenges alternately beginning with the prosecution. When a juror was struck, a replacement juror was immediately selected and examined in the manner described above. Once a replacement was provisionally seated, the trial court called for the exercise of a challenge by the party whose turn it was. This procedure was repeated until each side had exercised or waived its nine peremptory challenges.

Darrell Huling's name was drawn to replace the juror excused by the defense with its fifth peremptory challenge. During *voir dire*, Huling initially indicated that he could vote to recommend a life sentence if the circumstances were appropriate. On further examination by defense counsel, Hul-

ing declared that if the jury found petitioner guilty, he would vote to impose death automatically. Defense counsel moved to have Huling removed for cause, arguing that Huling would not be able to follow the law at the penalty phase. The trial court denied the motion and Huling was provisionally seated. The defense then exercised its sixth peremptory challenge to remove Huling. The defense ultimately used all nine of its challenges. The prosecution used only five, waiving the remaining four.

None of the 12 jurors who actually sat and decided petitioner's fate was challenged for cause by defense counsel. Petitioner is black; the victim was white. At the close of jury selection, the defense objected "to the composition of the twelve people, in that there were no black people called as jurymen in this case and the defendant feels he's denied a fair and impartial trial by his peers." App. 25. The trial court overruled the objection, and the trial commenced.

After two days of evidence, the parties gave closing arguments, the trial court instructed the jury, and deliberations began. The jury found petitioner guilty of first-degree murder.[1] Following the presentation of evidence and arguments at a separate sentencing proceeding, the same jury found five aggravating circumstances and sentenced petitioner to death.

On appeal, the Oklahoma Court of Criminal Appeals rejected petitioner's argument that the trial court had committed reversible error in failing to excuse Huling for cause:

> "The failure of the trial court to remove a prospective juror who unequivocally states that he is unwilling to follow the law during the penalty phase by considering a life sentence is error. The record reflects that defense counsel challenged the prospective juror for cause, and when the court denied the challenge, defense counsel used

[1] Petitioner was also convicted of robbery with a firearm, Okla. Stat., Tit. 21, § 801 (Supp. 1987), and sentenced to 99 years' imprisonment on that charge.

> a peremptory challenge. All of [petitioner's] peremptory challenges were subsequently used; but as there is nothing in the record to show that any juror who sat on the trial was objectionable, we are unable to discover any grounds for reversal." 717 P. 2d 117, 120 (1986) (citations omitted).

We granted certiorari, 482 U. S. 926 (1987), to consider the Sixth and Fourteenth Amendment implications of the trial court's failure to remove Huling for cause and petitioner's subsequent use of a peremptory challenge to strike Huling. We now affirm.

In Wainwright v. Witt, 469 U. S. 412 (1985), the Court held that "the proper standard for determining when a prospective juror may be excused for cause because of his or her views on capital punishment . . . is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' " Id., at 424 (quoting Adams v. Texas, 448 U. S. 38, 45 (1980)). The Oklahoma Court of Criminal Appeals found, 717 P. 2d, at 120, and the State concedes, Tr. of Oral Rearg. 30, that Huling should have been excused for cause and that the trial court erred in failing to do so. Petitioner contends that this error abridged both his Sixth and Fourteenth Amendment right to an impartial jury, and his Fourteenth Amendment right to due process. We reject both grounds offered by petitioner.

It is well settled that the Sixth and Fourteenth Amendments guarantee a defendant on trial for his life the right to an impartial jury. *Witt, supra; Irvin* v. *Dowd*, 366 U. S. 717, 722 (1961). Had Huling sat on the jury that ultimately sentenced petitioner to death, and had petitioner properly preserved his right to challenge the trial court's failure to remove Huling for cause, the sentence would have to be overturned. *Adams, supra.* But Huling did not sit. Petitioner exercised a peremptory challenge to remove him, and Huling

was thereby removed from the jury as effectively as if the trial court had excused him for cause.

Any claim that the jury was not impartial, therefore, must focus not on Huling, but on the jurors who ultimately sat. None of those 12 jurors, however, was challenged for cause by petitioner, and he has never suggested that any of the 12 was not impartial. "[T]he Constitution presupposes that a jury selected from a fair cross section of the community is impartial, regardless of the mix of individual viewpoints actually represented on the jury, so long as the jurors can conscientiously and properly carry out their sworn duty to apply the law to the facts of the particular case." *Lockhart* v. *McCree*, 476 U. S. 162, 184 (1986). Although at the close of jury selection petitioner did assert that the jury was not fair and impartial, this claim was based on the absence of blacks from the jury panel. Petitioner neither presses that claim before this Court nor suggests that the absence of blacks was in any way related to the failure to remove Huling for cause. We conclude that petitioner has failed to establish that the jury was not impartial.

In arguing that the trial court's error abridged his right to an impartial jury, petitioner relies heavily upon *Gray* v. *Mississippi*, 481 U. S. 648 (1987), but we think that case affords him no help. During the jury selection in *Gray*, the State used several of its 12 peremptory challenges to remove jurors opposed to the death penalty whom the trial court should have excluded for cause under *Witherspoon*. See 481 U. S., at 669 (Powell, J., concurring in part and concurring in judgment); *id.*, at 673 (SCALIA, J., dissenting, joined by REHNQUIST, C. J., and WHITE and O'CONNOR, JJ.). After the State had exhausted all of its peremptory challenges, a prospective juror, Mrs. H. C. Bounds, stated during *voir dire* that although she was opposed to the death penalty she could vote to impose it in appropriate circumstances. Arguing that the previous "for cause" rulings had been erroneous, the State asked the trial court to restore one of its peremptory

challenges so that it might remove Bounds. In an apparent attempt to correct the earlier rulings, the trial court instead excused Bounds for cause. The jury ultimately seated sentenced Gray to death. A closely divided Court reversed Gray's sentence, concluding that the removal of Bounds was erroneous under *Adams*, *supra*, and *Witt*, *supra*, and that the error could not be considered harmless. *Gray*, *supra*.

Petitioner relies heavily upon the *Gray* Court's statement that "the relevant inquiry is 'whether the composition of the *jury panel as a whole* could possibly have been affected by the trial court's error.'" 481 U. S., at 665 (emphasis in original) (quoting *Moore* v. *Estelle*, 670 F. 2d 56, 58 (CA5) (specially concurring opinion), cert. denied, 458 U. S. 1111 (1982)). Petitioner points out that had he not used his sixth peremptory challenge to remove Huling, he could have removed another juror, including one who ultimately sat on the jury. Petitioner asserts, moreover, that had he used his sixth peremptory challenge differently, the prosecution may have exercised its remaining peremptory challenges differently in response, and consequently, the composition of the jury panel might have changed significantly.

Although we agree that the failure to remove Huling may have resulted in a jury panel different from that which would otherwise have decided the case, we do not accept the argument that this possibility mandates reversal. We decline to extend the rule of *Gray* beyond its context: the erroneous "*Witherspoon* exclusion" of a qualified juror in a capital case. We think the broad language used by the *Gray* Court is too sweeping to be applied literally,[2] and is best understood in

[2] As the dissent in *Gray* pointed out, the statement that any error which affects the composition of the jury must result in reversal defies literal application. 481 U. S., at 678 (SCALIA, J., dissenting). If, after realizing its error, the trial court in *Gray* had dismissed the entire venire and started anew, the composition of the jury would undoubtedly have been affected by the original error. But the *Gray* majority concedes that the trial court could have followed that course without risking reversal. *Id.*, at 663–664, n. 13.

the context of the facts there involved. One of the principal concerns animating the decision in *Gray* was the inability to know to a certainty whether the prosecution could and would have used a peremptory challenge to remove the erroneously excused juror. See *Gray*, 481 U. S., at 665; *id.*, at 669–670, and n. 2 (Powell, J., concurring in part and concurring in judgment). In the instant case, there is no need to speculate whether Huling would have been removed absent the erroneous ruling by the trial court; Huling was in fact removed and did not sit.

Petitioner was undoubtedly required to exercise a peremptory challenge to cure the trial court's error. But we reject the notion that the loss of a peremptory challenge constitutes a violation of the constitutional right to an impartial jury. We have long recognized that peremptory challenges are not of constitutional dimension. *Gray*, *supra*, at 663; *Swain* v. *Alabama*, 380 U. S. 202, 219 (1965); *Stilson* v. *United States*, 250 U. S. 583, 586 (1919). They are a means to achieve the end of an impartial jury. So long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated. See *Hopt* v. *Utah*, 120 U. S. 430, 436 (1887); *Spies* v. *Illinois*, 123 U. S. 131 (1887).[3] We conclude that no violation of petitioner's right to an impartial jury occurred.

Relying largely on *Logan* v. *Zimmerman Brush Co.*, 455 U. S. 422 (1982), and *Hicks* v. *Oklahoma*, 447 U. S. 343 (1980), petitioner also argues that the trial court's failure to

[3] In *Spies*, the petitioners were sentenced to death for their participation in the killing of several police officers at the Haymarket riot. Using a number of their peremptory challenges to excuse jurors unsuccessfully challenged for cause, petitioners eventually exhausted all of their peremptory challenges. See *Spies* v. *People*, 122 Ill. 1, 256–257, 12 N. E. 865, 989 (1887). Before this Court, petitioners argued they had been deprived of a fair trial because numerous biased jurors had not been excused for cause. The Court declined to examine the "for cause" rulings as to the jurors who had been removed by petitioners. 123 U. S., at 168.

remove Huling for cause violated his Fourteenth Amendment right to due process by arbitrarily depriving him of the full complement of nine peremptory challenges allowed under Oklahoma law. We disagree. It is true that we have previously stated that the right to exercise peremptory challenges is "'one of the most important of the rights secured to the accused.'" *Swain, supra,* at 219 (quoting *Pointer* v. *United States*, 151 U. S. 396, 408 (1894)). Indeed, the *Swain* Court cited a number of federal cases and observed: "The denial or impairment of the right is reversible error without a showing of prejudice." 380 U. S., at 219. But even assuming that the Constitution were to impose this same rule in state criminal proceedings, petitioner's due process challenge would nonetheless fail. Because peremptory challenges are a creature of statute and are not required by the Constitution, *Gray, supra,* at 663; *Swain, supra,* at 219, it is for the State to determine the number of peremptory challenges allowed and to define their purpose and the manner of their exercise. Cf. *Stilson, supra,* at 587; *Frazier* v. *United States*, 335 U. S. 497, 505, n. 11 (1948). As such, the "right" to peremptory challenges is "denied or impaired" only if the defendant does not receive that which state law provides.

It is a long settled principle of Oklahoma law that a defendant who disagrees with the trial court's ruling on a for-cause challenge must, in order to preserve the claim that the ruling deprived him of a fair trial, exercise a peremptory challenge to remove the juror. Even then, the error is grounds for reversal only if the defendant exhausts all peremptory challenges and an incompetent juror is forced upon him. *Ferrell* v. *State*, 475 P. 2d 825, 828 (Okla. Crim. App. 1970); *Stott* v. *State*, 538 P. 2d 1061, 1064–1065 (Okla. Crim. App. 1975). In *McDonald* v. *State*, 54 Okla. Crim. 161, 164–165, 15 P. 2d 1092, 1094 (1932), the court declared:

> "If counsel believed any juror was pledged to return a verdict imposing the death penalty, under the circumstances named, he should have purged the jury by chal-

lenge. He cannot speculate on the result of the jury's verdict by consenting that the juror sit on the panel, and, if the verdict is adverse, then assert he is disqualified."

Thus, although Oklahoma provides a capital defendant with nine peremptory challenges, this grant is qualified by the requirement that the defendant must use those challenges to cure erroneous refusals by the trial court to excuse jurors for cause. We think there is nothing arbitrary or irrational about such a requirement, which subordinates the absolute freedom to use a peremptory challenge as one wishes to the goal of empaneling an impartial jury. Indeed, the concept of a peremptory challenge as a totally free-wheeling right unconstrained by any procedural requirement is difficult to imagine. As pointed out by the dissenters in *Swain*, *supra*, at 243–244:

> "This Court has sanctioned numerous incursions upon the right to challenge peremptorily. Defendants may be tried together even though the exercise by one of his right to challenge peremptorily may deprive his codefendant of a juror he desires or may require that codefendant to use his challenges in a way other than he wishes. *United States* v. *Marchant*, [12 Wheat. 480 (1827)]. A defendant may be required to exercise his challenges prior to the State, so that some may be wasted on jurors whom the State would have challenged. *Pointer* v. *United States*, 151 U. S. 396 [(1894)]. Congress may regulate the number of peremptory challenges available to defendants by statute and may require codefendants to be treated as a single defendant so that each has only a small portion of the number of peremptories he would have if tried separately. *Stilson* v. *United States*, [250 U. S. 583 (1919)]."

As required by Oklahoma law, petitioner exercised one of his peremptory challenges to rectify the trial court's error, and consequently he retained only eight peremptory chal-

lenges to use in his unfettered discretion. But he received all that Oklahoma law allowed him, and therefore his due process challenge fails.[4]

Petitioner relies on *Logan*, 455 U. S. 422 (1982), and *Hicks*, 447 U. S. 343 (1980), to support his claim of a denial of due process. The *Logan* Court held that because of the arbitrary application of a limitations period, Logan had been deprived of a state-provided cause of action in violation of due process. In *Hicks*, the Court overturned on due process grounds the sentence imposed on Hicks because the sentence had not been determined by the jury as required by Oklahoma law. Here, however, the requirement that the defendant use peremptory challenges to cure trial court errors is established by Oklahoma law, and petitioner received all that was due under Oklahoma law.[5]

Although the trial court erred in failing to dismiss prospective juror Huling for cause, the error did not deprive petitioner of an impartial jury or of any interest provided by the State. "[T]he Constitution entitles a criminal defendant to a fair trial, not a perfect one." *Delaware* v. *Van Arsdall*, 475 U. S. 673, 681 (1986).

Affirmed.

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

A man's life is at stake. We should not be playing games. In this case, everyone concedes that the trial judge could not arbitrarily take away one of the defendant's peremptory chal-

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[4] We need not decide the broader question whether, in the absence of Oklahoma's limitation on the "right" to exercise peremptory challenges, "a denial or impairment" of the exercise of peremptory challenges occurs if the defendant uses one or more challenges to remove jurors who should have been excused for cause. See *Swain* v. *Alabama*, 380 U. S. 202, 219 (1965); cf. *Spies* v. *Illinois*, 123 U. S. 131 (1887); *Stroud* v. *United States*, 251 U. S. 380, 382 (1920), denying rehearing to 251 U. S. 15 (1919).

[5] No claim is made here that the trial court repeatedly and deliberately misapplied the law in order to force petitioner to use his peremptory challenges to correct these errors.

lenges. Yet, that is in effect exactly what happened here. I respectfully dissent.

Neither the State nor this Court disputes that the trial court "erred" when it refused to strike juror Huling for cause from the jury that sentenced petitioner Bobby Lynn Ross to death. Huling twice stated during *voir dire* that if he were to find Ross guilty of murder, he would automatically vote to impose the death penalty; there is no question that Huling was not the fair and impartial juror guaranteed to petitioner by the Sixth Amendment. The Court concludes, however, that the trial court's error does not require resentencing because it was "cure[d]" by the defense's use of one of a limited number of peremptory challenges to remove the biased juror. *Ante*, at 88. I believe that this conclusion is irreconcilable with this Court's holding just last Term that a similar Sixth Amendment error in capital jury selection requires resentencing if "'the composition of the *jury panel as a whole* could possibly have been affected by the trial court's error.'" *Gray* v. *Mississippi*, 481 U. S. 648, 665 (1987), quoting *Moore* v. *Estelle*, 670 F. 2d 56, 58 (CA5) (specially concurring opinion), cert. denied, 458 U. S. 1111 (1982). The Court's attempt to distinguish *Gray* not only fails to persuade, but also fails to protect petitioner's Sixth Amendment right to an impartial jury by condoning a scheme that penalizes the assertion of that right. I am convinced that application of *Gray*'s *per se* resentencing rule in this case is the only course consistent with the Sixth Amendment.

In *Gray*, the trial court granted the State's motion to strike for cause a juror who expressed some reservations about capital punishment, but nonetheless stated that she could vote to impose the death penalty in appropriate circumstances. The trial court's exclusion of this qualified juror was Sixth Amendment error under *Witherspoon* v. *Illinois*, 391 U. S. 510 (1968), and *Wainwright* v. *Witt*, 469 U. S. 412 (1985). The *Gray* Court refused the State's invitation to apply harmless-error analysis to such an error. Specifically,

the Court rejected the argument that the State's retention of unexercised peremptory challenges at the end of jury selection indicated that the error was harmless because the State would have removed the juror by peremptory challenge if the trial court had denied its for-cause motion. In addition, the Court rejected the argument that the error was an isolated incident without prejudicial effect because the ultimate panel fairly represented the commmunity. The Court explained that the contingent nature of the jury selection process "defies any attempt to establish that an erroneous *Witherspoon-Witt* exclusion of a juror is harmless." 481 U. S., at 665. According to the Court, "the relevant inquiry is 'whether the composition of the *jury panel as a whole* could possibly have been affected by the trial court's error.'" *Ibid.* (citation omitted). The Court recognized that its decision established a *per se* rule requiring the vacation of a death sentence imposed by a jury whose composition was affected by *Witherspoon* error. 481 U. S., at 660, 668.

The Court today unaccountably refuses to apply this *per se* rule in a case involving a similar Sixth Amendment error. Here the trial court, rather than excusing a qualified juror, refused to excuse a biased juror. The defense's attempt to correct the court's error and preserve its Sixth Amendment claim deprived it of a peremptory challenge. That deprivation "could possibly have . . . affected" the composition of the jury panel under the *Gray* standard, because the defense might have used the extra peremptory to remove another juror and because the loss of a peremptory might have affected the defense's strategic use of its remaining peremptories. See *id.*, at 665 ("A prosecutor with fewer peremptory challenges in hand may be willing to accept certain jurors whom he would not accept given a larger reserve of peremptories"). Even the Court acknowledges that the defense's loss of a peremptory meets the *Gray* test. See *ante*, at 87 ("[T]he failure to remove Huling may have resulted in a

jury panel different from that which would otherwise have decided the case").

Indeed, the loss of a peremptory challenge in this case affected the composition of the jury panel in precisely the same way as the trial court's error in *Gray* itself. In *Gray*, the defendant was deprived of a juror who, although inexcusable for cause, seemed to be sympathetic to the defense in that she had expressed reservations about the death penalty. The defense in the instant case was deprived of an opportunity to remove an otherwise qualified juror whom it perceived to be sympathetic to the prosecution. The defense's loss of a peremptory challenge thus resulted in a "'tribunal organized to return a verdict of death'" in exactly the fashion we rejected so recently in *Gray*. 481 U. S., at 668, quoting *Witherspoon*, *supra*, at 521.

The Court attempts to distinguish *Gray* in two ways. First, the Court dismissively declares that the *Gray* standard is "too sweeping to be applied literally." *Ante*, at 87. The Court offers only one reason for narrowing *Gray*'s broad language: if any Sixth Amendment error that "could possibly have . . . affected" the composition of the jury requires reversal, a trial court could never dismiss the venire and start anew, because the jury resulting from the new venire would necessarily be different from the one that would have been empaneled in the absence of the original error. *Ante*, at 87, n. 2. This argument misses the point of the *Gray* decision. The *Gray* Court did not hold that a defendant has the right to any particular venire or panel; rather, the Court held that a defendant has a right to a jury selection procedure untainted by constitutional error. Because it is impossible to be sure that an erroneous ruling by the trial court did not tilt the panel against the defendant, a death sentence returned by such a panel cannot stand. A wholly new venire does not pose the same problem of "tilting" as the result of constitutional error. Thus, the Court is simply wrong that the *Gray* standard would prevent a trial court from correcting an erro-

neous ruling by starting anew. The Court's unwillingness to apply the *Gray* standard "literally" is without foundation.

Second, the Court attempts to limit *Gray* by distinguishing it factually from the instant case. The Court correctly notes that "[o]ne of the principal concerns animating the decision in *Gray* was the inability to know to a certainty whether the prosecution could and would have used a peremptory challenge to remove the erroneously excused juror." *Ante*, at 88, citing 481 U. S., at 670, n. 2 (Powell, J., concurring in part and concurring in judgment). The Court then attempts to distinguish the instant case as follows: "In the instant case, there is no need to speculate whether Huling would have been removed absent the erroneous ruling by the trial court; Huling was in fact removed and did not sit." *Ante*, at 88.

The Court again misses the point of the *Gray* Court's reasoning. *Gray* did not indicate that the use of peremptory challenges always "cures" erroneous for-cause rulings. Rather, the *Gray* Court reasoned that if it could be sure that the prosecution would have excused the erroneously excused juror by use of a peremptory challenge, and if it could be sure that the composition of the jury panel would thereby *be identical* to the jury that was empaneled as a result of the error, then there would be no need for reversal. Because the Court could not be certain of the former point, reversal was required. In the instant case, although the Court can be sure that a peremptory challenge was in fact employed in an attempt to cure the erroneous for-cause ruling, the Court cannot be sure that the composition of the jury panel was thereby unaffected—as the Court itself acknowledges. See *ante*, at 87. Reversal is therefore required in the instant case as well, as the very portion of Justice Powell's concurrence in *Gray* that is quoted by the Court clearly establishes: "the only question is whether there is a reasonable doubt that the composition of the venire would have been different as a result." 481 U. S., at 670, n. 2.

The only argument that might successfully distinguish the instant case from *Gray* is implicit in the Court's holding, although not expressly made. The Court leaves undisturbed *Gray*'s rule that constitutional error in jury selection requires reversal if it changes the composition of the jury, but the Court holds that reversal is not required if state law requires a party to attempt to correct such error and this attempt leads to a change in jury composition. Under this view, any change in the composition of the jury wrought by the loss of a defense peremptory in the instant case was the result not of the trial court's error, but of the defense's attempt to cure that error pursuant to state law; the defense's use of a peremptory challenge was an intervening cause that broke the causal link between the trial court's error and the change in jury composition.

This "intervening cause" argument does distinguish the instant case from *Gray*, but it engenders serious constitutional problems of its own. The State's requirement that a defendant employ a peremptory challenge in order to preserve a Sixth Amendment claim arising from a trial court's erroneous for-cause ruling burdens the defendant's exercise of his Sixth Amendment right to a impartial jury. It is undisputed that petitioner had a Sixth Amendment right to be sentenced by a jury on which juror Huling did not sit. Yet the only way for petitioner to preserve this right under state law was to give up one of a limited number of peremptory challenges. We have emphasized that the ability to exercise peremptory challenges is "one of the most important of the rights secured to the accused," *Pointer* v. *United States*, 151 U. S. 396, 408 (1894), and that it "long has served the selection of an impartial jury," *Batson* v. *Kentucky*, 476 U. S. 79, 99, n. 22 (1986). It cannot seriously be questioned that the loss of a peremptory challenge vis-à-vis the prosecution burdens the defense in pretrial proceedings.

A venerable line of this Court's precedents has held that legislative schemes that unnecessarily burden the exercise of

federal constitutional rights cannot stand. Just a few examples from the criminal context suffice to establish this principle. In *United States* v. *Jackson*, 390 U. S. 570 (1968), the Court struck down a provision of the Federal Kidnapping Act that rendered eligible for the death penalty only defendants who invoked their right to trial by jury. The Court recognized that Congress' goal in enacting the provision was legitimate, but held that "[w]hatever might be said of Congress' objectives, they cannot be pursued by means that needlessly chill the exercise of basic constitutional rights." *Id.*, at 582. And in *Brooks* v. *Tennessee*, 406 U. S. 605 (1972), the Court struck down a state law that required a defendant who wished to testify on his own behalf to be the first defense witness presented. We noted that the state law at issue "exacts a price for [the defendant's] silence by keeping him off the stand entirely unless he chooses to testify first," *id.*, at 610, and that it therefore "casts a heavy burden on a defendant's otherwise unconditional right not to take the stand," *id.*, at 610–611.

The Court today ignores the clear dictates of these and other similar cases by condoning a scheme in which a defendant must surrender procedural parity with the prosecution in order to preserve his Sixth Amendment right to an impartial jury. The Court notes that "there is nothing arbitrary or irrational" about the State's rule that a defendant must use a peremptory challenge to cure an erroneous for-cause ruling, because the State has an interest in preventing needless or frivolous appeals. *Ante*, at 90. But the existence of a rational rather than a punitive reason for a burdensome requirement is of little significance under our cases. In *Brooks*, the State's interest in preventing the defendant's testimony from being influenced by the testimony of other defense witnesses was rational, but we found it insufficient to override the defendant's right to remain silent at trial. 406 U. S., at 611. And in *Jackson*, we struck down a federal statutory provision that was motivated by the legitimate in-

terest of permitting the death penalty to be imposed only upon the recommendation of a jury, because Congress had other means available to achieve that goal without burdening the exercise of constitutional rights. 390 U. S., at 582–583. In the instant case, the State's desire to prevent needless or frivolous appeals is insufficient to overcome the right to an impartial adjudicator, which "goes to the very integrity of the legal system." *Gray*, 481 U. S., at 668. Moreover, the State's concerns obviously could be addressed in numerous other ways. See, *e. g.*, Oklahoma Supreme Court Code of Professional Responsibility, DR 1–102(A)(4) ("A lawyer shall not . . . [e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation"). The burden on petitioner's Sixth Amendment rights is thus both heavy and avoidable. Our cases accordingly mandate the conclusion that the Oklahoma scheme cannot stand.

The Court's failure to apply *Gray*'s rule of *per se* reversal in this case is not justified by any of the Court's attempts to distinguish *Gray*. The only argument that might distinguish the instant case from *Gray* must condone an impermissible burden on the exercise of petitioner's Sixth Amendment right to an impartial jury. Because I am convinced that the Court's decision today cannot be squared with the Sixth Amendment either under our recent analysis in *Gray* or our other precedents, I dissent. I would reverse the judgment of the Oklahoma Court of Criminal Appeals to the extent that it left undisturbed the sentence of death.

Syllabus

BRASWELL *v.* UNITED STATES

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

No. 87–3. Argued March 1, 1988—Decided June 22, 1988

A federal grand jury issued a subpoena to petitioner as the president of two corporations, requiring him to produce the corporations' records. The subpoena provided that petitioner could deliver the records to the agent serving the subpoena, and did not require petitioner to testify. The corporations involved were incorporated by petitioner, who is the sole shareholder of one of them. Petitioner, his wife, and his mother are the directors of both corporations, and his wife and mother are secretary-treasurer and vice president of the corporations, respectively, but neither has any authority over the corporations' business affairs. The District Court denied petitioner's motion to quash the subpoena, holding that the "collective entity doctrine" prevented petitioner from asserting that his act of producing the corporations' records was protected by the Fifth Amendment privilege against self-incrimination. The Court of Appeals affirmed.

Held: The custodian of corporate records may not resist a subpoena for such records on the ground that the act of production will incriminate him in violation of the Fifth Amendment. This Court's precedents as to the development of the collective entity doctrine do not support petitioner's argument that, even though the contents of subpoenaed business records are not privileged, and even though corporations are not protected by the Fifth Amendment, nevertheless his act of producing the documents has independent testimonial significance, which would incriminate him individually, and that the Fifth Amendment prohibits Government compulsion of that act. If petitioner had conducted his business as a sole proprietorship, *United States* v. *Doe*, 465 U. S. 605, would require that he be provided the opportunity to show that his act of production would entail testimonial self-incrimination as to admissions that the records existed, were in his possession, and were authentic. However, representatives of a collective entity act as agents, and the official records of the organization that are held by them in a representative rather than a personal capacity cannot be the subject of their personal privilege against self-incrimination, even though production of the papers might tend to incriminate them personally. The plain mandate of the precedents is that the corporate entity doctrine applies regardless of the corporation's size, and regardless of whether the subpoena is ad-

dressed to the corporation or, as here, to the individual in his capacity as the records' custodian. Any claim of Fifth Amendment privilege asserted by the agent would be tantamount to a claim of privilege by the corporation, which possesses no such privilege. Recognizing a Fifth Amendment privilege on behalf of records custodians of collective entities would have a detrimental impact on the Government's efforts to prosecute "white-collar crime." Such impact cannot be satisfactorily minimized by either granting the custodian statutory immunity as to the act of production or addressing the subpoena to the corporation and allowing it to choose an agent to produce the records who can do so without incriminating himself. However, since the custodian acts as the corporation's representative, the act of production is deemed one of the corporation, not the individual, and the Government may make no evidentiary use of the "individual act" of production against the individual. Pp. 102–119.

814 F. 2d 190, affirmed.

REHNQUIST, C. J., delivered the opinion of the Court, in which WHITE, BLACKMUN, STEVENS, and O'CONNOR, JJ., joined. KENNEDY, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and SCALIA, JJ., joined, *post*, p. 119.

Michael S. Fawer argued the cause for petitioner. With him on the brief was *Herbert V. Larson, Jr.*

Roy T. Englert, Jr., argued the cause for the United States. With him on the brief were *Solicitor General Fried, Assistant Attorney General Weld, Deputy Solicitor General Bryson*, and *Joel M. Gershowitz.**

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

This case presents the question whether the custodian of corporate records may resist a subpoena for such records on the ground that the act of production would incriminate him in violation of the Fifth Amendment. We conclude that he may not.

From 1965 to 1980, petitioner Randy Braswell operated his business—which comprises the sale and purchase of equip-

**David S. Rudolf* filed a brief for the National Association of Criminal Defense Lawyers as *amicus curiae*.

ment, land, timber, and oil and gas interests—as a sole proprietorship. In 1980, he incorporated Worldwide Machinery Sales, Inc., a Mississippi corporation, and began conducting the business through that entity. In 1981, he formed a second Mississippi corporation, Worldwide Purchasing, Inc., and funded that corporation with the 100 percent interest he held in Worldwide Machinery. Petitioner was and is the sole shareholder of Worldwide Purchasing, Inc.

Both companies are active corporations, maintaining their current status with the State of Mississippi, filing corporate tax returns, and keeping current corporate books and records. In compliance with Mississippi law, both corporations have three directors, petitioner, his wife, and his mother. Although his wife and mother are secretary-treasurer and vice-president of the corporations, respectively, neither has any authority over the business affairs of either corporation.

In August 1986, a federal grand jury issued a subpoena to "Randy Braswell, President Worldwide Machinery Sales, Inc. [and] Worldwide Purchasing, Inc.," App. 6, requiring petitioner to produce the books and records of the two corporations.[1] The subpoena provided that petitioner could deliver the records to the agent serving the subpoena, and did not require petitioner to testify. Petitioner moved to quash the subpoena, arguing that the act of producing the records would incriminate him in violation of his Fifth Amendment privilege against self-incrimination. The District Court denied the motion to quash, ruling that the "collective entity doctrine" prevented petitioner from asserting that his act of producing the corporations' records was protected by the

[1] The subpoena requested the following: receipts and disbursement journals; general ledger and subsidiaries; accounts receivable/accounts payable ledgers, cards, and all customer data; bank records of savings and checking accounts, including statements, checks, and deposit tickets; contracts, invoices—sales and purchase—conveyances, and correspondence; minutes and stock books and ledgers; loan disclosure statements and agreements; liability ledgers; and retained copies of Forms 1120, W–2, W–4, 1099, 940 and 941.

Fifth Amendment. The court rejected petitioner's argument that the collective entity doctrine does not apply when a corporation is so small that it constitutes nothing more than the individual's alter ego.

The United States Court of Appeals for the Fifth Circuit affirmed, citing *Bellis* v. *United States*, 417 U. S. 85, 88 (1974), for the proposition that a corporation's records custodian may not claim a Fifth Amendment privilege no matter how small the corporation may be. The Court of Appeals declared that *Bellis* retained vitality following *United States* v. *Doe*, 465 U. S. 605 (1984), and therefore, "Braswell, as custodian of corporate documents, has no act of production privilege under the fifth amendment regarding corporate documents." *In re Grand Jury Proceedings*, 814 F. 2d 190, 193 (1987). We granted certiorari to resolve a conflict among the Courts of Appeals.[2] 484 U. S. 814 (1987). We now affirm.

There is no question but that the contents of the subpoenaed business records are not privileged. See *Doe*, *supra*; *Fisher* v. *United States*, 425 U. S. 391 (1976). Similarly, petitioner asserts no self-incrimination claim on behalf of the corporations; it is well established that such artificial entities are not protected by the Fifth Amendment. *Bellis*, *supra*. Petitioner instead relies solely upon the argument that his

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[2] Compare *In re Grand Jury Proceedings (Morganstern)*, 771 F. 2d 143 (CA6) (en banc), cert. denied, 474 U. S. 1033 (1985); *In re Grand Jury Subpoena (85–W–71–5)*, 784 F. 2d 857 (CA8 1986), cert. dism'd *sub nom. See* v. *United States*, 479 U. S. 1048 (1987); *United States* v. *Malis*, 737 F. 2d 1511 (CA9 1984); *In re Grand Jury Proceedings (Vargas)*, 727 F. 2d 941 (CA10), cert. denied, 469 U. S. 819 (1984), which have refused to recognize a Fifth Amendment privilege, with *United States* v. *Antonio J. Sancetta, M. D., P. C.*, 788 F. 2d 67, 74 (CA2 1986); *In re Grand Jury Matter (Brown)*, 768 F. 2d 525 (CA3 1985) (en banc); *United States* v. *Lang*, 792 F. 2d 1235, 1240 (CA4), cert. denied, 479 U. S. 985 (1986); *In re Grand Jury No. 86–3 (Will Roberts Corp.)*, 816 F. 2d 569, 573 (CA11 1987); *In re Sealed Case*, 266 U. S. App. D. C. 30, 832 F. 2d 1268 (1987), which have recognized a Fifth Amendment privilege.

act of producing the documents has independent testimonial significance, which would incriminate him individually, and that the Fifth Amendment prohibits Government compulsion of that act. The bases for this argument are extrapolated from the decisions of this Court in *Fisher*, *supra*, and *Doe*, *supra*.

In *Fisher*, the Court was presented with the question whether an attorney may resist a subpoena demanding that he produce tax records which had been entrusted to him by his client. The records in question had been prepared by the client's accountants. In analyzing the Fifth Amendment claim forwarded by the attorney, the Court considered whether the client-taxpayer would have had a valid Fifth Amendment claim had he retained the records and the subpoena been issued to him. After explaining that the Fifth Amendment prohibits "compelling a person to give 'testimony' that incriminates him," 425 U. S., at 409, the Court rejected the argument that the contents of the records were protected. The Court, however, went on to observe:

> "The act of producing evidence in response to a subpoena nevertheless has communicative aspects of its own, wholly aside from the contents of the papers produced. Compliance with the subpoena tacitly concedes the existence of the papers demanded and their possession or control by the taxpayer. It also would indicate the taxpayer's belief that the papers are those described in the subpoena. *Curcio* v. *United States*, 354 U. S. 118, 125 (1957). The elements of compulsion are clearly present, but the more difficult issues are whether the tacit averments of the taxpayer are both 'testimonial' and 'incriminating' for purposes of applying the Fifth Amendment. These questions perhaps do not lend themselves to categorical answers; their resolution may instead depend on the facts and circumstances of particular cases or classes thereof." *Id.*, at 410.

The Court concluded that under the "facts and circumstances" there presented, the act of producing the accountants' papers would not "involve testimonial self-incrimination." *Id.*, at 411.[3]

Eight years later, in *United States* v. *Doe*, *supra*, the Court revisited the question, this time in the context of a claim by a sole proprietor that the compelled production of business records would run afoul of the Fifth Amendment. After rejecting the contention that the contents of the records were themselves protected, the Court proceeded to address whether respondent's act of producing the records would constitute protected testimonial incrimination. The Court concluded that respondent had established a valid Fifth Amendment claim. It deferred to the lower courts, which had found that enforcing the subpoenas at issue would provide the Government valuable information: By producing the records, respondent would admit that the records existed, were in his possession, and were authentic. 465 U. S., at 613, n. 11.

Had petitioner conducted his business as a sole proprietorship, *Doe* would require that he be provided the opportunity to show that his act of production would entail testimonial self-incrimination. But petitioner has operated his business through the corporate form, and we have long recognized that, for purposes of the Fifth Amendment, corporations and other collective entities are treated differently from individuals. This doctrine—known as the collective entity rule—has a lengthy and distinguished pedigree.

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[3] After observing that the papers in question had been prepared by the taxpayer's accountants, the Court noted: "The existence and location of the papers are a foregone conclusion and the taxpayer adds little or nothing to the sum total of the Government's information by conceding that he in fact has the papers." 425 U. S., at 411. Nor would the taxpayer's production of the papers serve to authenticate or vouch for the accuracy of the accountants' work. *Id.*, at 413.

The rule was first articulated by the Court in the case of *Hale* v. *Henkel*, 201 U. S. 43 (1906). Hale, a corporate officer, had been served with a subpoena ordering him to produce corporate records and to testify concerning certain corporate transactions. Although Hale was protected by personal immunity, he sought to resist the demand for the records by interposing a Fifth Amendment privilege on behalf of the corporation. The Court rejected that argument: "[W]e are of the opinion that there is a clear distinction . . . between an individual and a corporation, and . . . the latter has no right to refuse to submit its books and papers for an examination at the suit of the State." *Id.*, at 74. The Court explained that the corporation "is a creature of the State," *ibid.*, with powers limited by the State. As such, the State may, in the exercise of its right to oversee the corporation, demand the production of corporate records. *Id.*, at 75.

The ruling in *Hale* represented a limitation on the prior holding in *Boyd* v. *United States*, 116 U. S. 616 (1886), which involved a court order directing partners to produce an invoice received by the partnership. The partners had produced the invoice, but steadfastly maintained that the court order ran afoul of the Fifth Amendment. This Court agreed. After concluding that the order transgressed the Fourth Amendment, the Court declared: "[A] compulsory production of the *private* books and papers of the owner of goods sought to be forfeited . . . is compelling him to be a witness against himself, within the meaning of the Fifth Amendment to the Constitution . . . ." *Id.*, at 634–635 (emphasis added). *Hale* carved an exception out of *Boyd* by establishing that corporate books and records are not "private papers" protected by the Fifth Amendment.

Although *Hale* settled that a corporation has no Fifth Amendment privilege, the Court did not address whether a corporate officer could resist a subpoena for corporate records by invoking his personal privilege—Hale had been protected by immunity. In *Wilson* v. *United States*, 221 U. S.

361 (1911), the Court answered that question in the negative. There, a grand jury investigating Wilson had issued a subpoena to a corporation demanding the production of corporate letterpress copybooks, which Wilson, the corporation's president, possessed. Wilson refused to produce the books, arguing that the Fifth Amendment prohibited compulsory production of personally incriminating books that he held and controlled. The Court rejected this argument, observing first that the records sought were not private or personal, but rather belonged to the corporation. The Court continued:

> "[Wilson] held the corporate books subject to the corporate duty. If the corporation were guilty of misconduct, he could not withhold its books to save it; and if he were implicated in the violations of law, he could not withhold the books to protect himself from the effect of their disclosures. The [State's] reserved power of visitation would seriously be embarrassed, if not wholly defeated in its effective exercise, if guilty officers could refuse inspection of the records and papers of the corporation. No personal privilege to which they are entitled requires such a conclusion. . . . [T]he visitatorial power which exists with respect to the corporation of necessity reaches the corporate books without regard to the conduct of the custodian." *Id.*, at 384–385.
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> ". . . When [Wilson] became president of the corporation and as such held and used its books for the transaction of its business committed to his charge, he was at all times subject to its direction, and the books continuously remained under its control. If another took his place his custody would yield. He could assert no personal right to retain the corporate books against any demand of government which the corporation was bound to recognize." *Id.*, at 385.

In a companion case, *Dreier* v. *United States*, 221 U. S. 394 (1911), the Court applied the holding in *Wilson* to a Fifth

Amendment attack on a subpoena addressed to the corporate custodian. Although the subpoena in *Wilson* had been addressed to the corporation, the Court found the distinction irrelevant: "Dreier was not entitled to refuse the production of the corporate records. By virtue of the fact that they were the documents of the corporation in his custody, and not his private papers, he was under the obligation to produce them when called for by proper process." 221 U. S., at 400.

The next significant step in the development of the collective entity rule occurred in *United States* v. *White*, 322 U. S. 694 (1944), in which the Court held that a labor union is a collective entity unprotected by the Fifth Amendment. There, a grand jury had issued a subpoena addressed to a union requiring the production of certain union records. White, an assistant supervisor of the union, appeared before the grand jury and declined to produce the documents "'upon the ground that they might tend to incriminate [the union], myself as an officer thereof, or individually.'" *Id.*, at 696.

We upheld an order of contempt against White, reasoning first that the Fifth Amendment privilege applies only to natural individuals and protects only private papers. Representatives of a "collective group" act as agents "[a]nd the official records and documents of the organization that are held by them in a representative rather than in a personal capacity cannot be the subject of the personal privilege against self-incrimination, even though production of the papers might tend to incriminate them personally." *Id.*, at 699. With this principle in mind, the Court turned to whether a union is a collective group:

> "The test . . . is whether one can fairly say under all the circumstances that a particular type of organization has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common or group interests only. If so, the privilege cannot be in-

voked on behalf of the organization or its representatives in their official capacity. Labor unions—national or local, incorporated or unincorporated—clearly meet that test." *Id.*, at 701

In applying the collective entity rule to unincorporated associations such as unions, the Court jettisoned reliance on the visitatorial powers of the State over corporations owing their existence to the State—one of the bases for earlier decisions. See *id.*, at 700–701.

The frontiers of the collective entity rule were expanded even further in *Bellis* v. *United States*, 417 U. S. 85 (1974), in which the Court ruled that a partner in a small partnership could not properly refuse to produce partnership records. Bellis, one of the members of a three-person law firm that had previously been dissolved, was served with a subpoena directing him to produce partnership records he possessed. The District Court held Bellis in contempt when he refused to produce the partnership's financial books and records. We upheld the contempt order. After rehearsing prior precedent involving corporations and unincorporated associations, the Court examined the partnership form and observed that it had many of the incidents found relevant in prior collective entity decisions. The Court suggested that the test articulated in *White*, *supra*, for determining the applicability of the Fifth Amendment to organizations was "not particularly helpful in the broad range of cases." 417 U. S., at 100. The Court rejected the notion that the "formulation in *White* can be reduced to a simple proposition based solely upon the size of the organization. It is well settled that no privilege can be claimed by the custodian of corporate records, regardless of how small the corporation may be." *Ibid.* Bellis held the partnership's financial records in "a representative capacity," *id.*, at 101, and therefore, "his personal privilege against compulsory self-incrimination is inapplicable." *Ibid.*

The plain mandate of these decisions is that without regard to whether the subpoena is addressed to the corporation, or

as here, to the individual in his capacity as a custodian, see *Dreier*, *supra*; *Bellis*, *supra*, a corporate custodian such as petitioner may not resist a subpoena for corporate records on Fifth Amendment grounds. Petitioner argues, however, that this rule falls in the wake of *Fisher* v. *United States*, 425 U. S. 391 (1976), and *United States* v. *Doe*, 465 U. S. 605 (1984). In essence, petitioner's argument is as follows: In response to *Boyd* v. *United States*, 116 U. S. 616 (1886), with its privacy rationale shielding personal books and records, the Court developed the collective entity rule, which declares simply that corporate records are not private and therefore are not protected by the Fifth Amendment. The collective entity decisions were concerned with the contents of the documents subpoenaed, however, and not with the act of production. In *Fisher* and *Doe*, the Court moved away from the privacy-based collective entity rule, replacing it with a compelled-testimony standard under which the contents of business documents are never privileged but the act of producing the documents may be. Under this new regime, the act of production privilege is available without regard to the entity whose records are being sought. See *In re Grand Jury Matter (Brown)*, 768 F. 2d 525, 528 (CA3 1985) (en banc) ("*[Fisher* and *Doe]* make the significant factor, for the privilege against self-incrimination, neither the nature of entity which owns the documents, nor the contents of documents, but rather the communicative or noncommunicative nature of the arguably incriminating disclosures sought to be compelled").

To be sure, the holding in *Fisher*—later reaffirmed in *Doe*—embarked upon a new course of Fifth Amendment analysis. See *Fisher*, *supra*, at 409. We cannot agree, however, that it rendered the collective entity rule obsolete. The agency rationale undergirding the collective entity decisions, in which custodians asserted that production of entity records would incriminate them personally, survives. From *Wilson* forward, the Court has consistently recognized that the cus-

todian of corporate or entity records holds those documents in a representative rather than a personal capacity. Artificial entities such as corporations may act only through their agents, *Bellis*, *supra*, at 90, and a custodian's assumption of his representative capacity leads to certain obligations, including the duty to produce corporate records on proper demand by the Government. Under those circumstances, the custodian's act of production is not deemed a personal act, but rather an act of the corporation. Any claim of Fifth Amendment privilege asserted by the agent would be tantamount to a claim of privilege by the corporation—which of course possesses no such privilege.

The *Wilson* Court declared: "[B]y virtue of their character and the rules of law applicable to them, the books and papers are held subject to examination by the demanding authority, the custodian has no privilege to refuse production although their contents tend to criminate him. In assuming their custody he has accepted the incident obligation to permit inspection." 221 U. S., at 382. "Nothing more is demanded than that the appellant should perform the obligations pertaining to his custody and should produce the books which he holds in his official capacity in accordance with the requirements of the subpoena." *Id.*, at 386.

This theme was echoed in *White:*

> "But individuals, when acting as representatives of a collective group, cannot be said to be exercising their personal rights and duties nor to be entitled to their purely personal privileges. Rather they assume the rights, duties and privileges of the artificial entity or association of which they are agents or officers and they are bound by its obligations. In their official capacity, therefore, they have no privilege against self-incrimination. And the official records and documents of the organization that are held by them in a representative rather than in a personal capacity cannot be the subject of the personal privilege against self-incrimination, even though production

of the papers might tend to incriminate them personally." 322 U. S., at 699.[4]

In *Dreier*, 221 U. S. 394 (1911), and *Bellis*, 417 U. S. 85 (1974), the subpoenas were addressed to the custodians and demanded that they produce the records sought. In both cases, the custodian's act of producing the documents would "tacitly admi[t] their existence and their location in the hands of their possessor," *Fisher*, *supra*, at 411–412. Nevertheless, the Court rejected the Fifth Amendment claims advanced by the custodians. Although the Court did not focus on the testimonial aspect of the act of production, we do not think such a focus would have affected the results reached. "It is well settled that no privilege can be claimed by the custodian of corporate records . . . ." *Bellis*, *supra*, at 100.

Indeed, the opinion in *Fisher*—upon which petitioner places primary reliance[5]—indicates that the custodian of corporate records may not interpose a Fifth Amendment objection to

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[4] See also *Bellis* v. *United States*, 417 U. S. 85, 88 (1974) ("[A]n individual cannot rely upon the privilege to avoid producing the records of a collective entity which are in his possession in a representative capacity, even if these records might incriminate him personally"); *Essgee Co. of China* v. *United States*, 262 U. S. 151, 158 (1923) ("[T]he cases of *Hale* v. *Henkel*, 201 U. S. 43, *Wilson* v. *United States*, 221 U. S. 361, and *Wheeler* v. *United States*, 226 U. S. 478, show clearly that an officer of a corporation in whose custody are its books and papers is given no right to object to the production of the corporate records because they may disclose his guilt. He does not hold them in his private capacity and is not, therefore, protected against their production or against a writ requiring him as agent of the corporation to produce them").

[5] Petitioner also offers *United States* v. *Doe*, 465 U. S. 605 (1984), as support for his position, but that decision is plainly inapposite. The *Doe* opinion begins by explaining that the question presented for review is "whether, and to what extent, the Fifth Amendment privilege against compelled self-incrimination applies to the business records of a *sole proprietorship*." *Id.*, at 606 (emphasis added). A sole proprietor does not hold records in a representative capacity. Thus, the absence of any discussion of the collective entity rule can in no way be thought a suggestion that the status of the holder of the records is irrelevant.

the compelled production of corporate records, even though the act of production may prove personally incriminating. The *Fisher* Court cited the collective entity decisions with approval and offered those decisions to support the conclusion that the production of the accountant's workpapers would "not . . . involve testimonial self-incrimination." 425 U. S., at 411. The Court observed: "This Court has . . . time and again allowed subpoenas against the custodian of corporate documents or those belonging to other collective entities such as unions and partnerships and those of bankrupt businesses over claims that the documents will incriminate the custodian despite the fact that producing the documents tacitly admits their existence and their location in the hands of their possessor." *Id.*, at 411–412. The Court later noted that "in *Wilson*, *Dreier*, *White*, *Bellis*, and *In re Harris*, [221 U. S. 274 (1911)], the custodian of corporate, union, or partnership books or those of a bankrupt business was ordered to respond to a subpoena for the business' books even though doing so involved a 'representation that the documents produced are those demanded by the subpoena,' *Curcio* v. *United States*, 354 U. S., at 125." *Id.*, at 413 (citations omitted). In a footnote, the Court explained: "In these cases compliance with the subpoena is required even though the books have been kept by the person subpoenaed and his producing them would itself be sufficient authentication to permit their introduction against him." *Id.*, at 413, n. 14. The Court thus reaffirmed the obligation of a corporate custodian to comply with a subpoena addressed to him.

That point was reiterated by JUSTICE BRENNAN in his concurrence in *Fisher*. *Id.*, at 429 (concurring in judgment). Although JUSTICE BRENNAN disagreed with the majority as to its use of the collective entity cases to support the proposition that the act of production is not testimonial, he nonetheless acknowledged that a custodian may not resist a subpoena

on the ground that the act of production would be incriminating. "Nothing in the language of [the collective entity] cases, either expressly or impliedly, indicates that the act of production with respect to the records of business entities is insufficiently testimonial for purposes of the Fifth Amendment. At most, those issues, though considered, were disposed of on the ground, not that production was insufficiently testimonial, but that one in control of the records of an artificial organization undertakes an obligation with respect to those records foreclosing any exercise of his privilege." *Id.*, at 429–430; see also *id.*, at 430, n. 9. Thus, whether one concludes—as did the Court—that a custodian's production of corporate records is deemed not to constitute testimonial self-incrimination, or instead that a custodian waives the right to exercise the privilege, the lesson of *Fisher* is clear: A custodian may not resist a subpoena for corporate records on Fifth Amendment grounds.

Petitioner also attempts to extract support for his contention from *Curcio* v. *United States*, 354 U. S. 118 (1957). But rather than bolstering petitioner's argument, we think *Curcio* substantiates the Government's position. Curcio had been served with two subpoenas addressed to him in his capacity as secretary-treasurer of a local union, which was under investigation. One subpoena required that he produce union books, the other that he testify. Curcio appeared before the grand jury, stated that the books were not in his possession, and refused to answer any questions as to their whereabouts. Curcio was held in contempt for refusing to answer the questions propounded. We reversed the contempt citation, rejecting the Government's argument "that the representative duty which required the production of union records in the *White* case requires the giving of oral testimony by the custodian." *Id.*, at 123.

Petitioner asserts that our *Curcio* decision stands for the proposition that although the contents of a collective entity's

records are unprivileged, a representative of a collective entity cannot be required to provide testimony about those records. It follows, according to petitioner, that because *Fisher* recognizes that the act of production is potentially testimonial, such an act may not be compelled if it would tend to incriminate the representative personally. We find this reading of *Curcio* flawed.

The *Curcio* Court made clear that with respect to a custodian of a collective entity's records, the line drawn was between oral testimony and other forms of incrimination. "A custodian, by assuming the duties of his office, undertakes the obligation to produce the books of which he is custodian in response to a rightful exercise of the State's visitorial powers. But he cannot lawfully be compelled, in the absence of a grant of adequate immunity from prosecution, to condemn himself by his own *oral testimony*." 354 U. S., at 123–124 (emphasis added).[6]

In distinguishing those cases in which a corporate officer was required to produce corporate records and merely identify them by oral testimony, the Court showed that it understood the testimonial nature of the act of production: "The custodian's act of producing books or records in response to a subpoena *duces tecum* is itself a representation that the documents produced are those demanded by the subpoena. Requiring the custodian to identify or authenticate the documents for admission in evidence merely makes explicit what is implicit in the production itself." *Id.*, at 125. In the face of this recognition, the Court nonetheless noted: "In this case petitioner might have been proceeded against for his failure

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[6] See also 354 U. S., at 124–125 ("There is no hint in [the collective entity] decisions that a custodian of corporate or association books waives his constitutional privilege as to oral testimony by assuming the duties of his office. By accepting custodianship of records he 'has voluntarily assumed a duty which overrides his claim of privilege' *only* with respect to the production of the records themselves. *Wilson* v. *United States*, 221 U. S. 361, 380") (emphasis in original).

to produce the records demanded by the subpoena *duces tecum.*"[7] *Id.*, at 127, n. 7. As JUSTICE BRENNAN later observed in his concurrence in *Fisher:* "The Court in *Curcio*, however, apparently did not note any self-incrimination problem [with the testimonial significance of the act of production] because of the undertaking by the custodian with respect to the documents." 425 U. S., at 430, n. 9.[8]

We note further that recognizing a Fifth Amendment privilege on behalf of the records custodians of collective entities would have a detrimental impact on the Government's efforts to prosecute "white-collar crime," one of the most serious problems confronting law enforcement authorities.[9] "The greater portion of evidence of wrongdoing by an organization or its representatives is usually found in the official records and documents of that organization. Were the cloak of the privilege to be thrown around these impersonal records and documents, effective enforcement of many federal and state laws would be impossible." *White*, 322 U. S., at 700. If

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[7] The dissent's suggestion that we have extracted from *Curcio* a distinction between oral testimony and act of production testimony that is nowhere found in the *Curcio* opinion, see *post*, at 126, simply ignores this part of *Curcio*. Similarly, the dissent pays mere lipservice to the agency rationale supporting an unbroken chain of collective entity decisions. We have consistently held that for Fifth Amendment purposes a corporate custodian acts in a representative capacity when he produces corporate documents under the compulsion of a subpoena. The dissent's failure to recognize this principle and its suggestion that petitioner was not called upon to act in his capacity as an agent of the corporations cannot be squared with our previous decisions.

[8] Doubtless, the compelled production of the records at issue in the subsequent *Bellis* decision would have had testimonial implications; the Court nonetheless upheld the contempt order. *Bellis* v. *United States*, 417 U. S. 85 (1974).

[9] White-collar crime is "the most serious and all-pervasive crime problem in America today." Conyers, Corporate and White-Collar Crime: A View by the Chairman of the House Subcommittee on Crime, 17 Am. Crim. L. Rev. 287, 288 (1980). Although this statement was made in 1980, there is no reason to think the problem has diminished in the meantime.

custodians could assert a privilege, authorities would be stymied not only in their enforcement efforts against those individuals but also in their prosecutions of organizations. In *Bellis*, the Court observed: "In view of the inescapable fact that an artificial entity can only act to produce its records through its individual officers or agents, recognition of the individual's claim of privilege with respect to the financial records of the organization would substantially undermine the unchallenged rule that the organization itself is not entitled to claim any Fifth Amendment privilege, and largely frustrate legitimate governmental regulation of such organizations." 417 U. S., at 90.

Petitioner suggests, however, that these concerns can be minimized by the simple expedient of either granting the custodian statutory immunity as to the act of production, 18 U. S. C. §§ 6002, 6003, or addressing the subpoena to the corporation and allowing it to chose an agent to produce the records who can do so without incriminating himself. We think neither proposal satisfactorily addresses these concerns. Taking the last first, it is no doubt true that if a subpoena is addressed to a corporation, the corporation "must find some means by which to comply because no Fifth Amendment defense is available to it." *In re Sealed Case*, 266 U. S. App. D. C. 30, 44, n. 9, 832 F. 2d 1268, 1282, n. 9 (1987). The means most commonly used to comply is the appointment of an alternate custodian. See, *e. g.*, *In re Two Grand Jury Subpoenae Duces Tecum*, 769 F. 2d 52, 57 (CA2 1985); *United States* v. *Lang*, 792 F. 2d 1235, 1240–1241 (CA4), cert. denied, 479 U. S. 985 (1986); *In re Grand Jury No. 86–3 (Will Roberts Corp.)*, 816 F. 2d 569, 573 (CA11 1987). But petitioner insists he cannot be required to aid the appointed custodian in his search for the demanded records, for any statement to the surrogate would itself be testimonial and incriminating. If this is correct, then petitioner's "solution" is a chimera. In situations such as this—where the corporate custodian is likely the only person with knowledge

about the demanded documents—the appointment of a surrogate will simply not ensure that the documents sought will ever reach the grand jury room; the appointed custodian will essentially be sent on an unguided search.

This problem is eliminated if the Government grants the subpoenaed custodian statutory immunity for the testimonial aspects of his act of production. But that "solution" also entails a significant drawback. All of the evidence obtained under a grant of immunity to the custodian may of course be used freely against the corporation, but if the Government has any thought of prosecuting the custodian, a grant of act of production immunity can have serious consequences. Testimony obtained pursuant to a grant of statutory use immunity may be used neither directly nor derivatively. 18 U. S. C. § 6002; *Kastigar* v. *United States*, 406 U. S. 441 (1972). And "[o]ne raising a claim under [the federal immunity] statute need only show that he testified under a grant of immunity in order to shift to the government the heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources." *Id.*, at 461–462. Even in cases where the Government does not employ the immunized testimony for any purpose—direct or derivative—against the witness, the Government's inability to meet the "heavy burden" it bears may result in the preclusion of crucial evidence that was obtained legitimately.[10]

Although a corporate custodian is not entitled to resist a subpoena on the ground that his act of production will be personally incriminating, we do think certain consequences flow from the fact that the custodian's act of production is one in

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[10] The dissent asserts that recognition of an act of production privilege on behalf of corporate custodians will not seriously undermine law enforcement efforts directed against those custodians because only the custodian's act of production need be immunized. See *post*, at 130. But the burden of proving an independent source that a grant of immunity places on the Government could, in our view, have just such a deleterious effect on law enforcement efforts.

his representative rather than personal capacity. Because the custodian acts as a representative, the act is deemed one of the corporation and not the individual. Therefore, the Government concedes, as it must, that it may make no evidentiary use of the "individual act" against the individual. For example, in a criminal prosecution against the custodian, the Government may not introduce into evidence before the jury the fact that the subpoena was served upon and the corporation's documents were delivered by one particular individual, the custodian. The Government has the right, however, to use the corporation's act of production against the custodian. The Government may offer testimony—for example, from the process server who delivered the subpoena and from the individual who received the records—establishing that the corporation produced the records subpoenaed. The jury may draw from the corporation's act of production the conclusion that the records in question are authentic corporate records, which the corporation possessed, and which it produced in response to the subpoena. And if the defendant held a prominent position within the corporation that produced the records, the jury may, just as it would had someone else produced the documents, reasonably infer that he had possession of the documents or knowledge of their contents. Because the jury is not told that the defendant produced the records, any nexus between the defendant and the documents results solely from the corporation's act of production and other evidence in the case.[11]

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[11] We reject the suggestion that the limitation on the evidentiary use of the custodian's act of production is the equivalent of constructive use immunity barred under our decision in *Doe*, 465 U. S., at 616–617. Rather, the limitation is a necessary concomitant of the notion that a corporate custodian acts as an agent and not an individual when he produces corporate records in response to a subpoena addressed to him in his representative capacity.

We leave open the question whether the agency rationale supports compelling a custodian to produce corporate records when the custodian is able to establish, by showing for example that he is the sole employee and offi-

Consistent with our precedent, the United States Court of Appeals for the Fifth Circuit ruled that petitioner could not resist the subpoena for corporate documents on the ground that the act of production might tend to incriminate him. The judgment is therefore

Affirmed.

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

Our long course of decisions concerning artificial entities and the Fifth Amendment served us well. It illuminated two of the critical foundations for the constitutional guarantee against self-incrimination: first, that it is an explicit right of a natural person, protecting the realm of human thought and expression; second, that it is confined to governmental compulsion.

It is regrettable that the very line of cases which at last matured to teach these principles is now invoked to curtail them, for the Court rules that a natural person forfeits the privilege in a criminal investigation directed against him and that the Government may use compulsion to elicit testimonial assertions from a person who faces the threat of criminal proceedings. A case that might have served as the paradigmatic expression of the purposes served by the Fifth Amendment instead is used to obscure them.

The Court today denies an individual his Fifth Amendment privilege against self-incrimination in order to vindicate the rule that a collective entity which employs him has no such privilege itself. To reach this ironic conclusion, the majority must blur an analytic clarity in Fifth Amendment doctrine that has taken almost a century to emerge. After holding that corporate employment strips the individual of his privilege, the Court then attempts to restore some measure of protection by its judicial creation of a new zone of immunity

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cer of the corporation, that the jury would inevitably conclude that he produced the records.

in some vaguely defined circumstances. This exercise admits what the Court denied in the first place, namely, that compelled compliance with the subpoena implicates the Fifth Amendment self-incrimination privilege.

The majority's apparent reasoning is that collective entities have no privilege and so their employees must have none either. The Court holds that a corporate agent must incriminate himself even when he is named in the subpoena and is a target of the investigation, and even when it is conceded that compliance requires compelled, personal, testimonial, incriminating assertions. I disagree with that conclusion; find no precedent for it; maintain that if there is a likelihood of personal self-incrimination the narrow use immunity permitted by statute can be granted without frustrating the investigation of collective entities; and submit that basic Fifth Amendment principles should not be avoided and manipulated, which is the necessary effect of this decision.

I

There is some common ground in this case. All accept the longstanding rule that labor unions, corporations, partnerships, and other collective entities have no Fifth Amendment self-incrimination privilege; that a natural person cannot assert such a privilege on their behalf; and that the contents of business records prepared without compulsion can be used to incriminate even a natural person without implicating Fifth Amendment concerns. Further, all appear to concede or at least submit the case to us on the assumption that the act of producing the subpoenaed documents will effect personal incrimination of Randy Braswell, the individual to whom the subpoena is directed.

The petitioner's assertion of the Fifth Amendment privilege against the forced production of documents is based not on any contention that their contents will incriminate him but instead upon the unchallenged premise that the act of production will do so. When the case is presented on this assump-

tion, there exists no historical or logical relation between the so-called collective entity rule and the individual's claim of privilege. A brief review of the foundational elements of the Self-Incrimination Clause and of our cases respecting collective entities is a necessary starting point.

A

In *Boyd* v. *United States*, 116 U. S. 616 (1886), we held that the compelled disclosure of the contents of "private papers" (which in *Boyd* was a business invoice), *id.*, at 622, was prohibited not only by the Fifth Amendment but by the Fourth Amendment as well. The decision in *Boyd* generated nearly a century of doctrinal ambiguity as we explored its rationale and sought to define its protection for the contents of business records under the Fifth Amendment.

That effort was not always successful. As we recently recognized, *Boyd*'s reasoning is in many respects inconsistent with our present understanding of the Fourth and Fifth Amendments, and "[s]everal of *Boyd*'s express or implicit declarations have not stood the test of time." *Fisher* v. *United States*, 425 U. S. 391, 407 (1976). Its essential premise was rejected four years ago, when we held that the contents of business records produced by subpoena are not privileged under the Fifth Amendment, absent some showing that the documents were prepared under compulsion. *United States* v. *Doe*, 465 U. S. 605, 610–611, n. 8 (1984) *(Doe I)*. Our holding followed from a straightforward reading of the Fifth Amendment privilege. We held that unless the Government has somehow compelled the preparation of a business document, nothing in the Fifth Amendment prohibits the use of the writing in a criminal investigation or prosecution. *Id.*, at 610–612.

A subpoena does not, however, seek to compel creation of a document; it compels its production. We recognized this distinction in *Fisher*, holding that the act of producing documents itself may communicate information separate from the

documents' contents and that such communication, in some circumstances, is compelled testimony. An individual who produces documents may be asserting that they satisfy the general description in the subpoena, or that they were in his possession or under his control. Those assertions can convey information about that individual's knowledge and state of mind as effectively as spoken statements, and the Fifth Amendment protects individuals from having such assertions compelled by their own acts.

This is well-settled law, or so I had assumed. In *Doe I*, for example, when we reviewed a claim of Fifth Amendment privilege asserted by a sole proprietor in response to a Government subpoena for his business records, our opinion announced two principal holdings. First, we unequivocally rejected the notion, derived from *Boyd*, that any protection attached to their contents. 465 U. S., at 612. Second, in reliance on the findings of the District Court that production would be testimonial and self-incriminating, we upheld the claim that the act of producing these documents was privileged. *Id.*, at 613–614. Our second holding did not depend on who owned the papers, how they were created, or what they said; instead, we rested on the fact that "the act of producing the documents would involve testimonial self-incrimination." *Id.*, at 613. That principle ought to be sufficient to resolve the case before us.

The majority does not challenge the assumption that compliance with the subpoena here would require acts of testimonial self-incrimination from Braswell; indeed, the Government itself made this assumption in submitting its argument. Tr. of Oral Arg. 26, 36. The question presented, therefore, is whether an individual may be compelled, simply by virtue of his status as a corporate custodian, to perform a testimonial act which will incriminate him personally. The majority relies entirely on the collective entity rule in holding that such compulsion is constitutional.

B

The collective entity rule provides no support for the majority's holding. The rule, as the majority chooses to call it, actually comprises three distinct propositions, none of which is relevant to the claim in this case. First, since *Hale* v. *Henkel*, 201 U. S. 43 (1906), it has been understood that a corporation has no Fifth Amendment privilege and cannot resist compelled production of its documents on grounds that it will be incriminated by their release. Second, our subsequent opinions show the collective entity principle is not confined to corporations, and we apply it as well to labor unions, *United States* v. *White*, 322 U. S. 694 (1944), and partnerships, *Bellis* v. *United States*, 417 U. S. 85 (1974). Finally, in *Wilson* v. *United States*, 221 U. S. 361 (1911), we extended the rule beyond the collective entity itself and rejected an assertion of privilege by a corporate custodian who had claimed that the disclosure of the contents of subpoenaed corporate documents would incriminate him. *Id.*, at 363. In none of the collective entity cases cited by the majority, and in none that I have found, were we presented with a claim that the custodian would be incriminated by the act of production, in contrast to the contents of the documents.

The distinction is central. Our holding in *Wilson* was premised squarely on the fact that the custodian's claim rested on the potential for incrimination in the documents' contents, and we reasoned that the State's visitatorial powers over corporations included the authority to inspect corporate books. We compared the issue to that presented by cases involving public papers, explaining that "where, by virtue of their character and the rules of law applicable to them, the books and papers are held subject to examination by the demanding authority, the custodian has no privilege to refuse production although their contents tend to criminate him." *Id.*, at 382. Our decision in *Wilson* and in later collective entity cases reflected, I believe, the Court's understandable unease with drawing too close a connection between an indi-

vidual and an artificial entity. On a more practical level, the Court was also unwilling to draw too close a connection between the custodian and the contents of business documents over which he had temporary control but which belonged to his employer, often were prepared by others, and in all events were prepared voluntarily. This last factor became the focus of our analysis in *Fisher*, where we made clear that the applicability of the Fifth Amendment privilege depends on compulsion. *Fisher* put to rest the notion that a privilege may be claimed with respect to the contents of business records that were voluntarily prepared.

The act of producing documents stands on an altogether different footing. While a custodian has no necessary relation to the contents of documents within his control, the act of production is inescapably his own. Production is the precise act compelled by the subpoena, and obedience, in some cases, will require the custodian's own testimonial assertions. That was the basis of our recognition of the privilege in *Doe I*. The entity possessing the documents in *Doe I* was, as the majority points out, a sole proprietorship, not a corporation, partnership, or labor union. But the potential for self-incrimination inheres in the act demanded of the individual, and as a consequence the nature of the entity is irrelevant to determining whether there is ground for the privilege.

A holding that the privilege against self-incrimination applies in the context of this case is required by the precedents, and not, as the Government and the majority suggest, inconsistent with them. The collective entity rule established in *Hale* v. *Henkel*, and extended in *White* and *Bellis*, remains valid. It also continues to be the rule, as we held in *Wilson*, that custodians of a collective entity are not permitted to claim a personal privilege with respect to the contents of entity records, although that rule now derives not from the unprotected status of collective entities but from the more rational principle, established by *Fisher* and *Doe I* and now

recognized, that no one may claim a privilege with respect to the contents of business records not created by compulsion.

The question before us is not the existence of the collective entity rule, but whether it contains any principle which overrides the personal Fifth Amendment privilege of someone compelled to give incriminating testimony. Our precedents establish a firm basis for assertion of the privilege. Randy Braswell, like the respondent in *Doe I*, is being asked to draw upon his personal knowledge to identify and to deliver documents which are responsive to the Government's subpoena. Once the Government concedes there are testimonial consequences implicit in the act of production, it cannot escape the conclusion that compliance with the subpoena is indisputably Braswell's own act. To suggest otherwise "is to confuse metaphor with reality." *Pacific Gas & Electric Co.* v. *Public Utilities Comm'n of California*, 475 U. S. 1, 33 (1986) (REHNQUIST, J., dissenting).

C

The testimonial act demanded of petitioner in this case must be analyzed under the same principles applicable to other forms of compelled testimony. In *Curcio* v. *United States*, 354 U. S. 118 (1957), we reviewed a judgment holding a union custodian in criminal contempt for failing to give oral testimony regarding the location and possession of books and records he had been ordered to produce. *White* had already established that a labor union was as much a collective entity for Fifth Amendment purposes as a corporation, and the Government argued in *Curcio* that the custodian could not claim a personal privilege because he was performing only a "representative duty" on behalf of the collective entity to which he belonged. Brief for United States in *Curcio* v. *United States*, O. T. 1956, No. 260, p. 17. We rejected that argument and reversed the judgment below. We stated:

> "[F]orcing the custodian to testify orally as to the whereabouts of nonproduced records requires him to disclose

the contents of his own mind. He might be compelled to convict himself out of his own mouth. That is contrary to the spirit and letter of the Fifth Amendment." *Curcio*, *supra*, at 128.

We confront the same Fifth Amendment claim here. The majority is able to distinguish *Curcio* only by giving much apparent weight to the words "out of his own mouth," reading *Curcio* to stand for the proposition that the Constitution treats oral testimony differently than it does other forms of assertion. There is no basis in the text or history of the Fifth Amendment for such a distinction. The Self-Incrimination Clause speaks of compelled "testimony," and has always been understood to apply to testimony in all its forms. *Doe* v. *United States*, *post*, at 209–210, n. 8 *(Doe II)*. Physical acts will constitute testimony if they probe the state of mind, memory, perception, or cognition of the witness. The Court should not retreat from the plain implications of this rule and hold that such testimony may be compelled, even when self-incriminating, simply because it is not spoken.

The distinction established by *Curcio*, *supra*, is not, of course, between oral and other forms of testimony; rather it is between a subpoena which compels a person to "disclose the contents of his own mind," through words or actions, and one which does not. *Id.*, at 128. A custodian who is incriminated simply by the contents of the documents he has physically transmitted has not been compelled to disclose his memory or perception or cognition. A custodian who is incriminated by the personal knowledge he communicates in locating and selecting the document demanded in a Government subpoena has been compelled to testify in the most elemental, constitutional sense.

D

Recognition of the privilege here would also avoid adoption of the majority's metaphysical progression, which, I respectfully submit, is flawed. Beginning from ordinary prin-

ciples of agency, the majority proceeds to the conclusion that when a corporate employee, or an employee of a labor union or partnership, complies with a subpoena for production of documents, his act is necessarily and solely the act of the entity. That premise, of course, is at odds with the principle under which oral testimony in *Curcio* properly was deemed privileged.

Since the custodian in *Curcio* had been asked to provide testimony on the union's behalf and not his own, the Government argued, as it again argues here, that the attempted compulsion was constitutionally permissible because Curcio was performing only a representative duty. We held, however, that testimony of that sort may not be divorced from the person who speaks it. The questions the Government wished to ask would have required Curcio to disclose his own knowledge, and as a matter of law his responses could not be alienated from him and attributed to the labor union. In similar fashion, the act demanded of Braswell requires a personal disclosure of individual knowledge, a fact which cannot be dismissed by labeling him a mere agent.

The heart of the matter, as everyone knows, is that the Government does not see Braswell as a mere agent at all; and the majority's theory is difficult to square with what will often be the Government's actual practice. The subpoena in this case was not directed to Worldwide Machinery Sales, Inc., or Worldwide Purchasing, Inc. It was directed to "Randy Braswell, President[,] Worldwide Machinery Sales, Inc.[,] Worldwide Purchasing, Inc." and informed him that "[y]ou are hereby commanded" to provide the specified documents. App. 6. The Government explained at oral argument that it often chooses to designate an individual recipient, rather than the corporation generally, when it serves a subpoena because "[we] want the right to make that individual comply with the subpoena." Tr. of Oral Arg. 43. This is not the language of agency. By issuing a subpoena which

the Government insists is "directed to petitioner personally," Brief for United States 6 (filed Aug. 14, 1987), it has forfeited any claim that it is simply making a demand on a corporation that, in turn, will have to find a physical agent to perform its duty. What the Government seeks instead is the right to choose any corporate agent as a target of its subpoena and compel that individual to disclose certain information by his own actions.

The majority gives the corporate agent fiction a weight it simply cannot bear. In a peculiar attempt to mitigate the force of its own holding, it impinges upon its own analysis by concluding that, while the Government may compel a named individual to produce records, in any later proceeding against the person it cannot divulge that he performed the act. But if that is so, it is because the Fifth Amendment protects the person without regard to his status as a corporate employee; and once this be admitted, the necessary support for the majority's case has collapsed.

Perhaps the Court makes this concession out of some vague sense of fairness, but the source of its authority to do so remains unexplained. It cannot rest on the Fifth Amendment, for the privilege against self-incrimination does not permit balancing the convenience of the Government against the rights of a witness, and the majority has in any case determined that the Fifth Amendment is inapplicable. If Braswell by his actions reveals information about his state of mind that is relevant to a jury in a criminal proceeding, there are no grounds of which I am aware for declaring the information inadmissible, unless it be the Fifth Amendment.

In *Doe I* we declined expressly to do what the Court does today. Noting that there might well be testimonial assertions attendant upon the production of documents, we rejected the argument that compelled production necessarily carried with it a grant of constructive immunity. We held that immunity may be granted only by appropriate statutory proceedings. The Government must make a formal request

for statutory use immunity under 18 U. S. C. §§ 6002, 6003 if it seeks access to records in exchange for its agreement not to use testimonial acts against the individual. 465 U. S., at 614–617. Rather than beginning the practice of establishing new judicially created evidentiary rules, conferring upon individuals some partial use immunity to avoid results the Court finds constitutionally intolerable, I submit our precedents require the Government to use the only mechanism yet sanctioned for compelling testimony that is privileged: a request for immunity as provided by statute.

II

The majority's abiding concern is that if a corporate officer who is the target of a subpoena is allowed to assert the privilege, it will impede the Government's power to investigate corporations, unions, and partnerships, to uncover and prosecute white-collar crimes, and otherwise to enforce its visitatorial powers. There are at least two answers to this. The first, and most fundamental, is that the text of the Fifth Amendment does not authorize exceptions premised on such rationales. Second, even if it were proper to invent such exceptions, the dangers prophesied by the majority are overstated.

Recognition of the right to assert a privilege does not mean it will exist in many cases. In many instances, the production of documents may implicate no testimonial assertions at all. In *Fisher*, for example, we held that the specific acts required by the subpoena before us "would not itself involve testimonial self-incrimination" because, in that case, "the existence and location of the papers [were] a foregone conclusion and the taxpayer adds little or nothing to the sum total of the Government's information by conceding that he in fact has the papers." 425 U. S., at 411. Whether a particular act is testimonial and self-incriminating is largely a factual issue to be decided in each case. *Doe II*, *post*, p. 201. In the case before us, the Government has made its submission

on the assumption that the subpoena would result in incriminating testimony. The existence of a privilege in future cases, however, is not an automatic result.

Further, to the extent testimonial assertions are being compelled, use immunity can be granted without impeding the investigation. Where the privilege is applicable, immunity will be needed for only one individual, and solely with respect to evidence derived from the act of production itself. The Government would not be denied access to the records it seeks, it would be free to use the contents of the records against everyone, and it would be free to use any testimonial act implicit in production against all but the custodian it selects. In appropriate cases the Government will be able to establish authenticity, possession, and control by means other than compelling assertions about them from a suspect.

In one sense the case before us may not be a particularly sympathetic one. Braswell was the sole stockholder of the corporation and ran it himself. Perhaps that is why the Court suggests he waived his Fifth Amendment self-incrimination rights by using the corporate form. One does not always, however, have the choice of his or her employer, much less the choice of the business enterprise through which the employer conducts its business. Though the Court here hints at a waiver, nothing in Fifth Amendment jurisprudence indicates that the acceptance of employment should be deemed a waiver of a specific protection that is as basic a part of our constitutional heritage as is the privilege against self-incrimination.

The law is not captive to its own fictions. Yet, in the matter before us the Court employs the fiction that personal incrimination of the employee is neither sought by the Government nor cognizable by the law. That is a regrettable holding, for the conclusion is factually unsound, unnecessary for legitimate regulation, and a violation of the Self-Incrimination Clause of the Fifth Amendment of the Constitution. For these reasons, I dissent.

Syllabus

FELDER *v.* CASEY ET AL.

CERTIORARI TO THE SUPREME COURT OF WISCONSIN

No. 87–526. Argued March 28, 1988—Decided June 22, 1988

Nine months after being allegedly beaten by Milwaukee police officers who arrested him on a disorderly conduct charge that was later dropped, petitioner filed this state-court action against the city and certain of the officers under 42 U. S. C. § 1983, alleging that the beating and arrest were racially motivated and violated his rights under the Fourth and Fourteenth Amendments to the Federal Constitution. The officers (respondents) moved to dismiss the suit because of petitioner's failure to comply with Wisconsin's notice-of-claim statute, which provides, *inter alia*, that before suit may be brought in state court against a state or local governmental entity or officer, the plaintiff, within 120 days of the alleged injury, must notify the defendant of the circumstances and amount of the claim and the plaintiff's intent to hold the named defendant liable; that the defendant then has 120 days to grant or disallow the requested relief; and that the plaintiff must bring suit within six months of receiving notice of disallowance. The court denied the motion as to petitioner's § 1983 claim, and the Wisconsin Court of Appeals affirmed. The Wisconsin Supreme Court reversed, holding that while Congress may establish the procedural framework under which claims are heard in federal courts, States retain the authority under the Constitution to prescribe procedures that govern actions in their own tribunals, including actions to vindicate congressionally created rights.

Held: Because the Wisconsin notice-of-claim statute conflicts in both its purpose and effects with § 1983's remedial objectives, and because its enforcement in state-court actions will frequently and predictably produce different outcomes in § 1983 litigation based solely on whether the claim is asserted in state or federal court, it is pre-empted pursuant to the Supremacy Clause when the § 1983 action is brought in a state court. Pp. 138–153.

(a) Unlike the lack of statutes of limitations in the federal civil rights laws—which has led to borrowing state-law limitations periods for personal injury claims—the absence of any federal notice-of-claim provision is not a deficiency requiring the importation of such a state-law provision into the federal civil rights scheme. Notice-of-claim rules are neither universally familiar nor in any sense indispensable prerequisites to litigation, and there is thus no reason to suppose that Congress intended federal courts to apply such rules, which significantly inhibit the ability to

bring federal actions. With regard to federal pre-emption (as opposed to adoption) of state law, application of the notice requirement burdens the exercise of the federal right by forcing civil rights victims who seek redress in state courts to comply with a requirement that is absent from civil rights litigation in federal courts. Moreover, enforcement of such statutes in state-court § 1983 actions will frequently and predictably produce different outcomes in federal civil rights litigation based solely on whether the litigation takes place in state or federal court. Pp. 139–141.

(b) Wisconsin's notice-of-claim statute undermines § 1983's unique remedy against state governmental bodies and their officials by conditioning the right of recovery so as to minimize governmental liability. The state statute also discriminates against the federal right, since the State affords the victim of an intentional tort two years to recognize the compensable nature of his or her injury, while the civil rights victim is given only four months to appreciate that he or she has been deprived of a federal constitutional or statutory right. Moreover, the notice provision operates, in part, as an exhaustion requirement by forcing claimants to seek satisfaction in the first instance from the governmental defendant. Congress never intended that those injured by governmental wrongdoers could be required, as a condition of recovery, to submit their claims to the government responsible for their injuries. Pp. 141–142.

(c) Wisconsin has chosen, through its legislative scheme governing citizens' rights to sue the State's subdivisions, to expose its subdivisions to large liability and defense costs, and has made the concomitant decision to impose notice conditions that assist the subdivisions in controlling those costs. The decision to subject state subdivisions to liability for violations of federal rights, however, was a choice that Congress made, and it is a decision that the State has no authority to override. That state courts will hear the entire § 1983 cause of action once a plaintiff complies with the notice statute does not alter the fact that the statute discriminates against the precise type of claim Congress has created. Pp. 142–145.

(d) While prompt investigation of claims inures to the benefit of both claimants and local governments, notice statutes are enacted *primarily* for the benefit of governmental defendants, and are intended to afford such defendants an opportunity to prepare a stronger case. Sound notions of public administration may support the prompt notice requirement, but those policies necessarily clash with the remedial purposes of the federal civil rights laws. Pp. 145–146.

(e) *Patsy* v. *Board of Regents of Florida*, 457 U. S. 496, which held that plaintiffs need not exhaust state administrative remedies before instituting § 1983 suits in federal court, is not inapplicable to this state-court suit on the theory, asserted by the Wisconsin Supreme Court, that

States retain the authority to prescribe the rules and procedures governing suits in their courts. That authority does not extend so far as to permit States to place conditions on the vindication of a federal right. Congress meant to provide individuals immediate access to the federal courts and did not contemplate that those who sought to vindicate their federal rights in state courts could be required to seek redress in the first instance from the very state officials whose hostility to those rights precipitated their injuries. There is no merit to respondents' contention that the exhaustion requirement imposed by the Wisconsin statute is essentially *de minimis* because the statutory settlement period entails none of the additional expense or undue delay typically associated with administrative remedies, and does not alter a claimant's right to seek full compensation through suit. Moreover, to the extent the exhaustion requirement is designed to sift out "specious claims" from the stream of complaints that can inundate local governments in the absence of immunity, such a policy is inconsistent with the aims of the federal legislation. Pp. 146–150.

(f) Application of Wisconsin's statute to state-court § 1983 actions cannot be approved as a matter of equitable federalism. Just as federal courts are constitutionally obligated to apply state law to state claims, the Supremacy Clause imposes on state courts a constitutional duty to proceed in such manner that all the substantial rights of the parties under controlling federal law are protected. A state law that predictably alters the outcome of § 1983 claims depending solely on whether they are brought in state or federal court within the State is obviously inconsistent with the federal interest in intrastate uniformity. Pp. 150–153.

139 Wis. 2d 614, 408 N. W. 2d 19, reversed and remanded.

BRENNAN, J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, STEVENS, SCALIA, and KENNEDY, JJ., joined. WHITE, J., filed a concurring opinion, *post*, p. 153. O'CONNOR, J., filed a dissenting opinion, in which REHNQUIST, C. J., joined, *post*, p. 156.

Steven H. Steinglass argued the cause for petitioner. With him on the briefs was *Curry First.*

Grant F. Langley argued the cause for respondents. With him on the brief were *Rudolph M. Konrad* and *Reynold Scott Ritter.**

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*Briefs of *amici curiae* urging affirmance were filed for the State of California et al. by *Donald J. Hanaway*, Attorney General of Wisconsin, and *Charles D. Hoornstra* and *Arleen E. Michor*, Assistant Attorneys

JUSTICE BRENNAN delivered the opinion of the Court.

A Wisconsin statute provides that before suit may be brought in state court against a state or local governmental entity or officer, the plaintiff must notify the governmental defendant of the circumstances giving rise to the claim, the amount of the claim, and his or her intent to hold the named defendant liable. The statute further requires that, in order to afford the defendant an opportunity to consider the requested relief, the claimant must refrain from filing suit for 120 days after providing such notice. Failure to comply with these requirements constitutes grounds for dismissal of the action. In the present case, the Supreme Court of Wisconsin held that this notice-of-claim statute applies to federal civil rights actions brought in state court under 42 U. S. C. § 1983. Because we conclude that these requirements are pre-empted as inconsistent with federal law, we reverse.

I

On July 4, 1981, Milwaukee police officers stopped petitioner Bobby Felder for questioning while searching his neighborhood for an armed suspect. The interrogation proved to be hostile and apparently loud, attracting the attention of petitioner's family and neighbors, who succeeded in convincing the police that petitioner was not the man they sought. According to police reports, the officers then directed petitioner to return home, but he continued to argue

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General, and by the Attorneys General for their respective States as follows: *John K. Van de Kamp* of California, *Duane Woodard* of Colorado, *Jim Jones* of Idaho, *Linley E. Pearson* of Indiana, *Thomas J. Miller* of Iowa, *Frank J. Kelley* of Michigan, *Hal Stratton* of New Mexico, *Robert H. Henry* of Oklahoma, *LeRoy S. Zimmerman* of Pennsylvania, *David L. Wilkinson* of Utah, *Jeffrey Amestoy* of Vermont, *Mary Sue Terry* of Virginia, *Charles G. Brown* of West Virginia, and *Joseph B. Meyer* of Wyoming; for the State of South Dakota by *Roger A. Tellinghuisen*, Attorney General, and *Wade A. Hubbard* and *Craig M. Eichstadt*, Assistant Attorneys General; and for the International City Management Association et al. by *Benna Ruth Solomon*, *Beate Bloch*, and *Clifton S. Elgarten*.

and allegedly pushed one of them, thereby precipitating his arrest for disorderly conduct. Petitioner alleges that in the course of this arrest the officers beat him about the head and face with batons, dragged him across the ground, and threw him, partially unconscious, into the back of a paddy wagon face first, all in full view of his family and neighbors. Shortly afterwards, in response to complaints from these neighbors, a local city alderman and members of the Milwaukee Police Department arrived on the scene and began interviewing witnesses to the arrest. Three days later, the local alderman wrote directly to the chief of police requesting a full investigation into the incident. Petitioner, who is black, alleges that various members of the Police Department responded to this request by conspiring to cover up the misconduct of the arresting officers, all of whom are white. The Department took no disciplinary action against any of the officers, and the city attorney subsequently dropped the disorderly conduct charge against petitioner.

Nine months after the incident, petitioner filed this action in the Milwaukee County Circuit Court against the city of Milwaukee and certain of its police officers, alleging that the beating and arrest were unprovoked and racially motivated, and violated his rights under the Fourth and Fourteenth Amendments to the United States Constitution. He sought redress under 42 U. S. C. § 1983,[1] as well as attorney's fees pursuant to 42 U. S. C. § 1988. The officers moved to dis-

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[1] Title 42 U. S. C. § 1983 provides in relevant part:

"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."

Petitioner also stated a claim based on 42 U. S. C. § 1985(2), alleging a racially motivated conspiracy to interfere with his access to the state courts. The parties and the state courts below have treated these claims as identical for purposes of this suit, and we do so here as well.

miss the suit based on petitioner's failure to comply with the State's notice-of-claim statute. That statute provides that no action may be brought or maintained against any state governmental subdivision, agency, or officer unless the claimant either provides written notice of the claim within 120 days of the alleged injury, or demonstrates that the relevant subdivision, agency, or officer had actual notice of the claim and was not prejudiced by the lack of written notice. Wis. Stat. § 893.80(1)(a) (1983 and Supp. 1987).[2] The statute further provides that the party seeking redress must also

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[2] Section 893.80 provides in relevant part:

"(1) Except as provided in sub. (1m), no action may be brought or maintained against any . . . governmental subdivision or agency thereof nor against any officer, official, agent or employe of the . . . subdivision or agency for acts done in their official capacity or in the course of their agency or employment upon a claim or cause of action unless:

"(a) Within 120 days after the happening of the event giving rise to the claim, written notice of the circumstances of the claim signed by the party, agent or attorney is served on the . . . governmental subdivision or agency and on the officer, official, agent or employe. . . . Failure to give the requisite notice shall not bar action on the claim if the . . . governmental subdivision or agency had actual notice of the claim and the claimant shows to the satisfaction of the court that the delay or failure to give the requisite notice has not been prejudicial to the defendant . . . subdivision or agency or to the defendant officer, official, agent or employe; and

"(b) A claim containing the address of the claimant and an itemized statement of the relief sought is presented to the appropriate clerk or person who performs the duties of a clerk or secretary for the defendant . . . subdivision or agency and the claim is disallowed. Failure of the appropriate body to disallow within 120 days after presentation is a disallowance. Notice of disallowance shall be served on the claimant by registered or certified mail and the receipt therefor, signed by the claimant, or the returned registered letter, shall be proof of service. No action on a claim against any defendant . . . subdivision or agency nor against any defendant officer, official, agent or employe may be brought after 6 months from the date of service of the notice, and the notice shall contain a statement to that effect."

Many States have adopted similar provisions. See generally Civil Actions Against State Government, Its Divisions, Agencies, and Officers 559–569 (W. Winborne ed. 1982) (hereinafter Civil Actions).

submit an itemized statement of the relief sought to the governmental subdivision or agency, which then has 120 days to grant or disallow the requested relief. § 893.80(1)(b). Finally, claimants must bring suit within six months of receiving notice that their claim has been disallowed. *Ibid.*

The trial court granted the officers' motion as to all state-law causes of action but denied the motion as to petitioner's remaining federal claims. The Court of Appeals affirmed on the basis of its earlier decisions holding the notice-of-claim statute inapplicable to federal civil rights actions brought in state court. The Wisconsin Supreme Court, however, reversed. 139 Wis. 2d 614, 408 N. W. 2d 19 (1987). Passing on the question for the first time, the court reasoned that while Congress may establish the procedural framework under which claims are heard in federal courts, States retain the authority under the Constitution to prescribe the rules and procedures that govern actions in their own tribunals. Accordingly, a party who chooses to vindicate a congressionally created right in state court must abide by the State's procedures. Requiring compliance with the notice-of-claim statute, the court determined, does not frustrate the remedial and deterrent purposes of the federal civil rights laws because the statute neither limits the amount a plaintiff may recover for violation of his or her civil rights, nor precludes the possibility of such recovery altogether. Rather, the court reasoned, the notice requirement advances the State's legitimate interests in protecting against stale or fraudulent claims, facilitating prompt settlement of valid claims, and identifying and correcting inappropriate conduct by governmental employees and officials. Turning to the question of compliance in this case, the court concluded that the complaints lodged with the local police by petitioner's neighbors and the letter submitted to the police chief by the local alderman failed to satisfy the statute's actual notice standard, because these communications neither recited the facts giving

rise to the alleged injuries nor revealed petitioner's intent to hold the defendants responsible for those injuries.

We granted certiorari, 484 U. S. 942 (1987), and now reverse.

II

No one disputes the general and unassailable proposition relied upon by the Wisconsin Supreme Court below that States may establish the rules of procedure governing litigation in their own courts. By the same token, however, where state courts entertain a federally created cause of action, the "federal right cannot be defeated by the forms of local practice." *Brown* v. *Western R. Co. of Alabama*, 338 U. S. 294, 296 (1949). The question before us today, therefore, is essentially one of pre-emption: is the application of the State's notice-of-claim provision to § 1983 actions brought in state courts consistent with the goals of the federal civil rights laws, or does the enforcement of such a requirement instead "'stan[d] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress'"? *Perez* v. *Campbell*, 402 U. S. 637, 649 (1971) (quoting *Hines* v. *Davidowitz*, 312 U. S. 52, 67 (1941)). Under the Supremacy Clause of the Federal Constitution, "[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law," for "any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield." *Free* v. *Bland*, 369 U. S. 663, 666 (1962). Because the notice-of-claim statute at issue here conflicts in both its purpose and effects with the remedial objectives of § 1983, and because its enforcement in such actions will frequently and predictably produce different outcomes in § 1983 litigation based solely on whether the claim is asserted in state or federal court, we conclude that the state law is pre-empted when the § 1983 action is brought in a state court.

A

Section 1983 creates a species of liability in favor of persons deprived of their federal civil rights by those wielding state authority. As we have repeatedly emphasized, "the central objective of the Reconstruction-Era civil rights statutes . . . is to ensure that individuals whose federal constitutional or statutory rights are abridged may recover damages or secure injunctive relief." *Burnett* v. *Grattan*, 468 U. S. 42, 55 (1984). Thus, § 1983 provides "a uniquely federal remedy against incursions . . . upon rights secured by the Constitution and laws of the Nation," *Mitchum* v. *Foster*, 407 U. S. 225, 239 (1972), and is to be accorded "a sweep as broad as its language." *United States* v. *Price*, 383 U. S. 787, 801 (1966).

Any assessment of the applicability of a state law to federal civil rights litigation, therefore, must be made in light of the purpose and nature of the federal right. This is so whether the question of state-law applicability arises in § 1983 litigation brought in state courts, which possess concurrent jurisdiction over such actions, see *Patsy* v. *Board of Regents of Florida*, 457 U. S. 496, 506–507 (1982), or in federal-court litigation, where, because the federal civil rights laws fail to provide certain rules of decision thought essential to the orderly adjudication of rights, courts are occasionally called upon to borrow state law. See 42 U. S. C. § 1988. Accordingly, we have held that a state law that immunizes government conduct otherwise subject to suit under § 1983 is preempted, even where the federal civil rights litigation takes place in state court, because the application of the state immunity law would thwart the congressional remedy, see *Martinez* v. *California*, 444 U. S. 277, 284 (1980), which of course already provides certain immunities for state officials. See *e. g.*, *Davis* v. *Scherer*, 468 U. S. 183 (1984); *Stump* v. *Sparkman*, 435 U. S. 349 (1978); *Imbler* v. *Pachtman*, 424 U. S. 409 (1976). Similarly, in actions brought in federal courts, we have disapproved the adoption of state statutes of limita-

tion that provide only a truncated period of time within which to file suit, because such statutes inadequately accommodate the complexities of federal civil rights litigation and are thus inconsistent with Congress' compensatory aims. *Burnett*, *supra*, at 50–55. And we have directed the lower federal courts in § 1983 cases to borrow the state-law limitations period for personal injury claims because it is "most unlikely that the period of limitations applicable to such claims ever was, or ever would be, fixed [by the forum State] in a way that would discriminate against federal claims, or be inconsistent with federal law in any respect." *Wilson* v. *Garcia*, 471 U. S. 261, 279 (1985).

Although we have never passed on the question, the lower federal courts have all, with but one exception, concluded that notice-of-claim provisions are inapplicable to § 1983 actions brought in federal court. See *Brown* v. *United States*, 239 U. S. App. D. C. 345, 356, n. 6, 742 F. 2d 1498, 1509, n. 6 (1984) (en banc) (collecting cases); but see *Cardo* v. *Lakeland Central School Dist.*, 592 F. Supp. 765, 772–773 (SDNY 1984). These courts have reasoned that, unlike the lack of statutes of limitations in the federal civil rights laws, the absence of any notice-of-claim provision is not a deficiency requiring the importation of such statutes into the federal civil rights scheme. Because statutes of limitation are among the universally familiar aspects of litigation considered indispensable to any scheme of justice, it is entirely reasonable to assume that Congress did not intend to create a right enforceable in perpetuity. Notice-of-claim provisions, by contrast, are neither universally familiar nor in any sense indispensable prerequisites to litigation, and there is thus no reason to suppose that Congress intended federal courts to apply such rules, which "significantly inhibit the ability to bring federal actions." 239 U. S. App. D. C., at 354, 742 F. 2d, at 1507.

While we fully agree with this near-unanimous conclusion of the federal courts, that judgment is not dispositive here, where the question is not one of adoption but of pre-emption.

Nevertheless, this determination that notice-of-claim statutes are inapplicable to federal-court § 1983 litigation informs our analysis in two crucial respects. First, it demonstrates that the application of the notice requirement burdens the exercise of the federal right by forcing civil rights victims who seek redress in state courts to comply with a requirement that is entirely absent from civil rights litigation in federal courts. This burden, as we explain below, is inconsistent in both design and effect with the compensatory aims of the federal civil rights laws. Second, it reveals that the enforcement of such statutes in § 1983 actions brought in state court will frequently and predictably produce different outcomes in federal civil rights litigation based solely on whether that litigation takes place in state or federal court. States may not apply such an outcome-determinative law when entertaining substantive federal rights in their courts.

B

As we noted above, the central purpose of the Reconstruction-Era laws is to provide compensatory relief to those deprived of their federal rights by state actors. Section 1983 accomplishes this goal by creating a form of liability that, by its very nature, runs only against a specific class of defendants: government bodies and their officials. Wisconsin's notice-of-claim statute undermines this "uniquely federal remedy," *Mitchum* v. *Foster*, *supra*, at 239, in several interrelated ways. First, it conditions the right of recovery that Congress has authorized, and does so for a reason manifestly inconsistent with the purposes of the federal statute: to minimize governmental liability. Nor is this condition a neutral and uniformly applicable rule of procedure; rather, it is a substantive burden imposed only upon those who seek redress for injuries resulting from the use or misuse of governmental authority. Second, the notice provision discriminates against the federal right. While the State affords the victim of an intentional tort two years to recognize the com-

pensable nature of his or her injury, the civil rights victim is given only four months to appreciate that he or she has been deprived of a federal constitutional or statutory right. Finally, the notice provision operates, in part, as an exhaustion requirement, in that it forces claimants to seek satisfaction in the first instance from the governmental defendant. We think it plain that Congress never intended that those injured by governmental wrongdoers could be required, as a condition of recovery, to submit their claims to the government responsible for their injuries.

(1)

Wisconsin's notice-of-claim statute is part of a broader legislative scheme governing the rights of citizens to sue the State's subdivisions. The statute, both in its earliest and current forms, provides a circumscribed waiver of local governmental immunity that limits the amount recoverable in suits against local governments and imposes the notice requirements at issue here. Although the Wisconsin Supreme Court has held that the statutory limits on recovery are preempted in federal civil rights actions, *Thompson* v. *Village of Hales Corners*, 115 Wis. 2d 289, 340 N. W. 2d 704 (1983), and thus recognizes that partial immunities inconsistent with § 1983 must yield to the federal right, it concluded in the present case that the notice and exhaustion conditions attached to the waiver of such immunities may nevertheless be enforced in federal actions. The purposes of these conditions, however, mirror those of the judicial immunity the statute replaced. Such statutes "are enacted primarily for the benefit of governmental defendants," Civil Actions, at 564, and enable those defendants to "investigate early, prepare a stronger case, and perhaps reach an early settlement." *Brown* v. *United States*, *supra*, at 353, 742 F. 2d, at 1506. Moreover, where the defendant is unable to obtain a satisfactory settlement, the Wisconsin statute forces claimants to bring suit within a relatively short period after the local gov-

erning body disallows the claim, in order to "assure prompt initiation of litigation." *Gutter* v. *Seamandel*, 103 Wis. 2d 1, 22, 308 N. W. 2d 403, 413 (1981). To be sure, the notice requirement serves the additional purpose of notifying the proper public officials of dangerous physical conditions or inappropriate and unlawful governmental conduct, which allows for prompt corrective measures. See *Nielsen* v. *Town of Silver Cliff*, 112 Wis. 2d 574, 580, 334 N. W. 2d 242, 245 (1983); *Binder* v. *Madison*, 72 Wis. 2d 613, 623, 241 N. W. 2d 613, 618 (1976). This interest, however, is clearly not the predominant objective of the statute. Indeed, the Wisconsin Supreme Court has emphasized that the requisite notice must spell out both the amount of damages the claimant seeks and his or her intent to hold the governing body responsible for those damages precisely because these requirements further the State's interest in minimizing liability and the expenses associated with it. See *Gutter*, *supra*, at 10–11, 308 N. W. 2d, at 407 (statute's purpose cannot be served unless the claim demands a specific sum of money); *Pattermann* v. *Whitewater*, 32 Wis. 2d 350, 355–359, 145 N. W. 2d 705, 708–709 (1966) (distinguishing notice-of-injury from notice-of-claim requirement).

In sum, as respondents explain, the State has chosen to expose its subdivisions to large liability and defense costs, and, in light of that choice, has made the concomitant decision to impose conditions that "assis[t] municipalities in controlling those costs." Brief for Respondents 12. The decision to subject state subdivisions to liability for violations of federal rights, however, was a choice that Congress, not the Wisconsin Legislature, made, and it is a decision that the State has no authority to override. Thus, however understandable or laudable the State's interest in controlling liability expenses might otherwise be, it is patently incompatible with the compensatory goals of the federal legislation, as are the means the State has chosen to effectuate it.

This incompatibility is revealed by the design of the notice-of-claim statute itself, which operates as a condition precedent to recovery in all actions brought in state court against governmental entities or officers. *Sambs* v. *Nowak*, 47 Wis. 2d 158, 167, 177 N. W. 2d 144, 149 (1970). "Congress," we have previously noted, "surely did not intend to assign to state courts and legislatures a conclusive role in the formative function of defining and characterizing the essential elements of a federal cause of action." *Wilson*, 471 U. S., at 269. Yet that is precisely the consequence of what Wisconsin has done here: although a party bringing suit against a local governmental unit need not allege compliance with the notice statute as part of his or her complaint, *Nielsen*, *supra*, at 580, 334 N. W. 2d, at 245, the statute confers on governmental defendants an affirmative defense that obligates the plaintiff to demonstrate compliance with the notice requirement before he or she may recover at all, a showing altogether unnecessary when such an action is brought in federal court. States, however, may no more condition the federal right to recover for violations of civil rights than bar that right altogether, particularly where those conditions grow out of a waiver of immunity which, however necessary to the assertion of state-created rights against local governments, is entirely irrelevant insofar as the assertion of the federal right is concerned, see *Martinez*, 444 U. S., at 284, and where the purpose and effect of those conditions, when applied in § 1983 actions, is to control the expense associated with the very litigation Congress has authorized.

This burdening of a federal right, moreover, is not the natural or permissible consequence of an otherwise neutral, uniformly applicable state rule. Although it is true that the notice-of-claim statute does not discriminate between state and federal causes of action against local governments, the fact remains that the law's protection extends only to governmental defendants and thus conditions the right to bring suit against the very persons and entities Congress intended to

subject to liability. We therefore cannot accept the suggestion that this requirement is simply part of "the vast body of procedural rules, rooted in policies unrelated to the definition of any particular substantive cause of action, that forms no essential part of 'the cause of action' as applied to any given plaintiff." Brief for International City Management Association et al. as *Amici Curiae* 22 (Brief for *Amici Curiae*). On the contrary, the notice-of-claim provision is imposed only upon a specific class of plaintiffs—those who sue governmental defendants—and, as we have seen, is firmly rooted in policies very much related to, and to a large extent directly contrary to, the substantive cause of action provided those plaintiffs. This defendant-specific focus of the notice requirement serves to distinguish it, rather starkly, from rules uniformly applicable to all suits, such as rules governing service of process or substitution of parties, which respondents cite as examples of procedural requirements that penalize noncompliance through dismissal. That state courts will hear the entire § 1983 cause of action once a plaintiff complies with the notice-of-claim statute, therefore, in no way alters the fact that the statute discriminates against the precise type of claim Congress has created.

(2)

While respondents and *amici* suggest that prompt investigation of claims inures to the benefit of claimants and local governments alike, by providing both with an accurate factual picture of the incident, such statutes "are enacted *primarily* for the benefit of governmental defendants," and are intended to afford such defendants an opportunity to prepare a stronger case. Civil Actions, at 564 (emphasis added); see also *Brown* v. *United States*, 239 U. S. App. D. C., at 354, 742 F. 2d, at 1506. Sound notions of public administration may support the prompt notice requirement, but those policies necessarily clash with the remedial purposes of the federal civil rights laws. In *Wilson*, we held that, for purposes

of choosing a limitations period for § 1983 actions, federal courts must apply the state statute of limitations governing personal injury claims because it is highly unlikely that States would ever fix the limitations period applicable to such claims in a manner that would discriminate against the federal right. Here, the notice-of-claim provision most emphatically does discriminate in a manner detrimental to the federal right: only those persons who wish to sue governmental defendants are required to provide notice within such an abbreviated time period. Many civil rights victims, however, will fail to appreciate the compensable nature of their injuries within the 4-month window provided by the notice-of-claim provision,[3] and will thus be barred from asserting their federal right to recovery in state court unless they can show that the defendant had actual notice of the injury, the circumstances giving rise to it, and the claimant's intent to hold the defendant responsible—a showing which, as the facts of this case vividly demonstrate, is not easily made in Wisconsin.

(3)

Finally, the notice provision imposes an exhaustion requirement on persons who choose to assert their federal right in state courts, inasmuch as the § 1983 plaintiff must provide the requisite notice of injury within 120 days of the civil rights violation, then wait an additional 120 days while the

[3] The notice-of-claim statute does not require that claimants recognize or specify the constitutional nature of their injuries before they may initiate a § 1983 action. Certain constitutional injuries, of course, such as the deprivation of liberty petitioner suffered here, will have obvious and readily recognized common-law tort analogues, *e. g.*, battery. Although the State affords the victim of such an intentional tort two years to appreciate that he or she has suffered a compensable injury, Wis. Stat. § 893.57 (1983), it drastically reduces the time period when the tortfeasor is a governmental officer or employee. Moreover, many other deprivations, such as those involving denial of due process or of equal protection, will be far more subtle. In the latter, and by no means negligible, category of constitutional injuries, victims will frequently fail to recognize within the 4-month statutory period that they have been wronged at all.

governmental defendant investigates the claim and attempts to settle it. In *Patsy* v. *Board of Regents of Florida*, 457 U. S. 496 (1982), we held that plaintiffs need not exhaust state administrative remedies before instituting § 1983 suits in federal court. The Wisconsin Supreme Court, however, deemed that decision inapplicable to this state-court suit on the theory that States retain the authority to prescribe the rules and procedures governing suits in their courts. 139 Wis. 2d, at 623, 408 N. W. 2d, at 23. As we have just explained, however, that authority does not extend so far as to permit States to place conditions on the vindication of a federal right. Moreover, as we noted in *Patsy*, Congress enacted § 1983 in response to the widespread deprivations of civil rights in the Southern States and the inability or unwillingness of authorities in those States to protect those rights or punish wrongdoers. *Patsy*, *supra*, at 503–505; see also *Wilson* v. *Garcia*, 471 U. S., at 276–277, 279. Although it is true that the principal remedy Congress chose to provide injured persons was immediate access to *federal* courts, *Patsy*, *supra*, at 503–504, it did not leave the protection of such rights exclusively in the hands of the federal judiciary, and instead conferred concurrent jurisdiction on state courts as well. 457 U. S., at 506–507. Given the evil at which the federal civil rights legislation was aimed, there is simply no reason to suppose that Congress meant "to provide these individuals immediate access to the federal courts notwithstanding any provision of state law to the contrary," *id.*, at 504, yet contemplated that those who sought to vindicate their federal rights in state courts could be required to seek redress in the first instance from the very state officials whose hostility to those rights precipitated their injuries.[4]

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[4] Several *amici* note that "even the reform-minded Congress of the post-Civil War era did not undertake to try to reform state court procedures in the field of constitutional adjudication," Brief for *Amici Curiae* 14, and conclude from this that Congress "did not intend to interfere with procedural perquisites of the States and their courts." *Id.*, at 16. This argu-

Respondents nevertheless argue that any exhaustion requirement imposed by the notice-of-claim statute is essentially *de minimis* because the statutory settlement period entails none of the additional expense or undue delay typically associated with administrative remedies, and indeed does not alter a claimant's right to seek full compensation through suit. This argument fails for two reasons. First, it ignores our prior assessment of "the dominant characteristic of civil rights actions: *they belong in court.*" *Burnett*, 468 U. S., at 50 (emphasis added). "These causes of action," we have explained, "exist independent of any other legal or administrative relief that may be available as a matter of federal or state law. They are judicially enforceable *in the first instance.*" *Ibid.* (emphasis added). The dominant characteristic of a § 1983 action, of course, does not vary depending upon whether it is litigated in state or federal court, and States therefore may not adulterate or dilute the predominant feature of the federal right by imposing mandatory settlement periods, no matter how reasonable the administrative waiting period or the interests it is designed to serve may appear.

Second, our decision in *Patsy* rested not only on the legislative history of § 1983 itself, but also on the facts that in the Civil Rights of Institutionalized Persons Act of 1980, 94 Stat. 353, 42 U. S. C. § 1997e, Congress established an exhaustion requirement for a specific class of § 1983 actions—those brought by adult prisoners challenging the conditions of

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ment misses its mark. The defects Congress perceived in state courts lay in their jury factfinding processes, which of course were skewed by local prejudices, see *Patsy* v. *Board of Regents of Florida*, 457 U. S., at 506, and not in their otherwise neutral rules of procedure. The fact that Congress saw no need to alter these neutral procedural rules in no way suggests that all *future* state-court procedures, including exhaustion requirements that were unheard of at the time of § 1983's enactment and which apply only to injuries inflicted by the very targets of that statute, would similarly be consistent with the purposes and intent of the federal civil rights laws.

their confinement—and that, in so doing, Congress expressly recognized that it was working a change in the law. Accordingly, we refused to engraft an exhaustion requirement onto another type of § 1983 action where Congress had not provided for one, not only because the judicial imposition of such a requirement would be inconsistent with Congress' recognition that § 1983 plaintiffs normally need not exhaust administrative remedies, 457 U. S., at 508–512, but also because decisions concerning both the desirability and the scope and design of any exhaustion requirement turn on a host of policy considerations which "do not invariably point in one direction," and which, for that very reason, are best left to "Congress' superior institutional competence." *Id.*, at 513. "[P]olicy considerations alone," we concluded, "cannot justify judicially imposed exhaustion unless exhaustion is consistent with congressional intent." *Ibid.* While the exhaustion required by Wisconsin's notice-of-claim statute does not involve lengthy or expensive administrative proceedings, it forces injured persons to seek satisfaction from those alleged to have caused the injury in the first place. Such a dispute resolution system may have much to commend it, but that is a judgment the current Congress must make, for we think it plain that the Congress which enacted § 1983 over 100 years ago would have rejected as utterly inconsistent with the remedial purposes of its broad statute the notion that a State could require civil rights victims to seek compensation from offending state officials before they could assert a federal action in state court.

Finally, to the extent the exhaustion requirement is designed to sift out "specious claims" from the stream of complaints that can inundate local governments in the absence of immunity, see *Nielsen*, 112 Wis. 2d, at 580, 334 N. W. 2d, at 245, we have rejected such a policy as inconsistent with the aims of the federal legislation. In *Burnett*, state officials urged the adoption of a 6-month limitations period in a § 1983 action in order that they might enjoy "some reasonable pro-

tection from the seemingly endless stream of unfounded, and often stale, lawsuits brought against them." 468 U. S., at 54 (internal quotation marks omitted; citation omitted). Such a contention, we noted, "reflects in part a judgment that factors such as minimizing the diversion of state officials' attention from their duties outweigh the interest in providing [claimants] ready access to a forum to resolve valid claims." *Id.*, at 55. As we explained there, and reaffirm today, "[t]hat policy is manifestly inconsistent with the central objective of the Reconstruction-Era civil rights statutes." *Ibid.*

C

Respondents and their supporting *amici* urge that we approve the application of the notice-of-claim statute to § 1983 actions brought in state court as a matter of equitable federalism. They note that "'[t]he general rule, bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them.'" Brief for *Amici Curiae* 8 (quoting Hart, The Relations Between State and Federal Law, 54 Colum. L. Rev. 489, 508 (1954)). Litigants who choose to bring their civil rights actions in state courts presumably do so in order to obtain the benefit of certain procedural advantages in those courts, or to draw their juries from urban populations. Having availed themselves of these benefits, civil rights litigants must comply as well with those state rules they find less to their liking.

However equitable this bitter-with-the-sweet argument may appear in the abstract, it has no place under our Supremacy Clause analysis. Federal law takes state courts as it finds them only insofar as those courts employ rules that do not "impose unnecessary burdens upon rights of recovery authorized by federal laws." *Brown* v. *Western R. Co. of Alabama*, 338 U. S., at 298–299; see also *Monessen Southwestern R. Co.* v. *Morgan*, 486 U. S. 330, 336 (1988) (state rule designed to encourage settlement cannot limit recovery

in federally created action). States may make the litigation of federal rights as congenial as they see fit—not as a *quid pro quo* for compliance with other, uncongenial rules, but because such congeniality does not stand as an obstacle to the accomplishment of Congress' goals. As we have seen, enforcement of the notice-of-claim statute in § 1983 actions brought in state court so interferes with and frustrates the substantive right Congress created that, under the Supremacy Clause, it must yield to the federal interest. This interference, however, is not the only consequence of the statute that renders its application in § 1983 cases invalid. In a State that demands compliance with such a statute before a § 1983 action may be brought or maintained in its courts, the outcome of federal civil rights litigation will frequently and predictably depend on whether it is brought in state or federal court. Thus, the very notions of federalism upon which respondents rely dictate that the State's outcome-determinative law must give way when a party asserts a federal right in state court.

Under *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938), when a federal court exercises diversity or pendent jurisdiction over state-law claims, "the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court." *Guaranty Trust Co.* v. *York*, 326 U. S. 99, 109 (1945). Accordingly, federal courts entertaining state-law claims against Wisconsin municipalities are obligated to apply the notice-of-claim provision. See *Orthmann* v. *Apple River Campground, Inc.*, 757 F. 2d 909, 911 (CA7 1985). Just as federal courts are constitutionally obligated to apply state law to state claims, see *Erie*, *supra*, at 78–79, so too the Supremacy Clause imposes on state courts a constitutional duty "to proceed in such manner that all the substantial rights of the parties under controlling federal law [are] protected." *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239, 245 (1942).

Civil rights victims often do not appreciate the constitutional nature of their injuries, see *Burnett*, 468 U. S., at 50, and thus will fail to file a notice of injury or claim within the requisite time period, see n. 3, *supra*, which in Wisconsin is a mere four months. Unless such claimants can prove that the governmental defendant had actual notice of the claim, which, as we have already noted, is by no means a simple task in Wisconsin, and unless they also file an itemized claim for damages, they must bring their § 1983 suits in federal court or not at all. Wisconsin, however, may not alter the outcome of federal claims it chooses to entertain in its courts by demanding compliance with outcome-determinative rules that are inapplicable when such claims are brought in federal court, for "'[w]hatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.'" *Brown* v. *Western R. Co. of Alabama*, *supra*, at 298–299 (quoting *Davis* v. *Wechsler*, 263 U. S. 22, 24 (1923)). The state notice-of-claim statute is more than a mere rule of procedure: as we discussed above, the statute is a substantive condition on the right to sue governmental officials and entities, and the federal courts have therefore correctly recognized that the notice statute governs the adjudication of state-law claims in diversity actions. *Orthmann*, *supra*, at 911. In *Guaranty Trust*, *supra*, we held that, in order to give effect to a State's statute of limitations, a federal court could not hear a state-law action that a state court would deem time barred. Conversely, a state court may not decline to hear an otherwise properly presented federal claim because that claim would be barred under a state law requiring timely filing of notice. State courts simply are not free to vindicate the substantive interests underlying a state rule of decision at the expense of the federal right.

Finally, in *Wilson*, we characterized § 1983 suits as claims for personal injuries because such an approach ensured that

the same limitations period would govern all § 1983 actions brought in any given State, and thus comported with Congress' desire that the federal civil rights laws be given a uniform application within each State. 471 U. S., at 274–275. A law that predictably alters the outcome of § 1983 claims depending solely on whether they are brought in state or federal court within the same State is obviously inconsistent with this federal interest in intrastate uniformity.

III

In enacting § 1983, Congress entitled those deprived of their civil rights to recover full compensation from the governmental officials responsible for those deprivations. A state law that conditions that right of recovery upon compliance with a rule designed to minimize governmental liability, and that directs injured persons to seek redress in the first instance from the very targets of the federal legislation, is inconsistent in both purpose and effect with the remedial objectives of the federal civil rights law. Principles of federalism, as well as the Supremacy Clause, dictate that such a state law must give way to vindication of the federal right when that right is asserted in state court.

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

It is so ordered.

JUSTICE WHITE, concurring.

It cannot be disputed that, if Congress had included a statute of limitations in 42 U. S. C. § 1983, any state court that entertained a § 1983 suit would have to apply that statute of limitations. As the Court observed in an early case brought under the Federal Employers' Liability Act of 1908, 35 Stat. 65, 45 U. S. C. § 51 *et seq.*, "[i]f [a federal Act] be available in a state court to found a right, and the record shows a lapse of

time after which the [A]ct says that no action shall be maintained, the action must fail in the courts of a State as in those of the United States." *Atlantic Coast Line R. Co.* v. *Burnette*, 239 U. S. 199, 201 (1915). See also *Engel* v. *Davenport*, 271 U. S. 33, 38–39 (1926); *McAllister* v. *Magnolia Petroleum Co.*, 357 U. S. 221, 228 (1958) (BRENNAN, J., concurring).

Similarly, where the Court has determined that a particular state statute of limitations ought to be borrowed in order to effectuate the congressional intent underlying a federal cause of action that contains no statute of limitations of its own, any state court that entertains the same federal cause of action must apply the same state statute of limitations. We made such a determination in *Wilson* v. *Garcia*, 471 U. S. 261 (1985), which held that § 1983 suits must as a matter of federal law[1] be governed by the state statute of limitations applicable to tort suits for the recovery of damages for personal injuries. We reasoned that the choice of a single statute of limitations within each State was supported by "[t]he federal interests in uniformity, certainty, and the minimization of unnecessary litigation," *id.*, at 275, and that the choice of the personal-injury statute of limitations was supported by "the nature of the § 1983 remedy, and by the federal interest in ensuring that the borrowed period of limitations not discriminate against the federal civil rights remedy." *Id.*, at 276.

It has since been assumed that *Wilson* v. *Garcia* governs the timeliness of § 1983 suits brought in state as well as federal court. See, *e. g.*, *Russell* v. *Anchorage*, 743 P. 2d 372, 374–375, and n. 8 (Alaska 1987); *Ziccardi* v. *Pennsylvania Dept. of General Services*, 109 Pa. Commw. 628, 634–

[1] In explaining that the characterization of § 1983 claims for statute-of-limitations purposes is a question of federal law, we observed that "Congress surely did not intend to assign to state courts and legislatures a conclusive role in the formative function of defining and characterizing the essential elements of a federal cause of action." 471 U. S., at 269.

635, 527 A. 2d 183, 185–186 (1987); *Walker* v. *Maruffi*, 105 N. M. 763, 766–769, 737 P. 2d 544, 547–550 (App.), cert. denied, 105 N. M. 707, 736 P. 2d 985 (1987) (table); *Maddocks* v. *Salt Lake City Corp.*, 740 P. 2d 1337, 1338–1339 (Utah 1987); *423 South Salina Street, Inc.* v. *Syracuse*, 68 N. Y. 2d 474, 486–487; 503 N. E. 2d 63, 69–70 (1986), appeal dism'd, 481 U. S. 1008 (1987); *Fuchilla* v. *Layman*, 210 N. J. Super. 574, 582–583, 510 A. 2d 281, 286 (1986), aff'd, 109 N. J. 319, 537 A. 2d 652 (1988); *Henderson* v. *State*, 110 Idaho 308, 311, 715 P. 2d 978, 981, cert. denied, 477 U. S. 907 (1986); *Frisby* v. *Board of Education of Boyle County*, 707 S. W. 2d 359, 361 (Ky. App. 1986); *Vanaman* v. *Palmer*, 506 A. 2d 190 (Del. Super. 1986); *Hanson* v. *Madison Service Corp.*, 125 Wis. 2d 138, 141, 370 N. W. 2d 586, 588 (App. 1985).

The Wisconsin Supreme Court likewise assumed that *Wilson* v. *Garcia* governed which statute of limitations should apply to petitioner's § 1983 claim.[2] The court then effectively truncated the applicable limitations period, however, by dismissing petitioner's § 1983 suit for failure to file a notice of claim within 120 days of the events at issue as required by Wis. Stat. § 893.80 (1983 and Supp. 1987).[3] Hence, petitioner was allowed only about four months in which to investigate whether the facts and the law would support any claim

[2] The court did not decide whether the § 1983 claim was to be governed by the 2-year statute of limitations applicable to intentional torts, Wis. Stat. § 893.57 (1983), or the 3-year statute of limitations applicable generally to "injuries to the person," § 893.54(1).

[3] To be sure, § 893.80 provides that failure to file a notice of claim within the initial 120-day period "shall not bar an action on the claim if the . . . [governmental] subdivision or agency had actual notice of the claim and the claimant shows to the satisfaction of the court that the delay or failure to give the requisite notice has not been prejudicial to the defendant." The facts of this case demonstrate, however, that the "actual notice" requirement is difficult to satisfy. For example, the Wisconsin Supreme Court held that respondents had not received "actual notice" of petitioner's claim even though the local alderman had written directly to the chief of police requesting an investigation of the incident only three days after its occurrence. 139 Wis. 2d 614, 629–630, 408 N. W. 2d 19, 25–26 (1987).

against respondents (or retain a lawyer who would do so), and to notify respondents of his claim, rather than the two or three years that he would have been allowed under Wisconsin law had he sought to assert a similar personal-injury claim against a private party. It is also unlikely that any other State would apply a 120-day limitations period—or, indeed, a limitations period of less than one year—to such a personal-injury claim.[4] This reflects a generally accepted belief among state policymakers that individuals who have suffered injuries to their personal rights cannot fairly be expected to seek redress within so short a period of time.

The application of the Wisconsin notice-of-claim statute to bar petitioner's § 1983 suit—which is "in reality, 'an action for injury to personal rights'" 471 U. S., at 265 (quoting 731 F. 2d 640, 651 (CA10 1984) (opinion below))—thus undermines the purposes of *Wilson* v. *Garcia* to promote "[t]he federal interests in uniformity, certainty, and the minimization of unnecessary litigation," 471 U. S., at 275, and assure that state procedural rules do not "discriminate against the federal civil rights remedy." *Id.*, at 276. I therefore agree that in view of the adverse impact of Wisconsin's notice-of-claim statute on the federal policies articulated in *Wilson* v. *Garcia*, the Supremacy Clause proscribes the statute's application to § 1983 suits brought in Wisconsin state courts.

JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE joins, dissenting.

"A state statute cannot be considered 'inconsistent' with federal law merely because the statute causes the plaintiff to lose the litigation." *Robertson* v. *Wegmann*, 436 U. S. 584,

[4] See Shapiro, Choosing the Appropriate State Statute of Limitations for Section 1983 Claims After *Wilson* v. *Garcia*, 16 U. Balt. L. Rev. 242, 245–246 (1987) (listing potentially applicable limitations periods of 26 States and District of Columbia); Comment, 17 Memphis St. U. L. Rev. 127, 136–137, n. 74 (1986) (listing potentially applicable limitations periods of 29 States, District of Columbia, and Puerto Rico).

593 (1978). Disregarding this self-evident principle, the Court today holds that Wisconsin's notice of claim statute is pre-empted by federal law as to actions under 42 U. S. C. § 1983 filed in state court. This holding is not supported by the statute whose pre-emptive force it purports to invoke, or by our precedents. Relying only on its own intuitions about "the goals of the federal civil rights laws," *ante*, at 138, the Court fashions a new theory of pre-emption that unnecessarily and improperly suspends a perfectly valid state statute. This Court has said that "unenacted approvals, beliefs, and desires are not laws." *Puerto Rico Dept. of Consumer Affairs* v. *Isla Petroleum Corp.*, 485 U. S. 495, 501 (1988). Today's exercise departs not only from that unquestionable proposition, but even from the much more obvious principle that unexpressed approvals, beliefs, and desires are not laws.

Wisconsin's notice of claim statute, which imposes a limited exhaustion of remedies requirement on those with claims against municipal governments and their officials, serves at least two important purposes apart from providing municipal defendants with a special affirmative defense in litigation. First, the statute helps ensure that public officials will receive prompt notice of wrongful conditions or practices, and thus enables them to take prompt corrective action. Second, it enables officials to investigate claims in a timely fashion, thereby making it easier to ascertain the facts accurately and to settle meritorious claims without litigation. These important aspects of the Wisconsin statute bring benefits to governments and claimants alike, and it should come as no surprise that 37 other States have apparently adopted similar notice of claim requirements. App. to Brief for International City Management Association et al. as *Amici Curiae* 1a–2a. Without some compellingly clear indication that Congress has forbidden the States to apply such statutes in their own courts, there is no reason to conclude that they are "pre-empted" by federal law. Allusions to such vague concepts

as "the compensatory aims of the federal civil rights laws," *ante*, at 141, which are all that the Court actually relies on, do not provide an adequate substitute for the statutory analysis that we customarily require of ourselves before we reach out to find statutory pre-emption of legitimate procedures used by the States in their own courts.

Section 1983, it is worth recalling, creates no substantive law. It merely provides one vehicle by which certain provisions of the Constitution and other federal laws may be judicially enforced. Its purpose, as we have repeatedly said, "'was to interpose the *federal courts* between the States and the people, as guardians of the people's federal rights . . . .'" *Patsy* v. *Board of Regents of Florida*, 457 U. S. 496, 503 (1982) (quoting *Mitchum* v. *Foster*, 407 U. S. 225, 242 (1972)) (emphasis added). For that reason, the original version of § 1983 provided that the federal courts would have exclusive jurisdiction of actions arising under it. See Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13. This fact is conclusive proof that the "Congress which enacted § 1983 over 100 years ago," *ante*, at 149, could not possibly have meant thereby to alter the operation of state courts in any way or to "pre-empt" them from using procedural statutes like the one at issue today.

State courts may now entertain § 1983 actions if a plaintiff chooses a state court over the federal forum that is always available as a matter of right. See, *e. g.*, *Martinez* v. *California*, 444 U. S. 277, 283, and n. 7 (1980). Abandoning the rule of exclusive federal jurisdiction over § 1983 actions, and thus restoring the tradition of concurrent jurisdiction, however, "did not leave behind a pre-emptive grin without a statutory cat." *Puerto Rico Dept. of Consumer Affairs* v. *Isla Petroleum Corp.*, *supra*, at 504. Congress has never given the slightest indication that § 1983 was meant to replace state procedural rules with those that apply in the federal courts. The majority does not, because it cannot, cite any evidence to the contrary.

In an effort to remedy this fatal defect in its position, the majority engages in an extended discussion of *Patsy* v. *Board of Regents of Florida*, *supra*. See *ante*, at 147–149. *Patsy*, however, actually undermines the majority's conclusion. In that case, the Court concluded that state exhaustion of remedies requirements were not to be applied in § 1983 actions brought in *federal court*. The Court relied on legislative history indicating that § 1983 was meant to provide a federal forum with characteristics *different* from those in the state courts, 457 U. S., at 502–507, and it came only to the limited and hesitant conclusion that "it seems fair to infer that the 1871 Congress did not intend that an individual be compelled *in every case* to exhaust state administrative remedies before filing an action under [§ 1983]," *id.*, at 507 (emphasis added). Even this limited conclusion, the Court admitted, was "somewhat precarious," *ibid.*, which would have made no sense if the Court had been able to rely on the more general proposition—from which the holding in *Patsy* follows *a fortiori*—that it adopts today.

Patsy also relied on the Civil Rights of Institutionalized Persons Act of 1980, § 7, 94 Stat. 352, 42 U. S. C. § 1997e, which ordinarily requires exhaustion of state remedies before an adult prisoner can bring a § 1983 action in federal court. The Court concluded that the "legislative history of § 1997e demonstrates that Congress has taken the approach of carving out specific exceptions to the general rule that *federal courts* cannot require exhaustion under § 1983." 457 U. S., at 512 (emphasis added). This finding lends further support to the proposition that Congress has never concerned itself with the application of exhaustion requirements in *state* courts, and § 1997e conclusively shows that Congress does not believe that such requirements are somehow inherently incompatible with the nature of actions under § 1983.

For similar reasons, *Brown* v. *Western R. Co. of Alabama*, 338 U. S. 294 (1949), which is repeatedly quoted by the majority, does not control the present case. In *Brown*, which

arose under the Federal Employers' Liability Act (FELA), this Court refused to accept a state court's interpretation of allegations in a complaint asserting a federal statutory right. Concluding that the state court's interpretation of the complaint operated to "detract from 'substantive rights' granted by Congress in FELA cases," the Court "simply h[e]ld that under the facts alleged it was error to dismiss the complaint and that [the claimant] should be allowed to try his case." *Id.*, at 296, 299 (citations omitted). See also *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239, 249 (1942) ("Deeply rooted in admiralty as that right [to a certain presumption] is, it was a part of the very substance of [the plaintiff's] claim and cannot be considered a mere incident of a form of procedure") (citations omitted). In the case before us today, by contrast, the statute at issue does not diminish or alter any substantive right cognizable under § 1983. As the majority concedes, the Wisconsin courts "will hear the entire § 1983 cause of action once a plaintiff complies with the notice-of-claim statute." *Ante*, at 145.

Unable to find support for its position in § 1983 itself, or in its legislative history, the majority suggests that the Wisconsin statute somehow "discriminates against the federal right." *Ante*, at 141. The Wisconsin statute, however, applies to all actions against municipal defendants, whether brought under state or federal law. The majority is therefore compelled to adopt a new theory of discrimination, under which the challenged statute is said to "conditio[n] the right to bring suit against the very persons and entities [viz., local governments and officials] Congress intended to subject to liability." *Ante*, at 144–145. This theory, however, is untenable. First, the statute erects no barrier at all to a plaintiff's right to bring a § 1983 suit against anyone. Every plaintiff has the option of proceeding in federal court, and the Wisconsin statute has not the slightest effect on that right. Second, if a plaintiff chooses to proceed in the Wisconsin state courts, those courts stand ready to hear the entire fed-

eral cause of action, as the majority concedes. See *ante*, at 145. Thus, the Wisconsin statute "discriminates" only against a right that Congress has never created: the right of a plaintiff to have the benefit of selected federal court procedures after the plaintiff has rejected the federal forum and chosen a state forum instead. The majority's "discrimination" theory is just another version of its unsupported conclusion that Congress intended to force the state courts to adopt procedural rules from the federal courts.

The Court also suggests that there is some parallel between this case and cases that are tried in federal court under the doctrine of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938). Quoting the "outcome-determinative" test of *Guaranty Trust Co.* v. *York*, 326 U. S. 99, 109 (1945), the Court opines today that state courts hearing federal suits are obliged to mirror federal procedures to the same extent that federal courts are obliged to mirror state procedures in diversity suits. This suggestion seems to be based on a sort of upside-down theory of federalism, which the Court attributes to Congress on the basis of no evidence at all. Nor are the implications of this "reverse-*Erie*" theory quite clear. If the Court means the theory to be taken seriously, it should follow that defendants, as well as plaintiffs, are entitled to the benefit of all federal court procedural rules that are "outcome determinative." If, however, the Court means to create a rule that benefits only plaintiffs, then the discussion of *Erie* principles is simply an unsuccessful effort to find some analogy, no matter how attenuated, to today's unprecedented holding.

"Borrowing" cases under 42 U. S. C. § 1988, which the Court cites several times, have little more to do with today's decision than does *Erie*. Under that statute and those cases, we are sometimes called upon to fill in gaps in federal law by choosing a state procedural rule for application in § 1983 actions brought in federal court. See, *e. g.*, *Wilson* v. *Garcia*, 471 U. S. 261 (1985); *Burnett* v. *Grattan*, 468 U. S. 42 (1984). The congressionally imposed necessity of *supple-*

menting federal law with state procedural rules might well caution us against *supplanting* state procedural rules with federal gaps, but it certainly offers no support for what the Court does today.

Finally, JUSTICE WHITE's concurrence argues that Wisconsin's notice of claim statute is in the nature of a statute of limitations, and that the principles articulated in *Wilson* v. *Garcia*, *supra*, preclude its application to any action under § 1983. See *ante*, at 154–156. Assuming, *arguendo*, that state courts must apply the same statutes of limitations that federal courts borrow under § 1988, the concurrence is mistaken in treating this notice of claim requirement as a statute of limitations. As the concurrence acknowledges, the 120-day claim period established by the Wisconsin statute does not apply if the local government had actual notice of the claim and has not been prejudiced by the plaintiff's delay. *Ante*, at 155, n. 3. The concurrence suggests that the Wisconsin statute nonetheless is equivalent to a statute of limitations because the present case demonstrates that "the 'actual notice' requirement is difficult to satisfy." *Ibid.* I agree that a sufficiently burdensome notice of claim requirement could effectively act as a statute of limitations. The facts of this case, however, will not support such a characterization of the Wisconsin law. The court below said that no "detailed claim for damages" need be submitted; rather, the injured party need only "recit[e] the facts giving rise to the injury and [indicate] an intent . . . to hold the city responsible for any damages resulting from the injury." 139 Wis. 2d 614, 630, 408 N. W. 2d 19, 26 (1987) (citations omitted). It has not been suggested that petitioner tried to comply with this requirement but encountered difficulties in doing so. Indeed, it would have been easier to file the required notice of claim than to file this lawsuit, which petitioner proved himself quite capable of doing. Far from encountering "difficulties" in complying with the notice of claim statute, petitioner never tried.

As I noted at the outset, the majority correctly characterizes the issue before us as one of statutory pre-emption. In order to arrive at the result it has chosen, however, the Court is forced to search for "inconsistencies" between Wisconsin's notice of claim statute and some ill-defined federal policy that Congress has never articulated, implied, or suggested, let alone enacted. Nor is there any difficulty in explaining the absence of congressional attention to the problem that the Court wrongly imagines it is solving. A plaintiff who chooses to bring a § 1983 action in state court necessarily rejects the federal courts that Congress has provided. Virtually the only conceivable reason for doing so is to benefit from procedural advantages available exclusively in state court. Having voted with their feet for state procedural systems, such plaintiffs would hardly be in a position to ask Congress for a new type of forum that combines the advantages that Congress gave them in the federal system with those that Congress did *not* give them, and which are only available in state courts. Fortunately for these plaintiffs, however, Congress need not be consulted. The concept of statutory pre-emption takes on new meaning today, and it is one from which I respectfully dissent.

FRANKLIN *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS

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

No. 87-5546. Argued March 1, 1988—Decided June 22, 1988

At petitioner's Texas capital murder trial, his principal defense was that he had been mistakenly identified, and that—even if he was the person who stabbed the victim—her death resulted from incompetent hospital treatment and not the assault. After the jury found him guilty, the sole mitigating evidence he presented at the penalty phase was the stipulation that his disciplinary record while incarcerated, both before and after the murder, was without incident. At the conclusion of the penalty hearing, the trial court, pursuant to state law, submitted two "Special Issues" to the jury, asking whether it found from the evidence beyond a reasonable doubt (1) that the murder was committed deliberately and with the reasonable expectation that death would result, and (2) that there was a probability that petitioner would constitute a continuing threat to society. The court instructed the jury that if their answer was "Yes" to both questions, petitioner would be sentenced to death. Earlier, in order to direct the jury's consideration of the Special Issues, petitioner had submitted five "special requested" jury instructions, which, in essence, would have told the jury that any evidence they felt mitigated against the death penalty should be taken into account in answering the Special Issues, and could *alone* be enough to return a negative answer to either one or both of the questions, even if they otherwise believed that "Yes" answers were warranted. The court declined to give the requested instructions, and instead remonstrated the jury to remember and be guided by all instructions previously given, which included the charge that they arrive at their verdict based on all the evidence. After the jury returned "Yes" answers to both Special Issues, the court sentenced petitioner to death, and the state appellate court affirmed. Petitioner then filed this habeas corpus action, arguing that, absent his special requested instructions, the Special Issues limited the jury's consideration of mitigating evidence in violation of the Eighth Amendment under this Court's decisions. Rejecting this claim, the District Court denied relief, and the Court of Appeals affirmed.

Held: The judgment is affirmed.

823 F. 2d 98, affirmed.

JUSTICE WHITE, joined by THE CHIEF JUSTICE, JUSTICE SCALIA, and JUSTICE KENNEDY, concluded that the trial court's refusal to give peti-

tioner's requested special instructions did not violate his Eighth Amendment right to present mitigating evidence. Neither the instructions actually given nor the Texas Special Issues precluded jury consideration of any relevant mitigating circumstances, or otherwise unconstitutionally limited the jury's discretion. Pp. 171–183.

(a) There is no merit to petitioner's contention that the sentencing jury was deprived of a sufficient opportunity to consider any "residual doubt" it might have harbored about his identity as the murderer, or about the extent to which his actions (as opposed to medical mistreatment) actually caused, or were intended to result in, the victim's death. This Court has never held that a capital defendant has a constitutional right to an instruction telling the jury to revisit the question of his guilt as a basis for mitigation. The discussion of the "residual doubt" question in *Lockhart* v. *McCree*, 476 U. S. 162, stands only for the simple truism that such doubts will inure to the defendant's benefit where the State is willing to allow him to capitalize upon them. Nor does *Eddings* v. *Oklahoma*, 455 U. S. 104, establish the claimed "right," since lingering doubts over the defendant's guilt do not relate to his "character" or "record" or to "the circumstances of the offense," which the sentencer must be given a chance to consider in mitigation. However, even if the claimed "right" existed, the rejection of petitioner's proffered instructions did not impair that right, since the trial court placed no limitation on petitioner's opportunity to press the "residual doubts" issue. Moreover, the medical mistreatment and intentional killing questions are precisely the type of concerns that the jury might have considered in answering the deliberateness question of the first Special Issue, and, thus, petitioner was not deprived of any opportunity to make, and in fact made, a nondeliberateness argument to the jury. In any case, there was nothing in the proffered special instructions that offered specific direction to the jury concerning their consideration of any of these "residual doubt" questions. Pp. 172–176.

(b) Since, at the sentencing hearing, petitioner was permitted to emphasize evidence of his good prison disciplinary record with regard to the second Special Issue concerning future dangerousness, the jury was not precluded from giving adequate mitigating weight to that evidence. Petitioner's contention that the failure to give his requested instructions deprived the evidence of its significance as a reflection of his "character" independent of its relevance to the Special Issues is not convincing, since nothing in this Court's cases suggests that "character," as illuminated by a disciplinary record, encompasses anything more than likely future behavior. Cf. *Skipper* v. *South Carolina*, 476 U. S. 1. Furthermore, nothing in petitioner's presentation or discussion of his record at the hearing suggested that the jury should consider that evidence as probative of anything more than future dangerousness. Petitioner cannot

avail himself of the statement in *Eddings*, *supra*, at 114, that the sentencing jury may not be precluded from considering "any relevant mitigating evidence," since the State is entitled to structure the jury's consideration of mitigating factors. The claim that the jury should have been instructed that it was entitled to vote against the death penalty "independent" of its answers to the Special Issues is foreclosed by *Jurek* v. *Texas*, 428 U. S. 262, which held that the State could constitutionally impose death if the jury answered "Yes" to both Special Issues. Pp. 177–180.

(c) The Texas capital sentencing system adequately allows for jury consideration of mitigating circumstances, and therefore sufficiently provides for jury discretion. Pp. 181–182.

JUSTICE O'CONNOR, joined by JUSTICE BLACKMUN, concluded that the Texas capital sentencing procedure did not unconstitutionally prevent the jury from giving mitigating effect to any evidence relevant to petitioner's character or background or the circumstances of the offense. Pp. 183–188.

(a) Although the Texas procedure did confine consideration of the stipulation as to petitioner's prison disciplinary record to the context of the special verdict question regarding future dangerousness, thereby preventing the jury from treating the stipulation as if it were relevant to other character traits, that limitation has no practical or constitutional significance on the facts of this case, because the stipulation had no relevance to any aspect of petitioner's character other than a lack of future dangerousness. Thus, petitioner was not prejudiced by the limitation, since it did not interfere with his presentation of mitigating evidence or with the jury's ability to give effect to that evidence. Cf. *Skipper* v. *South Carolina*, 476 U. S. 1. Pp. 185–187.

(b) Although the capital sentencing procedure may have prevented the jury from giving effect to any "residual doubts" it might have had about petitioner's guilt, that limitation did not violate the Eighth Amendment. Rather than being a fact about the defendant's character or background or the circumstances of the particular offense, "residual doubt" is merely a lingering uncertainty about facts—a state of mind that exists somewhere between "beyond a reasonable doubt" and "absolute certainty"—and thus is not a mitigating circumstance under this Court's decisions, which have never required such a heightened burden of proof at capital sentencing. Pp. 187–188.

WHITE, J., announced the judgment of the Court, and delivered an opinion, in which REHNQUIST, C. J., and SCALIA and KENNEDY, JJ., joined. O'CONNOR, J., filed an opinion concurring in the judgment, in which BLACKMUN, J., joined, *post*, p. 183. STEVENS, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 189.

Mark Stevens argued the cause for petitioner. With him on the briefs were *Clarence Williams*, *Allen Cazier*, and *George Scharmen*.

William C. Zapalac, Assistant Attorney General of Texas, argued the cause for respondent. With him on the brief were *Jim Mattox*, Attorney General, *Mary F. Keller*, First Assistant Attorney General, *Lou McCreary*, Executive Assistant Attorney General, and *Michael P. Hodge*, Assistant Attorney General.

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

In this case, we are called on to determine if the Eighth Amendment required a Texas trial court to give certain jury instructions, relating to the consideration of mitigating evidence, that petitioner had requested in the sentencing phase of his capital trial.

I

Around midnight on July 25, 1975, someone attacked Mary Margaret Moran, a nurse at a Veterans' Administration hospital in San Antonio, Texas, in the hospital parking lot as she left work. Five days later, Ms. Moran was found, naked, lying in a field in the midday Texas sun. She had been stabbed seven times; Ms. Moran was also robbed, and possibly sexually assaulted. Still alive when she was discovered, Ms. Moran was taken to a local hospital, where she died the following day.

Suspicion had focused on petitioner within hours of Ms. Moran's abduction, and he was arrested the following morning at his house, where police found a wide array of physical evidence concerning the crime.[1] Petitioner told the officers

[1] Among the items found at petitioner's home were: a pair of shoes with human blood on them that matched the victim's type; some of petitioner's clothes, soiled with blood and plant samples (matching the field where the victim was discovered); one of petitioner's shirts, covered with fibers that

that he had loaned his car and clothing to a friend the previous evening, and had no explanation for the physical evidence revealed by the search.

Petitioner did not take the stand at his trial.[2] His principal defense was that he had been mistakenly identified, and that—even if he was the person who stabbed the victim—her death was the result of incompetent hospital treatment and not the assault. The jury found petitioner guilty of capital murder under Tex. Penal Code Ann. § 19.03 (1974).

At the penalty phase of petitioner's trial, the State called four police officers who testified that petitioner had a bad reputation as a law-abiding citizen. The State also proved that petitioner had a prior conviction for rape, and called a witness who testified that petitioner had raped her the year before this crime was committed. The sole mitigating evidence petitioner presented was the stipulation that petitioner's disciplinary record while incarcerated from 1971–1974 and 1976–1980 was without incident. At the conclusion of this penalty hearing, the trial court, pursuant to Tex. Code Crim. Proc. Ann., Art. 37.071(b) (Vernon 1981), submitted two "Special Issues" to the jury,[3] instructing the jury that if

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matched the victim's sweater. In addition, in a trash can behind petitioner's house, various items of the victim's personal property were found, as well as a knife which was later determined to be the apparent murder weapon.

Similar fiber, plant, and blood sample evidence was found in petitioner's car, matching samples of the victim's blood, her clothing, and the field where she was found. See *Franklin* v. *State*, 606 S. W. 2d 818, 819–821 (Tex. Crim. App. 1979).

[2] This petition concerns the proceedings at petitioner's 1982 trial, his third for this same offense. Petitioner's two previous convictions and death sentences were set aside for reasons unrelated to the issues before us now. See *Franklin* v. *State*, 693 S. W. 2d 420, 422 (Tex. Crim. App. 1985).

[3] The two Special Issues, as presented to the jury in this case, were:

"Do you find from the evidence beyond a reasonable doubt that the conduct of the Defendant, Donald Gene Franklin, that caused the death of

they determined the answer to both these questions to be "Yes," petitioner would be sentenced to death.

Earlier, petitioner had submitted five "special requested" jury instructions to direct the jury's consideration of the Special Issues.[4] In essence, the requested instructions would

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Mary Margaret Moran, was committed deliberately and with the reasonable expectation that the death of the deceased or another would result?

"Do you find from the evidence beyond a reasonable doubt that there is a probability that the Defendant, Donald Gene Franklin, would commit criminal acts of violence that would constitute a continuing threat to society?" App. 15.

[4] The requested jury instructions were, in pertinent part, as follows:

"'You are instructed that any evidence which, in your opinion, mitigates against the imposition of the Death Penalty, including any aspect of the Defendant's character or record, and any of the circumstances of the commission of the offense . . . may be sufficient to cause you to have a reasonable doubt as to whether or not the true answer to any of the Special Issues is "Yes"; and in the event such evidence does cause you to have such a reasonable doubt, you should answer the Issue "No."'" Defendant's Special Requested Charge on Punishment No. One, App. 7.

"'An answer of "No" may be given to any of the [Special] Issues if:

. . . . . .

"'2) . . . at least ten (10) jurors find that mitigating factors against the imposition of the Death Penalty exist, either in regard to any aspect of the Defendant's character or record, or in regard to any of the circumstances of the commission of the offense . . . or

"'3) if evidence of any such mitigating factors causes at least ten (10) jurors to have a reasonable doubt as to whether the true answer to the Issues is "Yes."'" *Id.*, at 8–9 (No. Two). (Texas law instructs the jury to answer the Special Issues in the negative if 10 jurors agree on the "No" answer. See App. 13.).

"'You are instructed that you may answer any of the Special Issues "No" if you find any aspect of the Defendant's character or record or any of the circumstances of the offense as factors which mitigate against the imposition of the death penalty.'" *Id.*, at 10 (No. Three).

"'You are instructed that you may answer Special Issue No. One "No" if you find any aspect of the Defendant's character or record as factors which mitigate against the imposition of the death penalty.'" *Id.*, at 11 (No. Four).

"'You are instructed that you may answer Special Issue No. 2 "No" if you find any aspect of the Defendant's character or record or any of the

have told the jury that any evidence considered by them to mitigate against the death penalty should be taken into account in answering the Special Issues, and could *alone* be enough to return a negative answer to either one or both of the questions submitted to them—even if the jury otherwise believed that "Yes" answers to the Special Issues were warranted.

The trial court declined to give the petitioner's requested instructions, and instead gave a brief charge which remonstrated the jury to "remember all the instructions that the Court has previously given you and be guided by them." App. 13. Those previous instructions included the charge that they arrive at their verdict based on all the evidence. The jury returned "Yes" answers to both Special Issues and the trial court therefore imposed a sentence of death. Subsequently, the Texas courts affirmed petitioner's conviction and death sentence. *Franklin* v. *State*, 693 S. W. 2d 420 (Tex. Crim. App. 1985).

Petitioner then filed this federal habeas action contesting his conviction and sentence. Among other claims, petitioner argued that, absent his special requested instructions, the Texas Special Issues limited the jury's consideration of mitigating evidence, contrary to this Court's decision in *Lockett* v. *Ohio*, 438 U. S. 586 (1978), and several other decisions as well. The District Court rejected this claim, finding no error in the trial court's refusal to give the requested instructions and no violation of this Court's precedents. App. 22. The Court of Appeals affirmed the District Court's denial of habeas relief without commenting on the jury instruction claim. 823 F. 2d 98, 99–100 (CA5 1987).

Petitioner then sought review by this Court. We granted certiorari to determine if the trial court's refusal to give the requested instructions violated petitioner's Eighth Amend-

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circumstances of the offense as factors which mitigate against the imposition of the death penalty.'" *Id.*, at 12 (No. Five).

ment right to present mitigating evidence at his capital sentencing trial, 484 U. S. 891 (1987), and now affirm the judgment below.

II

Jurek v. *Texas*, 428 U. S. 262 (1976), expressly upheld the constitutionality of the manner in which mitigating evidence is considered under the "Special Issues" submitted to Texas capital juries. See *id.*, at 273 (opinion of Stewart, Powell, and STEVENS, JJ.). Petitioner here does not challenge the constitutionality of the Texas capital sentencing scheme as a general matter, see Tr. of Oral Arg. 11; petitioner has disavowed any request for this Court to overrule its decision in *Jurek*, see Tr. of Oral Arg. 18, 20.

Nor does petitioner complain that he was denied the opportunity to present any mitigating evidence to the jury, or that the jury was instructed to ignore any mitigating evidence petitioner did present. Cf. *Hitchcock* v. *Dugger*, 481 U. S. 393 (1987). Here, petitioner was permitted to present to the jury any and all mitigating evidence that he offered. It is the established Texas practice to permit jury consideration of "'whatever mitigating circumstances' the defendant might be able to show" in capital sentencing—a practice which this Court relied upon when it concluded in *Lockett* v. *Ohio*, *supra*, that our decision in that case did not require reversal of our earlier approval of the Texas Special Issue scheme in *Jurek*. See *Lockett* v. *Ohio*, *supra*, at 606–607 (opinion of Burger, C. J.). In the decade which has followed, the Texas courts have expressed resolute adherence to *Lockett*, declaring that under Texas' capital sentencing procedures the defense is free to ask "the jury . . . to consider whatever evidence of mitigating circumstances the defense can bring before it." *Quinones* v. *State*, 592 S. W. 2d 933, 947 (Tex. Crim. App. 1980).[5]

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[5] See also, *e. g.*, *Cordova* v. *State*, 733 S. W. 2d 175, 189–190, and n. 3 (Tex. Crim. App. 1987); *Johnson* v. *State*, 691 S. W. 2d 619, 625–626 (Tex.

Petitioner nevertheless complains that the instructions and Special Issues did not provide sufficient opportunity for the jury, in the process of answering the two Special Issues, to consider whatever "residual doubt" it may have had about petitioner's guilt. The instructions also allegedly did not allow the jury to give adequate weight to the mitigating evidence of petitioner's good behavior while in prison. In addition, petitioner contends that the Eighth Amendment was violated because the jury was not afforded an opportunity to "giv[e] independent mitigating weight," *Lockett*, *supra*, at 605, to the circumstances the defense presented; *i. e.*, not permitted to weigh petitioner's mitigating evidence and circumstances apart from its deliberation over the Texas Special Issues, and return a verdict requiring a life sentence. See Brief for Petitioner 20; Tr. of Oral Arg. 18, 23.

We consider these claims with respect to each of petitioner's two "mitigating factors."

A

Petitioner first suggests that the jury may, in its penalty deliberations, have harbored "residual doubts" about three issues considered in the guilt phase of his trial: first, petitioner's identity as the murderer; second, the extent to which petitioner's actions (as opposed to medical mistreatment) actually caused the victim's death; and third, the extent to which petitioner's actions were intended to result in the victim's death. See Brief for Petitioner 13; 12 Record 2892–2896. He argues that the jury should have been instructed that it could consider any such doubts in arriving at its answers to the Special Issues.

(1)

At the outset, we note that this Court has never held that a capital defendant has a constitutional right to an instruction telling the jury to revisit the question of his identity as the

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Crim. App. 1984); *Stewart* v. *State*, 686 S. W. 2d 118, 121 (Tex. Crim. App. 1984); *Williams* v. *State*, 674 S. W. 2d 315, 322 (Tex. Crim. App. 1984).

murderer as a basis for mitigation. Petitioner suggests that our discussion of the "residual doubt" question in *Lockhart* v. *McCree*, 476 U. S. 162, 180–182 (1986), supports his position that he has such an entitlement. See Tr. of Oral Arg. 6–7; Brief for Petitioner 9. But all that this aspect of the *Lockhart* opinion stands for is the simple truism that *where* "States are willing to go to allow defendants to capitalize on 'residual doubts,'" such doubts will inure to the defendant's benefit. *Lockhart*, *supra*, at 181. *Lockhart* did not endorse capital sentencing schemes which permit such use of "residual doubts," let alone suggest that capital defendants have a *right* to demand jury consideration of "residual doubts" in the sentencing phase. Indeed, the *Lockhart* dissent recognized that there have been only a "few times in which any legitimacy has been given" to the notion that a convicted capital defendant has a right to argue his innocence during the sentencing phase. 476 U. S., at 205–206 (MARSHALL, J., dissenting). The dissent also noted that this Court has not struck down the practice in some States of prohibiting the consideration of "residual doubts" during the punishment trial.[6] *Ibid.*

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[6] Finding a constitutional right to rely on a guilt-phase jury's "residual doubts" about innocence when the defense presents its mitigating case in the penalty phase is arguably inconsistent with the common practice of allowing penalty-only trials on remand of cases where a death sentence—but not the underlying conviction—is struck down on appeal. See, *e. g.*, *Scott* v. *State*, 310 Md. 277, 301, 529 A. 2d 340, 352 (1987); *Stringer* v. *State*, 500 So. 2d 928, 946 (Miss. 1986); *Whalen* v. *State*, 492 A. 2d 552, 569 (Del. 1985). Cf. *Lockhart* v. *McCree*, 476 U. S., at 205 (MARSHALL, J., dissenting).

In fact, this Court has, on several previous occasions, suggested such a method of proceeding on remand. See, *e. g.*, *Hitchcock* v. *Dugger*, 481 U. S. 393, 399 (1987). Moreover, petitioner himself, in suggesting the appropriate relief in this case, asked only that he be "resentenced in a proceeding that comports with the requirements of *Lockett*"—not that he be retried in full so as to have the benefit of any potential guilt-phase "residual doubts." See Brief for Petitioner 21.

In sum, we are quite doubtful that such "penalty-only" trials are violative of a defendant's Eighth Amendment rights. Yet such is the logical

Our edict that, in a capital case, "'the sentencer . . . [may] not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense,'" *Eddings* v. *Oklahoma*, 455 U. S. 104, 110 (1982) (quoting *Lockett*, 438 U. S., at 604), in no way mandates reconsideration by capital juries, in the sentencing phase, of their "residual doubts" over a defendant's guilt. Such lingering doubts are not over any aspect of petitioner's "character," "record," or a "circumstance of the offense." This Court's prior decisions, as we understand them, fail to recognize a constitutional right to have such doubts considered as a mitigating factor.

Most importantly, even if we were inclined to discern such a right in the Eighth Amendment, we would not find any violation of it *in this case*. For even if such a right existed, nothing done by the trial court impaired petitioner's exercise of this "right." The trial court placed no limitation whatsoever on petitioner's opportunity to press the "residual doubts" question with the sentencing jury. Moreover, in our view, the trial court's rejection of petitioner's proffered jury instructions was without impact on the jury's consideration of the "residual doubts" issue. We reject petitioner's complaint that the possibility of residual doubt was not "self-evidently relevant to either of the special issue questions," and that "[u]nless told that *residual* doubt . . . could be considered in relation to [the special issue] question[s], the jurors could logically have concluded that such doubt was irrelevant." Brief for Petitioner 15, 16. Among other problems with this argument is the simple fact that petitioner's requested instructions on mitigating evidence themselves offered *no* specific direction to the jury concerning the potential consideration of "residual doubt." See App. 7–12. The proposed instructions did not suggest that lingering doubts

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conclusion of petitioner's claim of a constitutional right to argue "residual doubts" to a capital sentencing jury.

about the petitioner's guilt were to be a subject of deliberations in the sentencing phase.[7] Consequently, it is difficult to see how the rejection of these instructions denied petitioner the benefit of any "residual doubts" about his guilt.

In sum, even if petitioner had some constitutional right to seek jury consideration of "residual doubts" about his guilt during his sentencing hearing—a questionable proposition—the rejection of petitioner's proffered jury instructions did not impair this "right."

(2)

In regard to the second and third elements of "residual doubt" petitioner advances—potential jury doubts over his responsibility for the victim's death, and the extent to which he intended the victim's death if indeed he was her attacker—we do not think that the Texas Special Issues limited the jury's consideration of any doubts in these respects.

Petitioner suggests that there may have been residual doubt over the question of whether the victim would have perished had she received proper medical treatment. See Brief for Petitioner 5, 13; 12 Record 2895–2896. Yet, to the extent that this question implicates petitioner's culpability in causing Ms. Moran's death, this is precisely the concern that the jury might have considered in answering Special Issue No. One, *i. e.*, in determining that "the conduct of the Defendant . . . that caused the death of [the victim] was committed deliberately and with the reasonable expectation that the death of the deceased . . . would result." App. 15. The

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[7] Likewise, petitioner's closing argument—the sole element of his presentation in the sentencing phase—did not draw the jury's attention to the "residual guilt" question. The only element of the defense's lengthy closing statement that even remotely raised this issue was a brief suggestion, in the course of a general argument against the death penalty, that the jury should recognize "our inherent human fallibility . . . recognize [that] we can make a mistake." See 13 Record 2968. Otherwise, nothing in the defense's mitigating presentation sought the jury's reconsideration of petitioner's guilt in committing this crime.

Texas courts have consistently held that something more must be found in the penalty phase—something beyond the guilt-phase finding of "intentional" commission of the crime—before the jury can determine that a capital murder is "deliberate" within the meaning of the first Special Issue. See, *e. g.*, *Marquez* v. *State*, 725 S. W. 2d 217, 244 (Tex. Crim. App. 1987); *Fearance* v. *State*, 620 S. W. 2d 577, 584 (Tex. Crim. App. 1981). In fact, Texas juries have found, on occasion, that a defendant had committed an "intentional murder" without finding that the murder was a "deliberate" one. See, *e. g.*, *Heckert* v. *State*, 612 S. W. 2d 549, 552 (Tex. Crim. App. 1981). Petitioner was not deprived of any opportunity to make a similar argument here in mitigation.

The same is true of the parallel contention that petitioner did advance at the end of the penalty hearing: that his murder of Ms. Moran was not a "deliberate" one, but rather, "a [h]elter-skelter crazy crime of passion." 13 Record 2962–2963. This argument echoed a theme petitioner raised in the closing argument of the guilt phase of the trial. See 12 Record 2893–2897. But this element of "residual doubt" could likewise have been considered by the jury in answering the first Special Issue.

Petitioner was thus not deprived of any chance to have his sentencing jury weigh this element of his culpability. And, as was the case with respect to the "residual doubt" issue discussed in Part II–A(1), there was nothing in petitioner's proposed jury instructions which would have provided the jury with any further guidance, beyond that already found in the first Special Issue, to direct its consideration of this mitigating factor. The denial of petitioner's special requested instructions in no way limited his efforts to gain full consideration by the sentencing jury—including a reconsideration of any "residual doubts" from the guilt phase—of petitioner's deliberateness in killing Ms. Moran.

B

The second mitigating circumstance which petitioner claims that the jury did not adequately consider is his good disciplinary record during his period of incarceration, both before and after the murder of Ms. Moran.

As noted above, petitioner's prison disciplinary record was presented to the jury in this case—in fact, it was the sole bit of evidence in mitigation petitioner presented during the penalty phase of his trial. 13 Record 2952–2953. This case is therefore unlike *Skipper* v. *South Carolina*, 476 U. S. 1, 3 (1986), where evidence of the defendant's conduct while incarcerated was wholly excluded from the jury's consideration in its sentencing deliberations. To the contrary, petitioner here was permitted to press, with some emphasis, his good behavior in prison when he urged the jury, at the close of the sentencing hearing, to return a "No" answer to the second Special Issue concerning future dangerousness. See 13 Record 2963–2965. Petitioner acknowledged as much before this Court. Tr. of Oral Arg. 14, 24.

Petitioner objects, however, that—absent his requested jury instructions—there was no opportunity for the jury to give "independent" mitigating weight to his prison record. See *Lockett*, 438 U. S., at 604. He argues that this mitigating evidence had significance independent of its relevance to the Special Issues—as a reflection on his "character." See *Skipper*, *supra*, at 4. Petitioner contends that his prison disciplinary record reflected so positively on his "character" that the instructions in this case should have provided the jury with a "mechanism though which to impose a life sentence" even if the jury otherwise believed that both Special Issues should have been answered "Yes." Brief for Petitioner 20. For several reasons, we do not find these arguments convincing.

First, petitioner was accorded a full opportunity to have his sentencing jury consider and give effect to any mitigating

impulse that petitioner's prison record might have suggested to the jury as they proceeded with their task. In resolving the second Texas Special Issue the jury was surely free to weigh and evaluate petitioner's disciplinary record as it bore on his "character"—that is, his "character" as measured by his likely future behavior. We have never defined what the term "character" means when we have held that a defendant's "character" is a relevant consideration in capital sentencing.[8] But nothing in our cases supports petitioner's contention that relevant aspects of his "character," as far as they were illuminated by the presentation of evidence concerning petitioner's disciplinary record, encompassed anything more than those matters fully considered by the jury when it was asked to answer the second Special Issue.

Indeed, our discussion in *Skipper* of the relevancy of such disciplinary record evidence in capital sentencing decisions dealt exclusively with the question of how such evidence reflects on a defendant's likely future behavior. See *Skipper*, *supra*, at 4–5. Nothing in *Skipper* suggests that such evidence has any further relevancy with respect to a defendant's "character" or with respect to the punishment decision. Moreover, *Skipper*'s discussion of the proper use of a defendant's prison disciplinary record in a jury's sentencing decision focused precisely on the way in which such evidence is encompassed by the Texas future-dangerousness question, and on the Court's previous decision in *Jurek*. See 476 U. S., at 4–5. Furthermore, we note that nothing in petitioner's presentation or discussion of his prison record at the sentencing hearing urged the jury to consider petitioner's record as probative of anything more than that the answer to the question posed by Special Issue Two should be "No." See 13 Record

[8] See, *e. g.*, *Skipper* v. *South Carolina*, 476 U. S. 1, 4 (1986); *Eddings* v. *Oklahoma*, 455 U. S. 104, 110 (1982); *Lockett* v. *Ohio*, 438 U. S. 586, 604 (1978) (plurality opinion); *Woodson* v. *North Carolina*, 428 U. S. 280, 304 (1976).

2963–2964. Even in this Court, in seeking to define how his prison record sheds light on his "character," petitioner has cast his argument in terms of future dangerousness.[9]

We find unavailing petitioner's reliance on this Court's statement in *Eddings*, 455 U. S., at 114, that the sentencing jury may not be precluded from considering "any relevant, mitigating evidence." See Tr. of Oral Arg. 15. This statement leaves unanswered the question: relevant to what? While *Lockett*, *supra*, at 604, answers this question at least in part—making it clear that a State cannot take out of the realm of relevant sentencing considerations the questions of the defendant's "character," "record," or the "circumstances of the offense"—*Lockett* does not hold that the State has no role in structuring or giving shape to the jury's consideration of these mitigating factors. See *Booth* v. *Maryland*, 482 U. S. 496, 502 (1987). Given the awesome power that a sentencing jury must exercise in a capital case, it may be advisable for a State to provide the jury with some framework for discharging these responsibilities. And we have never held that a specific method for balancing mitigating and aggravating factors in a capital sentencing proceeding is constitutionally required. See *Zant* v. *Stephens*, 462 U. S. 862, 875–876, n. 13 (1983).

We are thus quite sure that the jury's consideration of petitioner's prison record was not improperly limited. The jury

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[9] In describing what, arguably, the Texas Special Issue did *not* permit the jury to take into account with respect to petitioner's "character" and his disciplinary record, petitioner principally argues that "Mr. Franklin's behavior in prison demonstrated that he had the strength of character to live a peaceful, productive life within the structured environment of a prison, and that, so long as he stayed in prison *there was no probability that he would pose a threat to others*." Brief for Petitioner 18–19 (emphasis added).

Yet, as the State noted at argument, the question of a defendant's likelihood of injuring others in prison is precisely the question posed by the second Texas Special Issue. See Tr. of Oral Arg. 27–28.

was completely free to give that evidence appropriate weight in arriving at its answers to the Special Issues. And as for the claim that the jury should have been instructed that, even if its answer to the Special Issues was "Yes," it was still entitled to cast an "independent" vote against the death penalty, we note that this submission is foreclosed by *Jurek*, which held that Texas could constitutionally impose the death penalty if a jury returned "Yes" answers to the two Special Issues. See *Jurek*, 428 U. S., at 273–274 (joint opinion). *Jurek* has not been overruled; and we are not inclined to take any such action now.[10]

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[10] The dissent says that the Texas scheme is infirm because it "limits the sentencer's consideration to only that mitigating evidence that bears on one or more of the Special Issues." *Post*, at 199. It is difficult to reconcile this statement with the dissent's avowed adherence to *Jurek*. If, as *Jurek* held, it is constitutional for Texas to impose a death sentence on a person whenever a jury answers both Special Issues in the affirmative—without any other inquiry—then surely Texas must be permitted to direct the jury's consideration of mitigating evidence to those items relevant to this undertaking.

In the final analysis, the dissent's position appears to be that the Texas capital punishment statute is unconstitutional because it does not require that the jurors be instructed that—even though they would answer the two statutory questions "Yes" after taking account of all mitigating evidence—they may rely on any mitigating evidence before them, although irrelevant to those two questions, as an independent basis for deciding against the death penalty. *Post*, at 199–200. Yet this is nothing more or less than a requirement that three, rather than two, Special Issues be put to the jury, the third one being: "Does any mitigating evidence before you, whether or not relevant to the above two questions, lead you to believe that the death penalty should not be imposed?"

Such a requirement would have foreclosed the decision in *Jurek*, since the Texas statute upheld there did not mandate such an inquiry—one that would be required in virtually every case where there was any suggestion of a mitigating circumstance, under the dissent's view. As we have said above, however, our cases since *Jurek* have not suggested that *Jurek* is to be overruled or modified. Our differences with the dissent are therefore clear enough: notwithstanding its stated adherence to *Jurek*, the dissent would revisit and overrule that precedent; we decline to do so.

III

Our specific rejection of petitioner's claims is well supported by the general principles governing the role of mitigating evidence in capital sentencing which have been developed since our decisions in *Gregg* v. *Georgia*, 428 U. S. 153 (1976), and *Jurek* v. *Texas*, *supra*.

It is true that since *Jurek* was decided, this Court has gone far in establishing a constitutional entitlement of capital defendants to appeal for leniency in the exercise of juries' sentencing discretion. See, *e. g.*, *Eddings* v. *Oklahoma*, *supra*, at 113–117; *Lockett* v. *Ohio*, 438 U. S., at 608 (opinion of Burger, C. J.). But even in so doing, this Court has never held that jury discretion must be unlimited or unguided; we have never suggested that jury consideration of mitigating evidence must be undirected or unfocused; we have never concluded that States cannot channel jury discretion in capital sentencing in an effort to achieve a more rational and equitable administration of the death penalty.

Much in our cases suggests just the opposite. This Court has previously held that the States "must channel the [capital] sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance' and that 'make rationally reviewable the process for imposing a sentence of death.'" *Godfrey* v. *Georgia*, 446 U. S. 420, 428 (1980) (plurality opinion) (footnotes omitted). Our cases before and since have similarly suggested that "sentencers may not be given unbridled discretion in determining the fates of those charged with capital offenses" and that the "Constitution . . . requires that death penalty statutes be structured so as to prevent the penalty from being administered in an arbitrary and unpredictable fashion." *California* v. *Brown*, 479 U. S. 538, 541 (1987). See also *Proffitt* v. *Florida*, 428 U. S. 242, 253 (1976) (joint opinion); *Gregg* v. *Georgia*, *supra*, at 189, 195, n. 46, 196, n. 47, 198 (joint opinion).

Arguably these two lines of cases—*Eddings* and *Lockett* on the one hand, and *Gregg* and *Proffitt* on the other—are somewhat in "tension" with each other. See *California* v. *Brown*, *supra*, at 544 (O'CONNOR, J., concurring). Yet the Texas capital sentencing system has been upheld by this Court, and its method for providing for the consideration of mitigating evidence has been cited repeatedly with favor,[11] precisely because of the way in which the Texas scheme accommodates *both* of these concerns. Doubtlessly this is why this Court originally approved Texas' use of Special Issues to guide jury discretion in the sentencing phase, notwithstanding the fact—expressly averted to in the plurality opinion for the Court—that mitigating evidence is employed in the Texas scheme only to inform the jury's consideration of the answers to the Special Issue questions. *Jurek*, *supra*, at 272–273.[12] No doubt this is also why the Texas scheme has continued to pass constitutional muster, even when the Court laid down its broad rule in *Lockett*, *supra*, at 606–607 (opinion of Burger, C. J.), concerning the consideration of mitigating evidence. Simply put, we have previously recognized that the Texas Special Issues adequately "allo[w] the jury to consider the mitigating aspects of the crime and the unique characteristics of the perpetrator, and therefore sufficiently provid[e] for jury discretion." See *Lowenfield* v. *Phelps*, 484 U. S. 231, 245 (1988). We adhere to this prior conclusion.

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[11] See, *e. g.*, *Lowenfield* v. *Phelps*, 484 U. S. 231, 245–246 (1988); *Lockhart* v. *McCree*, 476 U. S., at 193; *Pulley* v. *Harris*, 465 U. S. 37, 48–49 (1984); *Zant* v. *Stephens*, 462 U. S. 862, 875–876, n. 13 (1983); *Adams* v. *Texas*, 448 U. S. 38, 46 (1980).

[12] We also repeat our previous acknowledgment, that—as a practical matter—a Texas capital jury deliberating over the Special Issues is aware of the consequences of its answers, and is likely to weigh mitigating evidence as it formulates these answers in a manner similar to that employed by capital juries in "pure balancing" States. See *Adams* v. *Texas*, *supra*, at 46. Thus, the differences between the two systems may be even less than it appears at first examination.

IV

Because we do not believe that the jury instructions or the Texas Special Issues precluded jury consideration of any relevant mitigating circumstances in this case, or otherwise unconstitutionally limited the jury's discretion here, we reject petitioner's Eighth Amendment challenge to his death sentence. Consequently, the Fifth Circuit's judgment in this case is

Affirmed.

JUSTICE O'CONNOR, with whom JUSTICE BLACKMUN joins, concurring in the judgment.

Petitioner was sentenced to death by a jury that was permitted to express its views on punishment only by answering two questions: (1) Did petitioner murder the victim deliberately? and (2) Is there a probability that he will pose a continuing threat to society? We must decide whether this capital sentencing scheme unconstitutionally limited the jury's ability to give mitigating effect to evidence of petitioner's prison record or to "residual doubts" about his guilt.

The plurality concludes that the jury's consideration of petitioner's prison record and of its "residual doubts" about his guilt was not limited in this case, but nevertheless goes on to suggest that a State may constitutionally limit the ability of the sentencing authority to give effect to mitigating evidence relevant to a defendant's character or background or to the circumstances of the offense that mitigates against the death penalty. *Ante*, at 179, 180, n. 10. Unlike the plurality, I have doubts about a scheme that is limited in such a fashion. I write separately to express those doubts and to explain my reasons for concurring in the judgment.

In *Jurek* v. *Texas*, 428 U. S. 262 (1976), this Court held that the Texas capital sentencing procedures satisfied the Eighth Amendment requirement that the sentencer be allowed to consider circumstances mitigating against capital punishment. It was observed that even though the stat-

ute did not explicitly mention mitigating circumstances, the Texas Court of Criminal Appeals had construed the special verdict question regarding the defendant's future dangerousness to permit jury consideration of the defendant's prior criminal record, age, mental state, and the circumstances of the crime in mitigation. *Id.*, at 271–273. Since the decision in *Jurek*, we have emphasized that the Constitution guarantees a defendant facing a possible death sentence not only the right to introduce evidence mitigating against the death penalty but also the right to consideration of that evidence by the sentencing authority. *Lockett* v. *Ohio*, 438 U. S. 586 (1978), established that a State may not prevent the capital sentencing authority "from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation." *Id.*, at 605 (plurality opinion). We reaffirmed this conclusion in *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982), and in *Hitchcock* v. *Dugger*, 481 U. S. 393 (1987).

In my view, the principle underlying *Lockett*, *Eddings*, and *Hitchcock* is that punishment should be directly related to the personal culpability of the criminal defendant.

> "[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse. . . . Thus, the sentence imposed at the penalty stage should reflect a reasoned *moral* response to the defendant's background, character, and crime." *California* v. *Brown*, 479 U. S. 538, 545 (1987) (O'CONNOR, J., concurring) (emphasis in original).

In light of this principle it is clear that a State may not constitutionally prevent the sentencing body from giving effect to evidence relevant to the defendant's background or character or the circumstances of the offense that mitigates against

the death penalty. Indeed, the right to have the sentencer consider and weigh relevant mitigating evidence would be meaningless unless the sentencer was also permitted to give effect to its consideration.

Under the sentencing procedure followed in this case the jury could express its views about the appropriate punishment only by answering the special verdict questions regarding the deliberateness of the murder and the defendant's future dangerousness. To the extent that the mitigating evidence introduced by petitioner was relevant to one of the special verdict questions, the jury was free to give effect to that evidence by returning a negative answer to that question. If, however, petitioner had introduced mitigating evidence about his background or character or the circumstances of the crime that was not relevant to the special verdict questions, or that had relevance to the defendant's moral culpability beyond the scope of the special verdict questions, the jury instructions would have provided the jury with no vehicle for expressing its "reasoned moral response" to that evidence. If this were such a case, then we would have to decide whether the jury's inability to give effect to that evidence amounted to an Eighth Amendment violation. In my view, however, this is not such a case. The only mitigating evidence introduced by petitioner was the stipulation that he had no record of disciplinary violations while in prison. It is undisputed that the jury was free to give mitigating effect to this evidence in answering the special verdict question regarding future dangerousness. While it is true that the jury was prevented from giving mitigating effect to the stipulation to the extent that it demonstrated positive character traits other than the ability to exist in prison without endangering jailers or fellow inmates, that limitation has no practical or constitutional significance in my view because the stipulation had no relevance to any other aspect of petitioner's character. Nothing in *Lockett* or *Eddings* requires that the sentencing authority be permitted to give effect to evidence

beyond the extent to which it is relevant to the defendant's character or background or the circumstances of the offense. *Lockett*, *supra*, at 604, n. 12 ("Nothing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense"); *Eddings*, *supra*, at 114 (holding that the sentencer must consider "any *relevant* mitigating evidence") (emphasis added).

The limited probative value of the stipulation regarding petitioner's lack of prison disciplinary violations is best illustrated by the contrasting examples of probative character evidence suggested by the dissent. See *post*, at 190. Evidence of voluntary service, kindness to others, or of religious devotion might demonstrate positive character traits that might mitigate against the death penalty. Although petitioner argued to the sentencing jury that his prison record demonstrated his lack of future dangerousness, petitioner did not suggest that his lack of disciplinary violations revealed anything more positive about his character than that. See 13 Record 2963–2965. This is not surprising, because the lack of a prison disciplinary record reveals nothing about a defendant's character except that the defendant can exist in the highly structured environment of a prison without endangering others.

The conclusion that petitioner was not prejudiced by the limitation placed on the jury's consideration of the mitigating evidence he introduced is entirely consistent with our decision in *Skipper* v. *South Carolina*, 476 U. S. 1 (1986). In *Skipper* we vacated a death sentence because "it appear[ed] reasonably likely that the exclusion of evidence bearing upon petitioner's behavior in jail (and hence, upon his likely future behavior in prison) may have affected the jury's decision to impose the death sentence." *Id.*, at 8. In the case before us, the State did not interfere with petitioner's presentation of evidence regarding his lack of future dangerousness or with the jury's ability to give effect to that evi-

dence. Unlike the defendant in *Skipper*, petitioner suffered no prejudice from the limitations placed on the jury's ability to consider and give effect to mitigating evidence regarding his character.

Petitioner also contends that the sentencing procedures followed in his case prevented the jury from considering, in mitigation of sentence, any "residual doubts" it might have had about his guilt. Petitioner uses the phrase "residual doubts" to refer to doubts that may have lingered in the minds of jurors who were convinced of his guilt beyond a reasonable doubt, but who were not absolutely certain of his guilt. Brief for Petitioner 14. The plurality and dissent reject petitioner's "residual doubt" claim because they conclude that the special verdict questions did not prevent the jury from giving mitigating effect to its "residual doubt[s]" about petitioner's guilt. See *ante*, at 175; *post*, at 189. This conclusion is open to question, however. Although the jury was permitted to consider evidence presented at the guilt phase in the course of answering the special verdict questions, the jury was specifically instructed to decide whether the evidence supported affirmative answers to the special questions "beyond a *reasonable* doubt." App. 15 (emphasis added). Because of this instruction, the jury might not have thought that in sentencing petitioner, it was free to demand proof of his guilt beyond *all* doubt.

In my view, petitioner's "residual doubt" claim fails, not because the Texas scheme allowed for consideration of "residual doubt" by the sentencing body, but rather because the Eighth Amendment does not require it. Our cases do not support the proposition that a defendant who has been found to be guilty of a capital crime beyond a reasonable doubt has a constitutional right to reconsideration by the sentencing body of lingering doubts about his guilt. We have recognized that some States have adopted capital sentencing procedures that permit defendants in some cases to enjoy the benefit of doubts that linger from the guilt phase of the trial,

see *Lockhart* v. *McCree*, 476 U. S. 162, 181 (1986), but we have never indicated that the Eighth Amendment requires States to adopt such procedures. To the contrary, as the plurality points out, we have approved capital sentencing procedures that preclude consideration by the sentencing body of "residual doubts" about guilt. See *ante*, at 173, n. 6.

Our decisions mandating jury consideration of mitigating circumstances provide no support for petitioner's claim because "residual doubt" about guilt is not a mitigating circumstance. We have defined mitigating circumstances as facts about the defendant's character or background, or the circumstances of the particular offense, that may call for a penalty less than death. See *California* v. *Brown*, 479 U. S., at 541; *id.*, at 544 (O'CONNOR, J., concurring); *Eddings*, 455 U. S., at 110, 112; *id.*, at 117 (O'CONNOR, J., concurring); *Lockett*, 438 U. S., at 605. "Residual doubt" is not a fact about the defendant or the circumstances of the crime. It is instead a lingering uncertainty about facts, a state of mind that exists somewhere between "beyond a reasonable doubt" and "absolute certainty." Petitioner's "residual doubt" claim is that the States must permit capital sentencing bodies to demand proof of guilt to "an absolute certainty" before imposing the death sentence. Nothing in our cases mandates the imposition of this heightened burden of proof at capital sentencing.

In sum I agree with the plurality's conclusion that, on the facts of this case, the Texas capital sentencing procedure did not prevent the sentencing jury from giving mitigating effect to any evidence relevant to petitioner's character or background or to the circumstances of the offense. Moreover, while the capital sentencing procedure may have prevented the jury from giving effect to any "residual doubts" it might have had about petitioner's guilt, this aspect of Texas procedure violated no Eighth Amendment guarantee. For these reasons, I concur in the judgment.

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

The plurality's opinion discusses three subjects. In Part II–A the plurality explains why in this case there was no interference with any right petitioner may have had under the Eighth Amendment to have the jury consider "residual doubt" in making its sentencing determination. I do not disagree with that conclusion. In Part II–B the plurality concludes that evidence concerning petitioner's good behavior in prison is relevant to the sentencing determination only insofar as it may shed light on his future behavior. I disagree with that conclusion. Finally, in the last paragraph of Part II–B and in Part III, the plurality makes general comments on the Texas capital sentencing scheme. I shall begin with a discussion of the relevance of petitioner's mitigating evidence and an explanation of why, under the Texas sentencing scheme, the failure to give instructions similar to those requested by petitioner prevented the jury from giving that evidence independent mitigating weight. I will then comment on the portion of the plurality's opinion that seems to imply that it is permissible to "channel jury discretion in capital sentencing" by foreclosing the jury's consideration of relevant mitigating evidence.

I

In this case the mitigating evidence submitted by petitioner consisted of a stipulation indicating that during two periods of imprisonment aggregating about seven years he committed no disciplinary violations. That evidence militated against imposition of the death sentence in two quite different ways. Looking to the past, it suggested the possibility that petitioner's character was not without some redeeming features; a human being who can conform to strict prison rules without incident for several years may have virtues that can fairly be balanced against society's interest in killing him in retribution for his violent crime. Looking to the future, that evidence suggested that a sentence to prison,

rather than to death, would adequately protect society from future acts of violence by petitioner. The evidence was admissible for both purposes.

In *Skipper* v. *South Carolina*, 476 U. S. 1 (1986), the State argued that evidence of good behavior in prison could be excluded when offered to show the defendant's "*future* adaptability to prison life" *id.*, at 6 (emphasis in original), even though it could properly be admitted to prove "past good conduct in jail for purposes of establishing his good character." *Ibid.* We rejected that distinction as a basis for excluding this type of evidence. Implicitly the Court held that the evidence must be admitted not only for its relevance to the defendant's character and past history but also for its relevance to a prediction about his future behavior.

Ironically, today the plurality turns the Court's decision in *Skipper* on end. The plurality holds that no special instruction was needed to allow the jury to give adequate weight to the evidence of petitioner's good conduct in prison because that evidence had no relevance except insofar as it shed light on petitioner's probable future conduct. The plurality is quite wrong. Past conduct often provides insights into a person's character that will evoke a merciful response to a demand for the ultimate punishment even though it may shed no light on what may happen in the future. Evidence of past good behavior in prison is relevant in this respect just as is evidence of honorable military service or kindness to those in the defendant's community or regular church attendance. Although it may aid the sentencer in predicting the defendant's future conduct, it also tells the sentencer something about the defendant's personality. Importantly, for example, it may suggest that the conduct of which the defendant stands convicted was not in keeping with his or her usual qualities or traits, a fact that has as much relevance to culpability as to future dangerousness. Further, the evidence of petitioner's past prison conduct was relevant to show the appropriateness of the alternative punishment of imprison-

ment *for him*, another reflection of his character. Thus evidence of petitioner's conduct in prison "encompassed . . . more than [just] those matters . . . considered by the jury when it was asked to answer the second Special Issue," *ante*, at 178, which asked only if there was a probability that petitioner would commit future criminal acts of violence.

"The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special 'need for reliability in the determination that death is the appropriate punishment' in any capital case." *Johnson* v. *Mississippi*, 486 U. S. 578, 584 (1988). For that reason, when it is "considering whether to impose a death sentence the jury may be asked to consider whatever evidence of mitigating circumstances the defense can bring before it." *Jurek* v. *Texas*, 428 U. S. 262, 273 (1976) (joint opinion). If mitigating evidence is relevant to the sentencing determination, a defendant has a right to have the jury consider it even if an appellate court may question its weight.

Our cases explicating the role of mitigating evidence in capital sentencing have rigorously enforced one simple rule: A sentencing jury must be given the authority to reject imposition of the death penalty on the basis of any evidence relevant to the defendant's character or record or the circumstances of the offense proffered by the defendant in support of a sentence less than death. That rule does not merely require that the jury be allowed to hear any such evidence the defendant desires to introduce, *Skipper* v. *South Carolina*, 476 U. S., at 4; *Hitchcock* v. *Dugger*, 481 U. S. 393, 394 (1987), it also requires that the jury be allowed to give "independent mitigating weight" to the evidence. *Lockett* v. *Ohio*, 438 U. S. 586, 605 (1978);[1] *Eddings* v. *Oklahoma*, 455

[1] Although only four Members of the Court endorsed the entire opinion written by Chief Justice Burger in *Lockett*, it has the same precedential value as a Court opinion because JUSTICE MARSHALL's vote to set aside the death penalty rested on a broader ground than did the plurality's. See

U. S. 104, 112–113 (1982). We therefore consistently have condemned the erection of barriers to the jury's full consideration of mitigating evidence without regard to the device by which the barrier was created. *Mills* v. *Maryland*, 486 U. S. 367, 375 (1988); see *Lockett* v. *Ohio*, 438 U. S., at 586 (statute); *Hitchcock* v. *Dugger*, 481 U. S., at 398–399 (same); by the sentencing court, *Eddings* v. *Oklahoma*, 455 U. S., at 104 (sentencing court decision); *Skipper* v. *South Carolina*, 476 U. S., at 1 (evidentiary ruling).

On its face, the Texas capital sentencing scheme makes no mention of mitigating evidence. *Jurek*, 428 U. S., at 272. Instead it merely asks the jury to give a "yes" or "no" answer to two, and in some instances three, "Special Issues." Here the jury was instructed to answer "yes" to the first Special Issue if it found that petitioner acted "deliberately" and "with the reasonable expectation that [her] death . . . would result" when he assaulted Ms. Moran and "yes" to the second Special Issue if it found a probability that petitioner "would commit criminal acts of violence that would constitute a continuing threat to society." See, *ante*, at 168–169, and n. 3. Although the jury was informed that if it answered both issues "yes" petitioner would be sentenced to death, neither of the Special Issues as they would have been understood by reasonable jurors gave the jury the opportunity to consider petitioner's mitigating evidence of past good conduct in prison to the extent that it encompassed matters beyond those relevant to answering the Special Issues. Petitioner therefore was at least entitled to an instruction informing the jury that it could answer one of the issues "no" if it found by that evidence that petitioner's character was such that he should not be subjected to the ultimate penalty. The failure to give such an instruction removed that evidence from the sen-

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Marks v. *United States*, 430 U. S. 188, 193 (1977) (when no single rationale supporting the result commands a majority of the Court, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds").

tencer's consideration just as effectively as would have an instruction informing the jury that petitioner's character was irrelevant to its sentencing decision.

The plurality errs in suggesting that under our precedents Texas may "structur[e]" or "giv[e] shape", *ante*, at 179, to the jury's consideration of character as a mitigating factor by defining character to include only that evidence that reflects on future dangerousness, *ante*, at 177–178. The notion that a State may permissibly provide such a "framework" for the sentencer's discharge of its "awesome power," *ante*, at 179, is inconsistent with our holdings in *Lockett* and *Hitchcock* that a State may not limit the sentencer's consideration to certain enumerated mitigating factors. There is no constitutionally meaningful distinction between allowing the jury to hear all the evidence the defendant would like to introduce and then telling the jury to consider that evidence only to the extent that it is probative of one of the enumerated mitigating circumstances, which we held unconstitutional in both *Lockett* and *Hitchcock*, and allowing the jury to hear whatever evidence the defendant would like to introduce and then telling the jury to consider that evidence only to the extent that it is probative of future dangerousness, which the plurality here finds constitutional.

Petitioner does not contend that the jury required special instructions in order to give complete consideration to any mitigating evidence that was relevant to whether he acted deliberately or to whether he constituted a future threat to society. His argument is limited to the rather simple truism that absent some instruction, given the structure of the Texas scheme, it is probable that the jury misapprehended the significance it could attach to mitigating evidence that was descriptive of petitioner's character rather than predictive of his future behavior. The instructions he sought would only have informed the jury that it could answer either or both of the Special Issues "no" if it found that the mitigating evidence justified a sentence less than death—whether or

not that evidence was relevant to deliberateness or future dangerousness—authority the jury assuredly had under the Constitution and under the Texas sentencing scheme as we have previously construed it. See *Jurek*, 428 U. S., at 273; *Adams* v. *Texas*, 448 U. S. 38, 46 (1980). Although it is remotely possible that the jury that sentenced petitioner intuitively understood that possibility, the Constitution does not permit us to take the risk that the jury did not give full consideration to the mitigating evidence petitioner introduced. *Mills* v. *Maryland*, 486 U. S., at 383–384. Under our cases, the substantial risk that the jury failed to perceive the full ambit of consideration to which evidence of petitioner's past good conduct was entitled requires us to vacate the death sentence and remand for resentencing. *Id.*, at 384; *Eddings*, 455 U. S., at 119 (O'CONNOR, J., concurring). Chief Justice Burger's words in *Lockett* apply fully and determinately to the case before us:

> "There is no perfect procedure for deciding in which cases governmental authority should be used to impose death. But a statute [or evidentiary rule or jury instruction] that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." 438 U. S., at 605.

II

The plurality introduces its discussion of general principles concerning the role of mitigating evidence in capital sentencing with the gratuitous advice that it is not inclined to overrule *Jurek* v. *Texas*, 428 U. S. 262 (1976), see *ante*, at 180. The observation that we rejected a facial challenge to the

constitutionality of the Texas statute in that case is, of course, entirely irrelevant here. As the plurality recognizes, *ante*, at 171, petitioner has not raised a challenge to the constitutionality of the Texas sentencing scheme. Rather, he has merely asserted that the trial court's failure to give the jury instructions he requested was constitutional error.

Our holding in *Lockett* previously has required us to vacate death sentences that were imposed pursuant to facially valid capital sentencing statutes. In *Eddings* v. *Oklahoma*, although the statute provided that a defendant could present evidence "as to any mitigating circumstances," 455 U. S., at 115, n. 10, we set aside the death sentence because it appeared that the trial judge had not considered certain mitigating evidence offered by defendant. See *id.*, at 112–113. In *Hitchcock*, 481 U. S., at 398–399, even though we had sustained the Florida capital sentencing statute against a facial attack in *Proffitt* v. *Florida*, 428 U. S. 242 (1976), we held that a Florida death sentence could not stand because the advisory jury had been instructed not to consider nonstatutory mitigating circumstances. The instant case is analogous; our decision in *Jurek* v. *Texas*, upholding the facial validity of the statute under which petitioner was sentenced to death is not dispositive of the question whether his Eighth Amendment rights were violated because the sentencer was in effect instructed not to consider certain relevant mitigating evidence.

After referring to "tension" between our cases holding that the sentencer's discretion in capital sentencing must be "directed and limited so as to minimize the risk of wholly arbitrary and capricious action," *Gregg* v. *Georgia*, 428 U. S. 153, 189 (1976), and our cases holding that the jury must be permitted to consider any relevant mitigating evidence adduced by the defendant, see *Eddings* v. *Oklahoma*, the plurality suggests that our holding in *Jurek* was premised on a recognition that Texas' scheme accommodated that tension. See

ante, at 182. To the contrary, our holding in *Jurek* did not turn on an understanding that the Special Issues performed a narrowing function; rather our concern there, as it is here, was whether the Special Issues interfered with the jury's full consideration of mitigating evidence.

Instead of employing a list of aggravating circumstances to limit the scope of the jury's power to impose the death penalty, the Texas scheme defines the offense of capital murder in a manner that narrows the class. See *Lowenfield* v. *Phelps*, 484 U. S. 231, 245–246 (1988). This point was explained with some care in the joint opinion in *Jurek:*

> "The Texas Court of Criminal Appeals has thus far affirmed only two judgments imposing death sentences under its post-*Furman* law—in this case and in *Smith* v. *State*, No. 49,809 (Feb. 18, 1976). . . . In the present case the state appellate court noted that its law 'limits the circumstances under which the State may seek the death penalty to a small group of narrowly defined and particularly brutal offenses. This insures that the death penalty will only be imposed for the most serious crimes [and] . . . that [it] will only be imposed for the same type of offenses which occur under the same types of circumstances.' 522 S. W. 2d, at 939.
>
> "While Texas has not adopted a list of statutory aggravating circumstances the existence of which can justify the imposition of the death penalty as have Georgia and Florida, its action in narrowing the categories of murders for which a death sentence may ever be imposed serves much the same purpose. See *McGautha* v. *California*, 402 U. S. 183, 206, n. 16 (1971); Model Penal Code § 201.6, Comment 3, pp. 71–72 (Tent. Draft No. 9, 1959). In fact, each of the five classes of murders made capital by the Texas statute is encompassed in Georgia and Florida by one or more of their statutory aggravat-

> ing circumstances. For example, the Texas statute requires the jury at the guilt-determining stage to consider whether the crime was committed in the course of a particular felony, whether it was committed for hire, or whether the defendant was an inmate of a penal institution at the time of its commission. Cf. *Gregg* v. *Georgia*, *ante*, at 165–166, n. 9; *Proffitt* v. *Florida*, *ante*, at 248–249, n. 6. Thus, in essence, the Texas statute requires that the jury find the existence of a statutory aggravating circumstance before the death penalty may be imposed. So far as consideration of aggravating circumstances is concerned, therefore, the principal difference between Texas and the other two States is that the death penalty is an available sentencing option—even potentially—for a smaller class of murders in Texas. Otherwise the statutes are similar. Each requires the sentencing authority to focus on the particularized nature of the crime." 428 U. S., at 270–271.

Having approved the manner in which the Texas statute narrowed the class of murders for which the death sentence could be imposed, we confronted directly the question whether the Texas statute was nevertheless invalid because the Special Issues might interfere with the requirement that the jury must be allowed to consider "all relevant evidence" offered to demonstrate why the death penalty "should not be imposed."[2] Although the Texas Court of Criminal Appeals had not yet precisely defined the meanings of the terms used in the Special Issues, we understood the two decided cases on the question to indicate that the jury would be given a full opportunity "to consider whatever evidence of mitigating circumstances the defense can bring before it." *Id.*, at 273. Thus, nothing in *Jurek* implies that the Special Issues could

[2] As the joint opinion emphasized:

"A jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed." 428 U. S., at 271.

be used to curtail the defendant's right to have the sentencing decision made on the basis of all relevant mitigating evidence.

It is important to recognize that our holdings that the jury must be given the opportunity to consider, for whatever weight it might bear, any evidence relevant to a defendant's character or record or the circumstances of the offense do not give rise to the danger of arbitrary, capricious, and discriminatory decisionmaking that attends the vesting of unbridled discretion in the sentencer. We recognized this fact in *Gregg* v. *Georgia*, when we upheld Georgia's sentencing scheme against an Eighth Amendment challenge. The Georgia scheme permitted the jury to consider all mitigating evidence the defendant wished to introduce, but our decision nowhere suggested that in so doing the statute failed sufficiently to narrow and guide the discretion of the sentencer. We specifically noted that the existence of discretion to remove a particular defendant from the class of persons on whom death may be imposed did not offend the Constitution, see 428 U. S., at 199, 203; this is especially so when the sentencer is directed to exercise that discretion on the basis of evidence related to the defendant's crime or record or the circumstances of the offense. As JUSTICE WHITE stated:

> "The Georgia Legislature has plainly made an effort to guide the jury in the exercise of its discretion, while at the same time permitting the jury to dispense mercy on the basis of factors too intangible to write into a statute, and I cannot accept the naked assertion that the effort is bound to fail. As the types of murders for which the death penalty may be imposed become more narrowly defined and are limited to those which are particularly serious or for which the death penalty is peculiarly appropriate as they are in Georgia by reason of the aggravating-circumstance requirement, it becomes reasonable to expect that juries—even given discretion *not* to impose the death penalty—will impose the death pen-

alty in a substantial portion of the cases so defined. If they do, it can no longer be said that the penalty is being imposed wantonly and freakishly or so infrequently that it loses its usefulness as a sentencing device." *Id.*, at 222 (opinion concurring in judgment)

In requiring that the discretion of the sentencer in capital sentencing be guided, we have never suggested that the sentencer's discretion could be guided by blinding it to relevant evidence. The hallmark of a sentencing scheme that sufficiently guides and directs the sentencer is the presence of procedures that "require the jury to consider the circumstances of the crime and the criminal before it recommends sentence." *Id.*, at 197. The requirement that the State not bar the sentencer from considering any mitigating aspect of the offense or the offender only furthers the goal of focusing the sentencer's attention on the defendant and the particular circumstances of the crime.

If, as the plurality suggests, see *ante*, at 182, the Texas scheme limits the sentencer's consideration to only that mitigating evidence that bears on one or more of the Special Issues, then it is constitutionally infirm. The requirement that the sentencer's discretion be guided and channeled was intended to enlighten the jury's decisionmaking process, not to license the States to place blinders on juries. A scheme that permitted the sentencer to disregard evidence relevant to an understanding of the crime and the person who committed it would *create* tension with our cases requiring that the sentencing scheme be one that focuses the sentencer's attention on such evidence and with our cases requiring that the sentencer be permitted to consider all relevant mitigating evidence.

The joint opinion in *Jurek* reflects our concern about whether the Texas scheme would allow the jury to give proper weight to mitigating evidence. The Court merely found it reasonable to rely on evidence that the Special Issues "were written to direct and guide the jury's deliberations and

to focus their attention . . . upon the presence of *any possible* mitigating factors," Brief for Respondent in *Jurek* v. *Texas*, O. T. 1975, No. 5394, p. 26 (emphasis added), and that the Texas Court of Criminal Appeals had interpreted the second Special Issue to allow the jury "to consider whatever evidence of mitigating circumstances the defense can bring before it." *Jurek*, 428 U. S., at 273.

As we said in *Jurek:* "What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine. Texas law clearly assures that all such evidence will be adduced." *Id.*, at 276. The essential requirement we found satisfied in *Jurek* was not met in this case. If the Texas scheme is as we found it to be in *Jurek*, this shortcoming was merely the result of an error in instructing the jury. No matter what the ultimate cause is determined to be, however, it is clear that petitioner's Eighth Amendment rights were violated and that the violation would not have occurred had the trial court given the jury the instructions sought by petitioner.

I respectfully dissent.

DOE *v.* UNITED STATES

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

No. 86–1753. Argued March 2, 1988—Decided June 22, 1988

Pursuant to a subpoena, petitioner, the target of a federal grand jury investigation, produced some records as to accounts at foreign banks, but invoked his Fifth Amendment privilege against self-incrimination when questioned about the existence or location of additional bank records. After the foreign banks refused to comply with subpoenas to produce any account records because their governments' laws prohibit such disclosure without the customer's consent, the Government filed a motion with the Federal District Court for an order directing petitioner to sign a consent directive, without identifying or acknowledging the existence of any account, authorizing the banks to disclose records of any and all accounts over which he had a right of withdrawal. The court denied the motion, concluding that compelling petitioner to sign the form was prohibited by the Fifth Amendment. The Court of Appeals disagreed and reversed. On remand, the District Court ordered petitioner to execute the consent directive, and, after he refused, found him in civil contempt. The Court of Appeals affirmed.

Held: Because the consent directive here is not testimonial in nature, compelling petitioner to sign it does not violate his Fifth Amendment privilege against self-incrimination. Pp. 206–218.

(a) In order to be "testimonial," an accused's oral or written communication, or act, must itself, explicitly or implicitly, relate a factual assertion or disclose information. Cf. *Fisher* v. *United States*, 425 U. S. 391; *United States* v. *Doe*, 465 U. S. 605. It is consistent with the history of and the policies underlying the Self-Incrimination Clause to hold that the privilege may be asserted only to resist compelled explicit or implicit disclosures of incriminating information. Pp. 207–214.

(b) Petitioner's execution of the consent directive here would not have testimonial significance, because neither the form nor its execution communicates any factual assertions, implicit or explicit, or conveys any information to the Government. The form does not acknowledge that an account in a foreign bank is in existence or that it is controlled by petitioner. Nor does the form indicate whether documents or any other information relating to petitioner are present at the foreign bank, assuming that such an account does exist. Given the consent directive's phraseology, petitioner's execution of the directive has no testimo-

nial significance either. If the Government obtains bank records after petitioner signs the directive, the only factual statement made by anyone will be the *bank's* implicit declaration, by its act of production in response to a subpoena, that *it* believes the accounts to be petitioner's. Pp. 214–218.

812 F. 2d 1404, affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BRENNAN, WHITE, MARSHALL, O'CONNOR, SCALIA, and KENNEDY, JJ., joined. STEVENS, J., filed a dissenting opinion, *post*, 219.

Richard E. Timbie argued the cause for petitioner. With him on the briefs were *Cono R. Namorato*, *Scott D. Michel*, and *Jeffrey S. Lehman*.

Charles A. Rothfeld argued the cause for the United States. With him on the brief were *Solicitor General Fried*, *Assistant Attorney General Rose*, *Deputy Solicitor General Bryson*, *Gary R. Allen*, *Robert E. Lindsay*, and *Alan Hechtkopf*.*

JUSTICE BLACKMUN delivered the opinion of the Court.

This case presents the question whether a court order compelling a target of a grand jury investigation to authorize foreign banks to disclose records of his accounts, without identifying those documents or acknowledging their existence, violates the target's Fifth Amendment privilege against self-incrimination.

I

Petitioner, named here as John Doe, is the target of a federal grand jury investigation into possible federal offenses arising from suspected fraudulent manipulation of oil cargoes and receipt of unreported income. Doe appeared before the grand jury pursuant to a subpoena that directed him to produce records of transactions in accounts at three named banks in the Cayman Islands and Bermuda. Doe produced some bank records and testified that no additional records re-

**Rex E. Lee*, *Joseph B. Tompkins, Jr.*, and *Carter G. Phillips* filed a brief for the Government of the Cayman Islands as *amicus curiae*.

sponsive to the subpoena were in his possession or control. When questioned about the existence or location of additional records, Doe invoked the Fifth Amendment privilege against self-incrimination.

The United States branches of the three foreign banks also were served with subpoenas commanding them to produce records of accounts over which Doe had signatory authority. Citing their governments' bank-secrecy laws, which prohibit the disclosure of account records without the customer's consent,[1] the banks refused to comply. See App. to Pet. for Cert. 17a, n. 2. The Government then filed a motion with the United States District Court for the Southern District of Texas that the court order Doe to sign 12 forms consenting to disclosure of any bank records respectively relating to 12 foreign bank accounts over which the Government knew or suspected that Doe had control. The forms indicated the account numbers and described the documents that the Government wished the banks to produce.

The District Court denied the motion, reasoning that by signing the consent forms, Doe would necessarily be admit-

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[1] It is a criminal offense for a Cayman bank to divulge any confidential information with respect to a customer's account unless the customer has consented to the disclosure. See the 1976 Confidential Relationships (Preservation) Law No. 16, as amended, 1979 CAY. IS. LAWS, ch. 26, §§ 3, 4 (Cayman Islands bank-secrecy law).

Apparently, Bermuda common law has been interpreted as imposing an implied contract of confidentiality between a Bermuda bank and its customers, pursuant to which "no Bermuda bank may release information in its possession concerning its customers' affairs unless (1) it is ordered to do so by a court of competent jurisdiction in Bermuda, or (2) it receives a specific written direction from its customer requesting the bank to release such information." Letter dated August 1, 1984, from Richard A. Bradspies, Vice President-Operations, of the Bank of Bermuda International Ltd., to David Geneson, Esq., Fraud Section, Criminal Division, U. S. Dept. of Justice, Respondent's Exhibit 4; Respondent's Notice of Disclosure of 6(e) Materials, 2 Record 307.

The Government has not yet sought contempt sanctions against the banks.

ting the existence of the accounts. The District Court believed, moreover, that if the banks delivered records pursuant to the consent forms, those forms would constitute "an admission that [Doe] exercised signatory authority over such accounts." *Id.*, at 20a. The court speculated that the Government in a subsequent proceeding then could argue that Doe must have guilty knowledge of the contents of the accounts. Thus, in the court's view, compelling Doe to sign the forms was compelling him "to perform a testimonial act that would entail admission of knowledge of the contents of potentially incriminating documents," *id.*, at 20a, n. 6, and such compulsion was prohibited by the Fifth Amendment. The District Court also noted that Doe had not been indicted, and that his signing of the forms might provide the Government with the incriminating link necessary to obtain an indictment, the kind of "fishing expedition" that the Fifth Amendment was designed to prevent. *Id.*, at 21a.

The Government sought reconsideration. Along with its motion, it submitted to the court a revised proposed consent directive that was substantially the same as that approved by the Eleventh Circuit in *United States* v. *Ghidoni*, 732 F. 2d 814, cert. denied, 469 U. S. 932 (1984). The form purported to apply to any and all accounts over which Doe had a right of withdrawal, without acknowledging the existence of any such account.[2] The District Court denied this motion also, rea-

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[2] The revised consent form reads:

"I, ——, of the State of Texas in the United States of America, do hereby direct any bank or trust company at which I may have a bank account of any kind or at which a corporation has a bank account of any kind upon which I am authorized to draw, and its officers, employees and agents, to disclose all information and deliver copies of all documents of every nature in your possession or control which relate to said bank account to Grand Jury 84–2, empaneled May 7, 1984 and sitting in the Southern District of Texas, or to any attorney of the District of Texas, or to any attorney of the United States Department of Justice assisting said Grand Jury, and to give evidence relevant thereto, in the investigation conducted by Grand Jury 84–2 in the Southern District of Texas, and this shall be ir-

soning that compelling execution of the consent directive might lead to the uncovering and linking of Doe to accounts that the grand jury did not know were in existence. The court concluded that execution of the proposed form would "admit signatory authority over the speculative accounts [and] would implicitly authenticate any records of the speculative accounts provided by the banks pursuant to the consent." App. to Pet. for Cert. 13a, n. 7.

The Court of Appeals for the Fifth Circuit reversed in an unpublished *per curiam* opinion, judgt. order reported at 775 F. 2d 300 (1985). Relying on its intervening decision in *In re United States Grand Jury Proceedings (Cid)*, 767 F. 2d 1131 (1985), the court held that Doe could not assert his Fifth Amendment privilege as a basis for refusing to sign the consent directive, because the form "did not have testimonial significance" and therefore its compelled execution would not violate Doe's Fifth Amendment rights. App. to Pet. for Cert. 7a.[3]

On remand, the District Court ordered petitioner to execute the consent directive. He refused. The District Court accordingly found petitioner in civil contempt and ordered

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revocable authority for so doing. This direction has been executed pursuant to that certain order of the United States District Court for the Southern District of Texas issued in connection with the aforesaid investigation, dated ——. This direction is intended to apply to the Confidential Relationships (Preservation) Law of the Cayman Islands, and to any implied contract of confidentiality between Bermuda banks and their customers which may be imposed by Bermuda common law, and shall be construed as consent with respect thereto as the same shall apply to any of the bank accounts for which I may be a relevant principal." App. to Pet. for Cert. 12a, n. 5.

[3] The Court of Appeals, citing *United States* v. *New York Telephone Co.*, 434 U. S. 159, 174 (1977), held that the All Writs Act, 28 U. S. C. § 1651(a), authorized the District Court to consider the Government's motion to compel Doe's execution of the consent form, since that compulsion would facilitate the enforcement of the grand jury subpoenas served on the banks. App. to Pet. for Cert. 6a–7a. Petitioner has not challenged the Court of Appeals' conclusion regarding the District Court's authority for entering its order, and we do not address that issue here.

that he be confined until he complied with the order. *Id.*, at 2a. The court stayed imposition of sanction pending appeal and application for writ of certiorari. *Id.*, at 2a–3a.

The Fifth Circuit affirmed the contempt order, again in an unpublished *per curiam*, concluding that its prior ruling constituted the "law of the case" and was dispositive of Doe's appeal. *Id.*, at 3a; judgt. order reported at 812 F. 2d 1404 (1987). We granted certiorari, 484 U. S. 813 (1987), to resolve a conflict among the Courts of Appeals as to whether the compelled execution of a consent form directing the disclosure of foreign bank records is inconsistent with the Fifth Amendment.[4] We conclude that a court order compelling the execution of such a directive as is at issue here does not implicate the Amendment.

II

It is undisputed that the contents of the foreign bank records sought by the Government are not privileged under the Fifth Amendment. See *Braswell* v. *United States*, *ante*, at 108–110; *United States* v. *Doe*, 465 U. S. 605 (1984); *Fisher* v. *United States*, 425 U. S. 391 (1976). There also is no question that the foreign banks cannot invoke the Fifth Amendment in declining to produce the documents; the privilege does not extend to such artificial entities. See *Braswell* v. *United States*, *ante*, at 102–103; *Bellis* v. *United States*, 417 U. S. 85, 89–90 (1974). Similarly, petitioner asserts no Fifth Amendment right to prevent the banks from disclosing the account records, for the Constitution "necessarily does not proscribe incriminating statements elicited from an-

[4] The Second and Eleventh Circuits, as did the Fifth, have held that the Fifth Amendment is not implicated by a court order compelling consent to the disclosure of foreign bank records. *United States* v. *Ghidoni*, 732 F. 2d 814 (CA11), cert. denied, 469 U. S. 932 (1984); *United States* v. *Davis*, 767 F. 2d 1025, 1039–1040 (CA2 1985); accord, *In re Grand Jury Subpoena*, 826 F. 2d 1166 (CA2 1987), cert. pending *sub nom. Coe* v. *United States*, No. 87–517. A divided panel of the First Circuit, however, has held that such an order violates the Fifth Amendment. *In re Grand Jury Proceedings (Ranauro)*, 814 F. 2d 791 (1987).

other." *Couch* v. *United States*, 409 U. S. 322, 328 (1973). Petitioner's sole claim is that his execution of the consent forms directing the banks to release records as to which the banks believe he has the right of withdrawal has independent testimonial significance that will incriminate him, and that the Fifth Amendment prohibits governmental compulsion of that act.

The Self-Incrimination Clause of the Fifth Amendment reads: "No person . . . shall be compelled in any criminal case to be a witness against himself." This Court has explained that "the privilege protects a person only against being incriminated by his own compelled testimonial communications." *Fisher* v. *United States*, 425 U. S., at 409, citing *Schmerber* v. *California*, 384 U. S. 757 (1966); *United States* v. *Wade*, 388 U. S. 218 (1967); and *Gilbert* v. *California*, 388 U. S. 263 (1967). The execution of the consent directive at issue in this case obviously would be compelled, and we may assume that its execution would have an incriminating effect.[5] The question on which this case turns is whether the act of executing the form is a "testimonial communication." The parties disagree about both the meaning of "testimonial" and whether the consent directive fits the proposed definitions.

A

Petitioner contends that a compelled statement is testimonial if the Government could use the content of the speech or writing, as opposed to its physical characteristics, to further a criminal investigation of the witness. The second half of petitioner's "testimonial" test is that the statement must be incriminating, which is, of course, already a separate re-

[5] As noted above, the District Court concluded that the consent directive was incriminating in that it would furnish the Government with a link in the chain of evidence leading to Doe's indictment. Because we ultimately find no testimonial significance in either the contents of the directive or Doe's execution of it, we need not, and do not, address the incrimination element of the privilege.

quirement for invoking the privilege. Thus, Doe contends, in essence, that every written and oral statement significant for its content is necessarily testimonial for purposes of the Fifth Amendment.[6] Under this view, the consent directive is testimonial because it is a declarative statement of consent made by Doe to the foreign banks, a statement that the Government will use to persuade the banks to produce potentially incriminating account records that would otherwise be unavailable to the grand jury.

The Government, on the other hand, suggests that a compelled statement is not testimonial for purposes of the privilege, unless it implicitly or explicitly relates a factual assertion or otherwise conveys information to the Government. It argues that, under this view, the consent directive is not

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[6] Petitioner's blanket assertion that a statement is testimonial for Fifth Amendment purposes if its content can be used to obtain evidence confuses the requirement that the compelled communication be "testimonial" with the separate requirement that the communication be "incriminating." If a compelled statement is "not testimonial and for that reason not protected by the privilege, it cannot become so because it will lead to incriminating evidence." *In re Grand Jury Subpoena*, 826 F. 2d, at 1172, n. 2 (concurring opinion).

Petitioner's heavy reliance on this Court's decision in *Kastigar* v. *United States*, 406 U. S. 441 (1972), for a contrary proposition is misguided. *Kastigar* affirmed the constitutionality of 18 U. S. C. §§ 6002 and 6003, which permit the Government to compel testimony as long as the witness is immunized against the use in any criminal case of the "testimony or other information" provided. In holding that the immunity provided by the statute is coextensive with the Fifth Amendment privilege, the Court implicitly concluded that the privilege prohibits "the use of compelled testimony, as well as evidence derived directly and indirectly therefrom." 406 U. S., at 453. The prohibition of derivative use is an implementation of the "link in the chain of evidence" theory for invocation of the privilege, pursuant to which the "compelled testimony" need not itself be incriminating if it would lead to the discovery of incriminating evidence. See *Hoffman* v. *United States*, 341 U. S. 479, 486 (1951). See also *Murphy* v. *Waterfront Comm'n of New York Harbor*, 378 U. S. 52, 79 (1964); 8 J. Wigmore, Evidence § 2260 (McNaughton rev. 1961) (Wigmore). This prohibition, however, assumes that the suspect's initial compelled communication is testimonial.

testimonial because neither the directive itself nor Doe's execution of the form discloses or communicates facts or information. Petitioner disagrees.

The Government's view of the privilege, apparently accepted by the Courts of Appeals that have considered compelled consent forms,[7] is derived largely from this Court's decisions in *Fisher* and *Doe*. The issue presented in those cases was whether the act of producing subpoenaed documents, not itself the making of a statement, might nonetheless have some protected testimonial aspects. The Court concluded that the act of production could constitute protected testimonial communication because it might entail implicit statements of fact: by producing documents in compliance with a subpoena, the witness would admit that the papers existed, were in his possession or control, and were authentic. *United States* v. *Doe*, 465 U. S., at 613, and n. 11; *Fisher*, 425 U. S., at 409–410; *id.*, at 428, 432 (concurring opinions). See *Braswell* v. *United States*, *ante*, at 104; *ante*, at 122 (dissenting opinion). Thus, the Court made clear that the Fifth Amendment privilege against self-incrimination applies to acts that imply assertions of fact.

We reject petitioner's argument that this test does not control the determination as to when the privilege applies to oral or written statements. While the Court in *Fisher* and *Doe* did not purport to announce a universal test for determining the scope of the privilege, it also did not purport to establish a more narrow boundary applicable to acts alone. To the contrary, the Court applied basic Fifth Amendment principles.[8] An examination of the Court's application of these

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[7] See *In re United States Grand Jury Proceedings (Cid)*, 767 F. 2d 1131, 1132 (CA5 1985); *In re Grand Jury Proceedings (Ranauro)*, 814 F. 2d, at 793; *id.*, at 798 (dissenting opinion); *United States* v. *Davis*, 767 F. 2d, at 1040. See also *United States* v. *Ghidoni*, 732 F. 2d, at 816.

[8] The decisions in *Fisher* v. *United States*, 425 U. S. 391 (1976), and *United States* v. *Doe*, 465 U. S. 605 (1984), rested on the understanding that "'the Court has never on any ground . . . applied the Fifth Amend-

principles in other cases indicates the Court's recognition that, in order to be testimonial, an accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information.[9] Only then is a person compelled to be a "witness" against himself.

This understanding is perhaps most clearly revealed in those cases in which the Court has held that certain acts, though incriminating, are not within the privilege. Thus, a suspect may be compelled to furnish a blood sample, *Schmerber* v. *California*, 384 U. S., at 765; to provide a handwriting exemplar, *Gilbert* v. *California*, 388 U. S., at 266–267, or a voice exemplar, *United States* v. *Dionisio*, 410 U. S. 1, 7 (1973); to stand in a lineup, *United States* v. *Wade*, 388 U. S., at 221–222; and to wear particular clothing, *Holt* v. *United States*, 218 U. S. 245, 252–253 (1910). These decisions are grounded on the proposition that "the privilege protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature." *Schmerber*, 384 U. S., at 761. The Court accordingly held that the privilege

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ment to prevent the otherwise proper acquisition or use of evidence which, in the Court's view, did not involve compelled testimonial self-incrimination of some sort.'" *Id.*, at 611, n. 8, quoting *Fisher*, 425 U. S., at 399. The Court thus squarely held that the Fifth Amendment comes into play "only when the accused is compelled to make a *testimonial* communication that is incriminating." *Id.*, at 408 (emphasis in original); see *id.*, at 409; *Doe*, 465 U. S., at 611, 613. These principles were articulated in general terms, not as confined to acts. Petitioner has articulated no cogent argument as to why the "testimonial" requirement should have one meaning in the context of acts, and another meaning in the context of verbal statements.

[9] We do not disagree with the dissent that "[t]he expression of the contents of an individual's mind" is testimonial communication for purposes of the Fifth Amendment. *Post*, at 220, n. 1. We simply disagree with the dissent's conclusion that the execution of the consent directive at issue here forced petitioner to express the contents of his mind. In our view, such compulsion is more like "be[ing] forced to surrender a key to a strongbox containing incriminating documents" than it is like "be[ing] compelled to reveal the combination to [petitioner's] wall safe." *Post*, at 219.

was not implicated in each of those cases, because the suspect was not required "to disclose any knowledge he might have," or "to speak his guilt," *Wade*, 388 U. S., at 222–223. See *Dionisio*, 410 U. S., at 7; *Gilbert*, 388 U. S., at 266–267. It is the "extortion of information from the accused," *Couch* v. *United States*, 409 U. S., at 328, the attempt to force him "to disclose the contents of his own mind," *Curcio* v. *United States*, 354 U. S. 118, 128 (1957), that implicates the Self-Incrimination Clause. See also *Kastigar* v. *United States*, 406 U. S. 441, 445 (1972) (the privilege "protects against any *disclosures* that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used") (emphasis added). "Unless some attempt is made to secure a communication—written, oral or otherwise—upon which reliance is to be placed as involving [the accused's] consciousness of the facts and the operations of his mind in expressing it, the demand made upon him is not a testimonial one." 8 Wigmore § 2265, p. 386.[10]

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[10] Petitioner's reliance on a statement in this Court's decision in *Schmerber* v. *California*, 384 U. S. 757 (1966), for the proposition that all verbal statements sought for their content are testimonial is misplaced. In *Schmerber*, the Court stated that the privilege extends to "an accused's communications, whatever form they might take," *id.*, at 763–764, but it did so in the context of clarifying that the privilege may apply not only to verbal communications, as was once thought, but also to physical communications. See *United States* v. *Wade*, 388 U. S. 218, 223 (1967). Contrary to petitioner's urging, the *Schmerber* line of cases does not draw a distinction between unprotected evidence sought for its physical characteristics and protected evidence sought for its content. Rather, the Court distinguished between the suspect's being compelled himself to serve as evidence and the suspect's being compelled to disclose or communicate information or facts that might serve as or lead to incriminating evidence. See, *e. g.*, *Schmerber*, 384 U. S., at 764. See also *Holt* v. *United States*, 218 U. S. 245, 252–253 (1910); 8 Wigmore § 2265, p. 386. In order to be privileged, it is not enough that the compelled communication is sought for its content. The content itself must have testimonial significance. *Fisher*, 425 U. S., at 408; *Gilbert* v. *California*, 388 U. S. 263, 267 (1967); *Wade*, 388 U. S., at 222.

It is consistent with the history of and the policies underlying the Self-Incrimination Clause to hold that the privilege may be asserted only to resist compelled explicit or implicit disclosures of incriminating information. Historically, the privilege was intended to prevent the use of legal compulsion to extract from the accused a sworn communication of facts which would incriminate him. Such was the process of the ecclesiastical courts and the Star Chamber—the inquisitorial method of putting the accused upon his oath and compelling him to answer questions designed to uncover uncharged offenses, without evidence from another source. See *Andresen* v. *Maryland*, 427 U. S. 463, 470–471 (1976); 8 Wigmore § 2250; E. Griswold, The Fifth Amendment Today 2–3 (1955). The major thrust of the policies undergirding the privilege is to prevent such compulsion. The Self-Incrimination Clause reflects "'a judgment . . . that the prosecution should [not] be free to build up a criminal case, in whole or in part, with the assistance of enforced *disclosures* by the accused'" (emphasis added). *Ullmann* v. *United States*, 350 U. S. 422, 427 (1956), quoting *Maffie* v. *United States*, 209 F. 2d 225, 227 (CA1 1954). The Court in *Murphy* v. *Waterfront Comm'n of New York Harbor*, 378 U. S. 52 (1964), explained that the privilege is founded on

> "our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates 'a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load,' . . . ; our respect for the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life,'

> . . . ; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes 'a shelter to the guilty,' is often 'a protection to the innocent.'" *Id.*, at 55 (citations omitted).

These policies are served when the privilege is asserted to spare the accused from having to reveal, directly or indirectly, his knowledge of facts relating him to the offense or from having to share his thoughts and beliefs with the Government.[11]

We are not persuaded by petitioner's arguments that our articulation of the privilege fundamentally alters the power of the Government to compel an accused to assist in his prosecution. There are very few instances in which a verbal statement, either oral or written, will not convey information or assert facts. The vast majority of verbal statements thus will be testimonial and, to that extent at least, will fall within

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[11] Petitioner argues that at least some of these policies would be undermined unless the Government is required to obtain evidence against an accused from sources other than his compelled statements, whether or not the statements make a factual assertion or convey information. Petitioner accordingly maintains that the policy of striking an appropriate balance between the power of the Government and the sovereignty of the individual precludes the Government from compelling an individual to utter or write words that lead to incriminating evidence. Even if some of the policies underlying the privilege might support petitioner's interpretation of the privilege, "it is clear that the scope of the privilege does not coincide with the complex of values it helps to protect. Despite the impact upon the inviolability of the human personality, and upon our belief in an adversary system of criminal justice in which the Government must produce the evidence against an accused through its own independent labors, the prosecution is allowed to obtain and use . . . evidence which although compelled is generally speaking not 'testimonial,' *Schmerber* v. *California*, 384 U. S. 757, 761." *Grosso* v. *United States*, 390 U. S. 62, 72–73 (1968) (BRENNAN, J., concurring). See also *Schmerber*, 384 U. S., at 762–763. If the societal interests in privacy, fairness, and restraint of governmental power are not unconstitutionally offended by compelling the accused to have his body serve as evidence that leads to the development of highly incriminating testimony, as *Schmerber* and its progeny make clear, it is difficult to understand how compelling a suspect to make a nonfactual statement that facilitates the production of evidence by someone else offends the privilege.

the privilege.[12] Furthermore, it should be remembered that there are many restrictions on the government's prosecutorial practices in addition to the Self-Incrimination Clause. Indeed, there are other protections against governmental efforts to compel an unwilling suspect to cooperate in an investigation, including efforts to obtain information from him.[13] We are confident that these provisions, together with the Self-Incrimination Clause, will continue to prevent abusive investigative techniques.

B

The difficult question whether a compelled communication is testimonial for purposes of applying the Fifth Amendment often depends on the facts and circumstances of the particu-

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[12] In particular, we do not agree that our articulation cuts back on the Court's explanation in *Miranda* v. *Arizona*, 384 U. S. 436 (1966), that "the privilege is fulfilled only when the person is guaranteed the right 'to remain silent unless he chooses to speak in the unfettered exercise of his own will.'" *Id.*, at 460, quoting *Malloy* v. *Hogan*, 378 U. S. 1, 8 (1964). In *Miranda*, the Court addressed a suspect's Fifth Amendment privilege in the face of custodial interrogation by the government. Our test for when a communication is "testimonial" does not authorize law enforcement officials to make an unwilling suspect speak in this context. It is clear that the accused in a criminal case is exempt from giving answers altogether, for (at least on the prosecution's assumption) they will disclose incriminating information that the suspect harbors.

To the extent petitioner attempts to construe *Miranda* as establishing an absolute right against being compelled to speak, that understanding is refuted by the Court's decision in *United States* v. *Dionisio*, 410 U. S. 1 (1973), in which the Court held that a suspect may not invoke the privilege in refusing to speak for purposes of providing a voice exemplar.

[13] For example, the Fourth Amendment generally prevents the government from compelling a suspect to consent to a search of his home, cf. *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 248–249 (1973); the attorney-client privilege prevents the government from compelling a suspect to direct his attorney to disclose confidential communications, see generally *Upjohn Co.* v. *United States*, 449 U. S. 383, 389 (1981); 8 Wigmore § 2292; and the Due Process Clause imposes limitations on the government's ability to coerce individuals into participating in criminal prosecutions, see generally *Rochin* v. *California*, 342 U. S. 165, 174 (1952).

lar case. *Fisher*, 425 U. S., at 410. This case is no exception. We turn, then, to consider whether Doe's execution of the consent directive at issue here would have testimonial significance. We agree with the Court of Appeals that it would not, because neither the form, nor its execution, communicates any factual assertions, implicit or explicit, or conveys any information to the Government.

The consent directive itself is not "testimonial." It is carefully drafted not to make reference to a specific account, but only to speak in the hypothetical. Thus, the form does not acknowledge that an account in a foreign financial institution is in existence or that it is controlled by petitioner. Nor does the form indicate whether documents or any other information relating to petitioner are present at the foreign bank, assuming that such an account does exist. Cf. *United States* v. *Ghidoni*, 732 F. 2d, at 818; *In re Grand Jury Proceedings (Ranauro)*, 814 F. 2d 791, 793 (CA1 1987); *In re Grand Jury Subpoena*, 826 F. 2d 1166, 1170 (CA2 1987), cert. pending *sub nom. Coe* v. *United States*, No. 87–517; *In re United States Grand Jury Proceedings (Cid)*, 767 F. 2d, at 1132. The form does not even identify the relevant bank. Although the executed form allows the Government access to a potential source of evidence, the directive itself does not point the Government toward hidden accounts or otherwise provide information that will assist the prosecution in uncovering evidence. The Government must locate that evidence "'by the independent labor of its officers,'" *Estelle* v. *Smith*, 451 U. S. 454, 462 (1981), quoting *Culombe* v. *Connecticut*, 367 U. S. 568, 582 (1961) (opinion announcing the judgment). As in *Fisher*, the Government is not relying upon the "'truth-telling'" of Doe's directive to show the existence of, or his control over, foreign bank account records. See 425 U. S., at 411, quoting 8 Wigmore § 2264, p. 380.

Given the consent directive's phraseology, petitioner's compelled act of executing the form has no testimonial significance either. By signing the form, Doe makes no statement,

explicit or implicit, regarding the existence of a foreign bank account or his control over any such account. Nor would his execution of the form admit the authenticity of any records produced by the bank. Cf. *United States* v. *Ghidoni*, 732 F. 2d, at 818–819; *In re Grand Jury Subpoena*, 826 F. 2d, at 1170. Not only does the directive express no view on the issue, but because petitioner did not prepare the document, any statement by Doe to the effect that it is authentic would not establish that the records are genuine. Cf. *Fisher*, 425 U. S., at 413. Authentication evidence would have to be provided by bank officials.

Finally, we cannot agree with petitioner's contention that his execution of the directive admits or asserts Doe's consent. The form does not state that Doe "consents" to the release of bank records. Instead, it states that the directive "shall be construed as consent" with respect to Cayman Islands and Bermuda bank-secrecy laws. Because the directive explicitly indicates that it was signed pursuant to a court order, Doe's compelled execution of the form sheds no light on his actual intent or state of mind.[14] The form does "direct" the

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[14] The consent directive at issue here differs from the form at issue in *Ranauro* which suggested that the witness, in fact, had consented: "I, [witness], consent to the production to the [District Court and Grand Jury] of any and all records related to any accounts held by, or banking transactions engaged in with, [bank X], which are in the name of, or on behalf of: [witness], if any such records exist." 814 F. 2d, at 796. Further, the *Ranauro* form, unlike the directive here, did not indicate that it was executed under court order. *Id.*, at 795. It is true that the First Circuit made clear that its conclusion that the *Ranauro* form was testimonial did not turn on these distinctions, *ibid.*, but we are not sanguine that the differences are irrelevant. Even if the Self-Incrimination Clause was not implicated, it might be argued that the compelled signing of such a "consent" form raises due process concerns. Cf. *In re Grand Jury Subpoena*, 826 F. 2d, at 1171 (finding no due process violation where directive clearly states that witness is signing under compulsion of court order); *United States* v. *Ghidoni*, 732 F. 2d, at 818, n. 7 (same). Neither issue, of course, is presented by this case, and we take no position on whether such compulsion in fact would violate Fifth Amendment or due process principles.

bank to disclose account information and release any records that "may" exist and for which Doe "may" be a relevant principal. But directing the recipient of a communication to do something is not an assertion of fact or, at least in this context, a disclosure of information. In its testimonial significance, the execution of such a directive is analogous to the production of a handwriting sample or voice exemplar: it is a nontestimonial act. In neither case is the suspect's action compelled to obtain "any knowledge he might have." *Wade*, 388 U. S., at 222.[15]

We read the directive as equivalent to a statement by Doe that, although he expresses no opinion about the existence

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[15] Petitioner apparently maintains that the performance of every compelled act carries with it an implied assertion that the act has been performed by the person who was compelled, and therefore the performance of the act is subject to the privilege. In *Wade*, *Gilbert*, and *Dionisio*, the Court implicitly rejected this argument. It could be said in those cases that the suspect, by providing his handwriting or voice exemplar, implicitly "acknowledged" that the writing or voice sample was his. But as the holdings make clear, this kind of simple acknowledgment—that the suspect in fact performed the compelled act—is not "sufficiently testimonial for purposes of the privilege." *Fisher*, 425 U. S., at 411. Similarly, the acknowledgment that Doe directed the bank to disclose any records the bank thinks are Doe's—an acknowledgment implicit in Doe's placing his signature on the consent directive—is not sufficiently testimonial for purposes of the privilege.

The dissent apparently disagrees with us on this point, although the basis for its disagreement is unclear. See *post*, at 221–222, n. 2. Surely, the fact that the executed form creates "a new piece of evidence that may be used against petitioner" is not relevant to whether the execution has testimonial significance, for the same could be said about the voice and writing exemplars the Court found were not testimonial in nature. Similarly irrelevant to the issue presented here is the dissent's invocation of the First Circuit's hypothetical of how the Government might use the directive to link petitioner to whatever documents the banks produce. That hypothetical, as the First Circuit indicated, *Ranauro*, 814 F. 2d, at 793, goes only to showing that the directive may be *incriminating*, an issue not presented in this case. See n. 5, *supra*. It has no bearing on whether the compelled execution of the directive is *testimonial*.

of, or his control over, any such account, he is authorizing the bank to disclose information relating to accounts over which, in the bank's opinion, Doe can exercise the right of withdrawal. Cf. *Ghidoni*, 732 F. 2d, at 818, n. 8 (similarly interpreting a nearly identical consent directive). When forwarded to the bank along with a subpoena, the executed directive, if effective under local law,[16] will simply make it possible for the recipient bank to comply with the Government's request to produce such records. As a result, if the Government obtains bank records after Doe signs the directive, the only factual statement made by anyone will be the *bank's* implicit declaration, by its act of production in response to the subpoena, that *it* believes the accounts to be petitioner's. Cf. *Fisher*, 425 U. S., at 410, 412–413. The fact that the bank's customer has directed the disclosure of his records "would say nothing about the correctness of the bank's representations." Brief for United States 21–22. Indeed, the Second and Eleventh Circuits have concluded that consent directives virtually identical to the one here are inadmissible as an admission by the signator of either control or existence. *In re Grand Jury Subpoena*, 826 F. 2d, at 1171; *Ghidoni*, 732 F. 2d, at 818, and n. 9.

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[16] The Government of the Cayman Islands maintains that a compelled consent, such as the one at issue in this case, is not sufficient to authorize the release of confidential financial records protected by Cayman law. Brief for Government of Cayman Islands as *Amicus Curiae* 9–11. The Grand Court of the Cayman Islands has held expressly that a consent directive signed pursuant to an order of a United States court and at the risk of contempt sanctions, could not constitute "consent" under the Cayman confidentiality law. See *In re ABC Ltd.*, 1984 C. I. L. R. 130 (1984) (reviewing the consent directive at issue in *Ghidoni*). The United States observes that the cited decision has not been appealed and argues accordingly that Cayman law on the point has not been definitely settled.

The effectiveness of the directive under foreign law has no bearing on the constitutional issue in this case. Nevertheless, we are not unaware of the international comity questions implicated by the Government's attempts to overcome protections afforded by the laws of another nation. We are not called upon to address those questions here.

III

Because the consent directive is not testimonial in nature, we conclude that the District Court's order compelling petitioner to sign the directive does not violate his Fifth Amendment privilege against self-incrimination. Accordingly, the judgment of the Court of Appeals is affirmed.

It is so ordered.

JUSTICE STEVENS, dissenting.

A defendant can be compelled to produce material evidence that is incriminating. Fingerprints, blood samples, voice exemplars, handwriting specimens, or other items of physical evidence may be extracted from a defendant against his will. But can he be compelled to use his mind to assist the prosecution in convicting him of a crime? I think not. He may in some cases be forced to surrender a key to a strongbox containing incriminating documents, but I do not believe he can be compelled to reveal the combination to his wall safe—by word or deed.

The document the Government seeks to extract from John Doe purports to order third parties to take action that will lead to the discovery of incriminating evidence. The directive itself may not betray any knowledge petitioner may have about the circumstances of the offenses being investigated by the grand jury, but it nevertheless purports to evidence a reasoned decision by Doe to authorize action by others. The forced execution of this document differs from the forced production of physical evidence just as human beings differ from other animals.[1]

[1] The forced production of physical evidence, which we have condoned, see *Gilbert* v. *California*, 388 U. S. 263 (1967) (handwriting exemplar); *United States* v. *Wade*, 388 U. S. 218 (1967) (voice exemplar); *Schmerber* v. *California*, 384 U. S. 757 (1966) (blood test); *Holt* v. *United States*, 218 U. S. 245 (1910) (lineup), involves no intrusion upon the contents of the mind of the accused. See *Schmerber*, 384 U. S., at 765 (forced blood test permissible because it does not involve "even a shadow of testimonial compulsion upon or enforced communication by the accused"). The forced

If John Doe can be compelled to use his mind to assist the Government in developing its case, I think he will be forced "to be a witness against himself." The fundamental purpose of the Fifth Amendment was to mark the line between the kind of inquisition conducted by the Star Chamber and what we proudly describe as our accusatorial system of justice. It

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execution of a document that purports to convey the signer's authority, however, does invade the dignity of the human mind; it purports to communicate a deliberate command. The intrusion on the dignity of the individual is not diminished by the fact that the document does not reflect the true state of the signer's mind. Indeed, that the assertions petitioner is forced to utter by executing the document are false, causes an even greater violation of human dignity. For the same reason a person cannot be forced to sign a document purporting to authorize the entry of judgment against himself, cf. *Brady* v. *United States*, 397 U. S. 742, 748 (1970), I do not believe he can be forced to sign a document purporting to authorize the disclosure of incriminating evidence. In both cases the accused is being compelled "to be a witness against himself"; indeed, here he is being compelled to bear false witness against himself.

The expression of the contents of an individual's mind falls squarely within the protection of the Fifth Amendment. *Boyd* v. *United States*, 116 U. S. 616, 633–635 (1886); *Fisher* v. *United States*, 425 U. S. 391, 420 (1976). Justice Holmes' observation that "the prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him," *Holt* v. *United States*, 218 U. S., at 252–253, manifests a recognition that virtually any communication reveals the contents of the mind of the speaker. Thus the Fifth Amendment privilege is fulfilled only when the person is guaranteed the right "'to remain silent unless he chooses to speak in the unfettered exercise of his own will.'" *Miranda* v. *Arizona*, 384 U. S. 436, 460 (1966) (quoting *Malloy* v. *Hogan*, 378 U. S. 1, 8 (1964)). The deviation from this principle can only lead to mischievous abuse of the dignity the Fifth Amendment commands the Government afford its citizens. Cf. *Schmerber* v. *California*, 384 U. S., at 764. The instant case is illustrative. In allowing the Government to compel petitioner to execute the directive, the Court permits the Government to compel petitioner to speak against his will in answer to the question "Do you consent to the release of these documents?" Beyond this affront, however, the Government is being permitted also to demand that the answer be "yes."

reflects "our respect for the inviolability of the human personality," *Murphy* v. *Waterfront Comm'n of New York Harbor*, 378 U. S. 52, 55 (1964). "[I]t is an explicit right of a natural person, protecting the realm of human thought and expression." *Braswell* v. *United States*, *ante*, at 119 (KENNEDY, J., dissenting). In my opinion that protection gives John Doe the right to refuse to sign the directive authorizing access to the records of any bank account that he may control.[2] Accordingly, I respectfully dissent.

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[2] The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a *witness* against himself." A witness is one who "gives evidence in a cause." T. Cunningham, 2 New and Complete Law Dictionary (2d ed. 1771). The Court carefully scrutinizes the particular directive at issue here to determine whether its "form" or "execution" "communicates any factual assertions, implicit or explicit, or conveys any information to the Government." *Ante*, at 215. But the Court's opinion errs in focusing only on whether the directive reveals historical facts, ignoring that the execution of the directive *creates new* facts and a new piece of evidence that may be used against petitioner. The Court determines that the document's form has no testimonial significance because it does not reveal the identity of any particular banks or acknowledge the existence of any particular foreign accounts. This much is true. But the document does reveal exactly what it purports to reveal, which is that petitioner "directs," see *ante*, at 204–205, n. 2, the release of any documents that conform to the description contained in the statement. Thus, by executing the document, petitioner admits a state of mind, a present-tense desire. That the directive asserts that it was executed "pursuant to" court order does not save petitioner from this compelled admission. Only the most sophisticated bank officer could be expected to understand the phrase "pursuant to that certain order," *ibid.*, to mean "executed involuntarily under pain of contempt." But even if the directive expressly revealed its involuntary character, it would still communicate the direction that incriminating documents be produced.

By executing the document, petitioner creates evidence that has independent significance. The Court's opinion does not foreclose the possibility that the Government will attempt to introduce the directive itself to create a link between petitioner and whatever documents the Government is able to secure through use of the directive. This danger was fully described in an example employed by the First Circuit in its analysis of a

document, which, like the one at issue here, did not assert the existence of any particular bank records or accounts:

"Suppose that at trial the government were to introduce bank records produced in response to a subpoena that had been accompanied by the consent form and that it was not apparent from the face of the records or otherwise how [defendant] was linked to them. Suppose also that the government then introduced the subpoena and consent form, and a government witness testified that the bank records were received in response to the subpoena and consent form. . . . Would not the evidence linking [defendant] to the records be his own testimonial admission of consent?" *In re Grand Jury Proceedings (Ranauro)*, 814 F. 2d 791, 793 (1987).

The example reveals that the compelled execution causes the creation of evidence that did not exist before and which through the Government's artifice may become part of the prosecution's case against petitioner. The example also demonstrates that the "testimonial" significance of the directive can only be appreciated if the document is considered in its completed form from the perspective of an individual who knows no more about the circumstances of its creation than is revealed on its face. The fact that the document was produced under compulsion, which the Court relies on in asserting that the directive "sheds no light on [petitioner's] actual intent or state of mind," *ante*, at 216, is not relevant to consideration of the document's testimonial significance.

A critical issue at any trial at which the Government seeks to introduce bank records produced by a compulsory directive would be proof that the documents pertain to accounts within the control of the defendant. The directive relates the testimonial fact that the defendant ordered the production of those documents which relate to any account he has at a bank or trust company or over which he has signatory authority. Perhaps this testimony alone does not prove the fact of control, but it is certainly probative of that fact. The defendant can no longer testify without contradiction from the face of the directive that he never authorized the production of records relating to his accounts. The directive that he was compelled to create testifies against him.

Syllabus

FLORIDA ET AL. *v.* LONG ET AL.

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

No. 86–1685. Argued February 22, 1988—Decided June 22, 1988

Los Angeles Dept. of Water and Power v. *Manhart*, 435 U. S. 702, held that unequal pension plan contributions for male and female employees based on actuarial tables reflecting women's greater life spans violated the sex discrimination prohibitions of Title VII of the Civil Rights Act of 1964. *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans* v. *Norris*, 463 U. S. 1073, extended this nondiscrimination principle to unequal benefits payments. Florida's Retirement System (Florida System) for state and local government employees has always required equal contributions and equal "normal" benefits for similarly situated male and female employees. Until *Norris*, the Florida System also offered three retirement benefit options that were calculated in accordance with sex-based actuarial tables yielding lower monthly benefits for male retirees. Immediately after *Norris*, Florida adopted unisex actuarial tables equalizing benefits under all of the offered plans for similarly situated male and female employees retiring after *Norris*' effective date. Respondents, male employees who had retired before that date as optional plan participants, filed a class action in Federal District Court, alleging that the optional plans violated Title VII. The court entered summary judgment for respondents, awarding relief to class members who retired after *Manhart*'s, and before *Norris*', effective date, by retroactively "topping up" monthly benefits to the current unisex levels for the period between *Manhart* and the date of the court's judgment. Class members were also awarded topped-up future benefits, commencing on the latter date. The Court of Appeals affirmed.

Held:

1. *Norris*, rather than *Manhart*, establishes the appropriate date for commencing liability for employer-operated pension plans that offered discriminatory payment options, and liability may not be imposed for pre-*Norris* conduct. Pp. 229–238.

(a) Contrary to the Court of Appeals' holding, *Manhart* did not place Florida on notice that optional pension plans offering sex-based benefits violated Title VII. *Manhart* carefully limited its holding to unequal contributions, as distinct from benefits payments, and recognized an open market exception allowing each employee to purchase with the

contributions made on his or her behalf the largest benefit commercially available. In view of the substantial departure from existing practice that *Manhart* ordered, pension fund administrators could have reasonably concluded that the decision was confined to sex-based contributions, and did not prohibit plans from offering optional sex-based annuities similar to those offered by insurance companies on the open market, as long as the options included a sex-neutral benefit. Thus, Florida's continuance of the optional plans until *Norris*—which expressly prohibited unequal benefits and excluded from the open market exception plans which offered annuities duplicating those available from private companies—does not justify imposition of a retroactive award. Pp. 230–235.

(b) In the pension context, retroactive awards are not necessary to further Title VII's purposes and to ensure compliance with this Court's decisions, since Florida acted immediately after *Norris* to correct its discriminatory optional plans, and there is no evidence that employers in general have not complied with the requirements of *Manhart* and *Norris*. P. 235.

(c) The imposition of retroactive liability on the States, local governments, and other employers that offered sex-based pension plans to their employees would be inequitable, particularly since it would impose financial costs that would threaten the security of both the plans and their beneficiaries. The appropriateness of retroactive relief must be based upon broad principle, and not solely upon the particular circumstances of a case. Thus, the fact that the Florida System currently possesses a surplus and can afford the awards against it cannot control here, since basing an award on a particular pension fund's current financial status would amount to imposing a penalty for prudent management. Similarly, the fact that Florida's pension administrators might have speculated in internal memoranda and discussions that *Manhart* prohibited the continuation of sex-based benefits cannot authorize retroactive awards, since the meaning and scope of a decision do not rest on subjective interpretations by discrete, affected persons and their legal advisers. Pp. 235–238.

2. Both awards made by the District Court are impermissible. The first award, which requires prejudgment benefits adjustments, is retroactive without doubt and is therefore prohibited by this decision. The second award, which requires postjudgment adjustments, is also fundamentally retroactive even though it relates to future payments, since it increases benefits that were meant to be fixed on the basis of contribution levels and actuarial assumptions applicable when the retirement occurred and funding provisions were made, thereby undermining the plan's basic financial calculus and affecting its ability to meet its accrued obligations. It is not correct to consider benefits payments based on a

retirement that has already occurred as a sort of continuing violation, since this would ignore the essential assumptions of an actuarially funded pension plan and would in every case render employers liable for all past conduct, regardless of whether the liability principle was first announced by *Manhart*, *Norris*, or this decision. Pp. 238–240.

805 F. 2d 1542, reversed.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, O'CONNOR, and SCALIA, JJ., joined. BLACKMUN, J., filed an opinion concurring in part and dissenting in part, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 240. STEVENS, J., filed a dissenting opinion, *post*, p. 247.

Charles T. Collette argued the cause for petitioners. With him on the briefs was *Bruce A. Minnick*.

Woodrow M. Melvin, Jr., argued the cause for respondents. With him on the brief were *David Popper* and *Keith Olin*. Respondent *David V. Kerns* filed a brief *pro se*.*

JUSTICE KENNEDY delivered the opinion of the Court.

The questions presented for decision here are the date upon which pension funds covered by Title VII of the Civil Rights Act of 1964 were required to offer benefit structures that did not discriminate on the basis of sex and whether persons who retired before that date are entitled to adjusted benefits to eliminate any sex discrimination for all future benefit payments. We revisit our decisions in *Los Angeles Dept. of Water and Power* v. *Manhart*, 435 U. S. 702 (1978), and *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans* v. *Norris*, 463 U. S. 1073 (1983).

The issues before us turn on whether *Manhart*'s invalidation of discriminatory contributions necessarily apprised employers that plans which were nondiscriminatory as to contributions must in every case be nondiscriminatory as to

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**Robert E. Williams*, *Douglas S. McDowell*, and *Garen E. Dodge* filed a brief for the Equal Employment Advisory Council et al. as *amici curiae* urging reversal.

benefits. We conclude that *Manhart* neither resolved the issue nor gave employers notice that benefits necessarily were embraced by the decision. The point was not resolved in a definitive way until our decision in *Norris*. We hold further that employees who retired before the effective date of *Norris* are not entitled to a readjusted benefits payment structure.

I

Since 1970, the State of Florida has operated the Florida Retirement System (Florida System) for state employees and employees of over 1,100 participating local governments. Fla. Stat. § 121.011 *et seq.* (1987). The Florida System is a defined benefit pension plan, which guarantees retirement benefits that may not be lowered once the employee retires and selects a pension option. The Florida System's normal retirement benefit is a single life plan with monthly payments for the employee's life, calculated as a percentage of the employee's average highest salary upon retirement. § 121.091 (1). Upon retirement, an employee also may select a pension plan from one of three retirement options: (1) a joint and survivorship option providing monthly payments for the retiree's lifetime and, in the event of the retiree's death within 10 years after retirement, the same monthly payments to the beneficiary for the balance of the 10-year period; (2) a joint annuitant option ensuring monthly benefits for the lives of the retiree and his beneficiary; and (3) a joint annuitant option providing monthly payments for the lives of the retiree and his beneficiary, but reducing by one third, upon the death of either, the monthly benefits to the surviving individual. § 121.091(6).

The state legislature periodically reviews the Florida System's finances and operation, and determines the appropriate contribution rates for government employers as a percentage of the gross compensation of participating employees. Fla. Stat. §§ 121.031, 121.061, 121.071 (1987). The State Constitution requires Florida to collect contributions sufficient

to fund the System on a "sound actuarial basis." See Fla. Const., Art. X, § 14. The Florida System was funded originally by employer and employee contributions; but, since 1975, the System has been funded entirely by contributions from state and local government employers. Contributions for male and female employees with the same length of service, age, and salary always have been equal. The normal, or single life, plan, moreover, has provided equal monthly benefits to similarly situated male and female employees since the inception of the Florida System. Only the payment structure under the three joint options is in dispute here.

Florida calculates an employee's normal retirement benefit as a product of two variables, with the first variable a statutorily determined percentage of the employee's average monthly compensation upon retirement and the second variable the employee's credited years of employment. Fla. Stat. §§ 121.091(1)(a),(b) (1987). The normal retirement benefit is therefore equal for similarly situated male and female employees. If a retiring employee selects one of the optional joint annuitant plans instead of the normal plan, the Florida System then uses a third variable, the retiree's life expectancy, to determine the present actuarial value of his or her normal retirement benefit. § 121.091(6)(b). Until our *Norris* decision, Florida calculated a retiree's life expectancy using sex-based actuarial tables. As the male's life expectancy was less than a female's, so too was the actuarial value of his normal retirement benefit; and, because the optional plans operated by a presumed exchange of the normal benefit for an optional plan, the lower actuarial value of the male benefit caused the male retiree to receive a joint annuitant benefit with lower monthly payments.

Immediately after our decision in *Norris*, Florida acted to adopt unisex actuarial tables for all employees in the Florida System retiring after August 1, 1983. Under the unisex tables, male and female retirees similarly situated receive equal monthly pension benefits under any of the offered

plans. As a result, Florida's current retirement plans create no distinction, either in contributions or in payments, between employees or between post-*Norris* retirees on the basis of sex.

II

Retirees Hughlan Long and S. Dewey Haas brought this suit in the United States District Court for the Northern District of Florida against Florida and various of its officials with responsibility for management of the Florida System. They alleged that petitioners were violating Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. § 2000e *et seq.*, by operating pension plans that discriminated on the basis of sex, and requested the District Court to certify a class action under Federal Rule of Civil Procedure 23. Retirees requested retroactive compensation for underpayment of pension benefits.

On January 20, 1983, the District Court approved respondents' class action, certifying a class consisting of male retirees who elected one of the optional plans and who retired after March 24, 1972,[1] and before August 1, 1983. After an orderly progress to the merits, the District Court entered summary judgment in respondents' favor, holding that Florida's optional pension plans discriminated against male employees in violation of Title VII. The District Court determined that the effective date of our decision in *Manhart* was October 1, 1978. It awarded relief to class members who retired after that date and before August 1, 1983, by retroactive "topping up"[2] of the monthly retirement benefits to Florida's current

[1] March 24, 1972, is the effective date of the Equal Employment Opportunity Act of 1972, which, for the first time, made public employers like Florida and its local governments an "employer" within the meaning of Title VII. 86 Stat. 103. See 42 U. S. C. § 2000e. We do not determine whether this is the appropriate date for public employers' liability under Title VII.

[2] "Topping up" compensates for the difference between the benefits male retirees did receive and the benefits they would have received if the Florida System had used unisex mortality tables, but would not provide

unisex levels. The topping up was awarded for the period from October 1, 1978, to April 30, 1986, the date of the District Court's judgment for purposes of damages calculation. It also awarded all class members topped-up future monthly benefits, commencing on the date of its judgment.

The Court of Appeals for the Eleventh Circuit affirmed. 805 F. 2d 1542, rehearing denied, 805 F. 2d 1552 (1986) *(per curiam)*. It held, in sum, that our decision in *Manhart* had placed employers on notice that pension benefits, not just contributions, must be calculated without reliance on sex-based actuarial tables. *Id.*, at 1547–1548, 1551. We granted certiorari, 484 U. S. 814 (1987), to consider these issues, and we reverse.

III

Two aspects of retroactivity analysis are presented by this case. The first is whether *Manhart* or *Norris* establishes the appropriate date for commencing liability for employer-operated pension plans that offered discriminatory payment options. We discuss below the retroactivity principles already explored in the pension cases and determine that *Norris* is the controlling liability date and that liability may not be imposed for pre-*Norris* conduct. The second question concerns the proper implementation of our nonretroactivity determination. This requires us to determine whether benefit adjustments ordered by the District Court should be classified as retroactive or prospective. We hold the adjustments are retroactive and that pre-*Norris* retirees are not entitled to adjusted benefits for the violations claimed here.[3]

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male retirees with benefits equal to those female retirees received under the sex-based tables. App. to Pet. for Cert. A65. See *Los Angeles Dept. of Water and Power* v. *Manhart*, 435 U. S. 702, 719–720, n. 36 (1978) (full equalization "may give the victims of the discrimination more than their due").

[3] The parties raise other issues regarding whether 42 U. S. C. § 2000e-5(g) limits petitioners' liability for retroactive compensation to no more than two years prior to the filing of a proper Equal Employment Opportunity Commission (EEOC) charge of discrimination and whether 42 U. S. C.

A

We have identified three criteria for determining whether retroactive awards are appropriate in Title VII pension cases involving the use of sex-based actuarial tables. *Manhart*, 435 U. S., at 719–723; *Norris*, 463 U. S., at 1105–1107; *id.*, at 1109–1111 (O'CONNOR, J., concurring). See also *Chevron Oil Co.* v. *Huson*, 404 U. S. 97, 105–109 (1971). The first is to examine whether the decision established a new principle of law, focusing, in this context, on whether *Manhart* clearly defined the employer's obligations under Title VII with respect to benefits payments. The second criterion is to test whether retroactive awards are necessary to the operation of Title VII principles by acting to deter deliberate violations or grudging compliance. The third is to ask whether retroactive liability will produce inequitable results for the States, employers, retirees, and pension funds affected by our decision.

The first criterion, the extent to which new principles of law have been established, is of particular significance to our holding today. The Court of Appeals held that *Manhart* placed Florida on notice that optional pension plans offering sex-based benefits violated Title VII, and it awarded retroactive relief accordingly. We disagree. The pension plan provision at issue in *Manhart* was the "requirement that men and women make unequal contributions to an employer-operated pension fund." 435 U. S., at 717. While the language of our decision may have suggested the potential application of Title VII to unequal payments, we were careful

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§ 2000e-5(e) requires that the plaintiff class be restricted to include only those individuals who retired no more than 300 days prior to the filing of such an EEOC charge. We do not address these issues because, in either case, the relevant liability limitations would be prior to our decision in *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans* v. *Norris*, 463 U. S. 1073 (1983), which sets the controlling date for liability.

to state that we did not reach that issue. We limited our holding to unequal contributions.

We recognized that "[t]here can be no doubt that the prohibition against sex-differentiated employee contributions represents a marked departure from past practice." *Id.*, at 722. Our decision stated two principal limits on the potential liability of employer-operated pension plans. First, we limited the holding to the fact pattern then before us. We stated:

> "Although we conclude that the Department's practice [of requiring discriminatory pension contributions on the basis of sex] violated Title VII, we do not suggest that the statute was intended to revolutionize the insurance and pension industries. All that is at issue today is a requirement that men and women make unequal contributions to an employer-operated pension fund." *Id.*, at 717.

Second, we confined the reach of our decision by recognizing the potential for interaction between an employer-operated pension plan and pension plans available in the marketplace. We said:

> "Nothing in our holding implies that it would be unlawful for an employer to set aside equal retirement contributions for each employee and let each retiree purchase the largest benefit which his or her accumulated contributions could command in the open market." *Id.*, at 717–718.

Our references to contributions, as distinct from benefits payments, and our recognition of open market forces limited the decision and left some doubt regarding its command. Ensuing decisions expressed conflicting views of *Manhart*'s reach.[4] Commentators also expressed conflicting opinions

[4] Compare *Peters* v. *Wayne State University*, 691 F. 2d 235 (CA6 1982) (use of sex-based tables does not violate Title VII if actuarial value of pension plans for similarly situated males and females is equal), and *EEOC* v. *Colby College*, 589 F. 2d 1139, 1146 (CA1 1978) (Coffin, J., concurring)

regarding the permissible and appropriate scope of the decision.[5]

Not until *Norris*, decided five years after *Manhart*, did we address the matter of unequal benefits payments and the open market exception. *Norris* extended the principle of nondiscrimination to unequal benefits, stating that "the classification of employees on the basis of sex is no more per-

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(*Manhart* does not necessarily preclude pension system that offers employees equal benefit plans as well as optional "actuarially sound" plans, with unequal benefits, based on sex-based tables), with *Spirt* v. *Teachers Insurance and Annuity Assn.*, 691 F. 2d 1054 (CA2 1982) (unequal benefits as well as unequal contributions barred under *Manhart*), vacated and remanded, 463 U. S. 1223 (1983), and *Sobel* v. *Yeshiva University*, 566 F. Supp. 1166, 1192 (SDNY 1983) (following *Spirt* as binding Circuit law, but noting that the Court's decision to review *Norris* should end uncertainty regarding "[w]hether the Supreme Court will retreat from its *Manhart* holding or offer some reasonable means of applying it in a nondiscriminatory fashion . . . [and] the Court is almost certain to comment upon several types of distribution options which have been offered to avoid a *Manhart* problem" (footnote omitted)), rev'd and remanded, 797 F. 2d 1478 (CA2 1986), later decision, 656 F. Supp. 587 (SDNY 1987).

[5] Compare Jacobs, The *Manhart* Case: Sex-Based Differentials and the Application of Title VII to Pensions, 31 Lab. L. J. 232, 237–238, 244 (1980) (noting that "should the majority have intended the plain meaning of its words, the decision in *Manhart* will not invalidate gender-based mortality tables and pension benefits"), and Kistler & Healy, Sex Discrimination in Pension Plans since *Manhart*, 32 Lab. L. J. 229 (noting that lower court decisions after *Manhart* "resolved the uncertainty" by extending *Manhart* to "prohibit the payment of sex-based pension benefits as well as the unequal contributions procedure originally proscribed"), with Kimball, Reverse Sex Discrimination: *Manhart*, 1979 Am. Bar Found. Research J. 83, 91–92, 138 (noting expansion of *Manhart* "far beyond what the Court said or even hinted," and concluding that the effect of *Manhart* should be limited to unequal contribution requirement imposed on employees in employer-operated pension plans), and Note, *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans* v. *Norris:* Mandate of *Manhart*, 86 W. Va. L. Rev. 437, 452 (1983–1984) (*Manhart* significant "for what it did not do. . . . *Manhart* did not reach beyond 'men and women making unequal contributions to an employer-operated pension fund' ").

missible at the pay-out stage of a retirement plan than at the pay-in stage." *Norris*, 463 U. S., at 1081. It also addressed uncertainty over the open market exception and responded to discrete issues not raised in *Manhart*. Granting only narrow operation to the open market exception, we excluded from it employer-operated pension plans which offered annuities that duplicated those available from private companies. 463 U. S., at 1087–1088. *Norris* also condemned pension plans offering male and female employee annuities with "the same present actuarial value" where sex-based differentials resulted. *Id.*, at 1082–1083. Pension funds which offered nondiscriminatory plans with alternative discriminatory options were also held in noncompliance with Title VII's requirements. *Id.*, at 1081–1082, and n. 10. Thus, some questions left open by *Manhart* were answered in *Norris*. Our close division in the later case, however, suggests that application of the earlier law to differential benefits was far from obvious.

In view of the substantial departure from existing practice that *Manhart* ordered, pension fund administrators could rely with reasonable assurance on its express qualifications and conclude that it was confined to cases of sex-based contributions. A few months before our decision in *Norris*, the United States Department of Labor completed a study of pension plans and the financial impact of an Equal Employment Opportunity Commission proposal to adopt an equal benefits rule. United States Dept. of Labor, Cost Study of the Impact of an Equal Benefits Rule on Pension Benefits (Jan. 1983) (hereinafter Cost Study). The Cost Study found that "[s]ubstantial percentages of both [defined benefit and defined contribution] types of pension plans follow the customary insurance industry practice of using sex-segregated mortality tables in calculating annuity benefits." *Id.*, at 2. It estimated that 45% of the participants in defined benefit plans like the Florida System and 74% of the participants in

defined contribution plans continued to receive benefits calculated with sex-based tables. *Ibid.*

The Florida experience further illustrates the difficulty of determining the requirements for full compliance. Since its inception, the Florida System not only required equal contributions for male and female employees but also provided a primary single life benefit with equal payments to similarly situated male and female employees. The primary single life benefit is of particular significance, for it complied with both *Norris* and *Manhart*. See Cost Study 11–12; Hager & Zimpleman, The *Norris* Decision, Its Implications and Application, 32 Drake L. Rev. 913, 938 (1982–1983) (*Norris* decision will "have little effect upon defined benefit plans so far as the normal form pension benefit is concerned . . . [since that benefit] already pays equal annuity incomes").

The provision of optional annuity plans in the Florida System provided employees with a range of choices for their convenience. Before *Norris*, Florida could conclude reasonably that, once employees were offered a unisex primary benefit, *Manhart* did not prevent the offering of sex-based annuities as options. The alternative for employers who wished to control, or were unable to finance, the costs of unisex options would be to eliminate optional benefits entirely and offer the primary benefit alone. See Hager & Zimpleman, 32 Drake L. Rev., at 938–939. Employees do not benefit from the reduction of their pension plan options, and Florida may have assumed we did not intend to eliminate an employee's flexibility in choosing a retirement option, so long as the options presented included a sex-neutral benefit.

In *Norris* itself we recognized that *Manhart* had reserved the determination of some major issues. While we narrowed the open market exception to include only pension plans where employers set aside an equal lump-sum payment and the individual employee purchased an annuity from a private pension company, 463 U. S., at 1088, we recognized that employers "reasonably could have assumed that it would be law-

ful to make available to its employees annuities offered by insurance companies on the open market." *Id.*, at 1106. The pension plan we considered in *Norris* reflected a reasonable application of the open market exception. While the forms of the Florida System's plans and those considered in *Norris* may differ, they are the same in economic substance.

Florida's continuance of the optional plans until the *Norris* decision does not justify imposition of a retroactive award. We note, moreover, that while Florida's offer of the nondiscriminatory benefit makes its case against retroactivity more compelling, this particular feature is not essential to establish that *Norris* is the effective date for conforming benefit structures. The considerations discussed below are also of relevance.

The second and third criteria of retroactivity analysis also support our determination that *Norris*, and not *Manhart*, provides the appropriate date for determining liability and relief. In the pension context, we have considered whether retroactive awards are necessary to further the purposes of Title VII and to ensure compliance with our decisions, and we have concluded that retroactivity is not required. *Manhart*, 435 U. S., at 720–721; *Norris*, *supra*, at 1110 (O'CONNOR, J., concurring). We see no reason to depart from that conclusion in the case before us. Florida acted immediately after our decision in *Norris* and modified its optional pension plans to provide equal monthly benefits to each individual employee who retired after August 1, 1983. There is no evidence that employers in general have not complied with the Title VII requirements we announced in *Manhart* and extended in *Norris*.

Finally, we conclude here, as in *Manhart* and *Norris*, that the imposition of retroactive liability on the States, local governments, and other employers that offered sex-based pension plans to their employees is inequitable. The effect of "drastic changes in the legal rules governing pension and insurance funds" on the provision of reserves for unexpected

benefits; the complexities of pension funding in an industry that had once relied on sex-based tables, coupled with the lack of authoritative guidance from the courts or administrative agencies; the potential instability in pension and retirement programs and the resulting harm to other retirees as innocent third parties; and the absence of any reason to believe that "the threat of a backpay award" was necessary to effect pension fund compliance with our decision, all compelled our conclusion in *Manhart* that "the rules that apply to these funds should not be applied retroactively unless the legislature has plainly commanded that result." *Manhart*, *supra*, at 720–723. Noting that Congress had, in fact, stressed the importance of "making only gradual and prospective changes" in the legal rules governing pension plans, 435 U. S., at 721–722, n. 40, we concluded, in general terms, that the "*Albemarle* presumption in favor of retroactive relief" should not be applied to this type of Title VII pension plan suit. *Id.*, at 723. See *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 421 (1975).

In *Norris*, we reaffirmed our conclusion that retroactive liability was inappropriate in Title VII pension plan cases. 463 U. S., at 1105–1107. Retroactive awards, applied to every employer-operated pension plan that did not anticipate our decision, would impose financial costs that would threaten the security of both the funds and their beneficiaries. *Id.*, at 1110 (O'CONNOR, J., concurring); *id.*, at 1094–1095 (MARSHALL, J., concurring in judgment in part). See also Buck Research Corporation, Trends in Corporate Pension Benefits: Unisex Before and After *Norris* 15 (Oct. 1983) (survey of Fortune 500 industrial corporations showing only 39.8% used unisex tables for their pension annuities when *Norris* was decided).

Respondents argue that Florida's pension administrators had "actual notice from internal memoranda and discussions" that the continuation of the sex-based optional pension plans after *Manhart* violated Title VII. 805 F. 2d, at 1550. Simi-

larly, respondents argue that the Florida System can in fact afford the District Court's $43 million award. Our power to order appropriate relief under Title VII is equitable in nature and flexible, *Manhart*, *supra*, at 718–719; see 42 U. S. C. § 2000e-5(g), but the particular circumstances of a case are not the sole determinant of relief. That Florida's fund currently may possess a surplus or that Florida's administrators discussed early intimations of later doctrine should not control a decision that must be based on a broad principle. 435 U. S., at 722, n. 42. We will not adopt the premise that the appropriateness of a retroactive award turns on a particular pension fund's current financial status, so that financially successful pension funds pay but financially insecure pension funds do not. To do so imposes a penalty for prudent management. Similarly, the question whether *Manhart* placed employers on notice of Title VII's requirements cannot turn on the internal debates of one pension fund's administrators. The meaning and scope of a decision do not rest on the subjective interpretations of discrete, affected persons and their legal advisers. We have previously noted that "[i]mportant national goals would be frustrated by a regime of discretion that 'produce[d] different results for breaches of duty in situations that cannot be differentiated in policy.'" *Albemarle Paper*, *supra*, at 417 (citing *Moragne* v. *States Marine Lines*, 398 U. S. 375, 405 (1970)).

While we hold that *Manhart* did not establish the date for Florida to conform its payment options to unisex standards, we do not hesitate to say that *Norris* did so. If Florida had continued to use sex-based actuarial tables to calculate benefits for its pension plans after *Norris*, the case before us would have been an altogether different one. *Norris* informed covered employers with pension plans of the obligation under Title VII to provide payment levels, both for contributions and for benefits, that are nondiscriminatory as to sex. We conclude that the effective date of our decision in

Norris provides the appropriate limit on retroactive liability in this case.

B

We next consider implementation of our nonretroactivity determination. The District Court made two separate awards. The first, for back compensatory payments to employees who retired after *Manhart* and before *Norris* and covering the entire period from *Manhart* to the date of its judgment, is retroactive without doubt and is, by our decision here, impermissible. The second award required that payments after judgment be adjusted for all pre-*Norris* male retirees who are receiving lower benefits. The District Court, and the Court of Appeals in affirming, labeled this latter award prospective relief. We disagree.

The distinction between retroactive and prospective relief is not always self-evident. An order requiring adjusted future payments for pre-*Norris* retirees may contain the essential elements of a retroactive order. Unlike an ordinary injunction against future conduct, the effect of an order that increases pension benefits to employees who have already retired may be retroactive in a fundamental sense if it corrects a fixed calculation based on assumptions that both the State and the retiree held when the retirement occurred. Benefits are altered despite the circumstance that past contributions were keyed to lower benefit payments, which undermines the basic financial calculus of a pension plan that determines contribution rates to support a predicted level of payments. See *Norris*, 463 U. S., at 1092 (MARSHALL, J., concurring in judgment in part). Such changes in benefits based on past contributions and actuarial assumptions may create a deficiency in the pension fund, requiring additional funds from the State and other employers to meet the increased benefits liability or forcing the pension plan to violate its contractual benefit guarantee to other retirees. In sum, an award in many cases may be retroactive in nature "[w]hen a court di-

rects a change in benefits based on contributions made before the court's order." *Ibid.;* see *id.*, at 1105, n. 10.

It is not correct to consider payments of benefits based on a retirement that has already occurred as a sort of continuing violation. Our decision in *Bazemore* v. *Friday*, 478 U. S. 385 (1986), is not to the contrary. *Bazemore* concerned the continuing payment of discriminatory wages based on employer practices prior to Title VII. In a salary case, however, each week's paycheck is compensation for work presently performed and completed by an employee. Further, the employer does not fund its payroll on an actuarial basis. By contrast, a pension plan, funded on an actuarial basis, provides benefits fixed under a contract between the employer and retiree based on a past assessment of an employee's expected years of service, date of retirement, average final salary, and years of projected benefits. In the pension fund context, a continuing violation principle in every case would render employers liable for all past conduct, regardless of whether the liability principle was first announced by *Manhart*, *Norris*, or our decision here. We cannot recognize a principle of equitable relief that ignores the essential assumptions of an actuarially funded pension plan.

We applied these principles in *Norris* and held that an order to adjust future annuity payments to female retirees to reach equality with payments to similarly situated men was "fundamentally retroactive in nature." 463 U. S., at 1105, n. 10. The District Court's award here is indistinguishable in principle from the one found retroactive in *Norris*. The State of Florida determined contribution rates by relying on a precise assessment of expected future pension benefits for covered state and local government employees. The Constitution of the State of Florida mandated that the fund be maintained on a sound actuarial basis. Fla. Const., Art. X, § 14. As Florida guarantees the level of benefits, the District Court's award affects the pension fund's ability to meet its accrued obligations.

A different case, and a different assessment of retroactivity, might result under pension plan structures which do not provide retirees with a contractual right to a fixed level of benefits or rate of return on contributions. See *Spirt* v. *Teachers Insurance & Annuity Assn.*, 735 F. 2d 23, 28 (CA2 1984). There, an award for future increase may require neither additional funding by the State or employer nor violation of contractual rights of other retirees. That is not the case before us, however. It is essentially retroactive to disrupt past pension funding assumptions by requiring further adjustments based on conduct that could not reasonably have been considered violative of Title VII at the time retirements occurred and funding provisions were made. Respondents "could not have done anything after *[Norris]* to eliminate [the resulting disparity in the pension fund] short of expending state funds." *Norris*, *supra*, at 1095 (MARSHALL, J., concurring in judgment in part).

Under the Florida plan, no adjustment in benefits payments is required for employees who retired before the effective date of our decision in *Norris*. As the class here consists only of employees who retired before *Norris*, it is not entitled to the relief ordered by the District Court.

The judgment of the Court of Appeals for the Eleventh Circuit is reversed.

It is so ordered.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, concurring in part and dissenting in part.

The Court's decision today denies respondents retroactive relief on the ground that equitable considerations prevent imposition of liability for Florida's actions taken prior to the effective date of our decision in *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans* v. *Norris*, 463 U. S. 1073 (1983). Because I conclude that the same equitable considerations mandate retroactive liability for Florida's Title VII violations after this Court's earlier

decision in *Los Angeles Dept. of Water and Power* v. *Manhart*, 435 U. S. 702 (1978), I dissent from that part of the Court's judgment that categorically denies relief to the post-*Manhart* retirees.[1]

I

Until its amendment in August 1983, the pension plan the State of Florida operated for its employees discriminated on the basis of sex in a manner prohibited by Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. § 2000e *et seq.* To recapitulate briefly, the plan operated as follows: A state employee, upon retirement, could choose between two basic pension options—a single-life plan or a joint-annuitant plan. An employee selecting the single-life plan received benefits tied to the employee's salary and length of service. Because the employee's sex was irrelevant to the benefits paid under the single-life plan, this part of Florida's pension plan did not run afoul of Title VII. If, however, an employee selected a joint-annuitant plan, the amount of benefits the employee received under that plan would be tied to the actuarial value of the employee's single-life plan—a value established for this purpose by the use of sex-based actuarial tables. Because, on the average, men do not live so long as women, these tables ascribed a greater value to a female employee's single-life plan than to a male's, and, accordingly, the monthly benefits paid out under a female retiree's joint-annuitant pension were greater than those paid out under a male retiree's joint-annuitant pension. It is undisputed that Title VII prohibits this kind of sex-based distinction in the provision of retirement benefits.

The issue in this case, of course, is not whether the pension plan Florida operated is barred by Title VII, but, rather, whether retirees are entitled to retroactive relief for Flori-

[1] The parties raise other issues regarding the scope of Florida's retroactive liability. See *ante*, at 229–230, n. 3. Like the Court, I take no position on these issues.

da's discrimination.[2] Although retroactive relief is not mandatory in a Title VII case, see § 706(g), 42 U. S. C. § 2000e–5(g), the make-whole purpose of Title VII creates a "presumption in favor of retroactive liability [that] can seldom be overcome." *Manhart*, 435 U. S., at 719. As the Court notes, however, in the context of pension plans that run afoul of Title VII, the presumption of retroactive liability may be defeated if the relevant law concerning Title VII was not sufficiently clear at the time of the violation. *Ante*, at 230. In both *Manhart* and *Norris*, we found that, although pension plans were being operated in violation of Title VII, retroactive liability was inappropriate in part because the plan administrators reasonably might have assumed that their plans were lawful.

In denying retroactive relief to the post-*Manhart* retirees in this case, the Court concludes that it was not until the decision in *Norris* in 1983 that Florida had notice that its pension plan was unlawful. It is on this point, in my view, that the Court goes astray.

In *Manhart*, we were faced with a plan which required female employees to make greater contributions out of their paychecks than their male counterparts in order to obtain the same monthly pension benefits upon retirement. The employer sought to justify this difference by noting that since, as a group, female employees lived longer than male employees, "[t]he cost of a pension for the average retired female is greater than for the average male retiree because more monthly payments must be made to the average woman." 435 U. S., at 705. This difference in cost, argued the employer, allowed the difference in contributions. The *Manhart* Court accepted as true the employer's proffered rationale for its distinction, but nonetheless concluded that the plan violated Title VII. As the Court put it: "The question . . . is

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[2] I agree with the Court's conclusion that all the relief approved by the Court of Appeals properly is characterized as retroactive.

whether the existence or nonexistence of 'discrimination' is to be determined by comparison of class characteristics or individual characteristics." 435 U. S., at 708. The Court's conclusion in *Manhart* was that Congress intended that individual characteristics should control. See *id.*, at 708–709. Therefore, Title VII required that the pension plan be funded through sex-neutral employee contributions.

It is difficult to see any important distinction between that case and this one. The Court today relies on the fact that the pension plan at issue in *Manhart* discriminated at the contribution stage, while in this case the discrimination surfaced at the payment stage. In my view, it was always clear that this was a distinction without a difference. In *Manhart*, one sex took home less pay than the other in order to receive the same benefits upon retirement. Here, the take-home pay was the same, but one sex received a greater benefit upon retirement than the other. Both plans violated Title VII because the employer discriminated between men and women as a class. I see no plausible theory on which we might have distinguished the latter situation from the former, and the Court today offers none. In short, *Manhart* laid down a general rule that any employer-operated pension plan that relied on actuarial differences between women and men to the detriment of either group was prohibited by Title VII. Florida's pension plan violated this rule as clearly as did the plan at issue in *Manhart*.

Manhart's "open-market exception" cast no doubt on this fundamental holding. The majority focuses on the statement in *Manhart* that it might be lawful for "an employer to set aside equal retirement contributions for each employee and let each retiree purchase the largest benefit which his or her accumulated contributions could command in the open market," 435 U. S., at 717–718. The Court ignores, however, the explanatory footnote to that statement, which clearly articulated its rationale: "Title VII . . . primarily govern[s] relations between employees and their employer, not

between employees and third parties." *Id.*, at 718, n. 33. Thus, it should have been evident from the start that the open-market exception had nothing to do with a distinction between discrimination at the contribution stage and discrimination at the benefit stage. Rather, the exception involved a distinction between discrimination by an employer and discrimination by a third party, the latter being generally outside the scope of Title VII.

Our decision in *Norris* confirms, rather than casts doubt on, the conclusion that the unlawfulness of Florida's pension plan was established and made manifest by our decision in *Manhart*. The five Justices in *Norris* who found the type of plan there at issue barred by Title VII considered as obvious the application of *Manhart*'s rationale to the payment of unequal benefits:

> "We have no hesitation in holding, as have all but one of the lower courts that have considered the question, that the classification of employees on the basis of sex is no more permissible at the pay-out stage of a retirement plan than at the pay-in stage." 463 U. S., at 1081 (footnotes omitted).
>
> "[I]t is just as much discrimination 'because of . . . sex' to pay a woman lower benefits when she has made the same contributions as a man as it is to make her pay larger contributions to obtain the same benefits." *Id.*, at 1086.

The *Norris* majority's rejection of the contribution/benefit distinction was based almost entirely on the reasoning of *Manhart*, and came without mention of the open-market exception. See 463 U. S., at 1081–1086. See also *id.*, at 1108–1109 (O'CONNOR, J., concurring) ("Title VII *clearly* does not allow an employer to offer a plan to employees under which it will collect equal contributions, hold them in a trust account, and upon retirement disburse greater monthly checks to men than women") (emphasis added).

Similarly, Justice Powell's opinion for those Members of the Court who thought that the pension plan at issue in *Norris* did not violate Title VII focused on the distinction not between contributions and benefits but between employer-operated pension funds and those, like the one in *Norris*, that were administered by third parties. See 463 U. S., at 1099, 1103. His opinion did not contest the conclusion reached by the Court, *id.*, at 1086, that the plan at issue in *Norris* "plainly would have violated Title VII" if, like the plan under scrutiny here, it had been operated by the employers themselves.

Nor, finally, does the ultimate conclusion of five Justices in *Norris* that retroactive liability was inappropriate in that case call for a like conclusion here. The majority's decision that *Manhart* did not provide notice that the plan at issue in *Norris* violated Title VII was based solely on the view that, because of the open-market exception, "an employer reasonably could have assumed that it would be lawful to make available to its employees annuities *offered by insurance companies* on the open market." 463 U. S., at 1106 (Powell, J., dissenting in part and concurring in part) (emphasis added). See also *id.*, at 1110 (O'CONNOR, J., concurring) (referring to "pension plan administrators, who may have thought until our decision today that Title VII did not extend to plans *involving third-party insurers*") (emphasis added). The basis of the reasonable assumption of the lawfulness of the plan in *Norris*—the involvement of third-party insurers—simply has no application in this case.[3]

[3] The majority also places some reliance on a Department of Labor study dated nearly five years after our decision in *Manhart*, which estimated: "In the defined benefit plan sector, 45 percent of participants are in plans using sex-based tables. In the defined contribution plan sector, 74 percent of participants are in plans using sex-based tables." United States Dept. of Labor, Cost Study of the Impact of an Equal Benefits Rule on Pension Benefits 2 (Jan. 1983). See *ante*, at 233–234. As Florida concedes, however, the Department of Labor's survey made no distinction between employer-operated plans, like the plan in this case, and employer-sponsored

Because I conclude that the unlawfulness of Florida's pension plan was "clearly foreshadowed" by our decision in *Manhart*, and did not depend on a "new principle of law" announced in *Norris*, 463 U. S., at 1109 (O'CONNOR, J., concurring), I naturally disagree with the Court's conclusion that retroactive liability would be "inequitable." To the contrary, I believe such relief is clearly appropriate. See *id.*, at 1093. Cf. *Chevron Oil Co.* v. *Huson*, 404 U. S. 97, 106 (1971) ("[T]he decision to be applied nonretroactively *must* establish a new principle of law") (emphasis added). I note, in addition, that no special factors are presented here that would make an award of retroactive relief inequitable.

While I conclude that our decision in *Manhart* put Florida on notice that its pension plan violated Title VII, and that therefore retroactive relief is appropriate for post-*Manhart* retirees, I agree with the majority that those respondents who retired before our decision in *Manhart* are not entitled to retroactive relief. An award of retroactive relief to pre-*Manhart* retirees in effect would penalize Florida for its pre-*Manhart* use of sex-based annuity tables. A retroactive award of this kind would not be in accord with our decision in *Manhart* to deny such relief because, prior to that decision, the use of sex-based tables reasonably might have been assumed to be lawful.

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plans, like the plan in *Norris*. See Brief for Petitioners 33, n. 27. Yet it is only the former category of plans that *Manhart* established was in violation of Title VII. The study thus throws little light on the issue in this case.

Nor do I find persuasive the Court's emphasis on the fact that Florida also offered a nondiscriminatory single-annuitant option. See *ante*, at 234. The Court explained in *Norris:* "Title VII forbids all discrimination concerning 'compensation, terms, conditions, or privileges of employment' . . . . An employer that offers one fringe benefit on a discriminatory basis cannot escape liability because he also offers other benefits on a nondiscriminatory basis." 463 U. S., at 1081–1082, n. 10. Neither the language of Title VII nor precedents of this Court provided a basis for the contrary conclusion, even prior to the decision in *Norris*.

II

In summary: I conclude that our decision in *Manhart* supplies the date after which Florida should be held liable for its failure to use unisex tables in calculating retirement benefits. Accordingly, I concur in that part of the Court's judgment that denies relief to pre-*Manhart* retirees, but, for the reasons stated above, I dissent from that part of its judgment that categorically denies relief to post-*Manhart* retirees.

JUSTICE STEVENS, dissenting.

All of us agree that discrimination in the collection of contributions from employees prior to our decision in *Los Angeles Dept. of Water and Power* v. *Manhart*, 435 U. S. 702 (1978), cannot be remedied retroactively. A somewhat different issue is presented, however, when there is discrimination in the payment of benefits to employees who retired before *Manhart* was decided. The District Court and the Court of Appeals in this case agreed that it would be inequitable to grant retroactive relief that would adjust the benefits paid to pre-*Manhart* retirees for the period of unlawful discrimination that occurred prior to the date the District Court entered its judgment. Both of those courts concluded, however, that it would be appropriate to grant prospective relief that would increase the benefits payable to male retirees in the future. I agree.

It must be conceded that there is no recovery for any violation that occurred prior to our decision in *Manhart*. In the present case, however, I think it clear that each month's disparate retirement check constitutes a separate violation. Unlike *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans* v. *Norris*, 463 U. S. 1073, 1105, n. 10 (1983), the District Court's order in this case does not call upon the State "to fund retroactively the deficiency in past contributions made by its . . . retirees." (Powell, J., dissenting in part and concurring in part). Rather, even to the extent that the plan was in the past par-

tially funded by contributions on behalf of individual employees, those contributions are not directly tied to the employees' benefit payments.[1] Benefits are instead calculated on the basis of a percentage of average annual compensation of the participating employee. App. to Pet. for Cert. A39. As the Court of Appeals correctly concluded, given the fact that the order of relief is accordingly prospective in nature, the defendants should not be permitted to "continue to discriminate" in violation of the statute. 805 F. 2d 1542, 1548 (CA11 1986). The failure to "top up" the pre-*Manhart* retirees' future benefit payments is akin to the perpetuation of past discrimination that we condemned in *Bazemore* v. *Friday*, 478 U. S. 385 (1986).[2] Moreover, as both the District

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[1] As the Court of Appeals explained:

"[B]enefits in the [Florida Retirement System] are not based on individual contributions for individual employees. Instead the legislature sets a contribution rate for the employer based on the pension plan's financial needs. The Florida legislature has the power and responsibility to increase the contribution rates periodically to cover operating costs and the unfunded accrued actuarial liability." 805 F. 2d 1542, 1551 (CA11 1986).

During the period from 1970 to 1975, the plan was funded by a combination of contributions from employees and employers, but since 1975 has been funded entirely with public funds. *Id.*, at 1545–1546.

[2] In *Bazemore*, we held that a public employer has a duty to eradicate salary differentials created as a result of a pattern or practice of racial discrimination engaged in prior to the extension of Title VII to public employers, but perpetuated thereafter. We wrote:

"The error of the Court of Appeals with respect to salary disparities created prior to 1972 and perpetuated thereafter is too obvious to warrant extended discussion: that the Extension Service discriminated with respect to salaries *prior* to the time it was covered by Title VII does not excuse perpetuating that discrimination *after* the Extension Service became covered by Title VII. . . . While recovery may not be permitted for pre-1972 acts of discrimination, to the extent that this discrimination was perpetuated after 1972, liability may be imposed.

"Each week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII, regardless of the fact that this pattern was begun prior to the effective date of Title VII." 478

Court and the Court of Appeals concluded, there are no special equities in this case militating against the award of this type of prospective relief.

I am in complete accord with the result reached by the District Court and the Court of Appeals. Accordingly, while I also agree with JUSTICE BLACKMUN's exposition of the flaws in this Court's analysis, I would affirm the judgment of the Court of Appeals in its entirety.

U. S., at 395–396 (BRENNAN, J., for a unanimous Court, concurring in part).

BANK OF NOVA SCOTIA *v.* UNITED STATES

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

No. 87–578. Argued April 27, 1988—Decided June 22, 1988*

The District Court dismissed an indictment against petitioners and others on the basis of prosecutorial misconduct and irregularities in the grand jury proceedings, finding that dismissal was proper due to violations of Federal Rule of Criminal Procedure 6 and under the "totality of the circumstances," including "numerous" violations of Rules 6(d) and (e); violations of 18 U. S. C. §§ 6002 and 6003 and of the Fifth and Sixth Amendments to the Federal Constitution; and the prosecution's knowing presentation of misinformation to the grand jury and mistreatment of witnesses. In an apparent alternative holding, the District Court also ruled that dismissal, pursuant to its supervisory authority, was necessary in order to deter future conduct of this sort. The Court of Appeals reversed, ruling that petitioners were not prejudiced by the Government's conduct, and that absent prejudice the District Court lacked the authority to invoke its supervisory power to dismiss the indictment.

Held:

1. As a general matter, a district court may not dismiss an indictment for errors in grand jury proceedings unless such errors prejudiced the defendants. Pp. 254–257.

(a) A federal court may not invoke its supervisory power to circumvent the harmless-error inquiry prescribed by Federal Rule of Criminal Procedure 52(a). Since Rule 52 was promulgated pursuant to a statute which invested the Court with authority to prescribe rules of pleading, practice, and procedure, and because that statute provided that "all laws in conflict [with such a rule] shall be of no further force and effect," 18 U. S. C. § 687 (1946 ed.), Rule 52 is, in every pertinent respect, as binding as any federal statute. Courts have no more discretion to disregard the Rule's mandate through the exercise of supervisory power than they do to disregard constitutional or statutory provisions through the exercise of such power. The conclusion that a showing of prejudice is required is supported by *United States* v. *Mechanik*, 475 U. S. 66, which also involved prosecutorial misconduct before a grand jury, and by *United States* v. *Hasting*, 461 U. S. 499, which, unlike the present cases,

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*Together with No. 87–602, *Kilpatrick et al.* v. *United States*, also on certiorari to the same court.

involved constitutional error. A rule permitting federal courts to deal more sternly with nonconstitutional harmless errors than with constitutional errors that are likewise harmless would be inappropriate. Pp. 254–256.

(b) At least in cases involving nonconstitutional error, the standard of prejudice that courts should apply in assessing whether to dismiss an indictment prior to the trial's conclusion is that articulated in *United States* v. *Mechanik*, *supra*, at 78 (O'CONNOR, J., concurring in judgment), whereby dismissal is appropriate only "if it is established that the violations substantially influenced the grand jury's decision to indict," or if there is "grave doubt" that that decision was free from such substantial influence. The present cases must be distinguished from that class of cases in which indictments are dismissed because the structural protections of the grand jury have been so compromised as to render the proceedings fundamentally unfair, allowing the presumption of prejudice without any particular assessment of prejudicial impact. See, *e. g.*, *Vasquez* v. *Hillery*, 474 U. S. 254 (racial discrimination in selection of grand jury), and *Ballard* v. *United States*, 329 U. S. 187 (exclusion of women from grand jury). Pp. 256–257.

2. The record does not support the conclusion that petitioners were prejudiced by prosecutorial misconduct before the grand jury. No constitutional error occurred during the grand jury proceedings, and the instances of alleged nonconstitutional prosecutorial misconduct were insufficient to raise a substantial question, much less a grave doubt, as to whether they had a substantial effect on the jury's decision to indict. Pp. 257–263.

821 F. 2d 1456, affirmed.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BRENNAN, WHITE, BLACKMUN, STEVENS, O'CONNOR, and SCALIA, JJ., joined. SCALIA, J., filed a concurring opinion, *post*, p. 264. MARSHALL, J., filed a dissenting opinion, *post*, p. 264.

James E. Nesland argued the cause for petitioners in both cases. With him on the briefs for petitioner in No. 87–578 were *William B. Pennell*, *Henry Harfield*, *Robert G. Morvillo*, and *Robert J. Anello*. *William A. Cohan* filed briefs for petitioners in No. 87–602.

Deputy Solicitor General Bryson argued the cause for the United States in both cases. With him on the brief were *Solicitor General Fried*, *Assistant Attorney General Rose*,

Robert H. Klonoff, Gary R. Allen, Robert E. Lindsay, and *Alan Hechtkopf.*†

JUSTICE KENNEDY delivered the opinion of the Court.

The issue presented is whether a district court may invoke its supervisory power to dismiss an indictment for prosecutorial misconduct in a grand jury investigation, where the misconduct does not prejudice the defendants.

I

In 1982, after a 20-month investigation conducted before two successive grand juries, eight defendants, including petitioners William A. Kilpatrick, Declan J. O'Donnell, Sheila C. Lerner, and The Bank of Nova Scotia, were indicted on 27 counts. The first 26 counts charged all defendants with conspiracy and some of them with mail and tax fraud. Count 27 charged Kilpatrick with obstruction of justice. The United States District Court for the District of Colorado initially dismissed the first 26 counts for failure to charge a crime, improper pleading, and, as to charges against the bank, for failure to allege that the bank or its agents had the requisite knowledge and criminal intent. Kilpatrick was tried and convicted on the obstruction of justice count.

The Government appealed the dismissal of the first 26 counts. Before oral argument, however, the Court of Appeals granted a defense motion to remand the case to the District Court for a hearing on whether prosecutorial misconduct and irregularities in the grand jury proceedings were additional grounds for dismissal. United States District Judge Fred M. Winner first presided over the post-trial motions and granted a new trial to Kilpatrick on the obstruction of justice count. The cases were later reassigned to United

†Briefs of *amici curiae* urging reversal were filed for the American Civil Liberties Union Foundation et al. by *John A. Powell, Helen Hershkoff, Steven R. Shapiro, Richard F. Ziegler*, and *Martha F. Davis;* and for the National Association of Criminal Defense Lawyers by *Shelley I. Gilman* and *Larry S. Pozner.*

States District Judge John L. Kane, Jr., to complete the post-trial proceedings. After 10 days of hearings, Judge Kane dismissed all 27 counts of the indictment. The District Court held that dismissal was required for various violations of Federal Rule of Criminal Procedure 6. 594 F. Supp. 1324, 1353 (1984). Further, it ruled dismissal was proper under the "totality of the circumstances," including the "numerous violations of Rule 6(d) and (e), Fed. R. Crim. P., violations of 18 U. S. C. §§ 6002 and 6003, violations of the Fifth and Sixth Amendments to the United States Constitution, knowing presentation of misinformation to the grand jury and mistreatment of witnesses." *Ibid.* We shall discuss these findings in more detail below.

The District Court determined that "[a]s a result of the conduct of the prosecutors and their entourage of agents, the indicting grand jury was not able to undertake its essential mission" to act independently of the prosecution. *Ibid.* In an apparent alternative holding, the District Court also ruled that

> "[t]he supervisory authority of the court must be used in circumstances such as those presented in this case to declare with unmistakable intention that such conduct is neither 'silly' nor 'frivolous' and that it will not be tolerated." *Ibid.*

The Government appealed once again, and a divided panel of the Court of Appeals reversed the order of dismissal. 821 F. 2d 1456 (CA10 1987). The Court of Appeals first rejected the District Court's conclusion that the violations of Federal Rule of Criminal Procedure 6 were an independent ground for dismissal of the indictment. It then held that "the totality of conduct before the grand jury did not warrant dismissal of the indictment," *id.*, at 1473, because "the accumulation of misconduct by the Government attorneys did not significantly infringe on the grand jury's ability to exercise independent judgment." *Id.*, at 1474. Without a showing of such an infringement, the court held, the District Court could

not exercise its supervisory authority to dismiss the indictment. *Id.*, at 1474–1475.

The dissenting judge rejected the "view of the majority that prejudice to the defendant must be shown before a court can exercise its supervisory powers to dismiss an indictment on the basis of egregious prosecutorial misconduct." *Id.*, at 1476. In her view, the instances of prosecutorial misconduct relied on by the District Court pervaded the grand jury proceedings, rendering the remedy of dismissal necessary to safeguard the integrity of the judicial process notwithstanding the absence of prejudice to the defendants. *Id.*, at 1479–1480.

We hold that, as a general matter, a district court may not dismiss an indictment for errors in grand jury proceedings unless such errors prejudiced the defendants.

II

In the exercise of its supervisory authority, a federal court "may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress." *United States* v. *Hasting*, 461 U. S. 499, 505 (1983). Nevertheless, it is well established that "[e]ven a sensible and efficient use of the supervisory power . . . is invalid if it conflicts with constitutional or statutory provisions." *Thomas* v. *Arn*, 474 U. S. 140, 148 (1985). To allow otherwise "would confer on the judiciary discretionary power to disregard the considered limitations of the law it is charged with enforcing." *United States* v. *Payner*, 447 U. S. 727, 737 (1980). Our previous cases have not addressed explicitly whether this rationale bars exercise of a supervisory authority where, as here, dismissal of the indictment would conflict with the harmless-error inquiry mandated by the Federal Rules of Criminal Procedure.

We now hold that a federal court may not invoke supervisory power to circumvent the harmless-error inquiry prescribed by Federal Rule of Criminal Procedure 52(a). Rule

52(a) provides that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." The Rule was promulgated pursuant to 18 U. S. C. § 687 (1946 ed.) (currently codified, as amended, at 18 U. S. C. § 3771), which invested us with authority "to prescribe, from time to time, rules of pleading, practice, and procedure with respect to any or all proceedings prior to and including verdict . . . ." Like its present-day successor, § 687 provided that after a Rule became effective "all laws in conflict therewith shall be of no further force and effect." It follows that Rule 52 is, in every pertinent respect, as binding as any statute duly enacted by Congress, and federal courts have no more discretion to disregard the Rule's mandate than they do to disregard constitutional or statutory provisions. The balance struck by the Rule between societal costs and the rights of the accused may not casually be overlooked "because a court has elected to analyze the question under the supervisory power." *United States* v. *Payner*, *supra*, at 736.

Our conclusion that a district court exceeds its powers in dismissing an indictment for prosecutorial misconduct not prejudicial to the defendant is supported by other decisions of this Court. In *United States* v. *Mechanik*, 475 U. S. 66 (1986), we held that there is "no reason not to apply [Rule 52(a)] to 'errors, defects, irregularities, or variances' occurring before a grand jury just as we have applied it to such error occurring in the criminal trial itself." *Id.*, at 71–72. In *United States* v. *Hasting*, 461 U. S., at 506, we held that "[s]upervisory power to reverse a conviction is not needed as a remedy when the error to which it is addressed is harmless since, by definition, the conviction would have been obtained notwithstanding the asserted error." We stated that deterrence is an inappropriate basis for reversal where "means more narrowly tailored to deter objectionable prosecutorial conduct are available." *Ibid.* We also recognized that where the error is harmless, concerns about the "integrity of the [judicial] process" will carry less weight, *ibid.*, and that a

court may not disregard the doctrine of harmless error simply "in order to chastise what the court view[s] as prosecutorial overreaching." *Id.*, at 507. Unlike the present cases, see *infra*, at 258–259, *Hasting* involved constitutional error. It would be inappropriate to devise a rule permitting federal courts to deal more sternly with nonconstitutional harmless errors than with constitutional errors that are likewise harmless.

Having concluded that our customary harmless-error inquiry is applicable where, as in the cases before us, a court is asked to dismiss an indictment prior to the conclusion of the trial, we turn to the standard of prejudice that courts should apply in assessing such claims. We adopt for this purpose, at least where dismissal is sought for nonconstitutional error, the standard articulated by JUSTICE O'CONNOR in her concurring opinion in *United States* v. *Mechanik*, *supra*. Under this standard, dismissal of the indictment is appropriate only "if it is established that the violation substantially influenced the grand jury's decision to indict," or if there is "grave doubt" that the decision to indict was free from the substantial influence of such violations. *United States* v. *Mechanik*, *supra*, at 78. This standard is based on our decision in *Kotteakos* v. *United States*, 328 U. S. 750, 758–759 (1946), where, in construing a statute later incorporated into Rule 52(a), see *United States* v. *Lane*, 474 U. S. 438, 454–455 (1986) (BRENNAN, J., concurring and dissenting), we held that a conviction should not be overturned unless, after examining the record as a whole, a court concludes that an error may have had "substantial influence" on the outcome of the proceeding. 328 U. S., at 765.

To be distinguished from the cases before us are a class of cases in which indictments are dismissed, without a particular assessment of the prejudicial impact of the errors in each case, because the errors are deemed fundamental. These cases may be explained as isolated exceptions to the harmless-error rule. We think, however, that an alternative and

more clear explanation is that these cases are ones in which the structural protections of the grand jury have been so compromised as to render the proceedings fundamentally unfair, allowing the presumption of prejudice. See *Rose* v. *Clark*, 478 U. S. 570, 577–578 (1986). These cases are exemplified by *Vasquez* v. *Hillery*, 474 U. S. 254, 260–264 (1986), where we held that racial discrimination in selection of grand jurors compelled dismissal of the indictment. In addition to involving an error of constitutional magnitude, other remedies were impractical and it could be presumed that a discriminatorily selected grand jury would treat defendants unfairly. See *United States* v. *Mechanik*, *supra*, at 70–71, n. 1. We reached a like conclusion in *Ballard* v. *United States*, 329 U. S. 187 (1946), where women had been excluded from the grand jury. The nature of the violation allowed a presumption that the defendant was prejudiced, and any inquiry into harmless error would have required unguided speculation. Such considerations are not presented here, and we review the alleged errors to assess their influence, if any, on the grand jury's decision to indict in the factual context of the cases before us.

III

Though the standard we have articulated differs from that used by the Court of Appeals, we reach the same conclusion and affirm its decision reversing the order of dismissal. We review the record to set forth the basis of our agreement with the Court of Appeals that prejudice has not been established.

The District Court found that the Government had violated Federal Rule of Criminal Procedure 6(e) by: (1) disclosing grand jury materials to Internal Revenue Service employees having civil tax enforcement responsibilities; (2) failing to give the court prompt notice of such disclosures; (3) disclosing to potential witnesses the names of targets of the investigation; and (4) instructing two grand jury witnesses, who had represented some of the defendants in a separate investiga-

tion of the same tax shelters, that they were not to reveal the substance of their testimony or that they had testified before the grand jury. The court also found that the Government had violated Federal Rule of Criminal Procedure 6(d) in allowing joint appearances by IRS agents before the grand jury for the purpose of reading transcripts to the jurors.

The District Court further concluded that one of the prosecutors improperly argued with an expert witness during a recess of the grand jury after the witness gave testimony adverse to the Government. It also held that the Government had violated the witness immunity statute, 18 U. S. C. §§ 6002, 6003, by the use of "pocket immunity" (immunity granted on representation of the prosecutor rather than by order of a judge), and that the Government caused IRS agents to mischaracterize testimony given in prior proceedings. Furthermore, the District Court found that the Government violated the Fifth Amendment by calling a number of witnesses for the sole purpose of having them assert their privilege against self-incrimination and that it had violated the Sixth Amendment by conducting postindictment interviews of several high-level employees of The Bank of Nova Scotia. Finally, the court concluded that the Government had caused IRS agents to be sworn as agents of the grand jury, thereby elevating their credibility.

As we have noted, no constitutional error occurred during the grand jury proceedings. The Court of Appeals concluded that the District Court's findings of Sixth Amendment postindictment violations were unrelated to the grand jury's independence and decisionmaking process because the alleged violations occurred *after* the indictment. We agree that it was improper for the District Court to cite such matters in dismissing the indictment. The Court of Appeals also found that no Fifth Amendment violation occurred as a result of the Government's calling seven witnesses to testify despite an avowed intention to invoke their Fifth Amendment privilege. We agree that, in the circumstances of these cases,

calling the witnesses was not error. The Government was not required to take at face value the unsworn assertions made by these witnesses outside the grand jury room. Once a witness invoked the privilege on the record, the prosecutors immediately ceased all questioning. Throughout the proceedings, moreover, the prosecution repeated the caution to the grand jury that it was not to draw any adverse inference from a witness' invocation of the Fifth Amendment. App. 109, 130–131, 131–132, 155, 169–170.

In the cases before us we do not inquire whether the grand jury's independence was infringed. Such an infringement may result in grave doubt as to a violation's effect on the grand jury's decision to indict, but we did not grant certiorari to review this conclusion. We note that the Court of Appeals found that the prosecution's conduct was not "a significant infringement on the grand jury's ability to exercise independent judgment," 821 F. 2d, at 1475, and we accept that conclusion here. Finally, we note that we are not faced with a history of prosecutorial misconduct, spanning several cases, that is so systematic and pervasive as to raise a substantial and serious question about the fundamental fairness of the process which resulted in the indictment.

We must address, however, whether, despite the grand jury's independence, there was any misconduct by the prosecution that otherwise may have influenced substantially the grand jury's decision to indict, or whether there is grave doubt as to whether the decision to indict was so influenced. Several instances of misconduct found by the District Court—that the prosecutors manipulated the grand jury investigation to gather evidence for use in civil audits; violated the secrecy provisions of Rule 6(e) by publicly identifying the targets and the subject matter of the grand jury investigation; and imposed secrecy obligations in violation of Rule 6(e) upon grand jury witnesses—might be relevant to an allegation of a purpose or intent to abuse the grand jury process. Here, however, it is plain that these alleged breaches could

not have affected the charging decision. We have no occasion to consider them further.

We are left to consider only the District Court's findings that the prosecutors: (1) fashioned and administered unauthorized "oaths" to IRS agents in violation of Rule 6(c); (2) caused the same IRS agents to "summarize" evidence falsely and to assert incorrectly that all the evidence summarized by them had been presented previously to the grand jury; (3) deliberately berated and mistreated an expert witness for the defense in the presence of some grand jurors; (4) abused its authority by providing "pocket immunity" to 23 grand jury witnesses; and (5) permitted IRS agents to appear in tandem to present evidence to the grand jury in violation of Rule 6(d). We consider each in turn.

The Government administered oaths to IRS agents, swearing them in as "agents" of the grand jury. Although the administration of such oaths to IRS agents by the Government was unauthorized, there is ample evidence that the jurors understood that the agents were aligned with the prosecutors. At various times a prosecutor referred to the agents as "my agent(s)," App. 96, 98, 99, 108, 110, 113, 114, 115, 117, 137, 153, 163, 165, 171, 176, and, in discussions with the prosecutors, grand jurors referred to the agents as "your guys" or "your agents." *Id.*, at 117, 157. There is nothing in the record to indicate that the oaths administered to the IRS agents caused their reliability or credibility to be elevated, and the effect, if any, on the grand jury's decision to indict was negligible.

The District Court found that, to the prejudice of petitioners, IRS agents gave misleading and inaccurate summaries to the grand jury just prior to the indictment. Because the record does not reveal any prosecutorial misconduct with respect to these summaries, they provide no ground for dismissing the indictment. The District Court's finding that the summaries offered by IRS agents contained evidence that had not been presented to the grand jury in prior testimony

boils down to a challenge to the reliability or competence of the evidence presented to the grand jury. We have held that an indictment valid on its face is not subject to such a challenge. *United States* v. *Calandra*, 414 U. S. 338, 344–345 (1974). To the extent that a challenge is made to the accuracy of the summaries, the mere fact that evidence itself is unreliable is not sufficient to require a dismissal of the indictment. See *Costello* v. *United States*, 350 U. S. 359, 363 (1956) (holding that a court may not look behind the indictment to determine if the evidence upon which it was based is sufficient). In light of the record, the finding that the prosecutors knew the evidence to be false or misleading, or that the Government caused the agents to testify falsely, is clearly erroneous. Although the Government may have had doubts about the accuracy of certain aspects of the summaries, this is quite different from having knowledge of falsity.

The District Court found that a prosecutor was abusive to an expert defense witness during a recess and in the hearing of some grand jurors. Although the Government concedes that the treatment of the expert tax witness was improper, the witness himself testified that his testimony was unaffected by this misconduct. The prosecutors instructed the grand jury to disregard anything they may have heard in conversations between a prosecutor and a witness, and explained to the grand jury that such conversations should have no influence on its deliberations. App. 191. In light of these ameliorative measures, there is nothing to indicate that the prosecutor's conduct toward this witness substantially affected the grand jury's evaluation of the testimony or its decision to indict.

The District Court found that the Government granted "pocket immunity" to 23 witnesses during the course of the grand jury proceedings. Without deciding the propriety of granting such immunity to grand jury witnesses, we conclude the conduct did not have a substantial effect on the grand jury's decision to indict, and it does not create grave doubt as

to whether it affected the grand jury's decision. Some prosecutors told the grand jury that immunized witnesses retained their Fifth Amendment privilege and could refuse to testify, while other prosecutors stated that the witnesses had no Fifth Amendment privilege, but we fail to see how this could have had a substantial effect on the jury's assessment of the testimony or its decision to indict. The significant point is that the jurors were made aware that these witnesses had made a deal with the Government.

Assuming the Government had threatened to withdraw immunity from a witness in order to manipulate that witness' testimony, this might have given rise to a finding of prejudice. There is no evidence in the record, however, that would support such a finding. The Government told a witness' attorney that if the witness "testified for Mr. Kilpatrick, all bets were off." The attorney, however, ultimately concluded that the prosecution did not mean to imply that immunity would be withdrawn if his client testified for Kilpatrick, but rather that his client would be validly subject to prosecution for perjury. 594 F. Supp., at 1338. Although the District Court found that the Government's statement was interpreted by the witness to mean that if he testified favorably for Kilpatrick his immunity would be withdrawn, *ibid.*, neither Judge Winner nor Judge Kane made a definitive finding that the Government improperly threatened the witness. The witness may have felt threatened by the prosecutor's statement, but his subjective fear cannot be ascribed to governmental misconduct and was, at most, a consideration bearing on the reliability of his testimony.

Finally, the Government permitted two IRS agents to appear before the grand jury at the same time for the purpose of reading transcripts. Although allowing the agents to read to the grand jury in tandem was a violation of Rule 6(d), it was not prejudicial. The agents gave no testimony of their own during the reading of the transcripts. The grand jury was instructed not to ask any questions and the agents were

instructed not to answer any questions during the readings. There is no evidence that the agents' reading in tandem enhanced the credibility of the testimony or otherwise allowed the agents to exercise undue influence.

In considering the prejudicial effect of the foregoing instances of alleged misconduct, we note that these incidents occurred as isolated episodes in the course of a 20-month investigation, an investigation involving dozens of witnesses and thousands of documents. In view of this context, those violations that did occur do not, even when considered cumulatively, raise a substantial question, much less a grave doubt, as to whether they had a substantial effect on the grand jury's decision to charge.

Errors of the kind alleged in these cases can be remedied adequately by means other than dismissal. For example, a knowing violation of Rule 6 may be punished as a contempt of court. See Fed. Rule Crim. Proc. 6(e)(2). In addition, the court may direct a prosecutor to show cause why he should not be disciplined and request the bar or the Department of Justice to initiate disciplinary proceedings against him. The court may also chastise the prosecutor in a published opinion. Such remedies allow the court to focus on the culpable individual rather than granting a windfall to the unprejudiced defendant.

IV

We conclude that the District Court had no authority to dismiss the indictment on the basis of prosecutorial misconduct absent a finding that petitioners were prejudiced by such misconduct. The prejudicial inquiry must focus on whether any violations had an effect on the grand jury's decision to indict. If violations did substantially influence this decision, or if there is grave doubt that the decision to indict was free from such substantial influence, the violations cannot be deemed harmless. The record will not support the

conclusion that petitioners can meet this standard. The judgment of the Court of Appeals is affirmed.

It is so ordered.

JUSTICE SCALIA, concurring.

I agree that every United States court has an inherent supervisory authority over the proceedings conducted before it, which assuredly includes the power to decline to proceed on the basis of an indictment obtained in violation of the law. I also agree that we have authority to review lower courts' exercise of this supervisory authority, insofar as it affects the judgments brought before us, though I do not see the basis for any direct authority to supervise lower courts. Cf. *Frazier* v. *Heebe*, 482 U. S. 641, 651–652 (1987) (REHNQUIST, C. J., dissenting). Even less do I see a basis for any court's "supervisory powers to discipline the prosecutors of its jurisdiction," *United States* v. *Hasting*, 461 U. S. 499, 505 (1983), except insofar as concerns their performance before the court and their qualifications to be members of the court's bar.

I join the opinion of the Court because I understand the supervisory power at issue here to be of the first sort.

JUSTICE MARSHALL, dissenting.

I cannot concur in the Court's decision to apply harmless-error analysis to violations of Rule 6 of the Federal Rules of Criminal Procedure. I already have outlined my objections to the Court's approach, which converts "Congress' command regarding the proper conduct of grand jury proceedings to a mere form of words, without practical effect." *United States* v. *Mechanik*, 475 U. S. 66, 84 (1986) (MARSHALL, J., dissenting). Because of the strict protection of the secrecy of grand jury proceedings, instances of prosecutorial misconduct rarely come to light. This is especially true in the pretrial setting, because defendants' chief source of information about grand jury proceedings is governmental disclosures under the Jencks Act, 18 U. S. C. § 3500, which do not

occur until trial is underway. The fact that a prosecutor knows that a Rule 6 violation is unlikely to be discovered gives the Rule little enough bite. To afford the occasional revelation of prosecutorial misconduct the additional insulation of harmless-error analysis leaves Rule 6 toothless. Moreover, as I argued in *Mechanik*, in this context "[a]ny case-by-case analysis to determine whether the defendant was actually prejudiced is simply too speculative to afford defendants meaningful protection, and imposes a difficult burden on the courts that outweighs the benefits to be derived." 475 U. S., at 86. Given the nature of grand jury proceedings, Rule 6 violations can be deterred and redressed effectively only by a *per se* rule of dismissal. Today's decision reduces Rule 6 to little more than a code of honor that prosecutors can violate with virtual impunity. I respectfully dissent.

HOUSTON *v.* LACK, WARDEN

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

No. 87–5428. Argued April 27, 1988—Decided June 24, 1988

While incarcerated in a Tennessee prison, petitioner drafted a *pro se* notice of appeal from the Federal District Court's judgment dismissing his *pro se* habeas corpus petition, and, 27 days after the judgment, deposited the notice with the prison authorities for mailing to the District Court. The date of deposit was recorded in the prison's outgoing mail log. Because petitioner lacked the necessary funds, prison authorities refused his requests to certify the notice for proof that it had been deposited for mailing on the day in question and to send the notice air mail. Although the record contains no evidence of when the prison authorities actually mailed the notice or when the District Court actually received it, the court stamped the notice "filed" 31 days after the habeas judgment—that is, one day after the expiration of the 30-day filing period for taking an appeal under Federal Rule of Appellate Procedure 4(a)(1). For this reason, the Court of Appeals dismissed the appeal as jurisdictionally out of time.

Held: Under Rule 4(a)(1), *pro se* prisoners' notices of appeal are "filed" at the moment of delivery to prison authorities for forwarding to the district court. Cf. *Fallen* v. *United States*, 378 U. S. 139 (Stewart, J., concurring). Unskilled in law, unaided by counsel, and unable to leave the prison, a *pro se* prisoner's control over the processing of his notice necessarily ceases as soon as he hands it over to the only public officials to whom he has access—the prison authorities—and the only information he will likely have is the date he delivered the notice to those authorities and the date ultimately stamped upon it. The 30-day deadline for filing notices of appeal set forth in 28 U. S. C. § 2107, which applies to civil actions including habeas proceedings, does not preclude relief for petitioner, since that statute does not define when a notice has been "filed" nor in any way suggests that, in the unique circumstances of a *pro se* prisoner, it would be inappropriate to conclude that such filing occurs at the moment of delivery to prison officials. Such conclusion is not negated by the fact that Rules 3(a) and 4(a)(1) specify that the notice should be "filed with the clerk of the District Court," since the relevant question is one of timing, not destination, and neither Rule sets forth criteria for determining the moment at which the filing has occurred. The general rule that receipt by the court clerk constitutes filing, although appropri-

ate for most civil appeals, should not apply in the *pro se* prisoner context. Nothing in either Rule 3(a) or Rule 4(a)(1) compels the conclusion that receipt by the clerk must be the moment of filing in all cases, and, in fact, a number of federal courts have recognized exceptions to the general principle. Moreover, the rationale for the general rule is that the appellant has no control over delays after the court clerk's receipt of the notice—a rationale that suggests that the moment of filing here should be the moment when the *pro se* prisoner necessarily loses control over his notice: the moment of delivery to prison authorities for forwarding. The bright-line rule recognizing receipt by prison authorities as the moment of filing will also decrease disputes and uncertainty as to when a filing actually occurred, since such authorities keep detailed logs for recording the date and time at which they receive papers for mailing and can readily dispute a prisoner's contrary assertions. Relying on the date of receipt, by contrast, would raise difficult questions whether the prison authorities, the Postal Service, or the court clerk is to blame for any delay. Pp. 269–276.

819 F. 2d 289, reversed.

BRENNAN, J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. SCALIA, J., filed a dissenting opinion, in which REHNQUIST, C. J., and O'CONNOR and KENNEDY, JJ., joined, *post*, p. 277.

Penny J. White, by appointment of the Court, 484 U. S. 1057, argued the cause and filed a brief for petitioner.

Jerry L. Smith, Deputy Attorney General of Tennessee, argued the cause for respondent. With him on the brief were *W. J. Michael Cody*, Attorney General, and *Gordon W. Smith*, Assistant Attorney General.*

*A brief of *amici curiae* urging affirmance was filed for the State of South Dakota et al. by *Roger A. Tellinghuisen*, Attorney General of South Dakota, and *Craig M. Eichstadt*, Assistant Attorney General, and by the Attorneys General for their respective States as follows: *John Van de Kamp* of California, *Robert Butterworth* of Florida, *Jim Jones* of Idaho, *Linley E. Pearson* of Indiana, *Robert T. Stephan* of Kansas, *Michael C. Moore* of Mississippi, *William L. Webster* of Missouri, *Mike Greely* of Montana, *Robert M. Spire* of Nebraska, *Stephen E. Merrill* of New Hampshire, *W. Cary Edwards* of New Jersey, *Lacy H. Thornburg* of North Carolina, *Robert Henry* of Oklahoma, *Travis Medlock* of South Carolina, *Mary Sue Terry* of Virginia, *Joseph B. Meyer* of Wyoming, and *Dave Frohnmayer* of Oregon.

JUSTICE BRENNAN delivered the opinion of the Court.

Pro se prisoners can file notices of appeal to the federal courts of appeals only by delivering them to prison authorities for forwarding to the appropriate district court. The question we decide in this case is whether under Federal Rule of Appellate Procedure 4(a)(1) such notices are to be considered filed at the moment of delivery to prison authorities for forwarding or at some later point in time.

I

Incarcerated in a Tennessee prison, petitioner Prentiss Houston filed a *pro se* petition under 28 U. S. C. § 2254 for a writ of habeas corpus in Federal District Court in Tennessee. That court declined to appoint counsel and entered judgment dismissing the habeas petition on January 7, 1986. Still acting *pro se*, petitioner drafted a notice of appeal and, on February 3, 1986 (27 days after the judgment), deposited it with the prison authorities for mailing to the District Court. This date of deposit was recorded in the prison log of outgoing mail. Petitioner also states without contradiction that he requested the prison to certify his notice for proof that it had been deposited for mailing on that date and requested that the notice be sent air mail, but that the prison refused these requests because he lacked funds to pay the fees the prison charged for such services. The record does not contain the envelope in which the notice of appeal was mailed, and therefore does not contain the postmark or any other evidence of when the prison authorities actually mailed the letter. The prison log, however, suggests that in addressing the notice the petitioner may have mistakenly used the post office box number of the Tennessee Supreme Court rather than that of the Federal District Court (both of which are in Jackson, Tennessee, approximately 81 miles from the prison). Although there is no direct evidence of the date on which the District Court received the notice, the notice was stamped

"filed" by the Clerk of the District Court at 8:30 a.m. on February 7, 1986, 31 days after the District Court's judgment was entered—that is, one day after the expiration of the 30-day filing period for taking an appeal established by Federal Rule of Appellate Procedure 4(a)(1).

Neither the District Court nor respondent suggested that the notice of appeal might be untimely. Rather, the District Court issued a certificate of probable cause on February 18, 1986, noting that the appeal presented a "question of first impression" in the jurisdiction. App. 22. On March 5, 1986, the United States Court of Appeals for the Sixth Circuit circulated a briefing schedule to the parties. On March 21, 1986, however, 13 days after the time had expired to request an extension of the time for filing a notice of appeal under Federal Rule of Appellate Procedure 4(a)(5), the Court of Appeals discovered the time problem concerning the filing of petitioner's notice of appeal and alerted the parties by entering an order requiring petitioner to show cause why the appeal should not be dismissed for want of jurisdiction. Eventually the Court of Appeals appointed counsel to argue the time question for petitioner. On May 22, 1987, the court entered an order dismissing the appeal as jurisdictionally out of time. We granted certiorari, 484 U. S. 1025 (1988), and now reverse.

II

We last addressed questions concerning the timely filing of notices of appeals by *pro se* prisoners in *Fallen* v. *United States*, 378 U. S. 139 (1964). *Fallen* involved what was then Rule 37(a) of the Federal Rules of Criminal Procedure (the substance of which now appears in Federal Rule of Appellate Procedure 4(b)), under which a criminal defendant seeking to appeal had to file a notice of appeal with the clerk of the district court within 10 days after entry of the judgment being

appealed.[1] Two days before the 10-day deadline, Fallen, acting without counsel and while incarcerated, deposited a notice of appeal with prison authorities for mailing to the Clerk of the District Court. The notice, however, was not received by the Clerk of the court until four days after the deadline. We noted that "the timely filing of a notice of appeal is a jurisdictional prerequisite to the hearing of the appeal," 378 U. S., at 142, but concluded that Rule 37(a) could not be read literally to bar Fallen's appeal because, under the circumstances of that case, Fallen "had done all that could reasonably be expected to get the letter to its destination within the required 10 days." *Id.*, at 144. Justice Stewart, joined by Justices Clark, Harlan, and BRENNAN, concurred on the ground that "for purposes of Rule 37(a)(2), a defendant incarcerated in a federal prison and acting without the aid of counsel files his notice of appeal in time, if, within the 10-day period provided by the Rule, he delivers such notice to the prison authorities for forwarding to the clerk of the District Court. In other words, in such a case the jailer is in effect the clerk of the District Court within the meaning of Rule 37." *Ibid.*

We conclude that the analysis of the concurring opinion in *Fallen* applies here and that petitioner thus filed his notice within the requisite 30-day period when, three days before the deadline, he delivered the notice to prison authorities for forwarding to the District Court. The situation of prisoners seeking to appeal without the aid of counsel is unique. Such prisoners cannot take the steps other litigants can take to monitor the processing of their notices of appeal and to en-

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[1] At the time Rule 37(a), as amended in 1956 and 1962, provided:

"(1) *Notice of Appeal.* An appeal permitted by law from a district court to a court of appeals is taken by filing with the clerk of the district court a notice of appeal in duplicate. . . .

"(2) *Time for Taking Appeal.* An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from. . . ."

sure that the court clerk receives and stamps their notices of appeal before the 30-day deadline. Unlike other litigants, *pro se* prisoners cannot personally travel to the courthouse to see that the notice is stamped "filed" or to establish the date on which the court received the notice. Other litigants may choose to entrust their appeals to the vagaries of the mail and the clerk's process for stamping incoming papers, but only the *pro se* prisoner is forced to do so by his situation. And if other litigants do choose to use the mail, they can at least place the notice directly into the hands of the United States Postal Service (or a private express carrier); and they can follow its progress by calling the court to determine whether the notice has been received and stamped, knowing that if the mail goes awry they can personally deliver notice at the last moment or that their monitoring will provide them with evidence to demonstrate either excusable neglect or that the notice was not stamped on the date the court received it. *Pro se* prisoners cannot take any of these precautions; nor, by definition, do they have lawyers who can take these precautions for them. Worse, the *pro se* prisoner has no choice but to entrust the forwarding of his notice of appeal to prison authorities whom he cannot control or supervise and who may have every incentive to delay. No matter how far in advance the *pro se* prisoner delivers his notice to the prison authorities, he can never be *sure* that it will ultimately get stamped "filed" on time. And if there is a delay the prisoner suspects is attributable to the prison authorities, he is unlikely to have any means of proving it, for his confinement prevents him from monitoring the process sufficiently to distinguish delay on the part of prison authorities from slow mail service or the court clerk's failure to stamp the notice on the date received. Unskilled in law, unaided by counsel, and unable to leave the prison, his control over the processing of his notice necessarily ceases as soon as he hands it over to the only public officials to whom he has access—the prison authorities—and the only information he will likely have is the

date he delivered the notice to those prison authorities and the date ultimately stamped on his notice.

Respondent stresses that a petition for habeas corpus is a civil action, see *Browder* v. *Director, Dept. of Corrections of Illinois*, 434 U. S. 257, 265, n. 9, 269 (1978), and that the timing of the appeal here is thus, unlike the direct criminal appeal at issue in *Fallen*, subject to the statutory deadline set out in 28 U. S. C. § 2107. But, as relevant here, § 2107 merely provides:

> "[N]o appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree."

The statute thus does not define when a notice of appeal has been "filed" or designate the person with whom it must be filed, and nothing in the statute suggests that, in the unique circumstances of a *pro se* prisoner, it would be inappropriate to conclude that a notice of appeal is "filed" within the meaning of § 2107 at the moment it is delivered to prison officials for forwarding to the clerk of the district court.

Federal Rules of Appellate Procedure 3(a) and 4(a)(1) are a little more specific. Rule 3(a) provides: "An appeal permitted by law as of right from a district court to a court of appeals shall be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4." Rule 4(a)(1) provides:

> "In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from. . . ."

Rules 3(a) and 4(a)(1) thus specify that the notice should be filed "with the clerk of the district court." There is, however, no dispute here that the notice must be directed to the

clerk of the district court—delivery of a notice of appeal to prison authorities would not under any theory constitute a "filing" unless the notice were delivered for forwarding to the district court. The question is one of timing, not destination: whether the moment of "filing" occurs when the notice is delivered to the prison authorities or at some later juncture in its processing. The Rules are not dispositive on this point, for neither Rule sets forth criteria for determining the moment at which the "filing" has occurred. See *Fallen*, 378 U. S., at 144 (Stewart, J., joined by Clark, Harlan, and BRENNAN, JJ., concurring) (concluding that under Rule 37(a) a "filing with the clerk of the district court" of a *pro se* prisoner's notice of appeal occurs when he delivers it to prison authorities for forwarding to the district court). Indeed, our own Rules recognize that the moment when a document is "filed" with a court can be the moment it is sent to that court. See Rule 28.2 (providing that a document can be deemed "filed" at the moment it is deposited in the mail for delivery to the Clerk of the Court).

Respondent concedes that receipt of a notice of appeal by the clerk of the district court suffices to meet the "filing" requirement under Rules 3 and 4 even though the notice has not yet been formally "filed" by the clerk of the court. *Parissi* v. *Telechron, Inc.*, 349 U. S. 46, 47 (1955); see also, *e. g.*, *Deloney* v. *Estelle*, 661 F. 2d 1061, 1062–1063 (CA5 1981); *Aldabe* v. *Aldabe*, 616 F. 2d 1089, 1091 (CA9 1980); *United States* v. *Solly*, 545 F. 2d 874, 876 (CA3 1976). But the rationale for concluding that receipt constitutes filing in the ordinary civil case is that the appellant has no control over delays between the court clerk's receipt and formal filing of the notice. See, *e. g.*, *Deloney*, *supra*, at 1063; *Aldabe*, *supra*, at 1091; *Solly*, *supra*, at 876. This rationale suggests a far different conclusion here, since, as we discussed above, the lack of control of *pro se* prisoners over delays extends much further than that of the typical civil litigant: *pro se* prisoners have no control over delays between

the prison authorities' receipt of the notice and its filing, and their lack of freedom bars them from delivering the notice to the court clerk personally.

True, a large body of lower court authority has rejected the general argument that a notice of appeal is "filed" at the moment it is placed in the mail addressed to the clerk of the court—this on the ground that *receipt* by the district court is required.[2] See, *e. g.*, *Haney* v. *Mizell Memorial Hospital*, 744 F. 2d 1467, 1472 (CA11 1984); *In re LBL Sports Center, Inc.*, 684 F. 2d 410, 413 (CA6 1982); *Sanchez* v. *Board of Regents of Texas Southern University*, 625 F. 2d 521, 522 (CA5 1980); *In re Bad Bubba Racing Products, Inc.*, 609 F. 2d 815, 816 (CA5 1980); *Allen* v. *Schnuckle*, 253 F. 2d 195, 197 (CA9 1958). But see *In re Pigge*, 539 F. 2d 369 (CA4 1976) (adopting the mailbox rule). To the extent these cases state the general rule in civil appeals, we do not disturb them. But we are persuaded that this general rule should not apply here. First, as we discussed above, nothing in Rules 3 and 4 compels the conclusion that, in all cases, receipt by the clerk of the district court is the moment of filing. The lower courts have, in fact, also held that receipt by a District Judge, *Halfen* v. *United States*, 324 F. 2d 52, 54 (CA10 1963), or at the former address for the District Court Clerk, *Lundy* v. *Union Carbide Corp.*, 695 F. 2d 394, 395, n. 1 (CA9 1982), can be the moment of filing. And the United States Court of Appeals for the Federal Circuit does not read Rule 4(a) as necessarily making receipt the moment of filing, for under Rule 10(a)(1) of that Circuit a notice of appeal can be deemed filed on mailing if the district court from which the appeal

[2] Respondent suggests that this Court has rejected the mailbox rule, citing *Parissi* v. *Telechron, Inc.*, 349 U. S. 46 (1955), and *United States* v. *Lombardo*, 241 U. S. 73 (1916). *Parissi*, though, merely held that timely receipt was sufficient, not necessary, to meet the filing requirement under 28 U. S. C. § 2107, and *Lombardo* did not involve the filing of a notice of appeal but a filing requirement imposed by a criminal statute. Neither case involved the efforts of a prisoner to file a notice of appeal without the aid of counsel.

is taken has adopted a rule which deems a document filed on mailing. See generally *Placeway Construction Corp.* v. *United States*, 713 F. 2d 726 (CA Fed. 1983).

Second, the policy grounds for the general rule making receipt the moment of filing suggest that delivery to prison authorities should instead be the moment of filing in this particular context. As detailed above, the moment at which *pro se* prisoners necessarily lose control over and contact with their notices of appeal is at delivery to prison authorities, not receipt by the clerk. Thus, whereas the general rule has been justified on the ground that a civil litigant who *chooses* to mail a notice of appeal assumes the risk of untimely delivery and filing, see, *e. g.*, *Bad Bubba*, *supra*, at 816, a *pro se* prisoner has no choice but to hand his notice over to prison authorities for forwarding to the court clerk. Further, the rejection of the mailbox rule in other contexts has been based in part on concerns that it would increase disputes and uncertainty over when a filing occurred and that it would put all the evidence about the date of filing in the hands of one party. See, *e. g.*, *United States* v. *Lombardo*, 241 U. S. 73, 78 (1916). These administrative concerns lead to the opposite conclusion here. The *pro se* prisoner does not anonymously drop his notice of appeal in a public mailbox—he hands it over to prison authorities who have well-developed procedures for recording the date and time at which they receive papers for mailing and who can readily dispute a prisoner's assertions that he delivered the paper on a different date. Because reference to prison mail logs will generally be a straightforward inquiry, making filing turn on the date the *pro se* prisoner delivers the notice to prison authorities for mailing is a bright-line rule, not an uncertain one. Relying on the date of receipt, by contrast, raises such difficult to resolve questions as whether delays by the United States Postal Service constituted excusable neglect and whether a notice stamped "filed" on one date was actually received ear-

lier.[3] These questions are made particularly difficult here because any delays might instead be attributable to the prison authorities' failure to forward the notice promptly. Indeed, since, as everyone concedes, the prison's failure to act promptly cannot bind a *pro se* prisoner, relying on receipt in this context would raise yet more difficult to resolve questions whether the prison authorities were dilatory. The prison will be the only party with access to at least some of the evidence needed to resolve such questions—one of the vices the general rule is meant to avoid—and evidence on any of these issues will be hard to come by for the prisoner confined to his cell, who can usually only guess whether the prison authorities, the Postal Service, or the court clerk is to blame for any delay.

We thus conclude that the Court of Appeals had jurisdiction over petitioner's appeal because the notice of appeal was filed at the time petitioner delivered it to the prison authorities for forwarding to the court clerk.[4] The judgment of the Court of Appeals is accordingly

Reversed.

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[3] In this very case, for example, it is not clear when the notice was actually mailed, and petitioner alleges both that the mail service was slower than advertised and that the date stamped on the notice is not the date of receipt. In connection with the latter allegation, he notes that most of the papers mailed to the District Court were stamped as filed at 8:30 a.m. and suggests that the time of stamping may simply reflect a method of processing incoming papers wherein the papers received in the court's post office box are not collected and stamped until the start of the *following* working day. See generally *In re Piper Aircraft Distribution System Antitrust Litigation*, 551 F. 2d 213, 216, n. 7 (CA8 1977) (leaving it open to party to prove that clerk received the notice of appeal on a date earlier than that recorded on it); *Da'Ville* v. *Wise*, 470 F. 2d 1364, 1365, and n. 2 (CA5 1973) (refusing to hold notice untimely when the court clerk's practices created a strong possibility that the notice was not stamped when received).

[4] Because of our holding, we need not reach petitioner's other arguments: that any untimeliness should be excused because he "did all he could" under *Fallen* v. *United States*, 378 U. S. 139, 144 (1964); that the District Court received the notice on time but stamped it late; that he was

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

Today's decision obliterates the line between textual construction and textual enactment. It would be within the realm of normal judicial creativity (though in my view wrong) to interpret the phrase "filed with the clerk" to mean "mailed to the clerk," or even "mailed to the clerk or given to a person bearing an obligation to mail to the clerk." But interpreting it to mean "delivered to the clerk or, if you are a prisoner, delivered to your warden" is no more acceptable than any of an infinite number of variants, such as: "delivered to the clerk or, if you are out of the country, delivered to a United States consul"; or "delivered to the clerk or, if you are a soldier on active duty in a war zone, delivered to your commanding officer"; or "delivered to the clerk or, if you are held hostage in a foreign country, meant to be delivered to the clerk." Like these other examples, the Court's rule makes a good deal of sense. I dissent only because it is not the rule that we have promulgated through congressionally prescribed procedures.

I

This case requires us to construe one statutory provision and two provisions of the Federal Rules of Appellate Procedure. The former is 28 U. S. C. § 2107, which sets a statutory, jurisdictional deadline for the filing of notices of appeal in civil actions such as this habeas proceeding. It provides:

> "[N]o appeal shall bring any judgment, order or decree in an action, suit, or proceeding of a civil nature before a court of appeals for review unless notice of appeal is *filed*, within thirty days after the entry of such judgment, order or decree" (emphasis added).

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lulled into thinking that his appeal was timely by the issuance of a certificate of probable cause and a briefing schedule and thus any untimeliness should be excused because of "unique circumstances" under *Harris Truck Lines, Inc.* v. *Cherry Meat Packers, Inc.*, 371 U. S. 215, 217 (1962), and *Thompson* v. *INS*, 375 U. S. 384 (1964); and that his notice of appeal should be treated as a motion for extension of time under Rule 4(a)(5).

Although the statute itself does not define when a notice of appeal has been "filed" or designate with whom it must be filed, the Federal Rules of Appellate Procedure fill in these details. Federal Rule of Appellate Procedure 3(a) provides:

> "An appeal permitted by law as of right from a district court to a court of appeals shall be taken by *filing a notice of appeal with the clerk of the district court* within the time allowed by Rule 4" (emphasis added).

This is supplemented by Federal Rule of Appellate Procedure 4(a)(1), which provides:

> "In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be *filed with the clerk of the district court* within 30 days after the date of entry of the judgment or order appealed from . . ." (emphasis added).

It is clear, then, that there was a notice of appeal effective to give the Court of Appeals jurisdiction in this case if, and only if, it was "filed with the clerk of the district court" within the 30-day period.

The Court observes that "filed with the clerk" could mean many different things, including merely "mailed to the clerk." *Ante*, at 272–274. That is unquestionable. But it is the practice in construing such a phrase to pick a single meaning, and not to impart first one, and then another, as the judicially perceived equities of individual cases might require. Some statutory terms, such as "restraint of trade," *Business Electronics Corp.* v. *Sharp Electronics Corp.*, 485 U. S. 717, 731–733 (1988), invite judicial judgment from case to case; but a provision establishing a deadline upon which litigants are supposed to rely is not of that sort. That is why we adopted the proviso in Rule 28.2 of our own Rules, which the Court unexpectedly invokes in support of its position. Rule 28.2 reads:

> "To be timely filed, a document must be received by the Clerk within the time specified for filing, *except that* any document shall be deemed timely filed if it has been deposited in a United States post office or mailbox, with first-class postage prepaid, and properly addressed to the Clerk of this Court, within the time allowed for filing, and if there is filed with the Clerk a notarized statement by a member of the Bar of this Court, setting forth the details of the mailing, and stating that to his knowledge the mailing took place on a particular date within the permitted time." (Emphasis added.)

Since "received by the Clerk" must, in the context of such a rule, reasonably be understood to have a unitary meaning, which would of course normally be actual receipt, we felt constrained to *specify* an exception in which mailing would suffice. It would have been as inappropriate (though no less possible) there as in the present case to create the exception through interpretation—reasoning that the Post Office can be deemed the agent of the addressee, *Household Fire & Carriage Accident Ins. Co.* v. *Grant*, 4 Ex. D. 216 (1879) ("[P]ost office [is] the agent of both parties"), and hence it is theoretically possible to consider the document "received by" the Clerk when it is mailed, and the policy considerations usually militating in favor of a rule of actual receipt are well enough satisfied by an affidavit from a member of our Bar, etc.

If the need for a uniform meaning is apparent even with respect to ordinary statutory deadlines, and indeed even with respect to court-created rules that can be amended at the judges' discretion, it is even more apparent when a statutory deadline bearing upon the very jurisdiction of the courts is at issue. In that context, allowing courts to give different meanings from case to case allows them to expand and contract the scope of their own competence. That this is not envisioned is plain (if any citation is needed) from Rule 26(b) of the Federal Rules of Appellate Procedure, which specifically

excepts from the courts' broad equitable power to "suspend the requirements or provisions of any of these rules in a particular case," Fed. Rule App. Proc. 2, the power to "enlarge the time for filing a notice of appeal." When we adopted Rules 3 and 4 of the Federal Rules of Appellate Procedure we delayed, as required by law, their effective date until 90 days after they were "reported to Congress by the Chief Justice," 28 U. S. C. § 2072, so that Congress might consider whether it wished to legislate any changes in them. Surely Congress could not have imagined that "filing . . . with the clerk" in Rule 3(a) and "filed with the clerk" in Rule 4(a)(1) could have a meaning as remote from plain English as "delivered to the warden of a prison"—or whatever else might be held in the future to fit today's announced "rationale . . . that the appellant has no control over delays," *ante*, at 273.

The Court seeks to have it both ways, at one and the same time abandoning a unitary interpretation of "filed" for purposes of the present decision, yet purporting "not [to] disturb" the many cases stating that a notice of appeal is filed when received, "[t]o the extent these cases state the general rule." *Ante*, at 274. See, *e. g.*, *Parissi* v. *Telechron, Inc.*, 349 U. S. 46, 47 (1955) (holding that timely receipt satisfies 28 U. S. C. § 2107); *United States* v. *Lombardo*, 241 U. S. 73, 76 (1916) ("A paper is filed when it is delivered to the proper official and by him received and filed"); *Haney* v. *Mizell Memorial Hospital*, 744 F. 2d 1467, 1472 (CA11 1984); *In re LBL Sports Center, Inc.*, 684 F. 2d 410, 413 (CA6 1982); *In re Robinson*, 640 F. 2d 737, 738 (CA5 1981); *In re Ramsey*, 612 F. 2d 1220, 1223 (CA9 1980); *In re Bad Bubba Racing Products, Inc.*, 609 F. 2d 815, 816 (CA5 1980); *Ward* v. *Atlantic Coast Line R. Co.*, 265 F. 2d 75, 80 (CA5 1959), rev'd on other grounds, 362 U. S. 396 (1960); *Allen* v. *Schnuckle*, 253 F. 2d 195, 197 (CA9 1958). It seems to me that to leave them undisturbed only "to the extent [they] state the general rule" is to disturb them profoundly. The rationale of today's decision is that any of various theoretically possible meanings

of "filed with the clerk" may be adopted—even one as remote as "addressed to the clerk and given to the warden"—depending upon what equity requires. It may turn out that we will not often agree that equity requires anything other than "received by the clerk," but parties will often argue it, and the lower courts will sometimes hold it. Thus is wasteful litigation in our appellate courts multiplied.

Petitioner Prentiss Houston's notice of appeal in this case was stamped received 31 days after the District Court's judgment was entered—that is, one day after the expiration of the 30-day filing period set out in Federal Rule of Appellate Procedure 4(a)(1). Since there is no legal warrant for creating a special exception to the rule of receipt for the benefit of incarcerated *pro se* appellants, I cannot join the Court in reversing the judgment on that basis.

II

Petitoner advanced several additional arguments supporting reversal which the Court did not have to reach. *Ante*, at 276–277, n. 4. I must consider them, and, having done so, find that none of them has merit.

First, petitioner asserts that his untimeliness in filing his notice of appeal should be excused because he "did all he could under the circumstances," as required by *Fallen* v. *United States*, 378 U. S. 139, 144 (1964). This argument fails because there is no warrant for equitable tolling of filing deadlines in the civil context of this habeas proceeding as there was in the criminal context that was at issue in *Fallen*. The bar erected by § 2107 in civil cases is jurisdictional, and this Court is without power to waive it, no matter what the equities of a particular case. As noted above, this is made explicit in Rule 26(b) of the Federal Rules of Appellate Procedure. In *Fallen*, by contrast, there was no jurisdictional statute at issue, and the relevant Federal Rule of Criminal Procedure 2 provided that a "just determination" should be achieved. See 378 U. S., at 142.

Second, petitioner maintains that he was lulled into thinking that his appeal was timely by the issuance of a certificate of probable cause and briefing schedule, and thus did not move for an extension of time within the 30-day grace period, see Fed. Rule App. Proc. 4(a)(5). This, he suggests, constitutes a "unique circumstance" of the sort recognized in *Harris Truck Lines, Inc.* v. *Cherry Meat Packers, Inc.*, 371 U. S. 215, 217 (1962); *Thompson* v. *INS*, 375 U. S. 384, 387 (1964); and *Wolfsohn* v. *Hankin*, 376 U. S. 203 (1964). Petitioner asserts that those cases establish an equitable doctrine that sometimes permits the late filing of notices of appeal. Our later cases, however, effectively repudiate the *Harris Truck Lines* approach, affirming that the timely filing of a notice of appeal is "mandatory and jurisdictional." *Griggs* v. *Provident Consumer Discount Co.*, 459 U. S. 56, 58, 61 (1982); see also *Browder* v. *Director, Dept. of Corrections of Illinois*, 434 U. S. 257 (1978). As we observed in *United States* v. *Locke*, 471 U. S. 84, 100–101 (1985):

> "Filing deadlines, like statutes of limitations, necessarily operate harshly and arbitrarily with respect to individuals who fall just on the other side of them, but if the concept of a filing deadline is to have any content, the deadline must be enforced. 'Any less rigid standard would risk encouraging a lax attitude toward filing dates,' *United States* v. *Boyle*, 469 U. S. [241,] 249 [(1985)]. A filing deadline cannot be complied with, substantially or otherwise, by filing late—even by one day."

Finally, petitioner asserts that his notice of appeal should be treated as a motion for extension of time under Federal Rule of Appellate Procedure 4(a)(5). That Rule, however, was specifically amended to require that *a motion* must be filed with the district court to obtain an extension, and its text precludes treating a late filed notice as being a motion. As revised, the Rule explicitly states:

> "The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal *upon motion* filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a)" (emphasis added).

The Advisory Committee's Notes on Appellate Rule 4(a)(5) explain:

> "Under the present rule there is a possible implication that prior to the time the initial appeal time has run, the district court may extend the time on the basis of an informal application. The amendment would require that the application must be made by motion, though the motion may be made ex parte. After the expiration of the initial time a motion for the extension of the time must be made in compliance with the F. R. C. P. and local rules of the district court." 28 U. S. C. App., p. 469.

The courts below were therefore without power to treat petitioner's late filed notice of appeal as a motion for extension of time under Federal Rule of Appellate Procedure 4(a)(5).

* * *

Twenty-four years ago Justice Clark, joined by Justices Harlan, Stewart, and WHITE, said in the dissent in *Thompson:*

> "Rules of procedure are a necessary part of an orderly system of justice. Their efficacy, however, depends upon the willingness of the courts to enforce them according to their terms. Changes in rules whose inflexibility has turned out to work hardship should be effected by the process of amendment, not by *ad hoc* relaxations by this Court in particular cases. Such dispensations in the long run actually produce mischievous results, undermining the certainty of the rules and causing confusion among the lower courts and the bar." 375 U. S., at 390.

That could not be more correct, nor more applicable to the present case. The filing rule the Court supports today seems to me a good one, but it is fully within our power to adopt it by an amendment of the Rules. Doing so instead in the present fashion not only evades the statutory requirement that changes be placed before Congress so that it may reject them by legislation before they become effective, 28 U. S. C. § 2072, but destroys the most important characteristic of filing requirements, which is the certainty of their application. It is hard to understand why the Court felt the need to short-circuit the orderly process of rule amendment in order to provide immediate relief in the present case. Petitioner delivered his notice of appeal to the warden three days before it was due to be filed with the Clerk. It would have been imprudent even to place it in a mailbox with the deadline so close at hand.

For the reasons stated, I respectfully dissent.

Syllabus

PATTERSON *v.* ILLINOIS

CERTIORARI TO THE SUPREME COURT OF ILLINOIS

No. 86–7059. Argued March 22, 1988—Decided June 24, 1988

After being informed by police that he had been indicted for murder, petitioner, who was in police custody, twice indicated his willingness to discuss the crime during interviews initiated by the authorities. On both occasions, petitioner was read a form waiving his rights under *Miranda* v. *Arizona*, 384 U. S. 436, initialed each of the five specific warnings on the form, and signed the form. He then gave inculpatory statements to the authorities. The Illinois trial court denied his motions to suppress his statements on constitutional grounds, and the statements were used against him at trial. The State Supreme Court affirmed his conviction, rejecting his contention that the warnings he received, while adequate to protect his *Fifth* Amendment rights as guaranteed by *Miranda*, did not adequately inform him of his *Sixth* Amendment right to counsel.

Held: The postindictment questioning that produced petitioner's incriminating statements did not violate his Sixth Amendment right to counsel. Pp. 290–300.

(a) Petitioner cannot avail himself of the argument that, because his Sixth Amendment right to counsel arose with his indictment, the police were thereafter barred from initiating questioning, since he at no time sought to have counsel present. The essence of *Edwards* v. *Arizona*, 451 U. S. 477, and its progeny, on which petitioner relies, is the preservation of the integrity of an accused's choice to communicate with police only through counsel. Had petitioner indicated he wanted counsel's assistance, the questioning would have stopped, and further questioning would have been forbidden unless he himself initiated the meeting. *Michigan* v. *Jackson*, 475 U. S. 625. However, once an accused "knowingly and intelligently" elects to proceed without counsel, the uncounseled statements he then makes need not be excluded at trial. Pp. 290–291.

(b) Petitioner's contention that his Sixth Amendment rights were violated because he did not "knowingly and intelligently" waive his right to have counsel present during his postindictment questioning is without merit. The constitutional minimum for determining whether a waiver was "knowing and intelligent" is that the accused be made sufficiently aware of his right to have counsel present and of the possible consequences of a decision to forgo the aid of counsel. Here, by admonishing petitioner with the *Miranda* warnings, respondent met this burden, and petitioner's waiver was valid. First, by telling him that he had the

rights to consult an attorney, to have a lawyer present while he was questioned, and even to have a lawyer appointed if he could not afford one, the authorities conveyed to him the sum and substance of his Sixth Amendment rights. Second, by informing him that any statement he made could be used against him, the authorities made him aware of the ultimate adverse consequence of his decision to waive his Sixth Amendment rights and of what a lawyer could "do for him" during post-indictment questioning: namely, advise him to refrain from making any such statements. Petitioner's inability here to articulate with precision what additional information should have been provided before he would have been competent to waive his right to counsel supports the conclusion that the information that was provided satisfies the constitutional minimum. Pp. 292–297.

(c) This Court has never adopted petitioner's suggestion that the Sixth Amendment right to counsel is "superior" to or "more difficult" to waive than its Fifth Amendment counterpart. Rather, in Sixth Amendment cases, the court has defined the scope of the right to counsel by a pragmatic assessment of the usefulness of counsel to the accused at the particular stage of the proceedings in question, and the dangers to the accused of proceeding without counsel at that stage. An accused's waiver is "knowing and intelligent" if he is made aware of these basic facts. *Miranda* warnings are sufficient for this purpose in the post-indictment questioning context, because, at that stage, the role of counsel is relatively simple and limited, and the dangers and disadvantages of self-representation are less substantial and more obvious to an accused than they are at trial. Pp. 297–300.

116 Ill. 2d 290, 507 N. E. 2d 843, affirmed.

WHITE, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, and KENNEDY, JJ., joined. BLACKMUN, J., filed a dissenting opinion, *post*, p. 300. STEVENS, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 301.

Donald S. Honchell argued the cause for petitioner. With him on the briefs were *Paul P. Biebel, Jr.*, and *Robert P. Isaacson*.

Jack Donatelli, Assistant Attorney General of Illinois, argued the cause for respondent. With him on the brief were *Neil F. Hartigan*, Attorney General, *Shawn W. Denney*, Solicitor General, and *Terrence M. Madsen* and *Kenneth A. Fedinets*, Assistant Attorneys General.

Andrew J. Pincus argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief

were *Solicitor General Fried, Assistant Attorney General Weld,* and *Deputy Solicitor General Bryson.**

JUSTICE WHITE delivered the opinion of the Court.

In this case, we are called on to determine whether the interrogation of petitioner after his indictment violated his Sixth Amendment right to counsel.

I

Before dawn on August 21, 1983, petitioner and other members of the "Vice Lords" street gang became involved in a fight with members of a rival gang, the "Black Mobsters." Some time after the fight, a former member of the Black Mobsters, James Jackson, went to the home where the Vice Lords had fled. A second fight broke out there, with petitioner and three other Vice Lords beating Jackson severely. The Vice Lords then put Jackson into a car, drove to the end of a nearby street, and left him face down in a puddle of water. Later that morning, police discovered Jackson, dead, where he had been left.

That afternoon, local police officers obtained warrants for the arrest of the Vice Lords, on charges of battery and mob action, in connection with the first fight. One of the gang members who was arrested gave the police a statement concerning the first fight; the statement also implicated several of the Vice Lords (including petitioner) in Jackson's murder. A few hours later, petitioner was apprehended. Petitioner was informed of his rights under *Miranda* v. *Arizona*, 384 U. S. 436 (1966), and volunteered to answer questions put to him by the police. Petitioner gave a statement concerning the initial fight between the rival gangs, but denied knowing anything

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*Briefs of *amici curiae* urging affirmance were filed for the Washington Legal Foundation by *Daniel J. Popeo* and *Paul D. Kamenar;* and for Americans for Effective Law Enforcement, Inc., et al. by *David Crump, Courtney A. Evans, Bernard J. Farber, Daniel B. Hales, James A. Murphy, Jack E. Yelverton, Fred E. Inbau, Wayne W. Schmidt,* and *James P. Manak.*

about Jackson's death. Petitioner was held in custody the following day, August 22, as law enforcement authorities completed their investigation of the Jackson murder.

On August 23, a Cook County grand jury indicted petitioner and two other gang members for the murder of James Jackson. Police Officer Michael Gresham, who had questioned petitioner earlier, removed him from the lockup where he was being held, and told petitioner that because he had been indicted he was being transferred to the Cook County jail. Petitioner asked Gresham which of the gang members had been charged with Jackson's murder, and upon learning that one particular Vice Lord had been omitted from the indictments, asked: "[W]hy wasn't he indicted, he did everything." App. 7. Petitioner also began to explain that there was a witness who would support his account of the crime.

At this point, Gresham interrupted petitioner, and handed him a *Miranda* waiver form. The form contained five specific warnings, as suggested by this Court's *Miranda* decision, to make petitioner aware of his right to counsel and of the consequences of any statement he might make to police.[1] Gresham read the warnings aloud, as petitioner read along with him. Petitioner initialed each of the five warnings, and signed the waiver form. Petitioner then gave a lengthy statement to police officers concerning the Jackson murder; petitioner's statement described in detail the role of each of the Vice Lords—including himself—in the murder of James Jackson.

Later that day, petitioner confessed involvement in the murder for a second time. This confession came in an inter-

[1] Although the signed waiver form does not appear in the record or the appendix, petitioner concedes that he was informed of his right to counsel to the extent required by our decision in *Miranda* v. *Arizona*, 384 U. S. 436 (1966). Brief for Petitioner 3; Tr. of Oral Arg. 6–8.

This apparently included informing petitioner that he had a right to remain silent; that anything he might say could be used against him; that he had a right to consult with an attorney; that he had a right to have an attorney present during interrogation; and that, as an indigent, the State would provide him with a lawyer if he so desired.

view with Assistant State's Attorney (ASA) George Smith. At the outset of the interview, Smith reviewed with petitioner the *Miranda* waiver he had previously signed, and petitioner confirmed that he had signed the waiver and understood his rights. Smith went through the waiver procedure once again: reading petitioner his rights, having petitioner initial each one, and sign a waiver form. In addition, Smith informed petitioner that he was a lawyer working with the police investigating the Jackson case. Petitioner then gave another inculpatory statement concerning the crime.

Before trial, petitioner moved to suppress his statements, arguing that they were obtained in a manner at odds with various constitutional guarantees. The trial court denied these motions, and the statements were used against petitioner at his trial. The jury found petitioner guilty of murder, and petitioner was sentenced to a 24-year prison term.

On appeal, petitioner argued that he had not "knowingly and intelligently" waived his Sixth Amendment right to counsel before he gave his uncounseled postindictment confessions. Petitioner contended that the warnings he received, while adequate for the purposes of protecting his *Fifth* Amendment rights as guaranteed by *Miranda*, did not adequately inform him of his *Sixth* Amendment right to counsel. The Illinois Supreme Court, however, rejected this theory, applying its previous decision in *People* v. *Owens*, 102 Ill. 2d 88, 464 N. E. 2d 261, cert. denied, 469 U. S. 963 (1984), which had held that *Miranda* warnings were sufficient to make a defendant aware of his Sixth Amendment right to counsel during postindictment questioning. *People* v. *Thomas*, 116 Ill. 2d 290, 298–300, 507 N. E. 2d 843, 846–847 (1987).

In reaching this conclusion, the Illinois Supreme Court noted that this Court had reserved decision on this question on several previous occasions[2] and that the lower courts are

[2] See, *e. g.*, *Michigan* v. *Jackson*, 475 U. S. 625, 635–636, n. 10 (1986); *Moran* v. *Burbine*, 475 U. S. 412, 428, n. 2 (1986); *Brewer* v. *Williams*, 430 U. S. 387, 405–406 (1977).

divided on the issue. *Id.*, at 299, 507 N. E. 2d, at 846. We granted this petition for certiorari, 484 U. S. 895 (1987), to resolve this split of authority and to address the issues we had previously left open.

II

There can be no doubt that petitioner had the right to have the assistance of counsel at his postindictment interviews with law enforcement authorities. Our cases make it plain that the Sixth Amendment guarantees this right to criminal defendants. *Michigan* v. *Jackson*, 475 U. S. 625, 629–630 (1986); *Brewer* v. *Williams*, 430 U. S. 387, 398–401 (1977); *Massiah* v. *United States*, 377 U. S. 201, 205–207 (1964).[3] Petitioner asserts that the questioning that produced his incriminating statements violated his Sixth Amendment right to counsel in two ways.

A

Petitioner's first claim is that because his Sixth Amendment right to counsel arose with his indictment, the police were thereafter barred from initiating a meeting with him. See Brief for Petitioner 30–31; Tr. of Oral Arg. 2, 9, 11, 17. He equates himself with a preindictment suspect who, while being interrogated, asserts his Fifth Amendment right to counsel; under *Edwards* v. *Arizona*, 451 U. S. 477 (1981), such a suspect may not be questioned again unless he initiates the meeting.

Petitioner, however, at no time sought to exercise his right to have counsel present. The fact that petitioner's Sixth

[3] We note as a matter of some significance that petitioner had not retained, or accepted by appointment, a lawyer to represent him at the time he was questioned by authorities. Once an accused has a lawyer, a distinct set of constitutional safeguards aimed at preserving the sanctity of the attorney-client relationship takes effect. See *Maine* v. *Moulton*, 474 U. S. 159, 176 (1985). The State conceded as much at argument. See Tr. of Oral Arg. 28.

Indeed, the analysis changes markedly once an accused even *requests* the assistance of counsel. See *Michigan* v. *Jackson*, *supra;* Part II–A, *infra*.

Amendment right came into existence with his indictment, *i. e.*, that he had such a right at the time of his questioning, does not distinguish him from the preindictment interrogatee whose right to counsel is in existence and available for his exercise while he is questioned. Had petitioner indicated he wanted the assistance of counsel, the authorities' interview with him would have stopped, and further questioning would have been forbidden (unless petitioner called for such a meeting). This was our holding in *Michigan* v. *Jackson*, *supra*, which applied *Edwards* to the Sixth Amendment context. We observe that the analysis in *Jackson* is rendered wholly unnecessary if petitioner's position is correct: under petitioner's theory, the officers in *Jackson* would have been completely barred from approaching the accused in that case unless he called for them. Our decision in *Jackson*, however, turned on the fact that the accused "ha[d] asked for the help of a lawyer" in dealing with the police. *Jackson*, *supra*, at 631, 633–635.

At bottom, petitioner's theory cannot be squared with our rationale in *Edwards*, the case he relies on for support. *Edwards* rested on the view that once "an accused . . . ha[s] expressed his desire to deal with the police only through counsel" he should "not [be] subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication." *Edwards*, *supra*, at 484–485; cf. also *Michigan* v. *Mosley*, 423 U. S. 96, 104, n. 10 (1975). Preserving the integrity of an accused's choice to communicate with police only through counsel is the essence of *Edwards* and its progeny—not barring an accused from making an *initial* election as to whether he will face the State's officers during questioning with the aid of counsel, or go it alone. If an accused "knowingly and intelligently" pursues the latter course, we see no reason why the uncounseled statements he then makes must be excluded at his trial.

B

Petitioner's principal and more substantial claim is that questioning him without counsel present violated the Sixth Amendment because he did not validly waive his right to have counsel present during the interviews. Since it is clear that after the *Miranda* warnings were given to petitioner, he not only voluntarily answered questions without claiming his right to silence or his right to have a lawyer present to advise him but also executed a written waiver of his right to counsel during questioning, the specific issue posed here is whether this waiver was a "knowing and intelligent" waiver of his Sixth Amendment right.[4] See *Brewer* v. *Williams*, *supra*, at 401, 404; *Johnson* v. *Zerbst*, 304 U. S. 458, 464–465 (1938).

In the past, this Court has held that a waiver of the Sixth Amendment right to counsel is valid only when it reflects "an intentional relinquishment or abandonment of a known right or privilege." *Johnson* v. *Zerbst*, *supra*, at 464. In other words, the accused must "kno[w] what he is doing" so that "his choice is made with eyes open." *Adams* v. *United States ex rel. McCann*, 317 U. S. 269, 279 (1942). In a case arising under the Fifth Amendment, we described this requirement as "a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Moran* v. *Burbine*, 475 U. S. 412, 421 (1986). Whichever of these formulations is used, the key inquiry in a case such as this one must be: Was the accused, who waived his Sixth Amendment rights during postindictment questioning, made sufficiently aware of his right to have counsel present during the questioning, and of the possible conse-

[4] Of course, we also require that any such waiver must be voluntary. Petitioner contested the voluntariness of his confession in the trial court and in the intermediate appellate courts, which rejected petitioner's claim that his confessions were coerced. See 140 Ill. App. 3d 421, 425–426, 488 N. E. 2d 1283, 1287 (1986).

Petitioner does not appear to have maintained this contention before the Illinois Supreme Court, and in any event, he does not press this argument here. Thus, the "voluntariness" of petitioner's confessions is not before us.

quences of a decision to forgo the aid of counsel? In this case, we are convinced that by admonishing petitioner with the *Miranda* warnings, respondent has met this burden and that petitioner's waiver of his right to counsel at the questioning was valid.[5]

First, the *Miranda* warnings given petitioner made him aware of his right to have counsel present during the questioning. By telling petitioner that he had a right to consult with an attorney, to have a lawyer present while he was questioned, and even to have a lawyer appointed for him if he could not afford to retain one on his own, Officer Gresham and ASA Smith conveyed to petitioner the sum and substance of the rights that the Sixth Amendment provided him. "Indeed, it seems self-evident that one who is told he" has such rights to counsel "is in a curious posture to later complain" that his waiver of these rights was unknowing. Cf. *United States* v. *Washington*, 431 U. S. 181, 188 (1977). There is little more petitioner could have possibly been told in an effort to satisfy this portion of the waiver inquiry.

Second, the *Miranda* warnings also served to make petitioner aware of the consequences of a decision by him to waive his Sixth Amendment rights during postindictment questioning. Petitioner knew that any statement that he made could be used against him in subsequent criminal proceedings. This is the ultimate adverse consequence petitioner could have suffered by virtue of his choice to make

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[5] We emphasize the significance of the fact that petitioner's waiver of counsel was only for this limited aspect of the criminal proceedings against him—only for postindictment questioning. Our decision on the validity of petitioner's waiver extends only so far.

Moreover, even within this limited context, we note that petitioner's waiver was binding on him *only* so long as he wished it to be. Under this Court's precedents, at any time during the questioning petitioner could have changed his mind, elected to have the assistance of counsel, and immediately dissolve the effectiveness of his waiver with respect to any subsequent statements. See, *e. g.*, *Michigan* v. *Jackson*, 475 U. S., at 631–635; Part II–A, *supra*. Our decision today does nothing to change this rule.

uncounseled admissions to the authorities. This warning also sufficed—contrary to petitioner's claim here, see Tr. of Oral Arg. 7–8—to let petitioner know what a lawyer could "do for him" during the postindictment questioning: namely, advise petitioner to refrain from making any such statements.[6] By knowing what could be done with any statements he might make, and therefore, what benefit could be obtained by having the aid of counsel while making such statements, petitioner was essentially informed of the possible consequences of going without counsel during questioning. If petitioner nonetheless lacked "a full and complete appreciation of all of the consequences flowing" from his waiver, it does not defeat the State's showing that the information it provided to him satisfied the constitutional minimum. Cf. *Oregon* v. *Elstad*, 470 U. S. 298, 316–317 (1985).

Our conclusion is supported by petitioner's inability, in the proceedings before this Court, to articulate with precision what additional information should have been provided to him before he would have been competent to waive his right to counsel. All that petitioner's brief and reply brief suggest is petitioner should have been made aware of his "right under the Sixth Amendment to the broad protection of counsel"—a rather nebulous suggestion—and the "gravity of [his] situation." Reply Brief for Petitioner 13; see Brief for Petitioner 30–31. But surely this latter "requirement" (if it is one) was met when Officer Gresham informed petitioner that he had been formally charged with the murder of James Jackson.

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[6] An important basis for our analysis is our understanding that an attorney's role at postindictment questioning is rather limited, and substantially different from the attorney's role in later phases of criminal proceedings. At trial, an accused needs an attorney to perform several varied functions—some of which are entirely beyond even the most intelligent layman. Yet during postindictment questioning, a lawyer's role is rather unidimensional: largely limited to advising his client as to what questions to answer and which ones to decline to answer.

We discuss this point in greater detail below. See Part II–C, *infra*.

See n. 8, *infra*. Under close questioning on this same point at argument, petitioner likewise failed to suggest any meaningful additional information that he should have been, but was not, provided in advance of his decision to waive his right to counsel.[7] The discussions found in favorable court decisions, on which petitioner relies, are similarly lacking.[8]

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[7] Representative excerpts from the relevant portions of argument include the following:

"QUESTION: [Petitioner] . . . was told that he had a right to counsel.

"MR. HONCHELL [petitioner's counsel]: He was told—the word 'counsel' was used. He was told he had a right to counsel. But not through information by which it would become meaningful to him, because the method that was used was not designed to alert the accused to the Sixth Amendment rights to counsel. . . .

"QUESTION: . . . You mean they should have said you have a Sixth Amendment right to counsel instead of just, you have a right to counsel?

"He knew he had a right to have counsel present before [he] made the confession. Now, what in addition did he have to know to make the waiver an intelligent one?

"MR. HONCHELL: He had to meaningfully know he had a Sixth Amendment right to counsel present because—

"QUESTION: What is the difference between meaningfully knowing and knowing?

"MR. HONCHELL: Because the warning here used did not convey or express what counsel was intended to do for him after indictment.

"QUESTION: So then you say . . . [that] he would have had to be told more about what counsel would do for him after indictment before he could intelligently waive?

"MR. HONCHELL: That there is a right to counsel who would act on his behalf and represent him.

. . . . .

"QUESTION: Well, okay. So it should have said, in addition to saying counsel, counsel who would act on your behalf and represent you? That would have been the magic solution?

"MR. HONCHELL: That is a possible method, yes." Tr. of Oral Arg. 7–8.

We do not believe that adding the words "who would act on your behalf and represent you" in Sixth Amendment cases would provide any meaningful improvement in the *Miranda* warnings. Cf. *Brewer* v. *Williams*, 430 U. S., at 435–436, n. 5 (WHITE, J., dissenting).

[8] Even those lower court cases which have suggested that something beyond *Miranda* warnings is—or may be—required before a Sixth Amend-

As a general matter, then, an accused who is admonished with the warnings prescribed by this Court in *Miranda*, 384 U. S., at 479, has been sufficiently apprised of the nature of his Sixth Amendment rights, and of the consequences of abandoning those rights, so that his waiver on this basis will be considered a knowing and intelligent one.[9] We feel that

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ment waiver can be considered "knowing and intelligent" have failed to suggest just what this "something more" should be. See, *e. g.*, *Felder* v. *McCotter*, 765 F. 2d 1245, 1250 (CA5 1985); *Robinson* v. *Percy*, 738 F. 2d 214, 222 (CA7 1984); *Fields* v. *Wyrick*, 706 F. 2d 879, 880–881 (CA8 1983).

An exception to this is the occasional suggestion that, in addition to the *Miranda* warnings, an accused should be informed that he has been indicted before a postindictment waiver is sought. See, *e. g.*, *United States* v. *Mohabir*, 624 F. 2d 1140, 1150 (CA2 1980); *United States* v. *Payton*, 615 F. 2d 922, 924–925 (CA1), cert. denied, 446 U. S. 969 (1980). Because, in this case, petitioner concedes that he was so informed, see Brief for Petitioner 3, we do not address the question whether or not an accused must be told that he has been indicted before a postindictment Sixth Amendment waiver will be valid. Nor do we even pass on the desirability of so informing the accused—a matter that can be reasonably debated. See, *e. g.*, Tr. of Oral Arg. 24.

Beyond this, only one Court of Appeals—the Second Circuit—has adopted substantive or procedural requirements (in addition to *Miranda*) that must be completed before a Sixth Amendment waiver can be effectuated for postindictment questioning. See *United States* v. *Mohabir*, 624 F. 2d, at 1150–1153. As have a majority of the Courts of Appeals, we reject *Mohabir*'s holding that some "additional" warnings or discussions with an accused are required in this situation, or that any waiver in this context can only properly be made before a "neutral . . . judicial officer." *Ibid.*

[9] This does not mean, of course, that all Sixth Amendment challenges to the conduct of postindictment questioning will fail whenever the challenged practice would pass constitutional muster under *Miranda*. For example, we have permitted a *Miranda* waiver to stand where a suspect was not told that his lawyer was trying to reach him during questioning; in the Sixth Amendment context, this waiver would not be valid. See *Moran* v. *Burbine*, 475 U. S., at 424, 428. Likewise a surreptitious conversation between an undercover police officer and an unindicted suspect would not give rise to any *Miranda* violation as long as the "interrogation" was not in a custodial setting, see *Miranda*, 384 U. S., at 475; however, once the

our conclusion in a recent Fifth Amendment case is equally apposite here: "Once it is determined that a suspect's decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer, and that he was aware of the State's intention to use his statements to secure a conviction, the analysis is complete and the waiver is valid as a matter of law." See *Moran* v. *Burbine*, 475 U. S., at 422–423.

C

We consequently reject petitioner's argument, which has some acceptance from courts and commentators,[10] that since "the sixth amendment right [to counsel] is far superior to that of the fifth amendment right" and since "[t]he greater the right the greater the loss from a waiver of that right," waiver of an accused's Sixth Amendment right to counsel should be "more difficult" to effectuate than waiver of a suspect's Fifth Amendment rights. Brief for Petitioner 23. While our cases have recognized a "difference" between the Fifth Amendment and Sixth Amendment rights to counsel, and the "policies" behind these constitutional guarantees,[11] we have never suggested that one right is "superior" or "greater" than the other, nor is there any support in our cases for the notion that be-

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accused is indicted, such questioning would be prohibited. See *United States* v. *Henry*, 447 U. S. 264, 273, 274–275 (1980).

Thus, because the Sixth Amendment's protection of the attorney-client relationship—"the right to rely on counsel as a 'medium' between [the accused] and the State"—extends beyond *Miranda*'s protection of the Fifth Amendment right to counsel, see *Maine* v. *Moulton*, 474 U. S., at 176, there will be cases where a waiver which would be valid under *Miranda* will not suffice for Sixth Amendment purposes. See also *Michigan* v. *Jackson*, 475 U. S., at 632.

[10] See, *e. g.*, *United States* v. *Mohabir*, *supra*, at 1149–1152; Note, Proposed Requirements for Waiver of the Sixth Amendment Right to Counsel, 82 Colum. L. Rev. 363, 372 (1982).

[11] See, *e. g.*, *Michigan* v. *Jackson*, *supra*, at 633, n. 7; *Rhode Island* v. *Innis*, 446 U. S. 291, 300, n. 4 (1980).

cause a Sixth Amendment right may be involved, it is more difficult to waive than the Fifth Amendment counterpart.

Instead, we have taken a more pragmatic approach to the waiver question—asking what purposes a lawyer can serve at the particular stage of the proceedings in question, and what assistance he could provide to an accused at that stage—to determine the scope of the Sixth Amendment right to counsel, and the type of warnings and procedures that should be required before a waiver of that right will be recognized.

At one end of the spectrum, we have concluded there is no Sixth Amendment right to counsel whatsoever at a postindictment photographic display identification, because this procedure is not one at which the accused "require[s] aid in coping with legal problems or assistance in meeting his adversary." See *United States* v. *Ash*, 413 U. S. 300, 313–320 (1973). At the other extreme, recognizing the enormous importance and role that an attorney plays at a criminal trial, we have imposed the most rigorous restrictions on the information that must be conveyed to a defendant, and the procedures that must be observed, before permitting him to waive his right to counsel at trial. See *Faretta* v. *California*, 422 U. S. 806, 835–836 (1975); cf. *Von Moltke* v. *Gillies*, 332 U. S. 708, 723–724 (1948). In these extreme cases, and in others that fall between these two poles, we have defined the scope of the right to counsel by a pragmatic assessment of the usefulness of counsel to the accused at the particular proceeding, and the dangers to the accused of proceeding without counsel. An accused's waiver of his right to counsel is "knowing" when he is made aware of these basic facts.

Applying this approach, it is our view that whatever warnings suffice for *Miranda*'s purposes will also be sufficient in the context of postindictment questioning. The State's decision to take an additional step and commence formal adversarial proceedings against the accused does not substantially increase the value of counsel to the accused at questioning, or expand the limited purpose that an attorney serves when the

accused is questioned by authorities. With respect to this inquiry, we do not discern a substantial difference between the usefulness of a lawyer to a suspect during custodial interrogation, and his value to an accused at postindictment questioning.[12]

Thus, we require a more searching or formal inquiry before permitting an accused to waive his right to counsel at trial than we require for a Sixth Amendment waiver during postindictment questioning—*not* because postindictment questioning is "less important" than a trial (the analysis that petitioner's "hierarchical" approach would suggest)—but because the full "dangers and disadvantages of self-representation," *Faretta*, *supra*, at 835, during questioning are less substantial and more obvious to an accused than they are at trial.[13] Because the role of counsel at questioning is relatively simple and limited, we see no problem in having a waiver procedure at that stage which is likewise simple and limited. So long as the accused is made aware of the "dangers and disadvantages

[12] We note, incidentally, that in the *Miranda* decision itself, the analysis and disposition of the waiver question relied on this Court's decision in *Johnson* v. *Zerbst*, 304 U. S. 458 (1938)—a *Sixth* Amendment waiver case. See *Miranda*, 384 U. S., at 475.

From the outset, then, this Court has recognized that the waiver inquiry focuses more on the lawyer's role during such questioning, rather than the particular constitutional guarantee that gives rise to the right to counsel at that proceeding. See *ibid.*; see also *Moran* v. *Burbine*, 475 U. S., at 421. Thus, it should be no surprise that we now find a strong similarity between the level of knowledge a defendant must have to waive his Fifth Amendment right to counsel, and the protection accorded to Sixth Amendment rights. See Comment, Constitutional Law—Right to Counsel, 49 Geo. Wash. L. Rev. 399, 409 (1981).

[13] As discussed above, see n. 6, *supra*, an attorney's role at questioning is relatively limited. But at trial, counsel is required to help even the most gifted layman adhere to the rules of procedure and evidence, comprehend the subtleties of *voir dire*, examine and cross-examine witnesses effectively (including the accused), object to improper prosecution questions, and much more. Cf., *e. g.*, 1 Bench Book for United States District Court Judges 1.02–2—1.02–5 (3d ed. 1986); *McDowell* v. *United States*, 484 U. S. 980 (1987) (WHITE, J., dissenting from denial of certiorari).

of self-representation" during postindictment questioning, by use of the *Miranda* warnings, his waiver of his Sixth Amendment right to counsel at such questioning is "knowing and intelligent."

III

Before confessing to the murder of James Jackson, petitioner was meticulously informed by authorities of his right to counsel, and of the consequences of any choice not to exercise that right. On two separate occasions, petitioner elected to forgo the assistance of counsel, and speak directly to officials concerning his role in the murder. Because we believe that petitioner's waiver of his Sixth Amendment rights was "knowing and intelligent," we find no error in the decision of the trial court to permit petitioner's confessions to be used against him. Consequently, the judgment of the Illinois Supreme Court is

Affirmed.

JUSTICE BLACKMUN, dissenting.

I agree with most of what JUSTICE STEVENS says in his dissenting opinion, *post*, p. 301. I, however, merely would hold that after formal adversary proceedings against a defendant have been commenced, the Sixth Amendment mandates that the defendant not be "'subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.'" *Michigan* v. *Jackson*, 475 U. S. 625, 626 (1986), quoting *Edwards* v. *Arizona*, 451 U. S. 477, 484–485 (1981).

The Court's majority concludes, *ante*, at 290–291: "The fact that petitioner's Sixth Amendment right came into existence with his indictment . . . does not distinguish him from the preindictment interrogatee whose right to counsel is in existence and available for his exercise while he is questioned." I must disagree. "[W]hen the Constitution grants protection against criminal proceedings without the assistance of coun-

sel, counsel must be furnished whether or not the accused requested the appointment of counsel." *Carnley* v. *Cochran*, 369 U. S. 506, 513 (1962) (internal quotations omitted). In my view, the Sixth Amendment does not allow the prosecution to take undue advantage of any gap between the commencement of the adversary process and the time at which counsel is appointed for a defendant.

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

The Court should not condone unethical forms of trial preparation by prosecutors or their investigators. In civil litigation it is improper for a lawyer to communicate with his or her adversary's client without either notice to opposing counsel or the permission of the court.[1] An attempt to obtain evidence for use at trial by going behind the back of one's adversary would be not only a serious breach of professional ethics but also a manifestly unfair form of trial practice. In the criminal context, the same ethical rules apply and, in my opinion, notions of fairness that are at least as demanding should also be enforced.

After a jury has been empaneled and a criminal trial is in progress, it would obviously be improper for the prosecutor to conduct a private interview with the defendant for the pur-

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[1] Disciplinary Rule 7–104 of the ABA Model Code of Professional Responsibility (1982) provides in relevant part:

"(A) During the course of his representation of a client a lawyer shall not:

"(1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so."

Likewise, Rule 4.2 of the ABA Model Rules of Professional Conduct (1984) provides:

"In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so."

pose of obtaining evidence to be used against him at trial. By "private interview" I mean, of course, an interview initiated by the prosecutor, or his or her agents, without notice to the defendant's lawyer and without the permission of the court. Even if such an interview were to be commenced by giving the defendant the five items of legal advice that are mandated by *Miranda*, see *ante*, at 288, n. 1, I have no doubt that this Court would promptly and unanimously condemn such a shabby practice. As our holding in *Michigan* v. *Jackson*, 475 U. S. 625 (1986), suggests, such a practice would not simply constitute a serious ethical violation, but would rise to the level of an impairment of the Sixth Amendment right to counsel.[2]

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[2] In *Jackson*, we held that "if police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid." 475 U. S., at 636. In that case we held the waiver invalid even though the appointed law firm had not yet received notice of the appointment and the defendant had not yet been informed that a law firm had been appointed to represent him. *Id.*, at 627.

Similarly, our holdings in *Massiah* v. *United States*, 377 U. S. 201 (1964), *United States* v. *Henry*, 447 U. S. 264 (1980), and *Maine* v. *Moulton*, 474 U. S. 159 (1985), suggest that law enforcement personnel may not bypass counsel in favor of direct communications with an accused. In each of these cases, the government engaged in secret attempts to elicit incriminating statements from an indicted suspect through the use of government informants. Yet, the Court's analysis does not turn primarily upon the covert nature of the interrogation. See *Brewer* v. *Williams*, 430 U. S. 387, 400 (1977) ("That the incriminating statements were elicited surreptitiously in the *Massiah* case, and otherwise here, is constitutionally irrelevant"). Nor does the finding of a Sixth Amendment violation appear to turn upon the absence of a waiver, which, of course, could not have been obtained given the surreptitious nature of the attempts to elicit incriminating statements. But cf. *Jackson*, 475 U. S., at 641, n. 4 (REHNQUIST, J., dissenting). As the Court wrote in *Moulton:*

"Once the right to counsel has attached and been asserted, the State must of course honor it. This means more than simply that the State cannot prevent the accused from obtaining the assistance of counsel. The Sixth Amendment also imposes on the State an affirmative obligation to

The question that this case raises, therefore, is at what point in the adversary process does it become impermissible for the prosecutor, or his or her agents, to conduct such private interviews with the opposing party? Several alternatives are conceivable: when the trial commences, when the defendant has actually met and accepted representation by his or her appointed counsel, when counsel is appointed, or when the adversary process commences. In my opinion, the Sixth Amendment right to counsel demands that a firm and unequivocal line be drawn at the point at which adversary proceedings commence.

In prior cases this Court has used strong language to emphasize the significance of the formal commencement of adversary proceedings. Such language has been employed to explain decisions denying the defendant the benefit of the protection of the Sixth Amendment in preindictment settings, but an evenhanded interpretation of the Amendment would support the view that additional protection should automatically attach the moment the formal proceed-

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respect and preserve the accused's choice to seek this assistance. We have on several occasions been called upon to clarify the scope of the State's obligation in this regard, and have made clear that, at the very least, the prosecutor and police have an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel." 474 U. S., at 170–171 (footnote omitted).

See also *Henry*, 447 U. S., at 274 ("By intentionally creating a situation likely to induce Henry to make incriminating statements without the assistance of counsel, the Government violated Henry's Sixth Amendment right to counsel") (footnote omitted); *Massiah*, 377 U. S., at 206 ("We hold that the petitioner was denied the basic protections of [the Sixth Amendment] guarantee when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel"). I think it clear that an *ex parte* communication between a prosecutor, or his or her agents, and a represented defendant—regardless of whether the accused has received *Miranda* warnings—can only be viewed as an attempt to "circumven[t]" and "dilut[e] the protection afforded by the right to counsel." *Moulton*, 474 U. S., at 171.

ings begin. One such example is *Kirby* v. *Illinois*, 406 U. S. 682 (1972), in which the Court concluded that the general rule requiring the presence of counsel at pretrial, lineup identifications, see *United States* v. *Wade*, 388 U. S. 218 (1967); *Gilbert* v. *California*, 388 U. S. 263 (1967), should not extend to protect custodial defendants not yet formally charged. Justice Stewart's plurality opinion explained the significance of the formal charge:

> "The initiation of judicial criminal proceedings is far from a mere formalism. It is the starting point of our whole system of adversary criminal justice. For it is only then that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law. It is this point, therefore, that marks the commencement of the 'criminal prosecutions' to which alone the explicit guarantees of the Sixth Amendment are applicable. See *Powell* v. *Alabama*, 287 U. S., at 66–71; *Massiah* v. *United States*, 377 U. S. 201; *Spano* v. *New York*, 360 U. S. 315, 324 (Douglas, J., concurring)." 406 U. S., at 689–690 (footnote omitted).

Similarly, in *United States* v. *Gouveia*, 467 U. S. 180 (1984), we relied upon the significance of the absence of a formal charge in concluding that the Sixth Amendment does not require the appointment of counsel for indigent prison inmates confined in administrative detention while authorities investigate their possible involvement in criminal activity. Again the Court noted that "given the plain language of the Amendment and its purpose of protecting the unaided layman at critical confrontations with his adversary, our conclusion that the right to counsel attaches at the initiation of adversary ju-

dicial criminal proceedings 'is far from a mere formalism.' *Kirby* v. *Illinois*, 406 U. S., at 689." *Id.*, at 189.

Most recently, in *Moran* v. *Burbine*, 475 U. S. 412 (1986), the Court upheld a waiver of the right to counsel in a pretrial context even though the waiver "would not be valid" if the same situation had arisen after indictment, see *ante*, at 296–297, n. 9. In the *Moran* opinion, the Court explained:

> "It is clear, of course, that, absent a valid waiver, the defendant has the right to the presence of an attorney during any interrogation occurring after the first formal charging proceeding, the point at which the Sixth Amendment right to counsel initially attaches. *United States* v. *Gouveia*, 467 U. S. 180, 187 (1984); *Kirby* v. *Illinois*, 406 U. S. 682, 689 (1972) (opinion of Stewart, J.). See *Brewer* v. *Williams*, 430 U. S., at 400–401. And we readily agree that once the right *has* attached, it follows that the police may not interfere with the efforts of a defendant's attorney to act as a '"medium" between [the suspect] and the State' during the interrogation. *Maine* v. *Moulton*, 474 U. S. 159, 176 (1985); see *Brewer* v. *Williams*, *supra*, at 401, n. 8. The difficulty for respondent is that the interrogation sessions that yielded the inculpatory statements took place *before* the initiation of 'adversary judicial proceedings.' *United States* v. *Gouveia*, *supra*, at 192." 475 U. S., at 428.

Today, however, in reaching a decision similarly favorable to the interest in law enforcement unfettered by process concerns, the Court backs away from the significance previously attributed to the initiation of formal proceedings. In the majority's view, the purported waiver of counsel in this case is properly equated with that of an unindicted suspect. Yet, as recognized in *Kirby*, *Gouveia*, and *Moran*, important differ-

ences separate the two.[3] The return of an indictment, or like instrument, substantially alters the relationship between the state and the accused. Only after a formal accusation has "the government . . . committed itself to prosecute, and only then [have] the adverse positions of government and defendant . . . solidified." *Kirby*, 406 U. S., at 689. Moreover, the return of an indictment also presumably signals the government's conclusion that it has sufficient evidence to establish a prima facie case. As a result, any further interrogation can only be designed to buttress the government's case; authorities are no longer simply attempting "'to solve a crime.'" *United States* v. *Mohabir*, 624 F. 2d 1140, 1148 (CA2 1980) (quoting *People* v. *Waterman*, 9 N. Y. 2d 561, 565, 175 N. E. 2d 445, 447 (1961)); see also *Moran* v. *Burbine*, 475 U. S., at 430. Given the significance of the initiation of formal proceedings and the concomitant shift in the relationship between the state and the accused, I think it quite wrong to suggest that *Miranda* warnings—or for that

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[3] Other of our prior decisions have also made clear that the return of a formal charge fundamentally alters the relationship between the State and the accused, conferring increased protections upon defendants in their interactions with state authorities. In *Michigan* v. *Jackson*, 475 U. S. 625 (1986), we explained:

"Indeed, after a formal accusation has been made—and a person who had previously been just a 'suspect' has become an 'accused' within the meaning of the Sixth Amendment—the constitutional right to the assistance of counsel is of such importance that the police may no longer employ techniques for eliciting information from an uncounseled defendant that might have been entirely proper at an earlier stage of their investigation. Thus, the surreptitious employment of a cellmate, see *United States* v. *Henry*, 447 U. S. 264 (1980), or the electronic surveillance of conversations with third parties, see *Maine* v. *Moulton*, [474 U. S. 159 (1985)]; *Massiah* v. *United States*, 377 U. S. 201 (1964), may violate the defendant's Sixth Amendment right to counsel even though the same methods of investigation might have been permissible before arraignment or indictment." *Id.*, at 632 (footnote omitted).

See also *Wyrick* v. *Fields*, 459 U. S. 42, 50 (1982) (MARSHALL, J., dissenting).

matter, any warnings offered by an adverse party—provide a sufficient basis for permitting the undoubtedly prejudicial—and, in my view, unfair—practice of permitting trained law enforcement personnel and prosecuting attorneys to communicate with as-of-yet unrepresented criminal defendants.

It is well settled that there is a strong presumption against waiver of Sixth Amendment protections, see *Michigan* v. *Jackson*, 475 U. S., at 633; *Von Moltke* v. *Gillies*, 332 U. S. 708, 723 (1948) (plurality opinion); *Johnson* v. *Zerbst*, 304 U. S. 458, 464 (1938), and that a waiver may only be accepted if made with full awareness of "the dangers and disadvantages of self-representation," *Faretta* v. *California*, 422 U. S. 806, 835 (1975); see also *Adams* v. *United States ex rel. McCann*, 317 U. S. 269, 279 (1942) (accused "may waive his Constitutional right to assistance of counsel if he knows what he is doing and his choice is made with eyes open"). Warnings offered by an opposing party, whether detailed or cursory, simply cannot satisfy this high standard.

The majority premises its conclusion that *Miranda* warnings lay a sufficient basis for accepting a waiver of the right to counsel on the assumption that those warnings make clear to an accused "what a lawyer could 'do for him' during the postindictment questioning: namely, advise [him] to refrain from making any [incriminating] statements." *Ante*, at 294 (footnote omitted).[4] Yet, this is surely a gross understatement of the disadvantage of proceeding without a lawyer and

[4]The majority finds support for its conclusion that *Miranda* warnings provide a sufficient basis for a waiver of the Sixth Amendment right to counsel in "petitioner's inability, in the proceedings before this Court, to articulate with precision what additional information should have been provided to him before he would have been competent to waive his right to counsel." *Ante*, at 294. Additional—although not exhaustive—possible warnings, however, have been articulated. See, *e. g.*, *United States* v. *Callabrass*, 458 F. Supp. 964, 967 (SDNY 1978). Part of the difficulty in fashioning a proper boilerplate set of warnings is that, unlike in the Fifth Amendment context, the information that must be imparted to the accused will vary from case to case as the facts, legal issues, and parties differ.

an understatement of what a defendant must understand to make a knowing waiver.[5] The *Miranda* warnings do not, for example, inform the accused that a lawyer might examine the indictment for legal sufficiency before submitting his or her client to interrogation or that a lawyer is likely to be considerably more skillful at negotiating a plea bargain and that such negotiations may be most fruitful if initiated prior to any interrogation. Rather, the warnings do not even go so far as to explain to the accused the nature of the charges pending against him—advice that a court would insist upon before allowing a defendant to enter a guilty plea with or without the presence of an attorney, see *Henderson* v. *Morgan*, 426 U. S. 637 (1976). Without defining precisely the nature of the inquiry required to establish a valid waiver of the Sixth Amendment right to counsel, it must be conceded that at least minimal advice is necessary—the accused must be told of the "dangers and disadvantages of self-representation."

Yet, once it is conceded that certain advice is required and that after indictment the adversary relationship between the state and the accused has solidified, it inescapably follows

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[5] Respondent, and the United States as *amicus curiae*, argue that the comprehensive inquiry required by *Faretta* v. *California*, 422 U. S. 806 (1975), should not be extended to pretrial waivers because the role of counsel—and conversely the difficulty of proceeding without counsel—is more important at trial. I reject the premise that a lawyer's skills are more likely to sit idle at a pretrial interrogation than at trial. Both events require considerable experience and expertise and I would be reluctant to rank one over the other. Moreover, as we recognized in *Escobedo* v. *Illinois*, 378 U. S. 478 (1964):

"[T]he 'right to use counsel at the formal trial [would be] a very hollow thing [if], for all practical purposes, the conviction is already assured by pretrial examination.' *In re Groban*, 352 U. S. 330, 344 (Black, J., dissenting). 'One can imagine a cynical prosecutor saying: "Let them have the most illustrious counsel, now. They can't escape the noose. There is nothing that counsel can do for them at the trial."' *Ex parte Sullivan*, 107 F. Supp. 514, 517–518." *Id.*, at 487–488 (footnote omitted).

See also *United States* v. *Wade*, 388 U. S. 218, 226 (1967); *Spano* v. *New York*, 360 U. S. 315, 325, 326 (1959) (Douglas, J., concurring).

that a prosecutor may not conduct private interviews with a charged defendant. As at least one Court of Appeals has recognized, there are ethical constraints that prevent a prosecutor from giving legal advice to an uncounseled adversary.[6] Thus, neither the prosecutor nor his or her agents can ethically provide the unrepresented defendant with the kind of advice that should precede an evidence-gathering interview after formal proceedings have been commenced. Indeed, in my opinion even the *Miranda* warnings themselves are a species of legal advice that is improper when given by the prosecutor after indictment.

Moreover, there are good reasons why such advice is deemed unethical, reasons that extend to the custodial, postindictment setting with unequaled strength. First, the offering of legal advice may lead an accused to underestimate the prosecuting authorities' true adversary posture. For an incarcerated defendant—in this case, a 17-year-old who had been in custody for 44 hours at the time he was told of the

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[6] In discussing a suggestion that the prosecutor should supplement the customary *Miranda* warnings in the postindictment setting, the Court of Appeals for the Second Circuit wrote:

"We believe there are strong policy reasons, grounded in ethical considerations, for not adopting the . . . alternative of having the prosecutor give further warnings to the defendant. The government itself points out that a prosecutor 'is, in many senses, an adversary of the defendant, and, as such, is counselled not to give him legal advice'; in support of this proposition, the government cites the ABA Code of Professional Responsibility, DR 7-104(A)(2).[14]

"[14] DR 7–104(A) provides:

"During the course of his representation of a client a lawyer shall not:

"(1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

"(2) Give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client." *United States* v. *Mohabir*, 624 F. 2d 1140, 1152 (1980).

indictment—the assistance of someone to explain why he is being held, the nature of the charges against him, and the extent of his legal rights, may be of such importance as to overcome what is perhaps obvious to most, that the prosecutor is a foe and not a friend. Second, the adversary posture of the parties, which is not fully solidified until formal charges are brought, will inevitably tend to color the advice offered. As hard as a prosecutor might try, I doubt that it is possible for one to wear the hat of an effective adviser to a criminal defendant while at the same time wearing the hat of a law enforcement authority. Finally, regardless of whether or not the accused actually understands the legal and factual issues involved and the state's role as an adversary party, advice offered by a lawyer (or his or her agents) with such an evident conflict of interest cannot help but create a public perception of unfairness and unethical conduct. And as we held earlier this Term, "courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." *Wheat* v. *United States*, 486 U. S. 153, 160 (1988). This interest is a factor that may be considered in deciding whether to override a defendant's waiver of his or her Sixth Amendment right to conflict-free representation, see *ibid.*, and likewise, should be considered in determining whether a waiver based on advice offered by the criminal defendant's adversary is ever appropriate.[7]

In sum, without a careful discussion of the pitfalls of proceeding without counsel, the Sixth Amendment right cannot properly be waived. An adversary party, moreover, cannot adequately provide such advice. As a result, once the right to counsel attaches and the adversary relationship between

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[7] In *Wheat*, we sustained the District Court's decision to reject the defendant's waiver of the right to conflict-free representation even though Wheat, unlike the petitioner, made his decision to waive this right with the assistance of additional counsel, see 486 U. S., at 172 (STEVENS, J., dissenting).

the state and the accused solidifies, a prosecutor cannot conduct a private interview with an accused party without "dilut[ing] the protection afforded by the right to counsel," *Maine* v. *Moulton*, 474 U. S. 159, 171 (1985). Although this ground alone is reason enough to never permit such private interviews, the rule also presents the added virtue of drawing a clear and easily identifiable line at the point between the investigatory and adversary stages of a criminal proceeding. Such clarity in definition of constitutional rules that govern criminal proceedings is important to the law enforcement profession as well as to the private citizen. See *Arizona* v. *Roberson*, 486 U. S. 675 (1988). It is true, of course, that the interest in effective law enforcement would benefit from an opportunity to engage in incommunicado questioning of defendants who, for reasons beyond their control, have not been able to receive the legal advice from counsel to which they are constitutionally entitled. But the Court's singleminded concentration on that interest might also lead to the toleration of similar practices at any stage of the trial. I think it clear that such private communications are intolerable not simply during trial, but at any point after adversary proceedings have commenced.

I therefore respectfully dissent.

TORRES *v.* OAKLAND SCAVENGER CO. ET AL.

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

No. 86–1845. Argued February 23, 1988—Decided June 24, 1988

Petitioner is one of 16 plaintiffs whose complaint seeking intervention in an employment discrimination action against respondent Oakland Scavenger Co. (hereafter respondent) was dismissed by the District Court. On remand following the Court of Appeals' reversal of the dismissal, the District Court granted summary judgment against petitioner on the ground that he had not been named in the notice of appeal to the Court of Appeals, albeit inadvertently. The Court of Appeals affirmed, ruling that exclusion from the notice of appeal constituted a jurisdictional bar.

Held: Failure to file a notice of appeal in accordance with Federal Rule of Appellate Procedure 3(c)'s requirement that the notice "specify the party or parties taking the appeal" presents a jurisdictional bar to the appeal. The Rule's caveat that an appeal "shall not be dismissed for [the notice's] informality of form or title" does not aid petitioner, since his exclusion from the notice constitutes a failure to appeal rather than excusable informality. Nor can petitioner find relief in Rule 2's grant of broad equitable discretion to the courts of appeals, "for good cause shown," to "suspend the requirements . . . of any [Rule]," since Rule 26(b) contains an exception forbidding "enlarg[ing]" Rule 4's mandatory time limits for filing a notice, which would be vitiated if courts could exercise jurisdiction over parties not named in the notice. This reading is supported by the Advisory Committee's Note following Rule 3, and does not contravene *Foman* v. *Davis*, 371 U. S. 178, since, although under that decision a court may construe the Rules liberally and ignore "mere technicalities" in determining compliance, it may not waive the jurisdictional requirements of Rules 3 and 4, even for "good cause shown." Here, petitioner never filed the functional equivalent of a notice of appeal, was not named by implication in the notice that was filed, and did not seek leave to amend the notice within the time limit set by Rule 4. The use of "et al." in the notice was insufficient to notify respondent and the court that petitioner was an appellant or to allow them to determine with certitude whether he should be bound by an adverse judgment or held liable for costs or sanctions. Pp. 314–318.

807 F. 2d 178, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, BLACKMUN, STEVENS, O'CONNOR, and KENNEDY, JJ.,

joined. SCALIA, J., filed an opinion concurring in the judgment, *post*, p. 318. BRENNAN, J., filed a dissenting opinion, *post*, p. 319.

B. V. Yturbide argued the cause and filed briefs for petitioner.

Stephen McKae argued the cause for respondents and filed a brief for respondent Oakland Scavenger Co.

JUSTICE MARSHALL delivered the opinion of the Court.

This case presents the question whether a federal appellate court has jurisdiction over a party who was not specified in the notice of appeal in accordance with Federal Rule of Appellate Procedure 3(c).

I

Petitioner Jose Torres is one of 16 plaintiffs who intervened in an employment discrimination suit against respondent Oakland Scavenger Co. (hereafter respondent) after receiving notice of the action pursuant to a settlement agreement between respondent and the original plaintiffs. In their complaint, the intervenors purported to proceed not only on their own behalf, but also on behalf of all persons similarly situated. On August 31, 1981, the District Court for the Northern District of California dismissed the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim warranting relief. 4 Record, Doc. No. 87. A class had not been certified at the time of the dismissal.

On September 29, 1981, a notice of appeal was filed in the Court of Appeals for the Ninth Circuit. The Court of Appeals reversed the District Court's dismissal and remanded the case for further proceedings. *Bonilla* v. *Oakland Scavenger Co.*, 697 F. 2d 1297 (1982). Both the notice of appeal and the order of the Court of Appeals omitted petitioner's name. It is undisputed that the omission in the notice of appeal was due to a clerical error on the part of a secretary employed by petitioner's attorney.

On remand, respondent moved for partial summary judgment on the ground that the prior judgment of dismissal was final as to petitioner by virtue of his failure to appeal. The

District Court granted respondent's motion. App. to Pet. for Cert. B–1, Civ. Action No. C 75–0060 CAL (ND Cal., Oct. 30, 1985). The Court of Appeals affirmed, judgment order reported at 807 F. 2d 178 (1986), holding that "[u]nless a party is named in the notice of appeal, the appellate court does not have jurisdiction over him." App. to Pet. for Cert. A–4, citing *Farley Transportation Co.* v. *Santa Fe Trail Transportation Co.*, 778 F. 2d 1365, 1368 (CA9 1985).

We granted certiorari to resolve a conflict in the Circuits over whether a failure to file a notice of appeal in accordance with the specificity requirement of Federal Rule of Appellate Procedure 3(c) presents a jurisdictional bar to the appeal.[1] 484 U. S. 894 (1987). We now affirm.

II

Federal Rule of Appellate Procedure 3(c) provides in pertinent part that a notice of appeal "shall specify the party or parties taking the appeal." The Rule was amended in 1979 to add that an appeal "shall not be dismissed for informality of form or title of the notice of appeal." This caveat does not aid petitioner in the instant case. The failure to name a party in a notice of appeal is more than excusable "informality"; it constitutes a failure of that party to appeal.

More broadly, Rule 2 gives courts of appeals the power, for "good cause shown," to "suspend the requirements or provisions of any of these rules in a particular case on application of a party or on its own motion." Rule 26(b), however, contains certain exceptions to this grant of broad equitable dis-

[1] Compare *Farley Transportation Co.* v. *Santa Fe Trail Transportation Co.*, 778 F. 2d 1365, 1368–1370 (CA9 1985) (failure to specify party to appeal is jurisdictional bar); *Covington* v. *Allsbrook*, 636 F. 2d 63, 64 (CA4 1980) (same); *Life Time Doors, Inc.* v. *Walled Lake Door Co.*, 505 F. 2d 1165, 1168 (CA6 1974) (same), with *Ayres* v. *Sears, Roebuck & Co.*, 789 F. 2d 1173, 1177 (CA5 1986) (appeal by party not named in notice of appeal is permitted in limited instances); *Harrison* v. *United States*, 715 F. 2d 1311, 1312–1313 (CA8 1983) (same); *Williams* v. *Frey*, 551 F. 2d 932, 934, n. 1 (CA3 1977) (same).

cretion. The exception pertinent to this case forbids a court to "enlarge" the time limits for filing a notice of appeal, which are prescribed in Rule 4. We believe that the mandatory nature of the time limits contained in Rule 4 would be vitiated if courts of appeals were permitted to exercise jurisdiction over parties not named in the notice of appeal. Permitting courts to exercise jurisdiction over unnamed parties after the time for filing a notice of appeal has passed is equivalent to permitting courts to extend the time for filing a notice of appeal. Because the Rules do not grant courts the latter power, we hold that the Rules likewise withhold the former.

We find support for our view in the Advisory Committee Note following Rule 3:

> "Rule 3 and Rule 4 combine to require that a notice of appeal be filed with the clerk of the district court within the time prescribed for taking an appeal. Because the timely filing of a notice of appeal is 'mandatory and jurisdictional,' *United States* v. *Robinson*, [361 U. S. 220, 224 (1960)], compliance with the provisions of those rules is of the utmost importance." 28 U. S. C. App., p. 467.

This admonition by the Advisory Committee makes no distinction among the various requirements of Rule 3 and Rule 4; rather it treats the requirements of the two Rules as a single jurisdictional threshold. The Advisory Committee's caveat that courts should "dispense with literal compliance in cases in which it cannot fairly be exacted," *ibid.*, is not to the contrary. The examples cited by the Committee make clear that it was referring generally to the kinds of cases later addressed by the 1979 amendment to Rule 3(c), which excuses "informality of form or title" in a notice of appeal.[2] Permitting imperfect but substantial compliance with a technical re-

[2] For example, the Advisory Committee approvingly cited cases permitting a letter from a prisoner to a judge to suffice as a notice of appeal, see *Riffle* v. *United States*, 299 F. 2d 802 (CA5 1962), and permitting the mailing of a notice of appeal to constitute its time of "filing" rather than its receipt by the court, see *Halfen* v. *United States*, 324 F. 2d 52 (CA10 1963).

quirement is not the same as waiving the requirement altogether as a jurisdictional threshold. Our conclusion that the Advisory Committee viewed the requirements of Rule 3 as jurisdictional in nature, although not determinative, is "of weight" in our construction of the Rule. *Mississippi Publishing Corp.* v. *Murphree*, 326 U. S. 438, 444 (1946).

Nor does this Court's decision in *Foman* v. *Davis*, 371 U. S. 178 (1962), compel a contrary construction. In *Foman*, the Court addressed a separate provision of Rule 3(c) requiring that a notice of appeal "designate the judgment, order or part thereof appealed from." Foman was a plaintiff whose complaint was dismissed. She first filed motions in the District Court seeking to vacate the judgment against her and to amend her complaint. While the motions were pending, she filed a notice of appeal from the dismissal. When the District Court denied his motions, Foman filed a second notice of appeal from the denial. The Court of Appeals concluded that the first notice of appeal was premature because of Foman's pending motions, and that the second notice of appeal failed to designate the underlying dismissal as the judgment appealed from. This Court reversed the appellate court's refusal to hear Foman's appeal on the merits of her dismissal, holding that the court should have treated the second notice of appeal as "an effective, although inept, attempt to appeal from the judgment sought to be vacated." *Id.*, at 181.

Foman did not address whether the requirement of Rule 3(c) at issue in that case was jurisdictional in nature; rather, the Court simply concluded that in light of all the circumstances, the Rule had been complied with. We do not dispute the important principle for which *Foman* stands—that the requirements of the rules of procedure should be liberally construed and that "mere technicalities" should not stand in the way of consideration of a case on its merits. *Ibid.* Thus, if a litigant files papers in a fashion that is technically

at variance with the letter of a procedural rule, a court may nonetheless find that the litigant has complied with the rule if the litigant's action is the functional equivalent of what the rule requires. See, *e. g.*, *Houston* v. *Lack*, *ante*, p. 266 (delivery of notice of appeal by *pro se* prisoner to prison authorities for mailing constitutes "filing" within the meaning of Federal Rules of Appellate Procedure 3 and 4). But although a court may construe the Rules liberally in determining whether they have been complied with, it may not waive the jurisdictional requirements of Rules 3 and 4, even for "good cause shown" under Rule 2, if it finds that they have not been met.[3]

Applying these principles to the instant case, we find that petitioner failed to comply with the specificity requirement of Rule 3(c), even liberally construed. Petitioner did not file the functional equivalent of a notice of appeal; he was never named or otherwise designated, however inartfully, in the notice of appeal filed by the 15 other intervenors. Nor did petitioner seek leave to amend the notice of appeal within the time limits set by Rule 4. Thus, the Court of Appeals was correct that it never had jurisdiction over petitioner's appeal.

Petitioner urges that the use of "et al." in the notice of appeal was sufficient to indicate his intention to appeal. We

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[3] In addition to urging that the requirements of Rule 3(c) are not jurisdictional in nature, petitioner advances two other arguments in support of his position, neither of which has merit. First, petitioner argues that courts of appeals should apply "harmless error" analysis to defects in a notice of appeal. This argument misunderstands the nature of a jurisdictional requirement: a litigant's failure to clear a jurisdictional hurdle can never be "harmless" or waived by a court. Second, petitioner argues that refusal to permit him to cure the defect in the original notice of appeal will unfairly permit absent class members, now that the suit has been certified as a class action, to obtain relief from which petitioner is barred. The District Court, however, in granting summary judgment against petitioner, explicitly left open "the issue of whether Mr. Torres can or cannot participate in this litigation as a member of a class, should a class be properly certified." App. to Pet. for Cert. B–4.

cannot agree. The purpose of the specificity requirement of Rule 3(c) is to provide notice both to the opposition and to the court of the identity of the appellant or appellants. The use of the phrase "et al.," which literally means "and others," utterly fails to provide such notice to either intended recipient. Permitting such vague designation would leave the appellee and the court unable to determine with certitude whether a losing party not named in the notice of appeal should be bound by an adverse judgment or held liable for costs or sanctions. The specificity requirement of Rule 3(c) is met only by some designation that gives fair notice of the specific individual or entity seeking to appeal.

We recognize that construing Rule 3(c) as a jurisdictional prerequisite leads to a harsh result in this case, but we are convinced that the harshness of our construction is "imposed by the legislature and not by the judicial process." *Schiavone* v. *Fortune*, 477 U. S. 21, 31 (1986) (construing Federal Rule of Civil Procedure 15(c) in a similarly implacable fashion).

The judgment of the Court of Appeals is affirmed.

It is so ordered.

JUSTICE SCALIA, concurring in the judgment.

I agree with the judgment of the Court, but I do not believe that the principles set forth in its opinion produce it. If it is the fact that the requirements of the rules of procedure should be "liberally construed," that "'mere technicalities' should not stand in the way of consideration of a case on its merits," and that a rule is complied with if "the litigant's action is the functional equivalent of what the rule requires," *ante*, at 316, it would seem to me that a caption listing the first party to the case and then adding "et al." is enough to suggest that all parties are taking the appeal; and that the later omission of one of the parties in listing the appellants can, "liberally viewed," be deemed to create no more than an

ambiguity which does not destroy the effect of putting the appellee on notice.

The principle that "mere technicalities" should not stand in the way of deciding a case on the merits is more a prescription for ignoring the Federal Rules than a useful guide to their construction and application. By definition all rules of procedure are technicalities; sanction for failure to comply with them always prevents the court from deciding where justice lies in the particular case, on the theory that securing a fair and orderly process enables more justice to be done in the totality of cases. It seems to me, moreover, that we should seek to interpret the rules neither liberally nor stingily, but only, as best we can, according to their apparent intent. Where that intent is to provide leeway, a permissive construction is the right one; where it is to be strict, a permissive construction is wrong. Thus, the very first of the Rules of Civil Procedure does not prescribe that they are to be "liberally construed," but rather that they are to be "construed to secure the just, speedy, and inexpensive determination of every action." Fed. Rule Civ. Proc. 1.

The Appellate Rule at issue here requires the appellant to "specify the party or parties taking the appeal," Fed. Rule App. Proc. 3(c), which suggests to me more than just a residual "et al." Moreover, that it was thought necessary to specify that "informality of form or title" would not entail dismissal, *ibid.*, suggests that a strict application was generally contemplated. I concur in today's judgment, therefore, for essentially the same reasons that I dissented from the judgment in *Houston* v. *Lack*, *ante*, p. 266, which the Court appropriately cites to support its reasoning in the present case, but which in my view stands in stark contrast to its conclusion.

JUSTICE BRENNAN, dissenting.

"The Federal Rules," we have previously observed, "reject the approach that pleading is a game of skill in which one mis-

step by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Foman* v. *Davis*, 371 U. S. 178, 181–182 (1962). Although the Court today pays lip-service to the spirit of liberality animating the Federal Rules, it nevertheless holds that the Court of Appeals below lacked jurisdiction over petitioner's suit because his lawyer's secretary inadvertently omitted his name from the notice of appeal filed on behalf of him and his 15 coplaintiffs. Eschewing any inquiry into whether this omission was excusable or whether respondent suffered any prejudice as a result of it, the Court concludes that this "misstep by counsel" decides the outcome of petitioner's case because compliance with the party-specification requirement of Federal Rule of Appellate Procedure 3(c) is a jurisdictional prerequisite to appellate review. Nothing in the Federal Rules, however, compels such a construction of Rule 3(c), which I believe to be wholly at odds with the liberal policies underlying those Rules, as well as our own prior construction of them.

As the Court notes, Federal Rule of Appellate Procedure 2 permits the courts of appeals, upon a showing of good cause, to "suspend the requirements or provisions of any of these rules in a particular case," except as otherwise provided by Rule 26(b). Rule 26(b), in turn, permits appellate courts to enlarge the time established by the Rules for any act, except the "time for filing a notice of appeal" set out in Rule 4. On their face, then, Rules 2 and 26(b) together confer broad equitable discretion on the courts of appeals to excuse compliance with the requirements of any and all Rules save the time limitations of Rule 4. Notably, neither mentions Rule 3(c) as falling outside the purview of this broad equitable power.

In the face of this express policy favoring a liberal construction of all the Rules except the timeliness requirements of Rule 4, the Court nevertheless holds that Rule 3(c)'s party-

specification requirement must be deemed jurisdictional, for the "mandatory nature of the time limits contained in Rule 4 would be vitiated if courts of appeals were permitted to exercise jurisdiction over parties not named in the notice of appeal." *Ante*, at 315. This unsupported assertion, however, is only correct if we assume the answer to the question at issue here, *i. e.*, that "[t]he failure to name a party in a notice of appeal . . . constitutes a failure of that party to appeal." *Ante*, at 314. If, on the other hand, we assume, as several Courts of Appeals have, that an unnamed party effectively appeals where a notice is timely filed and the unnamed party's intention to join in the appeal is clear to all and prejudicial to none, see, *e. g.*, *Harrison* v. *United States*, 715 F. 2d 1311, 1312–1313 (CA8 1983); *Williams* v. *Frey*, 551 F. 2d 932, 934, n. 1 (CA3 1977), then Rule 4's mandatory time limitations would remain inviolate. The Court itself acknowledges that a "litigant's action [may be] the functional equivalent of what the rule requires." *Ante*, at 317. It is obvious, however, that the initial determination whether a given act satisfies any test of "functional equivalence" depends not at all on the time limitations prescribed by Rule 4; it is only *after* a court decides that a given act is not the functional equivalent of filing a notice of appeal that the necessity of amending any notice that was filed, and hence the necessity of enlarging the time requirements of Rule 4, arise.

The Court purports to find support for its jurisdictional construction of Rule 3(c) in the Advisory Committee Notes, which explain that Rules 3 and 4 "combine to require that a notice of appeal be filed with the clerk of the district court within the time prescribed for taking an appeal," and that "[b]ecause the timely filing of a notice of appeal is mandatory and jurisdictional . . . compliance with the provisions of those rules is of the utmost importance." 28 U. S. C. App., p. 467. Arguing that this admonition does not differentiate

between the various requirements of the two Rules, the Court concludes that all the requirements of both form "a single jurisdictional threshold." *Ante*, at 315. I believe the Advisory Committee Note lends no support to the result the Court reaches today. The comment itself says only that the "timely filing" requirement is mandatory and jurisdictional; significantly, the Advisory Committee stopped short of describing Rules 3 and 4 as jurisdictional in their entirety. Moreover, it is apparent from the context that the Advisory Committee did not intend to incorporate by reference every requirement of the two Rules, but rather, only those provisions discussed in the first sentence of the comment. Rule 3(a) provides that an appeal "shall be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4." It is thus this provision—which is tracked nearly word for word in the Advisory Committee Note—and not every enumerated requirement of Rule 3, that combines with Rule 4 to form the jurisdictional requirement "that a notice of appeal be filed with the clerk of the district court within the time prescribed for taking an appeal."

The Court's broader reading of the Note, and its jurisdictional construction of the Rule, are flatly inconsistent with *Foman* v. *Davis*, *supra*, where we held that Rule 3 (c)'s judgment-designation requirement is not jurisdictional. That requirement, which immediately precedes the party-specification provision, states that a notice of appeal "shall designate the judgment, order, or part thereof appealed from." Although the Court today suggests that in *Foman* we simply forgave mere technical noncompliance with the Rule, see *ante*, at 316, the lower court in that case expressly stated that the second notice of appeal in question made no reference to the judgment for which review was sought, and that the first notice of appeal was premature and thus void. *Foman* v. *Davis*, 292 F. 2d 85, 87 (CA1 1961). Because we

affirmed the lower court's disposition of the first notice, the lack of a designated judgment in the second notice was no more nor less a "mere technicality" than the absence of petitioner's name from the notice of appeal filed in this case: both the notice here and in *Foman* omitted precisely the information required by Rule 3(c). In *Foman*, we nevertheless held that the Court of Appeals should have "*treated* the [second notice of] appeal . . . as an effective, although inept, attempt to appeal" because when the two ineffective notices were read together, "petitioner's *intention to seek review* . . . was manifest." 371 U. S., at 181 (emphasis added).

Petitioner Torres makes precisely the same claim here, arguing that appellate counsel's presentation of the case—in which all issues in the case were treated as common to all the plaintiffs, named and unnamed in the District Court—and the inclusion of 15 of the 16 named intervenors in the notice of appeal, made his intention to join in the appeal manifest. The Court, however, simply dismisses this contention by asserting that "petitioner failed to comply with the specificity requirement of Rule 3(c)"; failed to "file the functional equivalent of a notice of appeal"; and was "never named or otherwise designated, however inartfully, in the notice of appeal filed by the 15 other intervenors." *Ante*, at 317. These statements, however, are wholly conclusional, and in no way distinguish petitioner's omission from that involved in *Foman*.

In 1979, Rule 3(c) was amended to provide that "[a]n appeal shall not be dismissed for informality of form or title of the notice of appeal." The Advisory Committee Note accompanying this amendment explained that "so long as the *function* of notice is met by the filing of a paper indicating an intention to appeal, the substance of the rule has been complied with." Advisory Committee Note to Rule 3, 28 U. S. C. App., p. 467 (emphasis added). The function of a notice of appeal, of course, is to notify the court of appeals

and the opposing party that an appeal is being taken, see *Cobb* v. *Lewis*, 488 F. 2d 41, 45 (CA5 1974) (cited with approval in Advisory Committee Note to Rule 3), which in turn ensures that the appellees are not prejudiced in any way by the appeal and that the appellants have made the requisite commitment to assuming the obligations of the appeal, particularly the obligation to pay any costs and fees that the appellate court might ultimately assess. These are factual inquiries that the courts of appeals are entirely capable of undertaking, and that better serve the purposes supposedly advanced by the bright-line jurisdictional rule the Court announces today.*

After today's ruling, appellees will be able to capitalize on mere clerical errors and secure the dismissal of unnamed appellants no matter how meritorious the appellant's claims and no matter how obvious the appellant's intention to seek appellate review, and courts of appeals will be powerless to correct even the most manifest of resulting injustices. The Court identifies no policy supporting, let alone requiring, this harsh rule, which I believe is patently inconsistent not only with the liberal spirit underlying the Federal Rules, but with Rule 2's express authorization permitting courts of appeals to forgive noncompliance where good cause for such forgiveness

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*Although the Court's jurisdictional approach to the specificity requirement provides no greater protection to litigants than the equitable approach adopted by several Courts of Appeals, like all bright-line tests its application is more certain and predictable. This advantage, however, is of marginal significance inasmuch as few courts have found the notice function satisfied where a party's name is omitted, and those that have have acknowledged that it is the exceptional case in which such a finding is even possible. See *Harrison* v. *United States*, 715 F. 2d 1311, 1313 (CA8 1983) ("[T]his is a very rare but appropriate case for a liberal construction of FRAP 3"); *Williams* v. *Frey*, 551 F. 2d 932, 934, n. 1 (CA3 1977) ("Under most circumstances, the designation of the party appellant in the notice of appeal will govern"). Certainly no responsible lawyer would intentionally omit a party's name in reliance on an equitable construction of the notice of appeal.

is shown. Instead, the Court simply announces by fiat that the omission of a party's name from a notice of appeal can never serve the function of notice, thereby converting what is in essence a factual question into an inflexible rule of convenience. Because the Court has failed to demonstrate that the notice filed in this case failed to apprise the court below or respondents that petitioner intended to join in the appeal taken by his 15 coplaintiffs, I would reverse the case and remand for the necessary factual inquiry.

Accordingly, I dissent.

UNITED STATES *v.* TAYLOR

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

No. 87–573. Argued April 25,1988—Decided June 24, 1988

The Speedy Trial Act of 1974 requires that an indictment be dismissed if the defendant is not brought to trial within a 70-day period, and requires the court, in determining whether to dismiss with or without prejudice, to "consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances . . . which led to the dismissal; and the impact of a reprosecution on the administration of [the Act and] of justice." 18 U. S. C. § 3162(a)(2). After respondent failed to appear for his trial on federal narcotics charges, which was scheduled to commence in the Federal District Court in Seattle one day prior to the expiration of the 70-day period, 15 days not otherwise excludable under the Act elapsed between his subsequent arrest in California and the issuance by a federal grand jury in Seattle of a superseding indictment. Respondent's return to Seattle for trial during this period was delayed for various reasons, including slow processing by the Government. The District Court granted respondent's § 3162(a)(2) motion to dismiss with prejudice, finding that, although respondent was charged with serious offenses, the Government's "lackadaisical behavior" was inexcusable and that the administration of the Act and of justice required a stern response. The Court of Appeals affirmed, concluding that, in light of the case's "peculiar circumstances," the lower court had not abused its discretion in dismissing with prejudice in order to send a strong message to the Government that the Act must be observed.

Held:

1. The Act establishes a framework which guides district court determinations of whether to dismiss with or without prejudice, and appellate court review of such determinations. Pp. 332–337.

(a) Section 3162(a)(2)'s language establishes that, in determining whether to dismiss with or without prejudice, courts must consider at least the three factors specified in the section. The Act's legislative history indicates that prejudice to the defendant should also be considered before reprosecution is barred, and that the decision to dismiss with or without prejudice is left to the district court's guided discretion, with neither remedy having priority. Pp. 332–335.

(b) Section 3162(a)(2) requires the district court to consider carefully the specified factors as applied to the particular case and to articu-

late clearly their effect in rendering its decision. On appeal, the reviewing court must undertake a more substantive scrutiny than would be the case absent legislatively identified standards, in order to ascertain whether the district court has properly applied the law to the facts or whether it has ignored or slighted a factor that Congress has deemed pertinent to the choice of remedy. When the statutory factors have been properly considered, and supporting factual findings are not clearly in error, the district court's judgment of how opposing considerations balance should not be lightly disturbed. Pp. 335–337.

2. Analysis of the record within the above framework establishes that the District Court abused its discretion in deciding to bar reprosecution, and that the Court of Appeals erred in holding otherwise. The District Court did not explain how it factored in the seriousness of the offenses with which respondent was charged. Rather, the court relied heavily on its unexplained characterization of the Government conduct as "lackadaisical," while failing to consider other relevant facts and circumstances leading to dismissal. Seemingly ignored were the brevity of the delay in bringing respondent to trial and the consequential lack of prejudice to respondent, as well as respondent's own illicit contribution to the delay in failing to appear for trial. The court's desire to send a strong message to the Government that unexcused delays will not be tolerated is by definition implicated in almost every case under the Act, and, standing alone, does not suffice to justify barring reprosecution in light of all the other circumstances. Pp. 337–343.

821 F. 2d 1377, reversed.

BLACKMUN, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, O'CONNOR, and KENNEDY, JJ., joined, and in all but Part II–A of which SCALIA, J., joined. WHITE, J., filed a concurring opinion, *post*, p. 344. SCALIA, J., filed an opinion concurring in part, *post*, p. 344. STEVENS, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 346.

Edwin S. Kneedler argued the cause for the United States. On the briefs were *Solicitor General Fried*, *Assistant Attorney General Weld*, *Deputy Solicitor General Bryson*, and *Harriet S. Shapiro*.

Ian G. Loveseth, by appointment of the Court, 485 U. S. 902, argued the cause and filed a brief for respondent.

JUSTICE BLACKMUN delivered the opinion of the Court.

This case requires us to consider the bounds of a district court's discretion to choose between dismissal with and with-

out prejudice, as a remedy for a violation of the Speedy Trial Act of 1974, as amended, 18 U. S. C. § 3161 *et seq.* (1982 ed. and Supp. IV).

I

On July 25, 1984, respondent Larry Lee Taylor was indicted by a federal grand jury on charges of conspiracy to distribute cocaine and possession of 400 grams of cocaine with intent to distribute. His trial was scheduled to commence in the United States District Court for the Western District of Washington in Seattle on November 19, 1984, the day prior to the expiration of the 70-day period within which the Act requires the Government to bring an indicted individual to trial. See 18 U. S. C. § 3161(c)(1).[1] Respondent failed to appear for trial, and a bench warrant was issued for his arrest. On February 5, 1985, respondent was arrested by local police officers in San Mateo County, Cal., on state charges that subsequently were dismissed. Respondent's return to Seattle for his federal trial was delayed for a number of reasons, some related to his being required to testify as a defense witness in a federal narcotics prosecution then pending in San Francisco, and others involving slow processing, the convenience of the United States Marshals Service, and what the District Court would later describe as the "lackadaisical" attitude on the part of the Government. App. to Pet. for Cert. 30a. On April 24, 1985, while respondent was back in San Francisco to testify at a retrial of the narcotics prosecution, a federal grand jury in Seattle issued a superseding indictment against respondent, adding a failure-to-

[1] Section 3161(c)(1) reads:

"In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs. If a defendant consents in writing to be tried before a magistrate on a complaint, the trial shall commence within seventy days from the date of such consent."

appear charge based on his nonappearance at the scheduled November 19, 1984, trial.

Upon his return to Seattle, respondent moved to dismiss all charges against him, alleging that the Speedy Trial Act had been violated. The District Court rejected the Government's argument that because respondent had failed to appear for trial, the 70-day speedy trial clock began anew when respondent was arrested on February 5, 1985. After considering the time between respondent's nonappearance on November 19, 1984, and the issuance of the superseding indictment on April 24, 1985,[2] the court determined that the time respondent was at large, or testifying in the San Francisco prosecution, or being held on state charges, as well as some reasonable time for transporting him to Seattle, were excludable under 18 U. S. C. § 3161(h).[3] The District Court

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[2] The Government's superseding indictment against respondent was issued without first dismissing the original indictment. The District Court apparently assumed that the period after April 24 was excludable because of the superseding indictment, see App. to Pet. for Cert. 29a; 821 F. 2d 1377, 1383 (CA9 1987). But cf. *United States* v. *Rojas-Contreras*, 474 U. S. 231, 234–235 (1985); *id.*, at 239–240 (BLACKMUN, J., concurring in judgment). Respondent has not challenged this assumption, presumably because he concluded that the period following April 24 was otherwise excludable under 18 U. S. C. § 3161(h). See Brief for Respondent 3.

[3] Section 3161(h) provides:

"The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

"(1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to—

. . . . . .

"(D) delay resulting from trial with respect to other charges against the defendant;

. . . . . .

"(G) delay resulting from any proceeding relating to the transfer of a case or the removal of any defendant from another district under the Federal Rules of Criminal Procedure;

"(H) delay resulting from transportation of any defendant from another district, . . . except that any time consumed in excess of ten days from

concluded, however, that, despite these time exclusions, 15 nonexcludable days had passed, that the clock thus had expired 14 days before the superseding indictment, and that dismissal of the original indictment therefore was mandated. App. to Pet. for Cert. 27a–29a.[4]

The District Court found that, although respondent was charged with serious offenses, there was "no excuse for the government's lackadaisical behavior in this case." *Id.*, at 30a. The court observed that some of the Government's explanations for the various nonexcludable delays were inconsistent; that the Marshals Service failed to produce respondent expeditiously when requested to do so by a San Mateo County judge; and that even after the state charges were dropped, respondent was not immediately brought before a federal magistrate on the fugitive warrant. The District Court also noted that after an order issued to bring respondent back to Seattle for trial, the Government responded, but without "dispatch," accommodating the Marshals Service's interest in moving several prisoners at once instead of moving respondent within the time period provided for by the Act. It said:

> "[T]he court concludes that the administration of the [Act] and of justice would be seriously impaired if the

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the date an order of removal or an order directing such transportation, and the defendant's arrival at the destination shall be presumed to be unreasonable;

. . . . . .

"(3)(A) Any period of delay resulting from the absence or unavailability of the defendant or an essential witness."

[4] The 15 nonexcludable days included the 6 days between the end of the federal trial in San Francisco at which respondent was testifying and the date on which state charges against respondent were dropped; the 5 additional days after the state charges were dropped that it took the United States Marshals Service to bring respondent before a federal Magistrate on the federal bench warrant; and 4 days beyond the 10 days provided for by 18 U. S. C. § 3161(h)(1)(H) that the Marshals Service took to transport respondent back to Seattle. App. to Pet. for Cert. 28a–29a.

> court were not to respond sternly to the instant violation. If the government's behavior in this case were to be tacitly condoned by dismissing the indictment without prejudice, then the [Act] would become a hollow guarantee." *Id.*, at 30a–31a.

The court dismissed the original counts with prejudice to reprosecution.[5]

A divided panel of the United States Court of Appeals for the Ninth Circuit affirmed. 821 F. 2d 1377 (1987). The full panel agreed with the District Court's holding that respondent's failure to appear for trial on November 19, 1984, should not restart the speedy trial clock, and confirmed the District Court's calculation of 15 nonexcludable days between respondent's flight and the issuance of the superseding indictment. *Id.*, at 1383–1385.

Applying an abuse-of-discretion standard, the Court of Appeals reviewed the District Court's discussion of its decision to dismiss the drug charges with prejudice. Characterizing the lower court's purpose as sending "a strong message to the government" that the Act must be "observed," even with respect to recaptured fugitives, the majority concluded: "Under the peculiar circumstances of this case, we see no need to disturb that ruling on appeal. The district court acted within the bounds of its discretion." *Id.*, at 1386.

The third judge concurred with the finding of a Speedy Trial Act violation, but concluded that the District Court abused its discretion in barring reprosecution. After reviewing the chronology and disputing whether, as a factual matter, the Government had failed to act reasonably, he felt that "none of the delay shown in this case—although admit-

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[5] The District Court rejected respondent's motion to dismiss the failure-to-appear charge, finding that after subtracting the various time periods held excludable, the Government had not violated the 30-day arrest-to-indictment provision of § 3161(b). See App. to Pet. for Cert. 31a–32a. Respondent eventually entered a plea of guilty to this charge and was sentenced to five years' imprisonment.

tedly non-excludable under the statute—was of such studied, deliberate, and callous nature as to justify dismissal with prejudice." *Id.*, at 1387.

On the Government's petition, which suggested that further guidance was needed with respect to the application of the Speedy Trial Act's remedy provision, § 3162, we granted certiorari. 484 U. S. 1025 (1988).

II

A

Neither party has asked this Court to review the lower courts' decision that a violation of the Act actually occurred.[6] And the statute admits no ambiguity in its requirement that when such a violation has been demonstrated, "the information or indictment shall be dismissed on motion of the defendant." § 3162(a)(2). The only question before us, therefore, is whether the District Court abused its discretion under the Act in dismissing the indictment with prejudice rather than permitting reprosecution. In relevant part, the Act's remedy provision, § 3162(a)(2), instructs:

> "If a defendant is not brought to trial within the time limit required by section 3161(c) as extended by 3161(h),

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[6] The Government asserts that both the District Court and the Court of Appeals relied on a "now-outmoded" method of calculating speedy trial time, and that under another now-favored method, there would have been 42 days of speedy trial time when respondent became a fugitive, and thus no speedy trial violation in this case. Brief for United States 5–6, n. 4. Inasmuch as that argument was neither raised below nor pressed here, we do not consider it.

The Government also argues that some of the time charged by the courts below as speedy trial time should have been excludable under § 3161(h)(1)(D) of the Act, see n. 3, *supra*, and thus that only 9 instead of 15 non-excludable days elapsed after respondent's capture. Brief for United States 24–26. Because, as is detailed below, our decision in this case does not turn on the distinction between a violation of 8 or of 14 days, we need not decide whether the District Court's application of the Act was erroneous in this respect.

> the information or indictment shall be dismissed on motion of the defendant. . . . In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice."

As is plain from this language, courts are not free simply to exercise their equitable powers in fashioning an appropriate remedy, but, in order to proceed under the Act, must consider at least the three specified factors. Because Congress employed somewhat broad and open-ended language, we turn briefly to the legislative history of the Act for some additional indication of how the contemplated choice of remedy should be made.

There apparently were those in Congress who thought courts should consider prejudice to the defendant before barring reprosecution. See 120 Cong. Rec. 41778 (1974) (remarks of Rep. Dennis); *id.*, at 41795 (remarks of Rep. Conyers). After suggesting that he might offer an amendment to add that factor to the statute's list of considerations for the court, Representative Dennis agreed to establish through "legislative history" the relevance of prejudice to the defendant. *Ibid.* Representative Cohen, the author of the compromise amendment, agreed that prejudice to the defendant was relevant, *id.*, at 41794–41795, but opposed adding that factor to § 3162(a)(2) for fear that district courts would treat a lack of prejudice to a defendant as dispositive:

> "[W]e [should] not consider it as a separate independent ground for the prosecution and open up to the Justice Department and the prosecutor to say we have not met the time limit and we did not take advantage of all the other time exemptions, but there is no prejudice to the defendant. I do not think that would be a sufficient basis in the consideration of the other factors to de-

termine if justice would be done." 120 Cong. Rec., at 41795.

Representative Cohen's amendment was thereafter adopted without further modification. Although the discussion in the House is inconclusive as to the weight to be given to the presence or absence of prejudice to the defendant, there is little doubt that Congress intended this factor to be relevant for a district court's consideration. See, *e. g.*, *United States* v. *Kramer*, 827 F. 2d 1174, 1178 (CA8 1987); *United States* v. *Caparella*, 716 F. 2d 976, 980 (CA2 1983); *United States* v. *Bittle*, 226 U. S. App. D. C. 49, 56, 699 F. 2d 1201, 1208 (1983).[7]

The legislative history also confirms that, consistent with the language of the statute, Congress did not intend any particular type of dismissal to serve as the presumptive remedy for a Speedy Trial Act violation. Prior to the passage of the Act, the dismissal sanction generated substantial controversy in Congress, with proponents of uniformly barring reprosecution arguing that without such a remedy the Act would lack any real force, and opponents expressing fear that criminals would unjustly escape prosecution. See generally A. Partridge, Legislative History of Title I of the Speedy Trial Act of 1974, pp. 31–33 (Federal Judicial Center 1980); *United States* v. *Caparella*, 716 F. 2d, at 978–979 (reviewing legislative history). Eventually, in order to obtain passage of the Act, a compromise was reached that incorporated, through amendments on the floor of the House of Representatives, the language that eventually became § 3162(a)(2).

[7] Although, like JUSTICE SCALIA, we are all in favor of fostering the democratic process, we do not agree that the statutory text renders it "so obviou[s]," *post*, at 345, that the presence or absence of prejudice to the defendant is one of the "other factors" that a district court is required by the Speedy Trial Act to consider. A brief review of the floor debate, cited above, demonstrates that at least some Members of Congress were uncertain about, and repeatedly sought clarification of, precisely what they were voting for.

See 120 Cong. Rec. 41774–41775, 41778, 41793–41794 (1974). The thrust of the compromise was that the decision to dismiss with or without prejudice was left to the guided discretion of the district court, and that neither remedy was given priority.[8] See, *e. g.*, *United States* v. *Kramer*, 827 F. 2d, at 1176; *United States* v. *Salgado-Hernandez*, 790 F. 2d 1265, 1267 (CA5), cert. denied, 479 U. S. 964 (1986); *United States* v. *Russo*, 741 F. 2d 1264, 1266–1267 (CA11 1984); *United States* v. *Caparella*, 716 F. 2d, at 980.

B

Consistent with the prevailing view, the Court of Appeals stated that it would review the dismissal with prejudice under an abuse-of-discretion standard. 821 F. 2d, at 1385. See, *e. g.*, *United States* v. *Kramer*, 827 F. 2d, at 1179 (reversing dismissal with prejudice as abuse of discretion); *United States* v. *Russo*, 741 F. 2d, at 1267–1268 (reversing dismissal without prejudice as abuse of discretion); *United States* v. *Caparella*, 716 F. 2d, at 980–981 (same); *United States* v. *Salgado-Hernandez*, 790 F. 2d, at 1267 (upholding dismissal without prejudice as within District Court's discretion). The court did not, however, articulate what that standard required.

[8] Because the provision at issue here was amended on the floor of the House, and that version was subsequently accepted by the Senate, we find largely unhelpful the preamendment Committee Report discussions, supporting dismissal with prejudice in all or most cases. Similarly, a House Judiciary Committee statement, made five years later and while in the process of considering and recommending a temporary suspension of the dismissal sanction, to the effect that dismissal without prejudice should be "the exception and not the rule," H. R. Rep. No. 96–390, pp. 8–9 (1979), cannot override the contemporaneous legislative history and create a presumption that reprosecution will be barred. In light of the compromise eventually reached, we are unwilling to read such a preference into the statute, which evinces no presumptions. We are similarly disinclined to read a contrary presumption into a statute that began as a bill barring reprosecution in all cases, and was amended to provide for the current balancing test as a compromise.

This Court previously has recognized—even with respect to another statute the legislative history of which indicated that courts were to have "wide discretion exercising their equitable powers," 118 Cong. Rec. 7168 (1972), quoted in *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 421 (1975)—that "discretionary choices are not left to a court's 'inclination, but to its judgment; and its judgment is to be guided by sound legal principles.'" *Id.*, at 416, quoting *United States* v. *Burr*, 25 F. Cas. 30, 35 (No. 14,692d) (CC Va. 1807) (Marshall, C. J.). Thus, a decision calling for the exercise of judicial discretion "hardly means that it is unfettered by meaningful standards or shielded from thorough appellate review." *Albemarle Paper Co.*, 422 U. S., at 416.

Whether discretion has been abused depends, of course, on the bounds of that discretion and the principles that guide its exercise. Had Congress merely committed the choice of remedy to the discretion of district courts, without specifying factors to be considered, a district court would be expected to consider "all relevant public and private interest factors," and to balance those factors reasonably. *Piper Aircraft Co.* v. *Reyno*, 454 U. S. 235, 257 (1981). Appellate review of that determination necessarily would be limited, with the absence of legislatively identified standards or priorities.

In the Speedy Trial Act, however, Congress specifically and clearly instructed that courts "*shall consider*, among others, *each of the following factors*," § 3162(a)(2) (emphasis added), and thereby put in place meaningful standards to guide appellate review. Although the role of an appellate court is not to substitute its judgment for that of the trial court, review must serve to ensure that the purposes of the Act and the legislative compromise it reflects are given effect. Where, as here, Congress has declared that a decision will be governed by consideration of particular factors, a district court must carefully consider those factors as applied to the particular case and, whatever its decision, clearly articulate their effect in order to permit meaningful appellate re-

view. Only then can an appellate court ascertain whether a district court has ignored or slighted a factor that Congress has deemed pertinent to the choice of remedy, thereby failing to act within the limits prescribed by Congress.

Factual findings of a district court are, of course, entitled to substantial deference and will be reversed only for clear error. *Anderson* v. *Bessemer City*, 470 U. S. 564 (1985). A judgment that must be arrived at by considering and applying statutory criteria, however, constitutes the application of law to fact and requires the reviewing court to undertake more substantive scrutiny to ensure that the judgment is supported in terms of the factors identified in the statute. Nevertheless, when the statutory factors are properly considered, and supporting factual findings are not clearly in error, the district court's judgment of how opposing considerations balance should not lightly be disturbed.

III

Because the District Court did not fully explicate its reasons for dismissing with prejudice the substantive drug charges against respondent, we are left to speculate in response to some of the parties' arguments pro and con. Respondent, for example, argues that the District Court may have taken into account the fact that respondent's codefendant had been sentenced on the same charges to three years' imprisonment, and that by dismissing the drug charges but sentencing respondent to five years' imprisonment on the failure-to-appear charge, it would be possible to effect substantial justice while sending at the same time "a strong message" to the Marshals Service and the local United States Attorney. See Tr. of Oral Arg. 29, 32. There are several problems with that line of reasoning, not the least of which is that the District Court did not articulate it. To the extent that respondent is suggesting that his codefendant's 3-year sentence implies that the offenses with which both were charged were not "serious," his argument is directly at odds

with the District Court's statement expressly to the contrary: "there is no question that the drug violations with which [respondent] is charged are serious," App. to Pet. for Cert. 30a. We have no reason to doubt the court's conclusion in that regard. Moreover, at the time the District Court decided to dismiss the drug charges against respondent, he had not yet entered a plea to the failure-to-appear charge, so that the court could not be certain that any opportunity would arise to take the drug violations into account in sentencing.[9]

With regard to the second factor that the statute requires a court to consider, that is, the circumstances of the case leading to dismissal, we find it difficult to know what to make of the District Court's characterization of the Government's conduct as "lackadaisical." We do not dispute that a truly neglectful attitude on the part of the Government reasonably could be factored against it in a court's consideration of this issue, but the District Court gave no indication of the foundation for its conclusion. The court's discussion following that

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[9] Even more important, respondent had not entered a guilty plea to, or been convicted of, the drug charges. It would have been highly improper—and we shall not presume the District Court assumed such unbridled discretion—to sentence respondent with undue harshness on one count, on the basis of the Court's untested and unsubstantiated assumption of what the facts might have been shown to be with regard to the drug charges, see Tr. of Oral Arg. 29–30, without the sort of inquiry conducted, in another context, under Federal Rule of Criminal Procedure 32. Although we realize it could be tempting to wrap up the "equities" in a single package and, with the best of intentions, effect what could be regarded as an essentially just result, we could not condone an approach that would violate the rights of defendants and misapply the Speedy Trial Act in the hope that the errors would balance out in the end. Contrary to the dissent's suggestion, see *post*, at 348–349, we do not question here the wisdom of Congress' decision to assess different penalties for failure to appear depending on the severity of the underlying charge. What we cannot countenance is a decision to punish someone more severely than would otherwise have been considered appropriate for the charged offense, solely for the reason that other charges had been dismissed under the Act.

statement merely recounted the Speedy Trial Act violations, and chastised the Government for failing to make "any particular show of concern," or to "respon[d] with dispatch." *Ibid.* The District Court did not find that the Government acted in bad faith with respect to respondent; neither did the court discover any pattern of neglect by the local United States Attorney, or evidence of what the Court of Appeals' majority later termed "the government's apparent antipathy toward a recaptured fugitive." 821 F. 2d, at 1386; see also Tr. of Oral Arg. 34–35.[10] Any such finding, suggesting something more than an isolated unwitting violation, would clearly have altered the balance. Instead, the extent of the District Court's explanation for its determination that "the second factor, . . . tends strongly to support the conclusion that the dismissal must be with prejudice," was that there was "no excuse" for the Government's conduct. App. to Pet. for Cert. 30a.

Then there is the fact of respondent's failure to appear. The Government was prepared to go to trial on the 69th day of the indictment-to-trial period, and it was respondent, not the prosecution, who prevented the trial from going forward in a timely fashion. Respondent argues that he has been charged separately and punished for his failure to appear for trial, that all the time he was at large has been excluded from the speedy trial calculation, and that the District Court therefore was correct in not considering his flight as a factor in deciding whether to bar reprosecution. Respondent also observes that the Court of Appeals held, and the Government does not dispute here, that his failure to appear for a trial scheduled with only one day remaining in the indictment-to-trial period does not restart the full 70-day

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[10] The third judge on the panel noted that most of the 15-day delay seemed largely attributable to a misunderstanding about who was responsible for moving respondent before the state hold was lifted, and the happenstance that notification of the lifting of the state hold had come right before a weekend. See 821 F. 2d, at 1387.

speedy trial clock. See 821 F. 2d, at 1380–1383.[11] That respondent's flight does not restart the clock, however, goes only to whether there has been a violation of the Act, and not to what the appropriate remedy should be. Respondent's culpable conduct and, in particular, his responsibility for the failure to meet the timely trial schedule in the first instance are certainly relevant as "circumstances of the case which led to the dismissal," § 3162(a)(2), and weigh heavily in favor of permitting reprosecution. These factors, however, were considered by neither the District Court nor the Court of Appeals' majority.

The Government argues that the District Court failed to consider that the delay caused by the Government's unexcused conduct was brief, and that there was no consequential prejudice to respondent. The length of delay, a measure of the seriousness of the speedy trial violation, in some ways is closely related to the issue of the prejudice to the defendant. The longer the delay, the greater the presumptive or actual prejudice to the defendant, in terms of his ability to prepare for trial or the restrictions on his liberty:

> "[I]nordinate delay between public charge and trial, . . . wholly aside from possible prejudice to a defense on the merits, may 'seriously interfere with the defendant's liberty, whether he is free on bail or not, and . . . may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends.'" *Barker* v. *Wingo*, 407 U. S. 514, 537 (1972) (WHITE, J.,

[11] A Department of Justice proposal to restart the 70-day period following recapture of a defendant who has fled prior to trial, see A. Partridge, Legislative History of Title I of the Speedy Trial Act of 1974, pp. 120–122 (Federal Judicial Center 1980), was rejected by Congress in favor of merely excluding "[a]ny period of delay resulting from the absence or unavailability of the defendant." § 3161(h)(3)(A).

concurring), quoting *United States* v. *Marion*, 404 U. S. 307, 320 (1971).[12]

The District Court found the Act's 70-day indictment-to-trial period here was exceeded by 14 nonexcludable days, but made no finding of prejudice. Indeed, the Court of Appeals concluded that the delay, "although not wholly insubstantial, was not so great as to mandate dismissal with prejudice." 821 F. 2d, at 1385. That court also found that there was no prejudice to respondent's trial preparation. *Ibid.* And, as respondent was being held to answer not only for the drug charges but also on a valid bench warrant issued after he did not appear, neither does there seem to have been any additional restrictions or burdens on his liberty as a result of the speedy trial violation.[13] Thus, although the absence of prejudice is not dispositive, in this case it is another consideration in favor of permitting reprosecution.

[12] In *Barker* v. *Wingo*, the Court articulated criteria by which the constitutional right to a speedy trial was to be judged, but declined to specify a time period within which a defendant must be brought to trial, leaving that kind of legislative or rulemaking activity to others better positioned to do so. 407 U. S., at 523. Congress now has taken up that responsibility and decreed that a defendant must be tried within 70 days of indictment, § 3161(c)(1), with certain exceptions for specified delays, § 3161(h). If the Government fails to try the defendant within the statutory time frame, the defendant is entitled to dismissal. Although Congress specified certain factors to be considered by the district court in deciding whether to bar reprosecution, it did not define a second threshold that must be crossed, whether in number of days or otherwise, before dismissal may be with prejudice. As in *Barker*, we decline to undertake such rulemaking. Indeed, during oral argument, the Government appeared to concede that it would be appropriate under some circumstances, as, for example, where there was a systemic problem with the procedures of a particular United States Attorney's Office, for a district court to bar reprosecution in a case involving a delay of only a few days. See Tr. of Oral Arg. 23.

[13] We do not decide that as a matter of law there could never be any prejudice to a defendant whose speedy trial rights were violated, but who was also being held on other charges. Because "prejudice" may take many forms, such determinations must be made on a case-by-case basis in the light of the facts.

The District Court's decision to dismiss with prejudice rested largely on its conclusion that the alternative would tacitly condone the Government's behavior, and that a stern response was appropriate in order to vindicate the guarantees of the Speedy Trial Act. We certainly encourage district courts to take seriously their responsibility to consider the "impact of a reprosecution on the administration" of justice and of the Act, § 3162(a)(2). It is self-evident that dismissal with prejudice always sends a stronger message than dismissal without prejudice, and is more likely to induce salutary changes in procedures, reducing pretrial delays. See Brief for United States 31. Nonetheless, the Act does not require dismissal with prejudice for every violation. Dismissal without prejudice is not a toothless sanction: it forces the Government to obtain a new indictment if it decides to reprosecute, and it exposes the prosecution to dismissal on statute of limitations grounds. Given the burdens borne by the prosecution and the effect of delay on the Government's ability to meet those burdens, substantial delay well may make reprosecution, even if permitted, unlikely. If the greater deterrent effect of barring reprosecution could alone support a decision to dismiss with prejudice, the consideration of the other factors identified in § 3162(a)(2) would be superfluous, and all violations would warrant barring reprosecution.[14]

Perhaps there was more to the District Court's decision than meets the eye. It is always difficult to review a cold appellate record and acquire a full understanding of all the

[14] The Speedy Trial Act also permits a district court directly to punish dilatory counsel, including a prosecutor, through a monetary fine, § 3162(b)(C), suspension from practice, § 3162(b)(D), or by filing a report with the appropriate disciplinary committee, § 3162(b)(E). That Congress expressly provided for these sanctions is further indication that the greater didactic effect of dismissal with prejudice should not by itself overcome what consideration of other factors would suggest is the appropriate remedy. Liberal use of direct sanctions may serve to "send a message" whenever one is warranted.

facts, nuances, and attitudes that influence a trial judge's decisionmaking, and we undertake such close review with reluctance. That is why the administration of the Speedy Trial Act and the necessity for thorough appellate review require that a district court carefully express its decision whether or not to bar reprosecution in terms of the guidelines specified by Congress. When the decision whether to bar reprosecution is analyzed in the framework established by the Act, it is evident from the record before us that the District Court abused its discretion in this case. The court did not explain how it factored in the seriousness of the offenses with which respondent stood charged. The District Court relied heavily on its unexplained characterization of the Government conduct as "lackadaisical," while failing to consider other relevant facts and circumstances leading to dismissal. Seemingly ignored were the brevity of the delay and the consequential lack of prejudice to respondent, as well as respondent's own illicit contribution to the delay. At bottom, the District Court appears to have decided to dismiss with prejudice in this case in order to send a strong message to the Government that unexcused delays will not be tolerated. That factor alone, by definition implicated in almost every Speedy Trial Act case, does not suffice to justify barring reprosecution in light of all the other circumstances present.[15]

IV

Ordinarily, a trial court is endowed with great discretion to make decisions concerning trial schedules and to respond to abuse and delay where appropriate. The Speedy Trial Act, however, confines the exercise of that discretion more nar-

[15] As should be evident from our discussion about the nature of a district court's discretion under the Speedy Trial Act, see *supra*, at 336–337, we do not hold today, despite the dissent's suggestion, *post*, at 350, that a district court can "best avoid reversal by adopting a consistent practice of dismissing without prejudice." Indeed, we have expressly concluded that there is no presumption in favor of either form of dismissal. See *supra*, at 335, and n. 8.

rowly, mandating dismissal of the indictment upon violation of precise time limits, and specifying criteria to consider in deciding whether to bar reprosecution. The District Court failed to consider all the factors relevant to the choice of a remedy under the Act. What factors it did rely on were unsupported by factual findings or evidence in the record. We conclude that the District Court abused its discretion under the Act, and that the Court of Appeals erred in holding otherwise. Accordingly, the judgment of the Court of Appeals is reversed.

It is so ordered.

JUSTICE WHITE, concurring.

I join the Court's opinion, agreeing that when a defendant, through deliberate misconduct, interferes with compliance with the Speedy Trial Act and a violation of the Act then occurs, dismissal with prejudice should not be ordered unless the violation is caused by Government conduct that is much more serious than is revealed by this record.

JUSTICE SCALIA, concurring in part.

I join the opinion of the Court except Part II–A, which is largely devoted to establishing, through the floor debate in the House, (1) that prejudice to the defendant is one of the factors that the phrase "among others" in § 3162(a)(2) refers to, and (2) that that factor is not necessarily determinative. Both these points seem to me so utterly clear from the text of the legislation that there is no justification for resort to the legislative history. Assume that there was nothing in the legislative history except statements that, unless the defendant had been harmed by the delay, dismissal with prejudice could not be granted. Would we permit that to govern, even though the text of the provision does not consider that factor dominant enough to be mentioned specifically, but just includes it within the phrase "among othe[r] [factors]," or perhaps within the phrase "facts and circumstances of the case which led to the dismissal"? Or assume the opposite, that

there was nothing in the legislative history except statements that harm to the defendant could not be considered at all. Would we permit that to govern, even though impairment of the accused's defense is so obviously one of the "other factors" highly relevant to whether the Government should be permitted to reinstitute the prosecution?

I think the answer to both these questions is obviously no. The text is so unambiguous on these points that it must be assumed that what the Members of the House and the Senators thought they were voting for, and what the President thought he was approving when he signed the bill, was what the text plainly said, rather than what a few Representatives, or even a Committee Report, said it said. Where we are not prepared to be governed by what the legislative history says—to take, as it were, the bad with the good—we should not look to the legislative history at all. This text is eminently clear, and we should leave it at that.

It should not be thought that, simply because adverting to the legislative history produces the same result we would reach anyway, no harm is done. By perpetuating the view that legislative history *can* alter the meaning of even a clear statutory provision, we produce a legal culture in which the following statement could be made—taken from a portion of the floor debate alluded to in the Court's opinion:

> "Mr. DENNIS. . . .
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> . . . . .
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> "I have an amendment here in my hand which could be offered, but if we can make up some legislative history which would do the same thing, I am willing to do it." 120 Cong. Rec. 41795 (1974).

We should not make the equivalency between making legislative history and making an amendment so plausible. It should not be possible, or at least should not be easy, to be sure of obtaining a particular result in this Court without making that result apparent on the face of the bill which both Houses consider and vote upon, which the President ap-

proves, and which, if it becomes law, the people must obey. I think we have an obligation to conduct our exegesis in a fashion which fosters that democratic process.

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

This is the kind of case that reasonable judges may decide differently. The issues have been narrowed by the Government's abandonment of the two principal arguments that it advanced in the District Court and in the Court of Appeals.[1] But even on the remaining question whether the dismissal of two of the three counts pending against respondent should have been with or without prejudice, there is room for disagreement between conscientious and reasonable judges. The question, however, is one that district judges are in a much better position to answer wisely than are appellate judges.

A judge who has personally participated in the series of events that culminates in an order of dismissal has a much better understanding, not only of what actually happened, but also of the significance of certain events, than does a judge who must reconstruct that history from a confusing sequence of written orders and motions. Moreover, the trial judge is privy to certain information not always reflected in the appellate record, such as her impression of the demeanor and attitude[2] of the parties, her intentions in handling the future course of the proceedings, and her understanding of how

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[1] The Government's primary submission in the lower courts was that the Speedy Trial Act's 70-day clock should have been restarted when Taylor was apprehended. See App. to Pet. for Cert. 26a–27a; 821 F. 2d 1377, 1380–1383 (CA9 1987). Its second submission was that even if the clock was not restarted, there was no violation of the Act. See App. to Pet. for Cert. 27a–29a; 821 F. 2d, at 1383–1385.

[2] As the majority recognizes, see *ante*, at 338–339, the Government's attitude concerning the administration of the Speedy Trial Act is a relevant factor in determining whether to dismiss an indictment with or without prejudice.

the limited issue faced on appeal fits within the larger factual and procedural context. I am convinced that in this case the District Judge made the sort of reasoned judgment that we as appellate judges would do well not to second-guess.

This is not a case in which dismissal with prejudice resulted in a dangerous criminal promptly returning to society without suffering substantial punishment for his wrongs. Rather, the District Court only dismissed the charges dealing with narcotics violations, while denying the motion to dismiss the failure-to-appear charge.[3] On that count, after respondent entered a guilty plea, the judge sentenced respondent to five years' imprisonment, the maximum permissible sentence. That sentence was more severe than the 3-year sentence she imposed on respondent's original codefendant who was found guilty on charges that paralleled the two dismissed counts.

The majority, however, declines to consider this important fact, concluding that it would have been improper for the District Judge to have given any weight to the presence of the remaining charge. I strongly disagree. Even though respondent was entitled to a presumption of innocence on the failure-to-appear charge, I believe it would be entirely proper to consider the strong possibility of conviction—given the fact that respondent's flight occurred shortly before his case was to be tried, the fact that a failure-to-appear prosecution generally does not involve even moderately complicated

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[3] Although it is unlikely that he was actually unaware of the fact that the failure-to-appear charge remained pending against respondent, the opinion of the dissenting judge on the Court of Appeals incorrectly suggests on its face that no additional charges remained against respondent. He wrote:

"The district court dismissed the indictment *(and with it the entire case against the defendant)* with prejudice. I believe this was entirely uncalled for and constituted an abuse of allowable discretion." 821 F. 2d, at 1386 (emphasis supplied).

The mere possibility that the dissenting judge may have overlooked the fact that a charge remained against respondent illustrates the danger of second-guessing district courts in cases of this type.

issues of proof, and the further fact that the circumstances of his subsequent arrest and detention had been fully explored in connection with the motion to dismiss the narcotics charges—and to conclude that even if respondent was guilty of the narcotics charges, a dismissal with prejudice would not mean that he would return to society unpunished. Although "at the time the District Court decided to dismiss the drug charges against respondent, . . . the court could not be certain that any opportunity would arise to take the drug violations into account in sentencing," *ante*, at 338, the judge undoubtedly could have assumed that there was a high probability that the Government could prove its case. Nor would such an assumption have interfered with the presumption of innocence. The presumption is, after all, for the benefit of the accused and not the Government.

The majority further posits that it would have been "highly improper" for the judge in sentencing respondent on the failure-to-appear charge to consider the dismissed narcotics charges. In my view, just the contrary holds—the facts of the dismissed narcotics charges were highly relevant and should properly have been considered. The statute respondent was charged under defined two classes of violations, each carrying a different sentencing range. Under that statute, a defendant who failed to appear to face felony charges could be sentenced to up to five years' imprisonment, while a defendant who failed to appear to face misdemeanor charges could not be sentenced to more than one year's imprisonment. See 18 U. S. C. § 3150. For the same reason that the statute differentiated between those who fail to appear to face felony and misdemeanor charges, I would think that the severity of the pending charge would be relevant to the determination of where within the 5-year range to fix sentence. While flight to avoid a relatively minor felony charge would not generally merit a 5-year sentence (particularly in cases in which the possible sentence for the underlying charge is substantially less than five years), flight to avoid a murder trial

might well warrant the maximum sentence. In fact, the current statute now imposes four—rather than two—possible sentencing ranges, varying more acutely with the severity of the underlying alleged offense. See 18 U. S. C. § 3146 (1982 ed., Supp. IV).

In addition, the majority appears to assume that the District Judge intended to impose a higher sentence for the failure-to-appear charge based on her "untested and unsubstantiated assumption of what the facts might have been shown to be with regard to the drug charges." *Ante*, at 338, n. 9. Yet, there is no basis for Court's assumption that the judge planned to take into account the narcotics charge without informing the parties of her intention to do so and without permitting them the opportunity to proffer relevant evidence. Indeed, the concern the Court expresses today did not come to fruition in this case. Not only has respondent not complained of unfair treatment, his attorney informs us that respondent *requested* to be sentenced "for [his] total conduct." Tr. of Oral Arg. 32. The greater risk of unfair treatment is presented by the possibility that respondent will now be sentenced twice for the same misconduct.

Nor can I agree with the Court's conclusion that the District Court did not offer any "indication of the foundation for its conclusion" that the Government's conduct leading to the Speedy Trial violation was "lackadaisical." *Ante*, at 338. Of particular importance, the District Judge found that the clock ran, in part, as a result of the Marshals Service's failure to comply with a court order from a San Mateo County judge requiring that respondent be produced in state court. See App. to Pet. for Cert. 28a, 30a. Failure to comply with a court order is certainly a serious matter, and, if anything, the District Court's characterization of such a violation as "lackadaisical" appears understated. Although the dissenting judge on the Court of Appeals expressed the view that a state court judge cannot order that the United States Marshal produce a defendant and that respondent could have

been transferred to state custody at any time the local authorities arrived at the San Francisco County jail with the required papers, 821 F. 2d 1377, 1387 (CA9 1987), the important issue is not whether the Marshals Service was technically in contempt, but whether the Service acted carelessly or without regard for respondent's and the public's interest in seeing justice administered swiftly. This is precisely the sort of issue that is more difficult for an appellate court than for a district court to address.

On the record before us, I do not know whether I would have dismissed counts I and II with prejudice had I been confronted with the issue as a district judge. As a district judge, I would know that a dismissal without prejudice would be a rather meaningless sanction unless, of course, the statutes of limitations had run, in which event the choice between dismissal with and without prejudice would itself be meaningless. I would also know—especially if I had foreknowledge of the opinion announced today—that I could best avoid reversal by adopting a consistent practice of dismissing without prejudice, even though such a practice would undermine the years of labor that have gone into enacting and construing the Speedy Trial Act. I would have assumed, however, that the choice of remedy was one that was committed to my discretion and that if I set forth a sensible explanation for my choice that it would withstand appellate review.

Although the Court's opinion today boils down to a criticism of the adequacy of the District Judge's explanation for her ruling, see *ante*, at 342–343, her opinion identifies the correct statutory criteria and, in my view, proceeds to apply them in a clear and sensible fashion. After explaining why she found the Government's legal arguments to be without merit, she wrote:

> "To summarize the above discussion, the conclusion is inescapable that the government did violate the [Speedy Trial Act (STA)]. The court rules that, even allowing the government a full ten days to effectuate the defend-

ant's return to this district, there elapsed at least fourteen days of nonexcludable time in excess of the 70-day requirement set forth in § 3161(c)(1) prior to April 24, 1985, the date on which the government filed the superseding indictment against defendant. Therefore, pursuant to § 3162(2), Counts I and II of the . . . indictment must be dismissed. The real question is whether this dismissal should be with or without prejudice. On this point, the STA, § 3162(2), provides as follows:

"'In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice.'

"Regarding the first factor as applied to the instant case, there is no question that the drug violations with which the defendant is charged are serious. However, the second factor, the circumstances of the case leading to the dismissal, tends strongly to support the conclusion that the dismissal must be with prejudice. There is simply no excuse for the government's lackadaisical behavior in this case. Despite the government's insistence on the temporary nature of the federal custody from February 7 until February 28, 1985, the [United States Marshals Service (USMS)] did not return defendant to state authorities after the purported reason for that temporary custody had ended on February 22, 1985. Even more telling is the failure of the USMS to produce defendant on February 28, 1985 pursuant to a specific court order from a San Mateo County judge.

"After the state hold was dropped, it took the government six more days to arrange for defendant's initial appearance before a magistrate despite the fact that he had been in federal custody in the district for almost a

month. Nor did the order of removal issued on April 3 prompt any particular show of concern on the government's part. Instead of responding with dispatch, the government apparently placed more value on accommodating the convenience of the USMS than on complying with the plain language of the STA. Pursuant to the third factor, the court concludes that the administration of the STA and of justice would be seriously impaired if the court were not to respond sternly to the instant violation. If the government's behavior in this case were to be tacitly condoned by dismissing the indictment without prejudice, then the STA would become a hollow guarantee. Counts I and II of the . . . indictment must be dismissed with prejudice." App. to Pet. for Cert. 29a–31a (footnote omitted).

Congress enacted the Speedy Trial Act because of its concern that this Court's previous interpretations of the Sixth Amendment right to a speedy trial had drained the constitutional right of any "real meaning."[4] The Judiciary Committees in both the Senate and the House of Representatives recognized that unless violations of the Act generally required dismissals with prejudice—as was the rule in several States—the Act would be unlikely to accomplish its purposes.[5] As the Court correctly notes, this view was compro-

[4] The House Report notes:

"The Committee finds that the adoption of speedy trial legislation is necessary in order to give real meaning to that Sixth Amendment right. Thus far, neither the decisions of the Supreme Court nor the implementation of Rule 50(b) of the Federal Rules of Criminal Procedure, concerning plans for achieving the prompt disposition of criminal cases, provides the courts with adequate guidance on this question." H. R. Rep. No. 93–1508, p. 11 (1974).

[5] The House Committee on the Judiciary adopted the position of the American Bar Association concerning the need for dismissal with prejudice. See H. R. 17409, 93d Cong., 2d Sess., § 101 (1974). The Committee Report quotes the commentary accompanying the ABA Standards Relating to Speedy Trial:

mised by amendments during the floor debates. See *ante*, at 334–335. The compromise, however, was one that was intended to give district judges discretion to choose the proper remedy based on factors identified in Judge Rothstein's opinion in this case. See 120 Cong. Rec. 41777–41778 (1974) (remarks of Reps. Cohen and Dennis). If that discretion is not broad enough to sustain her decision, as the Court now concludes, the statute is surely nothing more than the "hollow guarantee" that she described.

I respectfully dissent.

"'The position taken here is that the only effective remedy for denial of speedy trial is absolute and complete discharge. If, following undue delay in going to trial, the prosecution is free to commence prosecution again for the same offense, subject only to the running of the statute of limitations, the right to speedy trial is largely meaningless. Prosecutors who are free to commence another prosecution later have not been deterred from undue delay.'" H. R. Rep. No. 93–1508, p. 37 (1974).

As the Committee Report further notes, Judge Zirpoli, the spokesman for the Judicial Conference also endorsed this view. See *id.*, at 38.

Although admitting of qualification in cases involving "compelling evidence that the delay was caused by exceptional circumstances which the government and the court could not have foreseen or avoided," S. 754, 93d Cong., 2d Sess., § 101 (1974), the Senate Committee on the Judiciary agreed in principle with the position articulated by the American Bar Association, see S. Rep. No. 93–1021, p. 16 (1974). See also Speedy Trial, Hearings on S. 895 before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 92d Cong., 1st Sess., 21 (1971) (statement of Sen. Hart).

MISSISSIPPI POWER & LIGHT CO. *v.* MISSISSIPPI EX REL. MOORE, ATTORNEY GENERAL OF MISSISSIPPI, ET AL.

APPEAL FROM THE SUPREME COURT OF MISSISSIPPI

No. 86–1970. Argued February 22, 1988—Decided June 24, 1988

Appellant (MP&L), a subsidiary of Middle South Utilities (MSU), engages in wholesale sales of electricity, which are regulated by the Federal Energy Regulatory Commission (FERC), and in retail sales, which are subject to the jurisdiction of the Mississippi Public Service Commission (MPSC). MSU formed a new subsidiary, Middle South Energy, Inc. (MSE), to undertake the construction of a nuclear powerplant, Grand Gulf, in Mississippi. Although appellant was to operate the plant, Grand Gulf was planned and designed to meet the need of the entire MSU system for a diversified and expanded fuel base. The MPSC approved the application of MP&L and MSE to build Grand Gulf. As Grand Gulf neared completion, MSU filed for FERC's approval agreements allocating Grand Gulf's capacity among its four operating subsidaries and setting forth, *inter alia*, wholesale rates for the sale of Grand Gulf's capacity and energy. Following extensive hearings in which parties representing consumer interests and various state regulatory agencies, including the MPSC, participated, FERC entered an order allocating Grand Gulf costs among the members of the MSU system in proportion to their relative demand for energy generated by the system as a whole. The order required appellant to purchase 33% of the plant's output at rates determined by FERC to be just and reasonable. On review, the United States Court of Appeals for the District of Columbia Circuit affirmed. After public hearings, the MPSC granted appellant an increase in its retail rates to enable it to recover the costs of purchasing its FERC-mandated allocation of Grand Gulf power. The Mississippi Attorney General and certain other parties representing Mississippi consumers appealed to the Mississippi Supreme Court, charging that, under state law, the MPSC had exceeded its authority by adopting retail rates to pay Grand Gulf expenses without first determining that the expenses were prudently incurred. The court agreed and remanded the case, concluding that requiring the MPSC to review the prudence of management decisions incurring costs associated with Grand Gulf would not violate the Supremacy Clause of the Federal Constitution. The court rejected appellant's argument that a state prudence review was foreclosed by the decision in *Nantahala Power & Light Co.* v. *Thorn-*

burg, 476 U. S. 953, which barred a State from setting retail rates that did not take into account FERC's allocation of power between two related utility companies.

Held: The FERC proceedings pre-empted a prudence inquiry by the MPSC. The decision in *Nantahala* rests on a foundation that is broad enough to support the order entered by FERC here and to require the MPSC to treat appellant's FERC-mandated payments for Grand Gulf costs as reasonably incurred operating expenses for the purpose of setting appellant's retail rates. *Nantahala* relied on the fundamental pre-emption principles, applicable here, that FERC has exclusive authority to determine the reasonableness of wholesale rates; that FERC's exclusive jurisdiction applies not only to rates but also to power allocations that affect wholesale rates; and that States may not bar regulated utilities from passing through to retail consumers FERC-mandated wholesale rates. The Supremacy Clause compels the MPSC to permit appellant to recover as a reasonable operating expense costs incurred as a result of paying a FERC-determined wholesale rate for a FERC-mandated allocation of power. The Mississippi Supreme Court erred in adopting the view that the pre-emptive effect of FERC jurisdiction turned on whether a particular matter (here, the "prudence" question) was actually determined in the FERC proceedings. The reasonableness of rates and agreements regulated by FERC may not be collaterally attacked in state or federal courts. Here, the question of prudence was not discussed in the proceedings before FERC or on review by the Court of Appeals because no party raised the issue, not because it was a matter beyond the scope of FERC's jurisdiction. Moreover, FERC did, in fact, consider and reject some aspects of the prudence review that the Mississippi Supreme Court directed the MPSC to conduct. Pp. 369–377.

506 So. 2d 978, reversed.

STEVENS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, O'CONNOR, and KENNEDY, JJ., joined. SCALIA, J., filed an opinion concurring in the judgment, *post*, p. 377. BRENNAN, J., filed a dissenting opinion, in which MARSHALL and BLACKMUN, JJ., joined, *post*, p. 383.

Rex E. Lee argued the cause for appellant. With him on the brief were *George L. Saunders, Jr.*, *David W. Carpenter*, *Robert R. Nordhaus*, *Howard E. Shapiro*, and *James K. Child, Jr.*

Deputy Solicitor General Cohen argued the cause for the United States et al. as *amici curiae* urging reversal. With

him on the brief were *Solicitor General Fried*, *Richard J. Lazarus*, *Catherine C. Cook*, and *Jerome M. Feit*.

John L. Maxey II argued the cause for appellees. With him on the brief for appellee State of Mississippi were *Mike Moore*, Attorney General, *Frank Spencer*, Assistant Attorney General, and *W. Glenn Watts*, Special Assistant Attorney General. *Jesse C. Pennington* and *Lewis Burke* filed a brief for appellee Mississippi Legal Services Coalition.*

JUSTICE STEVENS delivered the opinion of the Court.

On July 1, 1985, Grand Gulf Unit 1, a major nuclear powerplant located in Port Gibson, Mississippi, began commercial operations. An order entered by the Federal Energy Regulatory Commission (FERC) required Mississippi Power and Light Company (MP&L) to purchase 33% of the plant's output at rates determined by FERC to be just and reasonable. The Mississippi Public Service Commission (MPSC) subsequently granted MP&L an increase in its retail rates to enable it to recover the cost of its purchases of Grand Gulf power. On appeal, the Mississippi Supreme Court held that it was error to grant an increase in retail rates without first examining the prudence of the management decisions that led to the construction and completion of Grand Gulf 1. The question presented to us is whether the FERC proceedings have pre-empted such a prudence inquiry by the State Commission. For reasons similar to those set forth in *Nantahala*

*Briefs of *amici curiae* urging affirmance were filed for the Consumer Federation of America et al. by *Scott Hempling* and *Roger Colton;* for the National Association of State Utility Consumer Advocates by *Raymon E. Lark, Jr.*, *Elizabeth Elliot*, and *Steven W. Hamm;* and for the National Governors' Association et al. by *Benna Ruth Solomon* and *Robert H. Loeffler*.

Briefs of *amici curiae* were filed for the Council of the city of New Orleans by *Clinton A. Vince;* for the Arkansas Public Service Commission et al. by *Steve Clark*, Attorney General of Arkansas, and *Mary B. Stallcup*, Deputy Attorney General, *Wallace L. Duncan*, *James D. Pembroke*, and *J. Cathy Fogel;* and for the Edison Electric Institute by *James B. Liberman*, and *Robert L. Baum*.

Power & Light Co. v. *Thornburg*, 476 U. S. 953 (1986), we conclude that the state proceedings are pre-empted and therefore reverse.

I

MP&L is one of four operating companies whose voting stock is wholly owned by Middle South Utilities (MSU), a public utility holding company.[1] The four companies are engaged both in the wholesale sale of electricity to each other and to companies outside the MSU system and in the retail sale of electricity in separate service areas in Louisiana, Arkansas, Missouri, and Mississippi. Through MSU the four companies operate as an integrated power pool, with all energy in the entire system being distributed by a single dispatch center located in Pine Bluff, Arkansas. Wholesale transactions among the four operating companies historically have been governed by a succession of three "System Agreements," which were filed with FERC in 1951, 1973, and 1982. The System Agreements have provided the basis for planning and operating the companies' generating units on a single-system basis and for equalizing cost imbalances among the four companies.

The retail sales of each of the operating companies are regulated by one or more local regulatory agencies. For example, Arkansas Power and Light Company (AP&L) sells in both Arkansas and Missouri and therefore is regulated by both the Arkansas Public Service Commission and the Missouri Public Service Commission. MP&L's retail rates are subject to the jurisdiction of the MPSC.

Through the 1950's and into the 1960's, most of the MSU system's generating plants were fueled with oil or gas. In the late 1960's, the MSU system sought to meet projected increases in demand and to diversify its fuel base by adding coal and nuclear generating units. It was originally contem-

[1] The other operating companies owned by MSU are Louisiana Power and Light (LP&L), New Orleans Public Service, Inc. (NOPSI), and Arkansas Power and Light Company (AP&L).

plated that each of the four operating companies would finance and construct a nuclear power facility.[2] Consistent with this scheme, MP&L was assigned to construct two nuclear power facilities at Port Gibson, Mississippi, Grand Gulf 1 and 2.[3] The Grand Gulf project, however, proved too large for one operating company to finance. MSU therefore formed a new subsidiary, Middle South Energy, Inc. (MSE), to finance, own, and operate Grand Gulf. MSE acquired full title to Grand Gulf, but hired MP&L to design, construct, and operate the facilities.

In April 1974, MSE and MP&L applied to MPSC for a certificate of public convenience and necessity authorizing the construction of the plant. The State Commission granted the certificate, noting that MP&L was part of "an integrated electric system" and that "the Grand Gulf Project [would] serve as a major source of baseload capacity for the company and the entire Middle South System pooling arrangement."[4] App. to Motion to Dismiss 36–37.

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[2] Prior to the events that gave rise to the instant controversy, each generating unit on the system was owned, financed, constructed, and operated by a single operating company despite the fact that new generating units were planned and constructed in accordance with the needs of the system as a whole, not merely the needs of the particular operating company. *Middle South Energy, Inc.*, 31 FERC ¶61,305, p. 61,653 (1985).

[3] Originally, AP&L was assigned to build and operate two nuclear facilities in Arkansas, ANO 1 and ANO 2; LP&L undertook the construction of Waterford 3 and 4; MP&L was assigned to build and operate Grand Gulf 1; and NOPSI was to construct a unit near New Orleans. Although the two ANO units were completed without incident, regulatory delays, additional construction requirements, and severe inflation led to serious problems in the construction of the remaining units. Plans to construct Waterford 4 quickly failed and severe costs overruns marred the completion of Waterford 3. The site for the NOPSI facility proved unsuitable and responsibility for construction of that unit, Grand Gulf 2, was transferred to MP&L.

[4] The MPSC's Order Granting Certificate of Public Convenience and Necessity reflected the MPSC's appreciation of the interstate dimensions of the MSU system. It stated, in part:

"Middle South Utilities, Inc. ('Middle South') is a holding company registered under the Public Utility Holding Company Act of 1935. It owns all

By the late 1970's it became apparent that systemwide demand in the ensuing years would be lower than had been forecast, making Grand Gulf's capacity unnecessary. Moreover, regulatory delays, additional construction requirements, and severe inflation frustrated the project. Management decided to halt construction of Grand Gulf 2, but to complete Grand Gulf 1, largely on the assumption that the relatively low cost of nuclear fuel would make the overall cost of Grand Gulf power per kilowatt hour lower than that of alternative energy sources. As it turned out, however, the cost of completing Grand Gulf construction was about six times greater than had been projected.[5] Consequently, the

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of the outstanding common stock of each of its principal operating subsidiaries: Arkansas Power & Light Company (Arkansas), Arkansas-Missouri Power Company (Ark-Mo), Louisiana Power & Light Company (Louisiana), [MP&L], and New Orleans Public Service Inc. (NOPSI). . . . Middle South and all of its subsidiaries constitute the Middle South Utilities System (Middle South System). The electric properties of the System operating companies constitute an integrated public utility system.

. . . . .

"The generating facilities of the Middle South System have been strategically located with a reference to the availability of fuel, protection of local loads and other controlling economic factors. The size of these units has been determined basically by the projected load growth of the Middle South System. [MP&L's] present rate and capital structure obviously cannot support construction of this magnitude.

"In order to finance this construction on a basis that will be in the best interests of both its investors and the investors in its subsidiaries, and to insure adequate and dependable electric service to the customers and service areas of its subsidiaries, including Company, and without unnecessarily complicating its financial structure, Middle South [Middle South Energy, Inc.] has been organized." App. to Motion to Dismiss 27–28, 30–31.

[5] It was originally estimated that the cost per kilowatt of capacity would be about $500; by the time commercial operations began, that cost amounted to $2,933. The original estimate for the cost of two nuclear units at Port Gibson was approximately $1.2 billion. Regulatory delays, additional construction requirements imposed after the Three Mile Island disaster, and severe inflation, however, ran up Grand Gulf costs to more than $3 billion for the single unit. See *Mississippi Industries* v. *FERC*, 257 U. S. App. D. C. 244, 250, 808 F. 2d 1525, 1531 (1987).

wholesale cost of Grand Gulf's power greatly exceeds that of power produced in other system facilities.

The four operating companies considered various methods of allocating the cost of Grand Gulf's power. In 1982 MSU filed two agreements with FERC. The first was a new System Agreement, which set forth the terms and conditions for coordinated operations and wholesale transactions among the four companies, including a scheme of "capacity equalization payments," which were designed to ensure that each company contribute proportionately to the total costs of generating power on the system. Transactions related to the purchase of power from Grand Gulf 1, however, were not included in the 1982 System Agreement. The second agreement filed with FERC was the Unit Power Sales Agreement (UPSA), which provided wholesale rates for MSE's sale of Grand Gulf 1 capacity and energy. Under the UPSA, AP&L was not obligated to purchase any of Grand Gulf's capacity; LP&L was obligated to purchase 38.57%, NOPSI 29.8%, and MP&L 31.63%.

The FERC Proceedings

FERC assigned the agreements to two different Administrative Law Judges, who were charged with the task of determining whether the agreements were "just and reasonable" within the meaning of the Federal Power Act.[6] Ex-

[6] Section 205 of the Federal Power Act declares unlawful any rate charged in any transaction within FERC's jurisdiction that is not just and reasonable. 49 Stat. 851, as amended, 16 U. S. C. § 824d(a). Section 206 of the Act provides that when FERC determines after a hearing that "any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order." 16 U. S. C. § 824e(a).

Because FERC determined that the UPSA allocating Grand Gulf power among the four operating companies was a contract affecting the wholesale

tensive hearings were held by each ALJ, in which numerous parties representing consumer interests and the various state regulatory agencies participated. Both judges concluded that because Grand Gulf was designed to serve the needs of the entire MSU system, the failure to distribute the costs associated with Grand Gulf among all members of the system rendered the agreements unduly discriminatory and that costs should be allocated in proportion to each company's relative system demand.[7] *Middle South Services, Inc.*, 30

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rates of those operating companies, § 206 of the FPA imposed on FERC an obligation to fix terms that would render the contract "just and reasonable." See *Mississippi Industries*, 257 U. S. App. D. C., at 259–260, 808 F. 2d, at 1540–1541.

[7] Administrative Law Judge Liebman, who reviewed the UPSA, "concluded that the evidence was overwhelming that the Middle South system is a single integrated and coordinated electric system operating in Louisiana, Mississippi, Arkansas, and Missouri. He found that the Grand Gulf project was initiated in the 1970's to meet the then projected load demand of the *system* and not just the load of any Middle South operating company or companies, and further that every unit on the Middle South system had been constructed to meet system load. Therefore, he concluded that the costs of Grand Gulf capacity and energy should be shared equitably by all four operating companies and their customers" and that the allocations in the UPSA were "unjust, unreasonable and unduly discriminatory." *Middle South Energy, Inc.*, 31 FERC, at 61,632–61,633 (emphasis in original); *Middle South Energy, Inc.*, 26 FERC ¶ 63,044, pp. 65,106–65,108 (1984). He concluded that the allocation proposal submitted by the Louisiana Public Service Commission was the most equitable. Under that proposal each operating company would be allocated a share of the cost of nuclear capacity on the MSU system roughly in proportion to each company's relative share of system demand, as fixed in 1982. *Id.*, at 65,109. This approach allocated 33% of Grand Gulf's capacity costs to MP&L, a percentage slightly higher than that contained in the UPSA, which had distributed costs among only three of the operating companies.

Administrative Law Judge Head, who presided in the proceedings involving the 1982 System Agreement, advocated equalizing production costs on the basis of annual demand. Although he characterized Grand Gulf as an "anomaly," he reached conclusions similar to ALJ Liebman's about the relationship of Grand Gulf to the system:

"[Grand Gulf] was planned, licensed, and constructed as a *system* plant, intended to supply power not only in Mississippi but throughout the entire

FERC ¶63,030, pp. 65,170–65,173 (1985) (1982 System Agreement); *Middle South Energy, Inc.*, 26 FERC ¶63,044, pp. 65,105–65,108 (1984) (UPSA).

FERC consolidated the decisions of the Administrative Law Judges for review and issued its decision in June 1985. *Middle South Energy, Inc.*, 31 FERC ¶61,305. The Commission acknowledged that it had before it difficult cost allocation issues and that there were "no easy answers." After extensive review, FERC concluded that the most equitable result would be to adopt ALJ Liebman's formula for allocating Grand Gulf costs.

The Commission affirmed and adopted the findings of the Administrative Law Judges that MSU is a highly integrated and coordinated power pool. It concluded that the result of this integration and coordination was "planning, construction, and operations which [were] conducted primarily for the system as a whole." *Id.*, at 61,645. Because it found that

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MSU system. . . . [T]he financial responsibility and production cost responsibility for Grand Gulf should be borne by all the operating companies. . . .

". . . Grand Gulf [should be integrated] into the 1982 System Agreement by having each of the four operating companies pay for the production costs of the Grand Gulf facility based on the ratio that the individual operating company's total annual demand bears to the total annual system demand." *Middle South Services, Inc.*, 30 FERC ¶63,030, p. 65,172 (1985) (emphasis added).

Both judges considered and rejected MP&L's proposition that costs should be allocated in accordance with the 1973 System Agreement. Under the 1973 Agreement, the cost to be borne by each operating company would depend on the percentage of Grand Gulf capacity that company needed to meet the demands of its customers. Thus companies owning capacity sufficient to meet their needs, "long" companies, would not bear any of the cost while "short" companies, companies that have to purchase additional capacity to meet their needs, would bear the total cost. Responsibility would shift as particular operating companies became "shorter" or "longer." Since MP&L is predicted to be a long company until sometime in the 1990's, under the 1973 System Agreement, it would not have had to bear any costs associated with Grand Gulf until depreciation had substantially reduced the cost of Grand Gulf power.

nuclear units on the System had been "planned to meet overall System needs and objectives," it concluded "that some form of equalization of nuclear plant costs [was] necessary to achieve just, reasonable, and non-discriminatory rates among the MSU operating companies." *Id.*, at 61,655. The Commission agreed with the judges that the 1982 System Agreement and the UPSA as filed would not together produce proper cost allocation, but concluded that the 1982 System Agreement in conjunction with ALJ Liebman's allocation of capacity costs associated with Grand Gulf would "achieve just and reasonable results." *Ibid.* Thus FERC affirmed the allocation of 33% of Grand Gulf's capacity costs to MP&L as just and reasonable. Although it did not expressly discuss the "prudence" of constructing Grand Gulf and bringing it on line, FERC implicitly accepted the uncontroverted testimony of the MSU executives who explained why they believed the decisions to construct and to complete Grand Gulf 1 were sound, and approved the finding that "continuing construction of Grand Gulf Unit No. 1 was prudent because Middle South's executives believed Grand Gulf would enable the Middle South system to diversify its base load fuel mix and, it was projected, at the same time, produce power for a total cost (capacity and energy) which would be less than existing alternatives on the system." 26 FERC, at 65,112–65,113; see 31 FERC, at 61,666 (affirming ALJ Liebman's decision to the extent not modified).

The Commission later clarified certain aspects of its previous order in the course of considering several petitions for rehearing. It rejected contentions that its exercise of jurisdiction would destroy effective state regulation of retail rates. Specifically, FERC rejected claims that it could not exercise jurisdiction because such action would result in States being "precluded from judging the prudence of Grand Gulf costs and denied any say in the rate of return imposed as part of these costs" and "imping[e] on the State's paramount

authority in certification decisions regarding need, type, and costs of construction of new generating facilities." *Middle South Energy, Inc.*, 32 FERC ¶61,425, p. 61,951 (1985). FERC asserted that its opinion was "the result of a careful balancing of the state and Federal interests involved" and that it had paid "careful heed to the impact [its] decision would have on the states." *Id.*, at 61,951–61,952. FERC went on to reject the argument that allocation of Grand Gulf costs should be based on whether individual companies *needed* Grand Gulf capacity. Since Grand Gulf had been constructed to meet the needs and serve the goals of the entire system, FERC reasoned that "the allocation of Grand Gulf power must rest not on the 'needs' of an individual company, but rather on the principles of just, reasonable, non-discriminatory, and non-preferential rates." *Id.*, at 61,958. FERC emphasized that the parties had entered the pooling agreement voluntarily and that its decision did no more than "alter in as limited a means as possible the agreed-upon cost scheme, in order to achieve just, reasonable, non-discriminatory and non-preferential rates." *Id.*, at 61,961.

On review, the United States Court of Appeals for the District of Columbia Circuit affirmed FERC's order that the four operating companies share the cost of the system's investment in nuclear energy in proportion to their relative demand for energy generated by the system as a whole. The court first rejected various challenges to FERC's authority to restructure the parties' agreed-upon allocations, holding that the Federal Power Act (FPA) gave FERC the necessary authority. The court then affirmed FERC's allocation of Grand Gulf capacity and costs as both rational and within the Commission's range of discretion to remedy unduly discriminatory rates. *Mississippi Industries* v. *FERC*, 257 U. S. App. D. C. 244, 285, 808 F. 2d 1525, 1566 (1987).[8]

[8]Judge Bork agreed with most of the majority's decision but dissented from the panel's affirmance of FERC's specific allocation of Grand Gulf costs on the ground that FERC had failed adequately to explain its criteria

The State Proceedings

On November 16, 1984, before the FERC proceedings were completed, MP&L filed an application for a substantial increase in its retail rates. The major portion of the requested increase was based on the assumption that MP&L would be required to purchase 31.63% of the high-cost Grand Gulf power when the unit began operating on July 1, 1985, in accordance with the terms of the UPSA. After public hearings, on June 14, 1985, the Mississippi Commission entered an order allowing MP&L certain additional revenues, but denying MP&L any retail rate relief associated with Grand Gulf Unit 1. App. to Juris. Statement 33a.

On June 27, 1985, MP&L applied for rehearing of the order insofar as it denied any rate relief associated with Grand Gulf. As expected, Grand Gulf went on line on July 1, 1985, and MP&L became obligated consistent with FERC's allocation to make net payments of about $27 million per month for Grand Gulf capacity. After public hearings on the rehearing petition, the MPSC found that MP&L would become insolvent if relief were not granted and allowed a rate increase to go into effect to recover a projected annual revenue de-

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for determining undue discrimination and why the allocation it adopted was not unduly discriminatory. The panel voted to deny rehearing, but the court granted rehearing en banc to consider the issues raised by the dissent and vacated the portions of the panel opinion concerning the specific allocation of costs. *Mississippi Industries* v. *FERC*, 259 U. S. App. D. C. 244, 814 F. 2d 773 (1987). Later, the en banc court vacated its order granting rehearing. 262 U. S. App. D. C. 41, 822 F. 2d 1103 (1987). At the same time, the panel vacated its order denying rehearing, granted rehearing, reversed FERC's order, vacated the part of its opinion concerning specific cost allocations, and remanded to FERC for reconsideration of the decision to equalize capacity costs and for an explanation of what constitutes undue discrimination and why FERC's order was not unduly discriminatory. *Mississippi Industries* v. *FERC*, 262 U. S. App. D. C. 42, 822 F. 2d 1104 (1987). On remand, FERC has issued an opinion reaffirming and further explaining the basis for its previous allocation. See *System Energy Resources, Inc.*, 41 FERC ¶61,238 (1987).

ficiency of about $327 million. The increase was predicated entirely on the company's need for revenues to cover the purchased power expenses associated with Grand Gulf 1. See *id.*, at 39a.

In its order the MPSC noted that petitions for rehearing were pending before FERC, in which the MPSC was continuing to challenge the allocation of 33% of Grand Gulf's power to MP&L. *Id.*, at 28a. It stated that it intended "to vigorously pursue every available legal remedy challenging the validity and fairness of the FERC allocation to MP&L," *id.*, at 51a, and that appropriate rate adjustments would be made if that allocation was changed. The order made no reference to the prudence of the investment in Grand Gulf.

The Attorney General of Mississippi and certain other parties representing Mississippi consumers appealed to the Mississippi Supreme Court. Under Mississippi law, the MPSC has authority to establish just and reasonable rates which will lead to a fair rate of return for the utility. Miss. Code Ann. § 77–3–39 (Supp. 1987). "A fair return is one which, under prudent and economical management, is just and reasonable to both the public and the utility." *Southern Bell Tel. & Tel. Co.* v. *Mississippi Public Service Comm'n*, 237 Miss. 157, 241, 113 So. 2d 622, 656 (1959); *Mississippi Public Service Comm'n* v. *Mississippi Power Co.*, 429 So. 2d 883 (Miss. 1983). The appealing parties charged, *inter alia*, that the MPSC had exceeded the scope of its authority by adopting "retail rates to pay Grand Gulf expenses without first determining that the expenses were prudently incurred." *Mississippi ex rel. Pittman* v. *Mississippi Public Service Comm'n*, 506 So. 2d 978, 979 (Miss. 1987). The State Supreme Court agreed, rejecting the argument that requiring the MPSC to review the prudence of incurring costs associated with Grand Gulf would violate the Supremacy Clause of the United States Constitution. The court concluded that MP&L and its sister and parent companies were

"using the jurisdictional relationship between state and federal regulatory agencies to completely evade a prudency review of Grand Gulf costs" by either state or federal agencies and remanded the case to the MPSC for further proceedings. The court held that FERC's determination that MP&L's assumption of a 33% share of the costs associated with Grand Gulf would be fair to its sister operating companies did not obligate the State to approve a pass-through of those costs to state consumers without a prudence review.[9]

The court rejected MP&L's argument that the decision of this Court in *Nantahala Power & Light Co.* v. *Thornburg*, 476 U. S. 953 (1986), which barred the State of North Carolina from setting retail rates that did not take into account FERC's allocation of power between two related utility companies, foreclosed a state prudence review. *Nantahala*, the state court concluded, simply did not force the "MPSC to set rates based on the construction and operation of a plant (nuclear or otherwise) that generates power that is not needed at a price that is not prudent." 506 So. 2d, at 985. The court assumed that only the fact that Grand Gulf was owned by an out-of-state corporation as opposed to MP&L created a

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[9] The court pointed out that approval to build Grand Gulf in the State of Mississippi had been secured on the strength of certain assumptions: "the first unit was to be operational in 1980, the two units were to cost $1.227 billion, and Mississippi ratepayers were not to pay for any more of its capacity than they needed." 506 So. 2d, at 984. Reliance on these assumptions proved unjustified: "Unit 1 began operation in July, 1985; the cost of Unit 1 alone, was over $3.5 billion; and the MSU-controlled operating companies agreed, among themselves that Mississippians should pay for 1/3 of its cost." *Ibid.* (emphasis omitted). Of course, the failure of the assumptions made by both MP&L and the State at the time construction of Grand Gulf was approved has little to do with the pre-emption question before us. We note, however, that the failure was not the result of any deception on the part of MP&L, MSU, or MSE. At the time construction of Grand Gulf was initiated, no one anticipated the enormous cost overruns that would be associated not only with that plant but also with virtually every nuclear power facility being constructed in the United States. See nn. 2 and 5, *supra*.

question whether a state prudence determination was preempted and concluded that that fact was not enough to rob it of authority. The court distinguished *Nantahala* because that case concerned an agreement allocating low-cost power, and the prudence of purchasing the available low-cost hydroelectric power was never at issue.

The state court adopted the view that in determining whether a particular aspect of state regulation was preempted by FERC action, the state court should "'examine those matters *actually determined*, whether expressly or impliedly, by the FERC.'" 506 So. 2d, at 986 (quoting *Appeal of Sinclair Machine Products, Inc.*, 126 N. H. 822, 833, 498 A. 2d 696, 704 (1985)). It concluded that "'[a]s to those matters not resolved by the FERC, State regulation is *not preempted provided* that regulation would not contradict or undermine FERC determinations and federal interests, or impose inconsistent obligations on the utility companies involved.'" 506 So. 2d, at 986. The court then noted that FERC "was never presented with the question of whether the completion of Grand Gulf, or its continued operation, was prudent" *ibid.*, and that the Court of Appeals in affirming FERC's allocation had "made no finding with regard to prudency *because the issue was not presented.*" *Id.*, at 987 (emphasis in original). Consistent with this analysis, the Mississippi Supreme Court remanded the case to the MPSC "for a review of the prudency of the Grand Gulf investment." The court specified that this review should "determine whether MP&L, [MSE] and MSU acted reasonably when they constructed Grand Gulf 1, in light of the change in demand for electric power in this state and the sudden escalation of costs." *Ibid.* Thus the MPSC was directed to examine the prudence of the investment of both domestic and foreign corporations in Grand Gulf *"in light of local conditions."* *Ibid.* (emphasis in original).

Appellant MP&L contends that our decision in *Nantahala*, the FPA, and the Commerce Clause require the MPSC in

setting retail electric rates to recognize that expenses incurred under FERC wholesale rate decisions that allocate interstate wholesale costs are reasonably incurred operating expenses.[10] In essence appellant asserts that FERC's allocation of Grand Gulf power pre-empts the jurisdiction of state regulatory agencies to set retail rates that do not recognize the costs associated with that allocation as reasonable. Appellees contend that the Supremacy Clause does not preclude review of MP&L's managerial prudence and that the effect of pre-emption would be to create a regulatory gap not contemplated by Congress, the Constitution, or this Court.

II

We hold that our decision in *Nantahala* rests on a foundation that is broad enough to support the order entered by

[10] Appellant asserted in its jurisdictional statement that the Mississippi Supreme Court had rejected its challenge to the constitutionality of Miss. Code Ann. § 77–3–39 (Supp. 1987) and that this Court had appellate jurisdiction under 28 U. S. C. § 1257(2). Relying on this assertion and on the substantial federal question presented, we postponed further consideration of the question of jurisdiction to the hearing of the case on the merits. 484 U. S. 813 (1987). On further review of the decision of the Mississippi Supreme Court and of the briefs submitted by appellant to that court, however, we are of the view that appellant never challenged the constitutionality of § 77–3–39; rather it merely argued that the MPSC's exercise of jurisdiction to determine prudence would violate the Supremacy Clause. Although appellant's argument implicitly called into question the scope of any state statutes that speak to the MPSC's jurisdiction, it was not the type of express challenge to the constitutionality of the state statute required for this Court's exercise of jurisdiction under § 1257(2). See *Peralta* v. *Heights Medical Center, Inc.*, 485 U. S. 80, 84, n. 4 (1988). Consequently, we dismiss the appeal for want of jurisdiction. However, because the papers do present a substantial federal question,"construing the papers filed as a petition for a writ of certiorari, we now grant the petition." *Addington* v. *Texas*, 441 U. S. 418, 422–423 (1979); see 28 U. S. C. § 2103. As we have in previous cases in which we have construed a jurisdictional statement as a petition for certiorari, for convenience we continue to refer to the parties as appellant and appellees. See *Peralta*, 485 U. S., at 84, n. 4; *Kulko* v. *California Superior Court*, 436 U. S. 84, 90, n. 4 (1978).

FERC in this case and to require the MPSC to treat MP&L's FERC-mandated payments for Grand Gulf costs as reasonably incurred operating expenses for the purpose of setting MP&L's retail rates. The Mississippi Supreme Court's judgment ordering the MPSC to conduct proceedings to determine whether some or all of the costs were not prudently incurred is pre-empted by federal law and must be reversed.[11]

In *Nantahala* we considered the pre-emptive effect of a FERC order that reallocated the respective shares of two affiliated companies' entitlement to low-cost power. Under an agreement between the two affiliated companies, Nantahala, a public utility selling to both retail and wholesale customers in North Carolina, had been allocated 20% of the low-cost power purchased from the Tennessee Valley Authority (TVA), while 80% was reserved for the affiliate whose only customer was their common parent. FERC found that the agreement was unfair to Nantahala and ordered it to file a new wholesale rate schedule based on an entitlement to 22.5% of the low-cost power purchased from TVA. Subsequently, in a retail rate proceeding, the North Carolina Regulatory Commission reexamined the issue and determined that any share less than 24.5% was unfair and therefore ordered Nantahala to calculate its costs for retail ratemaking purposes as though it had received 24.5% of the low-cost power. The effect of the State Commission's order was to force Nantahala to calculate its retail rates as though FERC had allocated it a greater share of the low-cost power and to deny Nantahala the right to recover a portion of the costs it had incurred in paying rates that FERC had determined to

[11] Appellees contend that the judgment of the Mississippi Supreme Court is not "final" within the meaning of 28 U. S. C. § 1257 because further proceedings will be held on remand. The critical federal question—whether federal law pre-empts such proceedings while the FERC order remains in effect—has, however, already been answered by the State Supreme Court and its judgment is therefore ripe for review. See *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469, 477 (1975). See also R. Stern, E. Gressman, & S. Shapiro, Supreme Court Practice 129 (6th ed., 1986).

be just and reasonable. Although the North Carolina Supreme Court acknowledged FERC's exclusive jurisdiction over wholesale rates, it held that the State Commission's *de facto* reallocation of low-cost power was "'well within the field of exclusive state rate making authority engendered by the "bright line" between state and federal regulatory jurisdiction under the Federal Power Act.'" *Nantahala*, 476 U. S., at 961 (quoting *State ex rel. Utilities Comm'n* v. *Nantahala Power & Light Co.*, 313 N. C. 614, 687–688, 332 S. E. 2d 397, 440–441 (1985)). The state court emphasized that its order did not require Nantahala to violate the FERC order and that it was not expressly contradicting a FERC finding. We rejected these arguments. The reasoning that led to our decision in *Nantahala* applies with equal force here and compels the same conclusion—States may not alter FERC-ordered allocations of power by substituting their own determinations of what would be just and fair. FERC-mandated allocations of power are binding on the States, and States must treat those allocations as fair and reasonable when determining retail rates.

Our decision in *Nantahala* relied on fundamental principles concerning the pre-emptive impact of federal jurisdiction over wholesale rates on state regulation. First, FERC has exclusive authority to determine the reasonableness of wholesale rates. It is now settled that "'the right to a reasonable rate is the right to the rate which the Commission files or fixes, and, . . . except for review of the Commission's orders, [a] court can assume no right to a different one on the ground that, in its opinion, it is the only or the more reasonable one.'" *Nantahala*, 476 U. S., at 963–964 (quoting *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U. S. 246, 251–252 (1951)). This principle binds both state and federal courts and is in the former respect mandated by the Supremacy Clause. 476 U. S., at 963. Second, FERC's exclusive jurisdiction applies not only to rates but also to power allocations that affect wholesale rates. *Id.*, at 966.

Third, States may not bar regulated utilities from passing through to retail consumers FERC-mandated wholesale rates. "The filed rate doctrine ensures that sellers of wholesale power governed by FERC can recover the costs incurred by their payment of just and reasonable FERC-set rates. When FERC sets a rate between a seller of power and a wholesaler-as-buyer, a State may not exercise its undoubted jurisdiction over retail sales to prevent the wholesaler-as-seller from recovering the costs of paying the FERC-approved rate. . . . Such a 'trapping' of costs is prohibited." *Id.*, at 970. These principles led us to hold in *Nantahala* that the North Carolina Utilities Commission's order "trapping" federally mandated costs was pre-empted. Today they compel us to hold that the MPSC may not enter an order "trapping" the costs MP&L is mandated to pay under the FERC order allocating Grand Gulf power or undertake a "prudence" review for the purpose of deciding whether to enter such an order.[12]

The facts of this case and *Nantahala* are not distinguishable in any way that has relevance to the operation of the principles stated above. Both cases concern FERC orders adjusting in the interest of fairness voluntary allocations of power among related entities. *Nantahala* involved a FERC order fixing the utility's right to acquire low-cost power; this case involves a FERC order fixing MP&L's obligation to acquire high-cost power. In *Nantahala* FERC had "deter-

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[12] It is clear that the only purpose of the prudence review ordered by the Mississippi Supreme Court was to determine whether the costs FERC had directed MP&L to pay for its allocation of Grand Gulf power should be "trapped" or passed on to MP&L's retail customers. The Mississippi Supreme Court's judgment ordering the review itself had the effect of "trapping" some Grand Gulf costs since the MPSC responded to the judgment by rescinding the previously approved rate increase and ordering MP&L to submit a plan for refunding to its customers all of its prior recovery of Grand Gulf expenses. To prevent this "trapping," we granted a stay of the Mississippi Supreme Court's judgment. *Mississippi Power & Light Co.* v. *Mississippi ex rel. Pittman*, 483 U. S. 1013 (1987).

mined that Nantahala's average cost of power obtained from TVA should be based on a particular allocation of entitlements power, *and no other*," *id.*, at 971 (emphasis added); in this case FERC has determined that MP&L's cost of power obtained from Grand Gulf should be based on a particular allocation, and no other. In *Nantahala* the state court attempted to approve retail rates based on the assumption that Nantahala was entitled to more low-cost power than FERC had allocated to it. Here the state court seeks to permit the State to set rates based on an assumption that MP&L is obligated to purchase less Grand Gulf power than FERC has ordered it to purchase.

In this case as in *Nantahala* we hold that "a state utility commission setting retail prices must allow, as reasonable operating expenses, costs incurred as a result of paying a FERC-determined wholesale price. . . . Once FERC sets such a rate, a State may not conclude in setting retail rates that the FERC-approved wholesale rates are unreasonable. A State must rather give effect to Congress' desire to give FERC plenary authority over interstate wholesale rates, and to ensure that the States do not interfere with this authority." *Nantahala*, 476 U. S., at 965, 966. Thus we conclude that the Supremacy Clause compels the MPSC to permit MP&L to recover as a reasonable operating expense costs incurred as the result of paying a FERC-determined wholesale rate for a FERC-mandated allocation of power.

Appellees seek to characterize this case as falling within facts distinguished in *Nantahala*. Without purporting to determine the issue, we stated in *Nantahala:* "[W]e may assume that a particular *quantity* of power procured by a utility from a particular source could be deemed unreasonably excessive if lower-cost power is available elsewhere, even though the higher-cost power actually purchased is obtained at a FERC-approved, and therefore reasonable, *price*." *Id.*, at 972 (emphasis in original). As we assumed, it might well be unreasonable for a utility to purchase unnecessary quanti-

ties of high-cost power, even at FERC-approved rates, if it had the legal right to refuse to buy that power. But if the integrity of FERC regulation is to be preserved, it obviously cannot be unreasonable for MP&L to procure the particular quantity of high-priced Grand Gulf power that FERC has ordered it to pay for. Just as Nantahala had no legal right to obtain any more low-cost TVA power than the amount allocated by FERC, it is equally clear that MP&L may not pay for less Grand Gulf power than the amount allocated by FERC.

The Mississippi Supreme Court erred in adopting the view that the pre-emptive effect of FERC jurisdiction turned on whether a particular matter was actually determined in the FERC proceedings. See 506 So. 2d, at 986. We have long rejected this sort of "'case-by-case analysis of the impact of state regulation upon the national interest'" in power regulation cases. *Nantahala*, 476 U. S., at 966 (quoting *FPC* v. *Southern California Edison Co.*, 376 U. S. 205, 215–216 (1964)). Congress has drawn a bright line between state and federal authority in the setting of wholesale rates and in the regulation of agreements that affect wholesale rates. States may not regulate in areas where FERC has properly exercised its jurisdiction to determine just and reasonable wholesale rates or to insure that agreements affecting wholesale rates are reasonable. FERC's jurisdiction to adjust the allocations of Grand Gulf power in the UPSA has been established.[13] Mississippi, therefore, may not consistent with the Supremacy Clause conduct any proceedings that challenge the reasonableness of FERC's allocation.

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[13] Appellant and other parties unsuccessfully challenged the jurisdiction of FERC over the UPSA in the FERC proceedings and on appeal to the United States Court of Appeals for the District of Columbia Circuit. After thorough consideration at every level of administrative and judicial review, this challenge was rejected. See 26 FERC, at 65,113–65,117; 31 FERC, at 61,643–61,644; 32 FERC, at 61,943–61,951; 257 U. S. App. D. C., at 258–262, 808 F. 2d, 1539–1543.

The reasonableness of rates and agreements regulated by FERC may not be collaterally attacked in state or federal courts. The only appropriate forum for such a challenge is before the Commission or a court reviewing the Commission's order. The Mississippi Supreme Court attached considerable significance to the fact that the prudence of investing in Grand Gulf and bringing it on line was not discussed either in the proceedings before FERC or on review by the United States Court of Appeals for the District of Columbia Circuit. The question of prudence was not discussed, however, because no party raised the issue, not because it was a matter beyond the scope of FERC's jurisdiction. The Mississippi Supreme Court characterized the conduct of MP&L and its sister companies as an effort to "us[e] the jurisdictional relationship between state and federal regulatory agencies to completely evade a prudency review of Grand Gulf costs by either agency." 506 So. 2d, at 979. The facts of this case, however, offer no evidence of such subterfuge. The very parties who are appellees here and who urged the Mississippi Supreme Court to order the MPSC to conduct a prudence review were also participants in the proceedings before FERC. The parties to the FERC proceedings recognized the impact that FERC's order would have on the jurisdiction of the state regulatory agencies. See *Middle South Energy, Inc.*, 32 FERC, at 61,951–61,952. Despite that recognition, appellees failed to raise the matter of the prudence of the investment in Grand Gulf before FERC though it was a matter FERC easily could have considered in determining whether to permit MSE to recoup 100% of the costs of Grand Gulf in the wholesale rates it charged to the four operating companies and in allocating Grand Gulf power. See *New England Power Co.*, 31 FERC ¶61,047, pp. 61,081–61,084 (1985), enf'd, 800 F. 2d 280 (CA1 1986).

In fact, FERC did consider and reject some aspects of the prudence review the Mississippi Supreme Court directed the MPSC to conduct. The state court emphasized that the MPSC was to determine whether "MSU and its subsidiaries made reasonable decisions *in light of local conditions*." 506 So. 2d, at 987. FERC rejected, however, the argument that decisions about the allocation of Grand Gulf costs should be made in light of the needs of any one of the operating companies. It emphasized that "the Middle South companies appropriately approach power planning on a systemwide basis, whereby the individual companies' needs are the component parts of the System power plan [and that] [i]mplementation of the System plan . . . require[d] that the individual companies' needs be subsumed by the greater interests of the entire System." 32 FERC, at 61,958. Thus FERC's order specifically bars a state regulatory agency from evaluating the prudence of Grand Gulf "in light of local conditions" alone. The state court also directed a "complete review of the transactions between MP&L, [MSE], and MSU, and their effect on Grand Gulf expense." These transactions, however, comprise the very System Agreements between MSU and the operating companies and UPSA evaluated by FERC in the exercise of its jurisdiction over wholesale rates. The MPSC lacks jurisdiction to reevaluate the reasonableness of those transactions. The MPSC cannot evaluate either the prudence of MSU's decision to invest in Grand Gulf and bring it on line or the prudence of MP&L's decision to be a party to agreements to construct and operate Grand Gulf without traversing matters squarely within FERC's jurisdiction.[14]

[14] In addition to arguing that the Supremacy Clause does not bar an MPSC prudence inquiry, appellees argue that MP&L should be equitably estopped from arguing that the prudence review ordered by the Mississippi Supreme Court is pre-empted by federal law. In acquiring a license from the State of Mississippi to construct Grand Gulf, MSU and MP&L made certain representations to the MPSC as to how Grand Gulf costs and power would be allocated. Appellees do not claim that these representations were false when made, Brief for Appellee State of Mississippi 39, or

There "can be no divided authority over interstate commerce . . . the acts of Congress on that subject are supreme and exclusive." *Missouri Pacific R. Co.* v. *Stroud*, 267 U. S. 404, 408 (1925). Consequently, a state agency's "efforts to regulate commerce must fall when they conflict with or interfere with federal authority over the same activity." *Chicago & North Western Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U. S. 311, 318–319 (1981). Mississippi's effort to invade the province of federal authority must be rejected. The judgment of the Mississippi Supreme Court is reversed.

It is so ordered.

JUSTICE SCALIA, concurring in the judgment.

I concur in the judgment of the Court, but write separately to discuss more fully what is to me the critical issue in this case: whether FERC had jurisdiction to determine whether MP&L's agreement to participate in the construction of Grand Gulf 1 and to purchase power from that facility was prudent.

It is common ground that if FERC has jurisdiction over a subject, the States cannot have jurisdiction over the same subject. See *Nantahala Power & Light Co.* v. *Thornburg*, 476 U. S. 953, 962–967 (1986). FERC has determined that when two or more utilities form a joint venture or pool to share electrical generating capacity, including construction of

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that FERC was bound by the representations made in the state proceedings, *id.*, at 42; rather, they argue that MSU should have been "denied standing . . . to file an application with FERC, or enforce any allocation against the Mississippi service area other than originally represented to secure the necessary construction certificate," *id.*, at 43. This argument has no relevance to the pre-emption question before us. Representations in state proceedings, even ones that were false when made, cannot subvert the operation of the Supremacy Clause. The appropriate place to contend that MSU and or MP&L lacked standing before the FERC was in the Commission proceedings, and the argument was in fact raised and rejected in those proceedings. See 257 U. S. App. D. C., at 268–269, 808 F. 2d, at 1549–1550.

a new facility, the resulting transfers of power are wholesales of electricity subject to FERC's jurisdiction under the Federal Power Act, 16 U. S. C. § 791a *et seq.* It is not disputed that in reviewing the wholesale rates charged to the participants in such a venture, FERC has jurisdiction to determine whether the venture was prudent as a whole. Nor is it seriously contested that in general FERC has jurisdiction to determine a fair allocation of the cost of the facility among the utilities in the pool. Cf. *Nantahala*, *supra*, at 966. The central controverted issue in the present case is whether FERC has jurisdiction to determine the prudence *of a particular utility's participation* in the pool.

FERC has asserted that it has such jurisdiction in the context of a pool of affiliated companies. In *AEP Generating Co.*, 36 FERC ¶61,226 (1986), FERC was asked to consider the prudence, "in light of the availability of alternative power supplies," of Kentucky Power Company's agreement to purchase 15% of the capacity of a generating facility as part of a pooling agreement with other, affiliated, utilities. *Id.*, at 61,549. FERC agreed to do so, concluding that fair allocation of costs among the utilities was inseparable from some inquiry into the prudence of Kentucky Power's entering into the pooling arrangement in light of available alternative power supplies. *Id.*, at 61,550–61,551. FERC explained that "the transaction involves affiliated, jurisdictional utilities, which are members of an integrated, interstate holding company arrangement" and that "[u]nder these circumstances, more complex, interrelated questions arise and, whether one characterizes the questions as related to prudence, interpretation [of the basic system agreements], or cost allocation, they are clearly matters most appropriately resolved by the Commission as part of its overriding authority to evaluate and implement all applicable wholesale rate schedules." *Id.*, at 61,550.

AEP Generating Co. makes plain that for the type of arrangement at issue in this case, see *ante*, at 357, and n. 1—a

joint venture or pooling agreement among affiliated companies—FERC asserts jurisdiction to inquire into the prudence of a particular utility's entering the arrangement. Nothing the Commission said or did in the present case is inconsistent with that assertion of jurisdiction. Its statement that allocation of the costs of Grand Gulf was not to be based on the "needs" of particular utilities, *Middle South Energy, Inc.*, 32 FERC ¶61,425, p. 61,958 (1985), merely rejects allocating costs according to the *current* needs of the utilities, which would be incompatible with the utilities' agreement to approach power planning on a systemwide basis. That has nothing to do with whether the prudence of a utility's joining the system in the first place can be examined. It is true, of course, that FERC did not conduct such an examination in the present case; but, as the Court discusses, see *ante*, at 375, neither did any party ask it to do so. That failure to ask does not take the issue out of FERC's jurisdiction and recommit it to the States.*

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*The dissent's assertion that "[i]n conducting this litigation, FERC originally took the position that it had no jurisdiction over the prudence of a pool member's purchase decision," *post*, at 388, is contradicted by the passage cited by the dissent from the Administrative Law Judge (ALJ) hearings. To be sure, appellees asserted before the ALJ that FERC had no jurisdiction over this prudency issue, see App. to Motion to Dismiss 52–53, 54, 56, 60, 61, 62, but the ALJ gave clear indications that he would address such an issue if a party pressed it:

"MR. EASTLAND [for MPSC]: . . . [W]hat we say we can do is that you set a wholesale charge, . . . but it is not necessarily proper or prudent for that utility, for purposes of utilizing that power in retail sales, to buy that power.

"That's what we're saying that we have the jurisdiction to make decisions with respect to.

"PRESIDING JUDGE: . . . I would not get into a prudency argument unless one of the Intervenors raises a prudency question.

"I mean we have prudency questions in the gas cases now all over the place, with customers screaming that the purchasing practices of the pipelines were imprudent, and those prudency issues have been set for hearing in rate cases as an initial determination as to the justness and reasonable-

What the case comes down to, then, is whether FERC's asserted jurisdiction to examine the prudence of a particular utility's joining a pooling arrangement with affiliated companies is supported by the provisions of the Federal Power Act. If so, there is no regulatory gap for the States to fill, and they are pre-empted from examining that question of prudence in calculating the rates chargeable to retail customers. In considering the Federal Power Act question we will defer, of course, to FERC's construction if it does not violate plain meaning and is a reasonable interpretation of silence or ambiguity. See, *e. g.*, *K mart Corp.* v. *Cartier, Inc.*, 486 U. S. 281, 291–292 (1988); *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842–844 (1984).

Contrary to the dissent, *post*, at 386–387, we have held that this rule of deference applies to an agency's interpretation of a statute designed to confine its authority. See, *e. g.*, *Japan Whaling Assn.* v. *American Cetacean Society*, 478 U. S. 221, 226, 233 (1986); *Chemical Manufacturers Assn.* v.

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ness of the rates and rate design, and what you should do if there is imprudence. So it comes into the justness and reasonableness.

"But if you are not going to argue that—If the Intervenors themselves are not going to argue imprudence on behalf of the company, MSE or the operating companies, I'm not going to get into that issue.

"MR. VINCE [for Council of the City of New Orleans (not a party here)]: Would your Honor be examining the issue of prudency in the subject of allocation?

"PRESIDING JUDGE: Not unless you raise it.

"MR. VINCE: Your Honor, New Orleans . . . would perhaps propose to take this one step further and say that the allocation, first of all with reference to AP&L, was imprudent and secondly, with reference to the individual operating companies was imprudent, and the methodology for the allocation was imprudent.

"PRESIDING JUDGE: Okay. If you raise that question then I will have to decide the prudency issue in the context of deciding whether or not such alleged imprudency would justify a finding of unjust unreasonableness in the allocation or discrimination with respect to the allocation.

"So you are raising the prudency issue?

"MR. VINCE: With respect to allocation, yes.

"PRESIDING JUDGE: Okay. So it's in." *Id.*, at 60–62.

Natural Resources Defense Council, Inc., 470 U. S. 116, 123, 125, 126 (1985). In particular, it is settled law that the rule of deference applies even to an agency's interpretation of its own statutory authority or jurisdiction. See *Commodity Futures Trading Comm'n* v. *Schor*, 478 U. S. 833, 844–845, (1986); *NLRB* v. *City Disposal Systems, Inc.*, 465 U. S. 822, 830, n. 7 (1984) ("We have never . . . held that such an exception [for issues of statutory jurisdiction] exists to the normal standard of review . . . ; indeed, we have not hesitated to defer . . ."); see also, *e. g.*, *City of New York* v. *FCC*, 486 U. S. 57, 64 (1988); *Capital Cities Cable, Inc.* v. *Crisp*, 467 U. S. 691, 700 (1984); *CBS, Inc.* v. *FCC*, 453 U. S. 367, 382 (1981); *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 379–381 (1969); *FTC* v. *Bunte Brothers, Inc.*, 312 U. S. 349, 352 (1941) (dictum). In fact, the arguments relied on by the dissent, *post*, at 386–387, have been expressly rejected by this Court—namely, that agencies can claim no special expertise in interpreting their authorizing statutes if an issue can be characterized as jurisdictional, see *Schor*, *supra*, at 845, and that the usual reliance on the agency to resolve conflicting policies is inappropriate if the resolution involves defining the limits of the agency's authority, see, *e. g.*, *City of New York* v. *FCC*, *supra*, at 64, rather than (what is really no different) defining the limits of application of authority it plainly has. Rather, it is plain that giving deference to an administrative interpretation of its statutory jurisdiction or authority is both necessary and appropriate. It is *necessary* because there is no discernible line between an agency's exceeding its authority and an agency's exceeding authorized application of its authority. To exceed authorized application is to exceed authority. Virtually any administrative action can be characterized as either the one or the other, depending upon how generally one wishes to describe the "authority." Cf. *NLRB* v. *City Disposal Systems, Inc.*, *supra*, at 830, n. 7. And deference is *appropriate* because it is consistent with the general rationale for deference: Congress would naturally ex-

pect that the agency would be responsible, within broad limits, for resolving ambiguities in its statutory authority or jurisdiction. Cf. *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, *supra*, at 843–844. Congress would neither anticipate nor desire that every ambiguity in statutory authority would be addressed, *de novo*, by the courts. To be sure, in defining agency jurisdiction Congress sometimes speaks in plain terms, in which case the agency has no discretion. But the dissent concedes that in this case, "[i]f agency deference applied, . . . these prudency issues are sufficiently intertwined that we should defer to FERC's conclusion." *Post*, at 386.

FERC's interpretation in the present case satisfies the conditions for deference. Under 16 U. S. C. § 824e(a), FERC is responsible for assuring that the rates charged to purchasers of electric energy at wholesale, and the contracts affecting such rates, are not "unjust, unreasonable, unduly discriminatory or preferential." Perhaps (we need not decide the point today) it cannot be considered "unjust, unreasonable, unduly discriminatory or preferential" to hold the participant in a joint venture to that fair proportion of the costs which it contracted in arm's-length negotiations to bear, even though its entry into the contract may have been imprudent. But I think it assuredly can be considered "unjust, unreasonable, unduly discriminatory or preferential" (for purposes of the ends served by the Federal Power Act) to make a participant bear such costs under an imprudent contract it was essentially assigned, through a process in which the overall interests of the affiliated group rather than the particular interest of the individual affiliate was paramount. It is entirely reasonable to think that the fairness of rates and contracts relating to joint ventures among affiliated companies cannot be separated from an inquiry into the prudence of each affiliate's participation.

Appellees rely upon the language in § 824(b)(1) which states that FERC "shall not have jurisdiction, except as spe-

cifically provided in this subchapter [the Federal Power Act] . . . , over facilities used for the generation of electric energy." But this does not plainly contradict FERC's assertion of jurisdiction. First, it is reasonable to regard FERC's § 824e(a) authority to set wholesale rates as precisely an example of jurisdiction "specifically provided." And second, it is reasonable to say that FERC is not exercising jurisdiction over the electrical generating facility but merely over the sale of the power created by that facility.

After today, the battle will no longer be over who has jurisdiction, FERC or the States, to evaluate the prudence of a particular utility's entering pooling arrangements with affiliated companies for the sharing of electrical generating capacity or the creation and wholesaling of electrical energy. FERC has asserted that jurisdiction and has been vindicated. What goes along with the jurisdiction is the responsibility, where the issue is appropriately raised, to protect against allocations that have the effect of making the ratepayers of one State subsidize those of another.

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

This case involves two separate prudency issues: one is governed by *Nantahala Power & Light Co.* v. *Thornburg*, 476 U. S. 953 (1986); the other is not. The first issue is whether the state utility commission has jurisdiction to determine whether, treating appellant's participation in the Grand Gulf project as a given, it was imprudent for appellant to purchase such a high amount of expensive Grand Gulf power. I agree with the Court that the portions of the Mississippi Supreme Court's opinion suggesting that the state commission does have this jurisdiction are in error. *Mississippi ex rel. Pittman* v. *Mississippi Public Service Comm'n*, 506 So. 2d 978, 984–985 (1987). The State cannot second-guess the prudency of the amount of power purchased because FERC's order imposed this allocation of power on appellant. The issue is precisely analogous to that decided in

Nantahala, where a state utility commission setting retail rates refused to allow a utility to recover its full wholesale costs on the theory that the utility should have purchased more low-cost power than it was allocated under a FERC order. Just as in *Nantahala* the utility's purchases of high-cost power could not be deemed unreasonably large because the utility could not have purchased any more low-cost power than FERC had allocated it, 476 U. S., at 972–973, so here, given that appellant had entered into and completed the Grand Gulf project, appellant's purchases of high-cost power could not be deemed unreasonably large because it could not have purchased any less high-cost power than FERC's allocation order compelled it to purchase.

That issue is distinct, however, from the issue whether, to the extent appellant's decision to participate in the Grand Gulf project involved the purchase decision of a retail utility, a state utility commission has jurisdiction to review the prudency of that purchase. This issue cannot be resolved by simple reference to *Nantahala*, for FERC did not order appellant to participate in the Grand Gulf project, and although FERC's order determines the allocation of the costs incurred in the project, the question remains whether appellant imprudently incurred those costs in the first place. I am convinced that the state utility commission does have jurisdiction over this prudency issue, and thus I would affirm the Mississippi Supreme Court's judgment remanding for a prudency determination. The question is, however, a complicated one, which forces us to confront the issue of how the normal jurisdictional principles of the Federal Power Act apply to the rather special situation of an interstate electricity pool.

In direct response to decisions of this Court concluding that, under the Commerce Clause, States can regulate interstate sales of energy at retail but not at wholesale, Congress enacted the Federal Power Act, which filled the regulatory gap and incorporated the wholesale/retail line by providing

FERC with regulatory jurisdiction over wholesale interstate sales of electricity and leaving retail sales to state regulation. See 16 U. S. C. §§ 824(a) and (b)(1); *Arkansas Electric Cooperative Corp.* v. *Arkansas Public Service Comm'n*, 461 U. S. 375, 377–380 (1983). Where retailing and wholesaling utilities are independent, the impact of this wholesale/retail division on federal and state jurisdiction to conduct prudency review is clear and undisputed. FERC has jurisdiction to determine whether a wholesaling utility has incurred costs imprudently. See, *e. g.*, *Arizona Public Service Co.*, 27 FERC ¶61,185 (1984). If FERC determines that costs were prudently incurred, it allows the wholesale rates to reflect those costs; otherwise, the wholesale rates cannot reflect those costs, and the wholesaler's stockholders, rather than its customers, must bear the burden of the utility's imprudence. See, *e. g.*, *Violet* v. *FERC*, 800 F. 2d 280 (CA1 1986). FERC does not, however, have jurisdiction to determine whether it might be imprudent, given other purchasing options, for a retailing utility to *purchase* power at the FERC-approved wholesale rate. See, *e. g.*, *Southern Company Services, Inc.*, 28 FERC ¶61,349 (1984). The state utility commissions have jurisdiction to determine, for example, that the retail utility does not need the power or could obtain power from other sources at a lower cost. *Nantahala*, *supra*, at 972. Thus, although a state utility commission cannot decide that a retail utility should have bought wholesale power from a given source at other than the FERC-approved wholesale rate, it can decide that the utility should not have bought power from that source at all. See, *e. g.*, *Pike County Light & Power Co.* v. *Pennsylvania Public Utility Comm'n*, 77 Pa. Commw. 268, 273–274, 465 A. 2d 735, 737–738 (1983). In short, the reasonableness of charging a rate as a wholesaler is distinct from the reasonableness of incurring that charge as a purchaser. See, *e. g.*, *Appeal of Sinclair Machine Products, Inc.*, 126 N. H. 822, 498 A. 2d 696 (1985).

Interstate electricity pools, however, present special difficulties for the wholesale/retail division of jurisdiction because the "wholesale" transaction is from the pool to the utilities belonging to the pool, and thus the entities wholesaling the power are the same ones purchasing and retailing that power. As a result, a member utility's decision to participate in the pool's building or operation of a powerplant is simultaneously a decision to purchase the power generated by that plant. The purchasing aspects of such a decision would seem to be within the jurisdiction of state utility commissions to determine whether a retail utility's decision to purchase power is prudent under state-law standards before those purchase costs can be passed on to retail customers. On the other hand, FERC would seem to have jurisdiction to determine the prudency of incurring these building or operation costs in order to determine whether those costs can be reflected in the wholesale rates the pool charges the member utilities.

If agency deference applied, I would conclude that these prudency issues are sufficiently intertwined that we should defer to FERC's conclusion that it has exclusive jurisdiction to determine all prudency issues concerning the participation of a retail utility in an interstate pool. I cannot, however, agree with JUSTICE SCALIA's conclusion that courts must defer to an agency's statutory construction even where, as here, the statute is designed to confine the scope of the agency's jurisdiction to the areas Congress intended it to occupy. *Ante*, at 380–382. Our agency deference cases have always been limited to statutes the agency was "entrusted to administer." *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 844 (1984); see also *id.*, at 842; *Japan Whaling Assn.* v. *American Cetacean Society*, 478 U. S. 221, 233 (1986); *Chemical Manufacturers Assn.* v. *Natural Resources Defense Council, Inc.*, 470 U. S. 116, 125 (1985). Agencies do not "administer" statutes confining the scope of their jurisdiction, and such statutes are not "en-

were *Solicitor General Fried*, *Assistant Attorney General Weld*, and *Deputy Solicitor General Bryson*.*

JUSTICE WHITE delivered the opinion of the Court.

In this case, we are called on to determine whether the interrogation of petitioner after his indictment violated his Sixth Amendment right to counsel.

I

Before dawn on August 21, 1983, petitioner and other members of the "Vice Lords" street gang became involved in a fight with members of a rival gang, the "Black Mobsters." Some time after the fight, a former member of the Black Mobsters, James Jackson, went to the home where the Vice Lords had fled. A second fight broke out there, with petitioner and three other Vice Lords beating Jackson severely. The Vice Lords then put Jackson into a car, drove to the end of a nearby street, and left him face down in a puddle of water. Later that morning, police discovered Jackson, dead, where he had been left.

That afternoon, local police officers obtained warrants for the arrest of the Vice Lords, on charges of battery and mob action, in connection with the first fight. One of the gang members who was arrested gave the police a statement concerning the first fight; the statement also implicated several of the Vice Lords (including petitioner) in Jackson's murder. A few hours later, petitioner was apprehended. Petitioner was informed of his rights under *Miranda* v. *Arizona*, 384 U. S. 436 (1966), and volunteered to answer questions put to him by the police. Petitioner gave a statement concerning the initial fight between the rival gangs, but denied knowing anything

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*Briefs of *amici curiae* urging affirmance were filed for the Washington Legal Foundation by *Daniel J. Popeo* and *Paul D. Kamenar;* and for Americans for Effective Law Enforcement, Inc., et al. by *David Crump*, *Courtney A. Evans*, *Bernard J. Farber*, *Daniel B. Hales*, *James A. Murphy*, *Jack E. Yelverton*, *Fred E. Inbau*, *Wayne W. Schmidt*, and *James P. Manak*.

tion by the States," 16 U. S. C. § 824(a), and that "[t]he provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but [with an exception not relevant here] shall not apply to any other sale of electric energy," 16 U. S. C. § 824(b)(1). The intent evident from the face of the statute is only reinforced by the legislative history, which, as we have noted before, shows a "constant purpose to protect . . . [the] authority of the states." *Connecticut Light & Power Co.* v. *FPC*, 324 U. S. 515, 525–527 (1945). See also S. Rep. No. 621, 74th Cong., 1st Sess., 48 (1935) ("[T]he policy of Congress [is] . . . not to impair or diminish the powers of any State commission"); H. R. Rep. No. 1318, 74th Cong., 1st Sess., 7, 8, 27 (1935) ("The bill takes no authority from State commissions"). Deference is particularly inappropriate where, as here, the statute is designed not merely to confine an agency's jurisdiction but to preserve the jurisdiction of other regulators, for Congress could not have intended courts to defer to one agency's interpretation of the jurisdictional division where the policies in conflict have purposely been committed to the care of different regulators.

Furthermore, FERC's statutory construction in this area has not been consistent and was not contemporaneous with the enactment of the Federal Power Act. See generally *INS* v. *Cardoza-Fonseca*, 480 U. S. 421, 446–447, n. 30 (1987); *Schor*, *supra*, at 844–845. In conducting this litigation, FERC originally took the position that it had no jurisdiction over the prudence of a pool member's purchase decision and over whether the costs could be passed on to retail customers. App. to Motion to Dismiss 52–66.* Since then

*Although JUSTICE SCALIA cites language from the Administrative Law Judge (ALJ) hearing demonstrating that the ALJ indicated his willingness to address certain "prudency issues," *ante* at 379, n., the ALJ stressed throughout the hearing the distinction between prudency issues relevant to setting wholesale rates and issues regarding the prudency of power pur-

FERC has, as JUSTICE SCALIA notes, *ante*, at 378–379, issued an opinion concluding that in regulating an integrated interstate pool, FERC's determination regarding the prudence of a wholesaler's costs inevitably determines the prudence of the wholesale purchase and the decision to enter into a pooling agreement. But FERC specifically noted in that opinion that its present conclusion differs from the position it took earlier in that very litigation. *AEP Generating Co.*, 36 FERC ¶61,226, p. 61,550 (1986).

I thus examine the jurisdictional issue without any special deference to the agency's position. I note at the outset that FERC's position rests on an already shaky jurisdictional foundation. FERC does not, after all, have any jurisdiction over a utility that simply builds its own generating facility and retails the electricity. FERC nonetheless asserts jurisdiction over transactions between a pool's generating facility and the utilities belonging to the pool on the theory that the pool and the member utilities are sufficiently separate to deem the transaction a wholesale transaction rather than an internal transfer. In some tension with this position, it then asserts jurisdiction to allocate power in a way that forces purchases from the pool on the theory that the member utilities are sufficiently integrated in the pool so that it is merely allocating costs rather than forcing purchases on retail utilities. The United States Court of Appeals for the District of Columbia Circuit upheld FERC's jurisdiction on both counts. *Mississippi Industries* v. *FERC*, 257 U. S. App. D. C. 244, 258–262, 264–266, 808 F. 2d 1525, 1539–1543, 1545–1547, cert. denied, 484 U. S. 985 (1987). Now FERC seeks to complete the jurisdictional circle by asserting that the state

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chases and their effect on retail rates, and stated several times that he and FERC would and could only address the former. App. to Motion to Dismiss 61, 63, 66. At any rate, regardless of FERC's position in this case (and it was at best unclear), FERC has certainly not demonstrated a consistent agency interpretation, nor one that was contemporaneous with the enactment of the Federal Power Act.

utility commissions do not even have the authority to question whether retail utilities have made imprudent purchase decisions by deciding to participate in pool projects, even though those decisions are what leaves the retail utilities in the position to have part of the incurred costs allocated onto them by FERC via forced purchases.

The jurisdictional decisions of the United States Court of Appeals for the District of Columbia Circuit are not before us, and I do not question them. Indeed, it makes a great deal of sense to read the statute as allowing FERC to exercise jurisdiction over the allocation of costs among interstate pool members because otherwise every state commission would have a parochial incentive to claim that the costs must be imposed on the utilities located in other States. A neutral federal mediator is needed. The issue of allocation is logically distinct, however, from the issue whether the costs allocated to a particular utility should be borne by the retail customers, through increased rates, or by the utility's stockholders. The latter issue is the type over which States traditionally exercise jurisdiction, and there are no special reasons counseling for a neutral federal intermediary. Nor, given that FERC's asserted authority to force intrapool purchases by retail utilities already lies at the farthest reaches of its jurisdiction, is there any reason to read this allocative authority expansively to encompass matters within the traditional purview of the States.

To be sure, in regulating the wholesale rates of an integrated interstate pool and determining the prudence of the costs the pool incurred as the wholesaler, FERC will examine many of the same factors a state utility commission would examine in reviewing the prudence of the decision to purchase that is part of entering into and continuing a pool project. But the issues are not identical. For example, if one retail utility happens to have a low-cost source and enters into an agreement to build a medium-cost plant, the construction of the medium-cost plant may not involve any impru-

dently incurred costs from the wholesaling perspective, but the medium-cost purchase would be imprudent for the retail utility with the low-cost source. Even to the extent the prudency issues do overlap, I see no reason why FERC's review should bar States from applying state-law standards of prudency to the purchase decisions that are an integral part of a member retail utility's participation in an interstate pool. FERC's interpretation of the Act would divest States of authority to determine the prudence of costs incurred by retail utilities whenever those utilities belong to an interstate pool—a result that I do not think can be squared (particularly given FERC's shaky jurisdictional foundation) with the clear intent of Congress to preserve the authority of States to regulate retail utilities. See *supra*, at 387–388. Moreover, allowing only FERC review of interstate pool decisions would effectively allow retail utilities that either belong to interstate pools or span more than one State to pick and choose between state and federal regulation by deciding whether to form subsidiaries to operate their generating facilities and sell them "wholesale" electricity.

I thus conclude that regardless of FERC's jurisdiction to allocate incurred costs among member utilities and regardless of its jurisdiction to review the prudency of an interstate pool's projects in order to set wholesale rates for intrapool transactions, state utility commissions retain jurisdiction to determine whether incurring those costs involved prudent purchase decisions that can be passed on to retail customers. I thus dissent from the Court's decision to reverse the Mississippi Supreme Court's judgment remanding for a prudency determination.

SHERIDAN ET UX. *v.* UNITED STATES

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

No. 87–626. Argued April 26, 1988—Decided June 24, 1988

An obviously intoxicated off-duty serviceman (Carr) fired several rifle shots into petitioners' automobile on a public street near the Bethesda Naval Hospital where Carr worked, causing physical injury to one of the petitioners and damage to the car. Petitioners filed suit against the Government under the Federal Tort Claims Act (FTCA) in Federal District Court, alleging that their injuries were caused by the Government's negligence in allowing Carr to leave the hospital with a loaded rifle in his possession. The facts, as alleged in the complaint and as supplemented by discovery, were that, after finishing his work shift, Carr consumed a large amount of alcoholic beverages; that naval corpsmen found him in a drunken stupor in a hospital building and attempted to take him to the emergency room; that the corpsmen fled when they saw a rifle in his possession; that the corpsmen neither took further action to subdue Carr nor alerted the appropriate authorities that he was intoxicated and brandishing a weapon; and that he fired the shots into petitioners' car later that evening. The District Court dismissed the action on the ground that the claim was barred by the FTCA's intentional tort exception, 28 U. S. C. § 2680(h), which provides that the Act's provisions subjecting the Government to liability for the negligent or wrongful act or omission of a Government employee while acting within the scope of his employment shall not apply to any claim "arising out of" an assault or battery. The court rejected petitioners' argument that § 2680(h) was not applicable because they were relying, not on the fact that Carr was a Government employee when he assaulted them, but rather on the negligence of other Government employees who failed to prevent his use of the rifle. The Court of Appeals affirmed.

Held: Petitioners' claim is not barred by § 2680(h). Although the words "any claims arising out of" an assault or battery are broad enough to bar all claims based entirely on an assault or battery, in at least some situations the fact that injury was directly caused by an assault or battery will not preclude liability against the Government for negligently allowing the assault to occur. Cf. *United States* v. *Muniz*, 374 U. S. 150. Even assuming that, when an intentional tort is a *sine qua non* of recovery, the action "arises out of" that tort, nevertheless the § 2680(h) exception does not bar recovery in this case. The intentional tort exception is in-

applicable to torts that fall outside the scope of the FTCA's general waiver of the Government's immunity from liability. Since the FTCA covers actions for personal injuries caused by the negligence or wrongful act or omission of any Government employee "while acting within the scope of his office or employment," if nothing more was involved here than Carr's conduct at the time he shot at petitioners, there would be no basis for imposing liability on the Government. As alleged in this case, however, the negligence of other Government employees who allowed a foreseeable assault and battery to occur may furnish a basis for Government liability that is entirely independent of Carr's employment status. Assuming that petitioners' version of the facts would support recovery under Maryland law on a negligence theory if the naval hospital had been owned and operated by a private person, the mere fact that Carr happened to be an off-duty federal employee would not provide a basis for protecting the Government from liability that would attach if Carr had been a non-Government employed patient or visitor in the hospital. The fact that Carr's behavior is characterized as an intentional assault rather than a negligent act is also irrelevant. Pp. 398–403.

823 F. 2d 820, reversed and remanded.

STEVENS, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ., joined. WHITE, J., filed a concurring opinion, *post*, p. 403. KENNEDY, J., filed an opinion concurring in the judgment, *post*, p. 404. O'CONNOR, J., filed a dissenting opinion, in which REHNQUIST, C. J., and SCALIA, J., joined, *post*, p. 408.

Michael J. Kator argued the cause for petitioners. With him on the briefs was *Irving Kator*.

Christopher J. Wright argued the cause for the United States. With him on the brief were *Solicitor General Fried*, *Assistant Attorney General Bolton*, *Deputy Solicitor General Ayer*, and *Anthony J. Steinmeyer*.*

JUSTICE STEVENS delivered the opinion of the Court.

On February 6, 1982, an obviously intoxicated off-duty serviceman named Carr fired several rifle shots into an automobile being driven by petitioners on a public street near the

*Briefs of *amici curiae* urging reversal were filed for George Bennett et al. by *Roy B. Ward*, *Martha Blue*, and *Dale Itschner*; and for John Doe One et al. by *James P. Cunningham*.

Bethesda Naval Hospital. Petitioners brought suit against the United States alleging that their injuries were caused by the Government's negligence in allowing Carr to leave the hospital with a loaded rifle in his possession. The District Court dismissed the action—and the Court of Appeals affirmed—on the ground that the claim is barred by the intentional tort exception to the Federal Tort Claims Act (FTCA or Act). The question we granted certiorari to decide is whether petitioners' claim is one "arising out of" an assault or battery within the meaning of 28 U. S. C. § 2680(h).[1]

I

When it granted the Government's motion to dismiss, the District Court accepted petitioners' version of the facts as al-

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[1] Title 28 U. S. C. § 2680 provides in part:

"The provisions of [28 U. S. C. §§ 2671–2680] and section 1346(b) of this title shall not apply to—

. . . . . .

"(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of [28 U. S. C. §§ 2671–2680] and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, 'investigative or law enforcement officer' means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law."

Title 28 U. S. C. § 1346(b) provides in part:

"Subject to the provisions of [28 U. S. C. §§ 2671–2680], the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

leged in their complaint and as supplemented by discovery. That version may be briefly stated. After finishing his shift as a naval medical aide at the hospital, Carr consumed a large quantity of wine, rum, and other alcoholic beverages. He then packed some of his belongings, including a rifle and ammunition, into a uniform bag and left his quarters. Some time later, three naval corpsmen found him lying face down in a drunken stupor on the concrete floor of a hospital building. They attempted to take him to the emergency room, but he broke away, grabbing the bag and revealing the barrel of the rifle. At the sight of the rifle barrel, the corpsmen fled. They neither took further action to subdue Carr, nor alerted the appropriate authorities that he was heavily intoxicated and brandishing a weapon. Later that evening, Carr fired the shots that caused physical injury to one of the petitioners and property damage to their car.

The District Court began its legal analysis by noting the general rule that the Government is not liable for the intentional torts of its employees. The petitioners argued that the general rule was inapplicable because they were relying, not on the fact that Carr was a Government employee when he assaulted them, but rather on the negligence of other Government employees who failed to prevent his use of the rifle. The District Court assumed that the alleged negligence would have made the defendant liable under the law of Maryland, and also assumed that the Government would have been liable if Carr had not been a Government employee. Nevertheless, although stating that it was "sympathetic" to petitioners' claim, App. to Pet. for Cert. 26a, it concluded that Fourth Circuit precedents required dismissal because Carr "happens to be a government employee rather than a private citizen," *id.*, at 23a.

The Court of Appeals affirmed. 823 F. 2d 820 (CA4 1987). Like the District Court, it concluded that the Circuit's prior decisions in *Hughes* v. *United States*, 662 F. 2d 219 (CA4 1981) *(per curiam)*, and *Thigpen* v. *United States*, 800 F. 2d

393 (CA4 1986),[2] foreclosed the following argument advanced by petitioners:

> "The Sheridans also argue that Carr's status as an enlisted naval man and, therefore, a government employee, should [be] irrelevant to the issue of the government's immunity *vel non* from liability for negligently failing to prevent the injury. They correctly assert that the shooting at the Sheridans' vehicle was not connected with Carr's job responsibility or duties as a government employee. The Sheridans further assert that if Carr had not been a government employee, a claim would undoubtedly lie against the government and § 2680(h) would be inapplicable. *See Rogers* v. *United States*, 397 F. 2d 12 (4th Cir. 1968) (holding § 2680(h) inapplicable where probationer alleged that negligence by United States marshal allowed non-government employee to assault and torture probationer). They contend it is anomalous to deny their claim simply because the corpsmen were negligent in the handling of a government employee

[2] The Court of Appeals explained its prior decisions as follows:

"In *Hughes* we affirmed the district court's dismissal of a claim against the government because it fell within [the intentional tort] exception. There, a postal employee, while on his route, lured two young girls into his postal truck and committed sexual indecencies. He had previously pled guilty to a similar offense. The parents of the children brought an action against the government under the Federal Tort Claims Act alleging the postal supervisor was negligent in allowing the employee to remain in a position where he came into contact with young children. The district court, reasoning that the cause of action arose from the intentional act of the employee and not from the negligence of the supervisor, held the claim barred by § 2680(h).

". . . In *Thigpen*, a naval corpsman had committed sexual indecencies with two minor girls while they were hospitalized in a naval hospital. An action was brought on behalf of the children contending that the Navy negligently failed to supervise the offending corpsman. There, too, the district court reasoned that the injury resulted from the intentional tort of the corpsman and not from a lack of supervision by the government." 823 F. 2d, at 822.

rather than a private citizen." 823 F. 2d, at 822 (footnotes omitted).

In dissent, Chief Judge Winter argued that cases involving alleged negligence in hiring or supervising Government employees are not applicable to a situation in which the basis for the Government's alleged liability has nothing to do with the assailant's employment status. He wrote:

> "As the majority opinion concedes . . . , *Hughes* and *Thigpen*, as well as the other cases relied upon by the majority . . . , are all cases where the purported government negligence was premised solely on claims of negligent hiring and/or supervision. The same was true in *United States* v. *Shearer*, [473 U. S. 52 (1985)]. Such claims are essentially grounded in the doctrine of respondeat superior. In these cases, the government's liability arises, if at all, *only* because of the employment relationship. If the assailant were not a federal employee, there would be no independent basis for a suit against the government. It is in this situation that an allegation of government negligence can legitimately be seen as an effort to 'circumvent' the § 2680(h) bar; it is just this situation—where government liability is possible only because of the fortuity that the assailant happens to receive federal paychecks—that § 2680(h) was designed to preclude. *See Shearer*, [473 U. S., at 54–57]; *Hughes*, 514 F. Supp. at 668, 669–70; *Panella* v. *United States*, 216 F. 2d 622, 624 (2 Cir. 1954).
>
> "On the other hand, where government liability is independent of the assailant's employment status, it is possible to discern two distinct torts: the intentional tort (assault and battery) and the government negligence that precipitated it. Where no reliance is placed on negligent supervision or respondeat superior principles, the cause of action against the government cannot really be said to 'arise out of' the assault and battery; rather it is

based on the government's breach of a separate legal duty." *Id.*, at 824 (footnote omitted).

The difference between the majority and the dissent in this case is reflected in conflicting decisions among the Circuits as well.[3] We therefore granted certiorari to resolve this important conflict. 484 U. S. 1024 (1988).

II

The FTCA gives federal district courts jurisdiction over claims against the United States for money damages "for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U. S. C. § 1346(b). However, among other limitations, the Act also provides that this broad grant of jurisdiction "shall not apply to . . . [a]ny claim arising out of assault, battery" or other specified intentional torts. 28 U. S. C. § 2680(h).

The words "any claim arising out of" an assault or battery are unquestionably broad enough to bar all claims based *entirely* on an assault or battery. The import of these words is less clear, however, when they are applied to a claim arising out of two tortious acts, one of which is an assault or battery and the other of which is a mere act of negligence. Nonetheless, it is both settled and undisputed that in at least some situations the fact that an injury was directly caused by an assault or battery will not preclude liability against the Government for negligently allowing the assault to occur. Thus,

[3] See, *e. g.*, *Doe* v. *United States*, 838 F. 2d 220 (CA7 1988); *Morrill* v. *United States*, 821 F. 2d 1426 (CA9 1987) *(per curiam)*; *Kearney* v. *United States*, 815 F. 2d 535 (CA9 1987); *Bennett* v. *United States*, 803 F. 2d 1502 (CA9 1986); *Hoot* v. *United States*, 790 F. 2d 836 (CA10 1986); *Johnson* v. *United States*, 788 F. 2d 845 (CA2), cert. denied, 479 U. S. 914 (1986).

in *United States* v. *Muniz*, 374 U. S. 150 (1963), we held that a prisoner who was assaulted by other inmates could recover damages from the United States because prison officials were negligent in failing to prevent the assault that caused his injury.[4]

Two quite different theories might explain why Muniz' claim did not "arise out of" the assault that caused his injuries. First, it might be assumed that since he alleged an independent basis for tort liability—namely, the negligence of the prison officials—the claim did not arise solely, or even predominantly, out of the assault. Rather, the attention of the trier of fact is focused on the Government's negligent act or omission; the intentional commission is simply considered as part of the causal link leading to the injury. Under this view, the assailant's individual involvement would not give rise to Government liability, but antecedent negligence by Government agents could, provided of course that similar negligent conduct would support recovery under the law of the State where the incident occurred. See Note, Section 2680(h) of the Federal Tort Claims Act: Government Liability for the Negligent Failure to Prevent an Assault and Battery by a Federal Employee, 69 Geo. L. J. 803, 822–825 (1981) (advocating this view and collecting cases).

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[4] *Muniz* involved two separate suits consolidated for our consideration. We described the relevant facts of one of the actions as follows:

"Respondent Muniz alleged that he was, in August 1959, a prisoner in a federal correctional institution in Danbury, Connecticut. On the afternoon of August 24, Muniz was outside one of the institution's dormitories when he was struck by an inmate, and then pursued by 12 inmates into another dormitory. A prison guard, apparently choosing to confine the altercation instead of interceding, locked the dormitory. The 12 inmates who had chased Muniz into the dormitory set upon him, beating him with chairs and sticks until he was unconscious. Muniz sustained a fractured skull and ultimately lost the vision of his right eye. He alleged that the prison officials were negligent in failing to provide enough guards to prevent the assaults leading to his injuries and in letting prisoners, some of whom were mentally abnormal, intermingle without adequate supervision." 374 U. S., at 152.

In response to this theory, the Government argues that the "arising out of" language must be read broadly and that the Sheridans' negligence claim is accordingly barred, for in the absence of Carr's assault, there would be no claim. We need not resolve this dispute, however, because even accepting the Government's contention that when an intentional tort is a *sine qua non* of recovery the action "arises out of" that tort, we conclude that the exception does not bar recovery in this case. We thus rely exclusively on the second theory, which makes clear that the intentional tort exception is simply inapplicable to torts that fall outside the scope of § 1346(b)'s general waiver.

This second explanation for the *Muniz* holding, which is narrower but not necessarily inconsistent with the first, adopts Judge (later Justice) Harlan's reasoning in *Panella* v. *United States*, 216 F. 2d 622 (CA2 1954). In that case, as in *Muniz*, a prisoner claimed that an assault by another inmate had been caused by the negligence of federal employees. After recognizing that the "immunity against claims arising out of assault and battery can literally be read to apply to assaults committed by persons other than government employees," *id.*, at 624, his opinion concluded that § 2680(h) must be read against the rest of the Act. The exception should therefore be construed to apply only to claims that would otherwise be authorized by the basic waiver of sovereign immunity. Since an assault by a person who was not employed by the Government could not provide the basis for a claim under the FTCA, the exception could not apply to such an assault; rather, the exception only applies in cases arising out of assaults by federal employees.

In describing the coverage of the FTCA, Judge Harlan emphasized the statutory language that was critical to his analysis. As he explained, the Act covers actions for personal injuries "caused by the negligent or wrongful act or omission *of any employee of the Government* while acting within the scope of his office or employment . . . (Italics supplied)."

Id., at 623. We need only move the emphasis to the next phrase—"while acting within the scope of his office or employment"—to apply his analysis to the assault and battery committed by the off-duty, inebriated enlisted man in this case. If nothing more was involved here than the conduct of Carr at the time he shot at petitioners, there would be no basis for imposing liability on the Government. The tortious conduct of an off-duty serviceman, not acting within the scope of his office or employment, does not in itself give rise to Government liability whether that conduct is intentional or merely negligent.

As alleged in this case, however, the negligence of other Government employees who allowed a foreseeable assault and battery to occur may furnish a basis for Government liability that is entirely independent of Carr's employment status. By voluntarily adopting regulations that prohibit the possession of firearms on the naval base and that require all personnel to report the presence of any such firearm,[5] and by further voluntarily undertaking to provide care to a person who was visibly drunk and visibly armed, the Government assumed responsibility to "perform [its] 'good Samaritan' task in a careful manner." *Indian Towing Co.* v. *United States*, 350 U. S. 61, 65 (1955). The District Court and the Court of Appeals both assumed that petitioners' version of the facts would support recovery under Maryland law on a negligence theory if the naval hospital had been owned and operated by a private person. Although the Government now disputes this assumption, it is not our practice to reexamine a question of state law of that kind or, without good reason, to pass upon it in the first instance.[6] See *Cort* v.

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[5] Allegedly, Carr's roommate was aware that Carr improperly possessed a firearm prior to the shooting incident, yet failed to comply with Navy regulations requiring that he report this violation to the appropriate authorities.

[6] The Government did not challenge this assumption before the District Court or the Court of Appeals. Its failure to do so may well simply be a

Ash, 422 U. S. 66, 73, n. 6 (1975). On this assumption, it seems perfectly clear that the mere fact that Carr happened to be an off-duty federal employee should not provide a basis for protecting the Government from liability that would attach if Carr had been an unemployed civilian patient or visitor in the hospital. Indeed, in a case in which the employment status of the assailant has nothing to do with the basis for imposing liability on the Government, it would seem perverse to exonerate the Government because of the happenstance that Carr was on a federal payroll.[7]

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product of the Government's view that the District Court was without jurisdiction and thus, presumably, had no basis for considering whether the alleged facts might state a claim under Maryland law. Moreover, in now challenging this assumption, the Government cites no Maryland law. We think it appropriate, at least in the first instance, to allow the District Court to pass upon whether the complaint states a cause of action under Maryland law.

[7] The Government's responsibility for an assault may be clear even though the identity of the assailant is unknown. For example, the Court of Appeals for the Seventh Circuit concluded in *Doe* v. *United States*, 838 F. 2d 220 (1988), that an action could be maintained under the FTCA even though discovery failed to reveal whether or not the assailant was a Government employee. The court described the factual setting of the case as follows:

"Plaintiffs in these consolidated cases are two minor children and their parents. During the fall of 1984, the children were sexually molested by *unknown* parties while in the care of the Scott Air Force Base Day Care Center. It is not clear from the incomplete record on appeal whether the incidents occurred at the day care center or the children were removed from the premises during the day, assaulted, then returned.

". . . The complaint alleged, in essence, that the government assumed a duty to care for the children and that it breached that duty, allowing the *unidentified* attacker to molest the youths. Child molestation is, of course, a form of assault and battery." *Id.*, at 221 (emphasis supplied).

The Court of Appeals was certainly correct in holding that it would be irrational to bar recovery if the assailant happened to be a Government employee, while permitting relief if he was not. Moreover, as the Court of Appeals also correctly noted, courts should strive to avoid attributing absurd designs to Congress, particularly when the language of the statute

In a case of this kind,[8] the fact that Carr's behavior is characterized as an intentional assault rather than a negligent act is also quite irrelevant. If the Government has a duty to prevent a foreseeably dangerous individual from wandering about unattended, it would be odd to assume that Congress intended a breach of that duty to give rise to liability when the dangerous human instrument was merely negligent but not when he or she was malicious. In fact, the human characteristics of the dangerous instrument are also beside the point. For the theory of liability in this case is analogous to cases in which a person assumes control of a vicious animal, or perhaps an explosive device. Cf. *Palsgraf* v. *Long Island R. Co.*, 248 N. Y. 339, 162 N. E. 99 (1928). Because neither Carr's employment status nor his state of mind has any bearing on the basis for petitioners' claim for money damages, the intentional tort exception to the FTCA is not applicable in this case.

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 WHITE, concurring.

In *United States* v. *Shearer*, 473 U. S. 52 (1985), four Justices, including myself, were of the view that 28 U. S. C. § 2680(h) barred recovery for damage caused from an assault by a Government employee said to be the result of a negligent act by another employee. But we did not address whether the assaulter was acting within the scope of his employment or whether that factor made a difference in apply-

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and its legislative history provide little support for the proffered, counter-intuitive reading.

[8] Because Carr's employment status is irrelevant to the outcome, it is not appropriate in this case to consider whether negligent hiring, negligent supervision, or negligent training may ever provide the basis for liability under the FTCA for a foreseeable assault or battery by a Government employee.

ing the § 2680(h) exclusion. In any event, to the extent the views I shared there are inconsistent with my present understanding, I think the Court's opinion, which I join, has the better of it.

JUSTICE KENNEDY, concurring in the judgment.

The question before us is how to interpret the intentional tort exception in the Federal Tort Claims Act, 28 U. S. C. §§ 1346(b) and 2671–2680, when a plaintiff's injury is caused both by an intentional tort and by negligence that precedes it. The intentional tort exception, 28 U. S. C. § 2680(h), provides, in pertinent part, that the United States shall not be liable for "[a]ny claim arising out of assault, battery . . . ." Both the majority and the dissent provide persuasive reasons for their conclusions. I write separately to set forth the bases for my differences with those opinions, and for my conclusion that the Court correctly decides that the judgment of the Court of Appeals must be reversed.

I

In an adaptation of Judge Harlan's analysis in *Panella* v. *United States*, 216 F. 2d 622 (CA2 1954), the Court asks whether the tortfeasor's actions occurred "while acting within the scope of his office or employment." *Ante*, at 400. Since "[t]he tortious conduct of an off-duty serviceman, not acting within the scope of his office or employment, does not in itself give rise to Government liability whether that conduct is intentional or merely negligent," the Court concludes that the intentional tort exception is inapplicable to this case. *Ante*, at 401–403. In my view, this analysis is misdirected. Petitioners' claim here is that the Government acted negligently, quite apart from the intentional tort of its employee. The issue then is how to give effect to the Act's express authorization of suits grounded in negligence without eviscerating the Act's prohibition of claims "arising out of" intentional torts. Whether or not the intentional tortfeasor

was on duty will not necessarily resolve this question. The proper inquiry must depend on an analysis of the Government's acts or omissions and of the theory on which the Government's negligence is predicated.

The Court seems to recognize as much when it states that it would allow a claim against the Government if based on negligence "of other Government employees . . . entirely independent of [the intentional tortfeasor's] employment status." *Ante*, at 401. The Court, however, fails to clarify the meaning of "independent" negligence or to explain how the legal significance of antecedent negligence somehow changes with the employment status of the intentional tortfeasor. Although its opinion asserts that it avoids the question whether a negligent supervision claim may be pressed against the Government in such a case, *ante*, at 403, n. 8, that issue is unavoidable, both as an analytic matter and on the facts of this case. As I explain more fully below, our inquiry should address whether a finding of liability for negligent supervision would undermine substantially the intentional tort exception.

The dissenting opinion is correct to focus on the statutory language, but I submit, with all respect, that it reaches the wrong result. The dissent's fundamental premise seems to be that any injury in which an intentional act is a substantial cause necessarily arises only from that intentional act. This contradicts the basic rule that the same injury can arise from more than one wrongful act:

> "Where voluntary acts of responsible human beings intervene between defendant's conduct and plaintiff's injury, the problem of foreseeability is the same and courts generally are guided by the same test. If the likelihood of the intervening act was one of the hazards that made defendant's conduct negligent—that is, if it was sufficiently foreseeable to have this effect—then defendant will generally be liable for the consequences . . . . So far as scope of duty . . . is concerned, it should make no difference whether the intervening actor is negligent or in-

tentional or criminal." 2 F. Harper & F. James, Law of Torts § 20.5, pp. 1143–1145 (1956) (footnotes omitted).

See also Restatement (Second) of Torts §§ 447–449 (1965). The dissent's approach implies the converse: that an intentional act somehow obliterates the legal significance of any negligence that precedes or follows it. It must be noted that the phrase "arising out of" refers to claims, not suits. Congress did not bar any *suit* arising out of intentional torts; it barred only *claims* arising out of such wrongs. 28 U. S. C. § 2680(h) ("Any *claim* arising out of assault, battery . . .") (emphasis added). Whatever uncertainty surrounds the intentional tort exception, it is unlikely that Congress intended it, as the dissent suggests, to bar suits for "all injuries associated in any way with an assault or battery." *Post*, at 409. It is standard tort doctrine that a reasonably foreseeable injury can arise from multiple causes, each arising from a breach of a different duty and each imposing liability accordingly. The dissent's position violates this basic principle by stating: "If we were to construe the words according to their ordinary meaning, we would say that a claim 'arises out of' a battery in any case in which the battery is essential to the claim." *Post*, at 408.

II

I am in substantial agreement with the opinion of Chief Judge Winter, who wrote the dissenting opinion when this case was before the Court of Appeals. To determine whether a claim arises from an intentional assault or battery and is therefore barred by the exception, a court must ascertain whether the alleged negligence was the breach of a duty to select or supervise the employee-tortfeasor or the breach of some separate duty independent from the employment relation. See 823 F. 2d 820, 824, 828 (CA4 1987). If the allegation is that the Government was negligent in the supervision or selection of the employee and that the intentional tort occurred as a result, the intentional tort exception of § 2680(h)

bars the claim. Otherwise, litigants could avoid the substance of the exception because it is likely that many, if not all, intentional torts of Government employees plausibly could be ascribed to the negligence of the tortfeasor's supervisors. To allow such claims would frustrate the purposes of the exception.

The Court is wrong to imply that this issue is somehow removed from the facts of this case. It is squarely implicated here, and the trial court should be advised how to deal with it, not left to wonder. It is quite plausible to argue that Carr was missupervised by Government officers who had authority over him and had, we may assume, the duty to control his unauthorized behavior and enforce the Government regulations restricting the possession of firearms on the naval base. Absent the exception set forth in § 2680(h), the Government could be held negligent for failing to supervise Carr in a way such that the rifle would be discovered. We should state explicitly that this is not a theory that petitioners are free to pursue on remand.

An alternative theory of liability, however, is the Government's negligent performance of its Good Samaritan duty under the state law of Maryland, which I assume, as the Court does, provides for such liability if Carr had been a private person. *Ante*, at 401–403. On this theory, the Government's negligence is independent of its employment relation with Carr. The Government's duty to control the behavior of individuals on the naval base extended to all individuals, employee and nonemployee alike. This theory of liability does not depend on the employment status of the intentional tortfeasor. When the Government would be liable even if the tortfeasor had been a private person, say an individual who wandered onto the naval base, there is little danger that § 2680(h) will be circumvented. The intentional tort exception does not preclude recovery under a theory of independent governmental negligence, despite the presence of a (barred) negligent supervision claim. Cf. *Block* v. *Neal*, 460

U. S. 289, 297–298 (1983) ("[T]he partial overlap between these two tort actions [of negligent misrepresentation and of negligent supervision regarding the construction of plaintiff's home] does not support the conclusion that if one is excepted under the Tort Claims Act, the other must be as well").

In sum, I would hold that where the plaintiff's tort claim is based on the mere fact of Government employment, a *respondeat superior* claim, or, a short step further, on the conduct of the employment relation between the intentional tortfeasor and the Government without more, a negligent supervision or negligent hiring claim, § 2680(h)'s exception applies and the United States is immune. See also *post*, at 411. I concur in the Court's judgment insofar as it finds that § 2680(h) does not bar tort claims based on the independent negligence of the Government. For these reasons, I agree that the judgment of the Court of Appeals must be reversed.

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

Petitioners seek to recover money damages under a section of the Federal Tort Claims Act (FTCA) that authorizes claims against the Government for personal injuries "caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." 28 U. S. C. § 1346(b). That section is subject to an exception for any claim "arising out of" an assault or battery. 28 U. S. C. § 2680(h). Despite the unqualified language of this exception, the Court today holds that it does not protect the Government from liability for a battery committed by a Government employee who acted outside the scope of his employment, if other Government employees had a duty to prevent the battery.

If we were to construe the words according to their ordinary meaning, we would say that a claim "arises out of" a battery in any case in which the battery is essential to the claim. Thus when the Court construed another exception to

the FTCA for claims "arising in respect of . . . the detention of any goods" by customs or law enforcement officials, 28 U. S. C. § 2680(c), we equated "arising in respect of" with "arising out of" and decided that the phrase includes "all injuries associated in any way with the 'detention' of goods." See *Kosak* v. *United States*, 465 U. S. 848, 854 (1984). A parallel construction of the exception at issue here leads to the conclusion that it encompasses all injuries associated in any way with an assault or battery. Indeed, four Justices described the exception essentially in this way in *United States* v. *Shearer*, 473 U. S. 52 (1985). That case involved a claim against the Army for negligent supervision of a serviceman who kidnaped and murdered another serviceman. The plurality explained, in terms equally applicable here, why it thought the claim was barred.

> "Respondent cannot avoid the reach of § 2680(h) by framing her complaint in terms of negligent failure to prevent the assault and battery. Section 2680(h) does not merely bar claims *for* assault or battery; in sweeping language it excludes any claim *arising out of* assault or battery. We read this provision to cover claims like respondent's that sound in negligence but stem from a battery committed by a Government employee. Thus 'the express words of the statute' bar respondent's claim against the Government. *United States* v. *Spelar*, 338 U. S. 217, 219 (1949)." *Id.*, at 55 (emphasis in original).

The Court acknowledges that the exception for claims arising out of assault or battery is phrased in broad terms. *Ante*, at 398. The Court believes, however, that we recognized implicit limitations on that exception in *United States* v. *Muniz*, 374 U. S. 150 (1963). One of the cases consolidated for decision in *Muniz* was brought by a prisoner who alleged that negligent Government employees failed to prevent other inmates from assaulting and beating him. The Court rejected the Government's argument that Congress

did not intend to allow prisoners to bring claims under the FTCA. *Id.*, at 158. The majority infers from this decision that the Government can be liable under the FTCA when Government employees fail to prevent nonemployees from committing assault or battery. *Ante*, at 398–399. But that inference is unnecessary, because the Court in *Muniz* expressly reserved judgment on whether one of the exceptions of § 2680 barred the prisoner's claim. 374 U. S., at 163.

The Court's decision in this case extends its erroneous interpretation of *Muniz*. The Court develops a theory to explain why the assault and battery exception does not bar a claim based on the negligent failure of Government employees to prevent a battery by a nonemployee, and shows why that theory applies with equal force to a battery by a Government employee like Carr who was not acting within the scope of his employment. *Ante*, at 400. Because I reject the interpretation of *Muniz* on which the majority's argument is premised, I reject this extension as well.

There is no support in the legislative history for the limitation of the assault and battery exception that the Court adopts today. When Congress enacted the exception, it was concerned with a particular factual situation. See *Shearer*, *supra*, at 55. Mr. Holtzoff, a Special Assistant to the Attorney General, told the Senate in general terms that the torts of assault and battery were excluded from the FTCA. Tort Claims Against the United States: Hearings on S. 2690 before a Subcommittee of the Senate Committee on the Judiciary, 76th Cong., 3d Sess., 39 (1940). At the House hearings, Mr. Holtzoff explained that "[t]he theory of these exemptions is that, since this bill is a radical innovation, perhaps we had better take it step by step and exempt certain torts and certain actions which might give rise to tort claims that would be difficult to defend, or in respect to which it would be unjust to make the Government liable." Tort Claims Against the United States: Hearings on H. R. 7236 before Subcommittee No. 1 of the House Committee on the

Judiciary, 76th Cong., 3d Sess., 22 (1940). Interpreting this remark, the Government suggests that Congress reasonably might have concluded that it would be unjust to make the Government liable for claims arising out of an assault or battery merely because Government employees other than the tortfeasor were negligent, since the individual tortfeasor plainly is the more culpable party. Indeed, intentional torts sometimes are found to be superseding causes that relieve a negligent party of liability. Restatement (Second) of Torts § 448 (1965). This analysis applies whether the person committing the intentional tort is a Government employee, a nonemployee, or a Government employee acting outside the scope of his office.

The Court stops short of adopting petitioners' most ambitious argument, according to which the Government can be liable for negligently supervising a Government employee who commits an assault or battery while acting within the scope of his employment. *Ante*, at 403, n. 8. I trust that the courts will preserve at least this core of the assault and battery exception. I dissent from the Court's decision to confine the exception to such a narrow scope.

SCHWEIKER ET AL. *v.* CHILICKY ET AL.

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

No. 86–1781. Argued March 1, 1988—Decided June 24, 1988

In 1980, Congress enacted legislation requiring that most disability determinations under Title II of the Social Security Act be reviewed at least once every three years. Under the "continuing disability review" (CDR) program, as originally implemented by the Secretary of Health and Human Services, benefits were usually terminated if the state agency performing the initial evaluation found that a claimant had become ineligible, and were not available during administrative appeals. Finding that benefits were frequently being improperly terminated by state agencies under CDR, only to be reinstated by a federal administrative law judge (ALJ) on appeal, Congress enacted reform legislation in 1983 and 1984, which, *inter alia*, provided for the continuation of benefits through the completion of ALJ review. Respondents, individuals whose Title II benefits were improperly terminated in 1981 and 1982, but were later restored, filed suit in Federal District Court. They alleged that petitioners, one Arizona and two federal officials who were CDR policymakers, had violated respondents' due process rights by adopting illegal policies that led to the benefits terminations. Respondents sought money damages from petitioners, in their individual capacities, for emotional distress and for loss of necessities proximately caused by petitioners' conduct. The court dismissed the case, but the Court of Appeals reversed and remanded, noting that respondents' money damages claims were predicated on the constitutional tort theory of *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388, and concluding, *inter alia*, that it could not be determined as a matter of law that respondents could prove no state of facts warranting recovery.

Held: The improper denial of Social Security disability benefits, allegedly resulting from due process violations by petitioners in their administration of the CDR program, cannot give rise to a cause of action for money damages against petitioners. Pp. 420–429.

(a) A money damages remedy against federal officials for constitutional torts will not be devised by the courts where "special factors counse[l] hesitation in the absence of affirmative action by Congress." *Bivens*, *supra*, at 396. Such "special factors" include the existence of statutory mechanisms giving meaningful remedies against the United States, even though those remedies do not provide "complete relief" to

the claimant. *Bush* v. *Lucas*, 462 U. S. 367. Thus, the courts must give appropriate deference to indications that congressional inaction has not been inadvertent, and should not create *Bivens* remedies when the design of a Government program suggests that Congress has provided what it considers to be adequate remedies for constitutional violations that may occur in the course of the program's administration. Pp. 420–423.

(b) Since the elaborate CDR remedial scheme devised by Congress does not include a money damages remedy against officials responsible for unconstitutional conduct that leads to the wrongful denial of benefits, such a remedy is unavailable. The present case is indistinguishable from *Bush*, *supra*. In both, Congress failed to authorize "complete relief" for emotional distress and other hardships, but Congress is presumed to have balanced governmental efficiency and individual rights in an acceptable manner. Moreover, congressional attention to problems in CDR administration (including the very problems that gave rise to this case) has been frequent and intense, as shown by the enactment of reform legislation on two occasions. Congress' unwillingness to provide compensation for consequential damages is at least as clear here as it was in *Bush*. *Bush* is not limited to its civil service context, since its reasoning—that Congress is in a better position than courts to decide whether the creation of a new substantive legal liability would serve the public interest—applies as much, or more, in this case. Respondents' attempt to distinguish *Bush* on the ground that the plaintiff there received compensation for the constitutional violation itself, while respondents here have merely received benefits to which they would have been entitled had there been no constitutional violation, is not analytically meaningful, since the harm resulting from the alleged constitutional violation can in neither case be separated from the denial of the statutory right. The fact that respondents have not been fully compensated for the injury caused by lengthy delays in providing the benefits on which they depended for the necessities of life cannot be remedied by this Court. Congress is charged with designing welfare benefits programs, and with balancing the need for administrative efficiency against individual rights, and Congress has discharged that responsibility to the extent that it affects this case. Pp. 424–429.

796 F. 2d 1131, reversed.

O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, SCALIA, and KENNEDY, JJ., joined, and in all but n. 3 of which STEVENS, J., joined. STEVENS, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 430. BRENNAN, J., filed a dissenting opinion, in which MARSHALL and BLACKMUN, JJ., joined, *post*, p. 430.

Solicitor General Fried argued the cause for petitioners. With him on the briefs were *Assistant Attorney General Willard*, *Deputy Solicitor General Ayer*, *Michael K. Kellogg*, *William Kanter*, and *Howard S. Scher*.

Laurence H. Tribe argued the cause for respondents. With him on the brief was *William E. Morris*.*

JUSTICE O'CONNOR delivered the opinion of the Court.

This case requires us to decide whether the improper denial of Social Security disability benefits, allegedly resulting from violations of due process by government officials who administered the federal Social Security program, may give rise to a cause of action for money damages against those officials. We conclude that such a remedy, not having been included in the elaborate remedial scheme devised by Congress, is unavailable.

I

A

Under Title II of the Social Security Act (Act), the Federal Government provides disability benefits to individuals who have contributed to the Social Security program and who, because of a medically determinable physical or mental impairment, are unable to engage in substantial gainful work. 42 U. S. C. §§ 423(a), (d) (1982 ed. and Supp. IV). A very similar program for disabled indigents is operated under Title XVI of the Act, 42 U. S. C. § 1381 *et seq.* (1982 ed. and Supp. IV), but those provisions are technically not at issue in this case. Title II, which is administered in conjunction with state welfare agencies, provides benefits only while an individual's statutory disability persists. See 42 U. S. C. §§ 421(a), 423(a)(1) (1982 ed. and Supp. IV). In 1980, Congress noted that existing administrative procedures provided

*Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union Foundation et al. by *Steven R. Shapiro*, *John A. Powell*, and *Helen Hershkoff*; and for the National Mental Health Association et al. by *Daniel M. Taubman* and *Peter Komlos-Hrobsky*.

for reexamination of eligibility "only under a limited number of circumstances." H. R. Conf. Rep. No. 96–944, p. 60 (1980); see also S. Rep. No. 96–408, pp. 60–61 (1979). Congress responded by enacting legislation requiring that most disability determinations be reviewed at least once every three years. Pub. L. 96–265, § 311(a), 94 Stat. 460, as amended, 42 U. S. C. § 421(i) (1982 ed. and Supp. IV). Although the statute did not require this program for "continuing disability review" (CDR) to become effective before January 1, 1982, the Secretary of Health and Human Services initiated CDR in March 1981. See Pub. L. 96–265, § 311(b), 94 Stat. 460, note following 42 U. S. C. § 421; Brief for Petitioners 10.

The administration of the CDR program was at first modeled on the previous procedures for reexamination of eligibility. Under these procedures, an individual whose case is selected for review bears the burden of demonstrating the continuing existence of a statutory disability. The appropriate state agency performs the initial review, and persons who are found to have become ineligible are generally provided with administrative review similar to the review provided to new claimants. See 42 U. S. C. § 421(i) (1982 ed. and Supp. IV); Brief for Petitioners 10. Cf. *Mathews* v. *Eldridge*, 424 U. S. 319, 335–339 (1976). Under the original CDR procedures, benefits were usually terminated after a state agency found a claimant ineligible, and were not available during administrative appeals. See H. R. Conf. Rep. No. 98–1039, p. 33 (1984).

Finding that benefits were too often being improperly terminated by state agencies, only to be reinstated by a federal administrative law judge (ALJ), Congress enacted temporary emergency legislation in 1983. This law provided for the continuation of benefits, pending review by an ALJ, after a state agency determined that an individual was no longer disabled. Pub. L. 97–455, § 2, 96 Stat. 2498; see also Pub. L. 98–118, § 2, 97 Stat. 803. In the Social Security Disability

Benefits Reform Act of 1984 (1984 Reform Act), Congress extended this provision until January 1, 1988, and provided for a number of other significant changes in the administration of CDR. Pub. L. 98–460, §§ 2, 7, 98 Stat. 1794–1796, 1803–1804, 42 U. S. C. §§ 423(f), (g) (1982 ed. and Supp. IV). In its final form, this legislation was enacted without a single opposing vote in either Chamber. See 130 Cong. Rec. 26000, 26145–26146 (1984); see also *id.*, at 6621; *id.*, at 13247.

The problems to which Congress responded so emphatically were widespread. One of the cosponsors of the 1984 Reform Act, who had conducted hearings on the administration of CDR, summarized evidence from the General Accounting Office as follows:

> "[T]he message perceived by the State agencies, swamped with cases, was to deny, deny, deny, and, I might add, to process cases faster and faster and faster. In the name of efficiency, we have scanned our computer terminals, rounded up the disabled workers in the country, pushed the discharge button, and let them go into a free [f]all toward economic chaos." *Id.*, at 13218 (Sen. Cohen).

Other legislators reached similar conclusions. See, *e. g.*, *id.*, at 13234 (Sen. Moynihan) ("[T]he Social Security Administration has tried to reduce program cost by terminating the benefits of hundreds of thousands of truly disabled Americans"); *id.*, at 6583 (Rep. Rostenkowski) (alluding to "massive number of beneficiaries who have lost their benefits over the last 3 years even though they are truly disabled and unable to work"). Such conclusions were based, not only on anecdotal evidence, but on compellingly forceful statistics. The Social Security Administration itself apparently reported that about 200,000 persons were wrongfully terminated, and then reinstated, between March 1981 and April 1984. *Id.*, at 25979 (Sen. Levin); see also *id.*, at 25989 (Sen. Byrd); *id.*, at 6588 (Rep. Conte). In the first year of CDR, half of those who were terminated appealed the decision, and "an

amazing two-thirds of those who appealed were being reinstated." *Id.*, at 25979 (Sen. Levin); see also *id.*, at 25986 (Sen. Heinz); *id.*, at 13244 (Sen. Glenn); S. Rep. No. 98–466, p. 18 (1984).

Congress was also made aware of the terrible effects on individual lives that CDR had produced. The chairman of the Senate's Special Committee on Aging pointed out that "[t]he human dimension of this crisis—the unnecessary suffering, anxiety, and turmoil—has been graphically exposed by dozens of congressional hearings and in newspaper articles all across the country." 130 Cong. Rec. 25986 (1984) (Sen. Heinz). Termination could also lead to the cut-off of Medicare benefits, so that some people were left without adequate medical care. *Id.*, at 13321–13322 (Sen. Durenberger); see also *id.*, at 6590 (Rep. Hammerschmidt). There is little doubt that CDR led to many hardships and injuries that could never be adequately compensated. See, *e. g.*, *id.*, at 6588–6589 (Rep. Regula).

B

Respondents are three individuals whose disability benefits under Title II were terminated pursuant to the CDR program in 1981 and 1982. Respondents Spencer Harris and Dora Adelerte appealed these determinations through the administrative process, were restored to disabled status, and were awarded full retroactive benefits. Respondent James Chilicky did not pursue these administrative remedies. Instead, he filed a new application for benefits about a year and a half after his benefits were stopped. His application was granted, and he was awarded one year's retroactive benefits; his application for the restoration of the other six months' benefits is apparently still pending. See Brief for Petitioners 18, and n. 13; Brief for Respondents 3. Because the terminations in these three cases occurred before the 1983 emergency legislation was enacted, respondents experienced delays of many months in receiving disability benefits to

which they were entitled. All the respondents had been wholly dependent on their disability benefits, and all allege that they were unable to maintain themselves or their families in even a minimally adequate fashion after they were declared ineligible. *Id.*, at 7–8. Respondent James Chilicky was in the hospital recovering from open-heart surgery when he was informed that his heart condition was no longer disabling. *Id.*, at 7.

In addition to pursuing administrative remedies, respondents (along with several other individuals who have since withdrawn from the case) filed this lawsuit in the United States District Court for the District of Arizona. They alleged that petitioners—one Arizona[1] and two federal officials who had policymaking roles in the administration of the CDR program—had violated respondents' due process rights. The thrust of the complaint, which named petitioners in their official and individual capacities, was that petitioners had adopted illegal policies that led to the wrongful termination of benefits by state agencies. Among the allegations were claims that petitioners improperly accelerated the starting date of the CDR program; illegally refused to acquiesce in decisions of the United States Court of Appeals for the Ninth Circuit; failed to apply uniform written standards in implementing the CDR program; failed to give effect to dispositive evidence in particular cases; and used an impermissible quota

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[1] Petitioner William R. Sims is director of the Arizona Disability Determination Service, which participates in the administration of Title II under the supervision of the Secretary of Health and Human Services. 42 U. S. C. § 421(a) (1982 ed. and Supp. IV). The Court of Appeals concluded, for jurisdictional purposes only, that Sims "was acting under color of federal law as an agent of the Secretary." 796 F. 2d 1131, 1135, n. 3 (CA9 1986) (opinion below). We may assume, *arguendo*, that if an action akin to the one recognized in *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971), would be available against the petitioners who were federal employees, it would also be available against Sims. In light of our disposition of the case, however, we need not decide the question.

system under which state agencies were required to terminate predetermined numbers of recipients. See 796 F. 2d 1131, 1133–1134 (1986) (opinion below). Respondents sought injunctive and declaratory relief, and money damages for "emotional distress and for loss of food, shelter and other necessities proximately caused by [petitioners'] denial of benefits without due process." *Id.*, at 1134, n. 2.

The District Court dismissed the case on the ground that petitioners were protected by a qualified immunity. Their alleged conduct, the court concluded, did not violate "'clearly established statutory or constitutional rights of which a reasonable person would have known.'" App. to Pet. for Cert. 16a (quoting *Harlow* v. *Fitzgerald*, 457 U. S. 800, 818 (1982)). Although the court discussed only the claims involving acceleration of the starting date for CDR and nonacquiescence in Ninth Circuit decisions, its qualified immunity holding apparently applied to respondents' other claims as well.

Respondents appealed, pressing only their claims for money damages against petitioners in their individual capacities. These claims, noted the Court of Appeals, are "predicated on the constitutional tort theory of *Bivens* v. *Six Unknown Named Agents*, 403 U. S. 388 . . . (1971)." 796 F. 2d, at 1134. Petitioners argued that the District Court lacked subject matter jurisdiction because the procedures set forth in 42 U. S. C. § 405(g), which do not authorize judicial review in a case like this one, provide the exclusive means of judicial redress for actions "arising under" the relevant provisions of the Act. The Court of Appeals rejected this argument, holding that subject matter jurisdiction existed because respondents' claims for emotional distress "arose under" the Due Process Clause of the Fifth Amendment rather than under the statute. The Court of Appeals went on to affirm the District Court to the extent that it dismissed the claims involving acceleration of the CDR program and nonacquiescence in Ninth Circuit decisions. As to respondents' other claims, however, the Court of Appeals con-

cluded that "[i]t cannot be determined as a matter of law that [respondents] could prove no state of facts . . . that resulted in violations of their due process rights and consequent damages." 796 F. 2d, at 1139.[2] The case was accordingly remanded for further proceedings, including a trial if necessary.

The petition for certiorari presented one question: "Whether a *Bivens* remedy should be implied for alleged due process violations in the denial of social security disability benefits." We granted the petition, 484 U. S. 814 (1987), and now reverse.

II

A

The Constitution provides that federal courts may be given original jurisdiction over "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." U. S. Const., Art. III, §§ 1, 2. Since 1875, Congress has provided the federal trial courts with general jurisdiction over such cases. See Judiciary Act of March 3, 1875, § 1, 18 Stat. 470; 13B C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3561 (2d ed. 1984); American Law Institute, Study of the Division of Jurisdiction between State and Federal Courts 162–163 (1969). The statute currently provides that the "district courts shall have original

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[2] The Court of Appeals described the remaining allegations as follows:

"1. Knowing use of unpublished criteria and rules and standards contrary to the Social Security Act.

"2. Intentional disregard of dispositive favorable evidence.

"3. Purposeful selection of biased physicians and staff to review claims.

"4. Imposition of quotas.

"5. Failure to review impartially adverse decisions.

"6. Arbitrary reversal of favorable decisions.

"7. Denial of benefits based on the type of disabling impairment.

"8. Unreasonable delays in receiving hearings after termination of benefits." 796 F. 2d, at 1138.

jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U. S. C. § 1331.

In 1971, this Court held that the victim of a Fourth Amendment violation by federal officers acting under color of their authority may bring suit for money damages against the officers in federal court. *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388. The Court noted that Congress had not specifically provided for such a remedy and that "the Fourth Amendment does not in so many words provide for its enforcement by an award of money damages for the consequences of its violation." *Id.*, at 396. Nevertheless, finding "no special factors counselling hesitation in the absence of affirmative action by Congress," and "no explicit congressional declaration" that money damages may not be awarded, the majority relied on the rule that "'where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.'" *Id.*, at 396–397 (quoting *Bell* v. *Hood*, 327 U. S. 678, 684 (1946)).

So-called "*Bivens* actions" for money damages against federal officers have subsequently been permitted under § 1331 for violations of the Due Process Clause of the Fifth Amendment, *Davis* v. *Passman*, 442 U. S. 228 (1979), and the Cruel and Unusual Punishments Clause of the Eighth Amendment, *Carlson* v. *Green*, 446 U. S. 14 (1980). In each of these cases, as in *Bivens* itself, the Court found that there were no "special factors counselling hesitation in the absence of affirmative action by Congress," no explicit statutory prohibition against the relief sought, and no exclusive statutory alternative remedy. See 442 U. S., at 246–247; 446 U. S., at 18–20.

Our more recent decisions have responded cautiously to suggestions that *Bivens* remedies be extended into new contexts. The absence of statutory relief for a constitutional violation, for example, does not by any means necessarily imply that courts should award money damages against the

officers responsible for the violation. Thus, in *Chappell* v. *Wallace*, 462 U. S. 296 (1983), we refused—unanimously—to create a *Bivens* action for enlisted military personnel who alleged that they had been injured by the unconstitutional actions of their superior officers and who had no remedy against the Government itself:

> "The special nature of military life—the need for unhesitating and decisive action by military officers and equally disciplined responses by enlisted personnel—would be undermined by a judicially created remedy exposing officers to personal liability at the hands of those they are charged to command. . . .
>
> "Also, Congress, the constitutionally authorized source of authority over the military system of justice, has not provided a damages remedy for claims by military personnel that constitutional rights have been violated by superior officers. *Any action to provide a judicial response by way of such a remedy would be plainly inconsistent with Congress' authority in this field.*
>
> "Taken together, the unique disciplinary structure of the Military Establishment and Congress' activity in the field constitute 'special factors' which dictate that it would be inappropriate to provide enlisted military personnel a *Bivens*-type remedy against their superior officers." 462 U. S., at 304 (emphasis added; citation omitted).

See also *United States* v. *Stanley*, 483 U. S. 669, 681 (1987) (disallowing *Bivens* actions by military personnel "whenever the injury arises out of activity 'incident to service'").

Similarly, we refused—again unanimously—to create a *Bivens* remedy for a First Amendment violation "aris[ing] out of an employment relationship that is governed by comprehensive procedural and substantive provisions giving meaningful remedies against the United States." *Bush* v. *Lucas*, 462 U. S. 367, 368 (1983). In that case, a federal employee was demoted, allegedly in violation of the First Amendment,

for making public statements critical of the agency for which he worked. He was reinstated through the administrative process, with retroactive seniority and full backpay, but he was not permitted to recover for any loss due to emotional distress or mental anguish, or for attorney's fees. See *id.*, at 371, 372, and nn. 8–9; *id.*, at 390–391 (MARSHALL, J., concurring). Concluding that the administrative system created by Congress "provides meaningful remedies for employees who may have been unfairly disciplined for making critical comments about their agencies," *id.*, at 386 (footnote omitted), the Court refused to create a *Bivens* action even though it assumed a First Amendment violation and acknowledged that "existing remedies do not provide complete relief for the plaintiff," 462 U. S., at 388. See also *id.*, at 385, n. 28 (no remedy whatsoever for short suspensions or for adverse personnel actions against probationary employees). The Court stressed that the case involved policy questions in an area that had received careful attention from Congress. *Id.*, at 380–388. Noting that the Legislature is far more competent than the Judiciary to carry out the necessary "balancing [of] governmental efficiency and the rights of employees," we refused to "decide whether or not it would be good policy to permit a federal employee to recover damages from a supervisor who has improperly disciplined him for exercising his First Amendment rights." *Id.*, at 389, 390.

In sum, the concept of "special factors counselling hesitation in the absence of affirmative action by Congress" has proved to include an appropriate judicial deference to indications that congressional inaction has not been inadvertent. When the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional *Bivens* remedies.

B

The administrative structure and procedures of the Social Security system, which affects virtually every American, "are of a size and extent difficult to comprehend." *Richardson* v. *Perales*, 402 U. S. 389, 399 (1971). Millions of claims are filed every year under the Act's disability benefits programs alone, and these claims are handled under "an unusually protective [multi]-step process for the review and adjudication of disputed claims." *Heckler* v. *Day*, 467 U. S. 104, 106 (1984).

The steps provided for under Title II are essentially identical for new claimants and for persons subject to CDR. An initial determination of a claimant's eligibility for benefits is made by a state agency, under federal standards and criteria. See 42 U. S. C. § 421(a) (1982 ed. and Supp. IV); see also 20 CFR §§ 404.1588–404.1599 (1987). Next, a claimant is entitled to *de novo* reconsideration by the state agency, and additional evidence may be presented at that time. §§ 404.907–404.922. If the claimant is dissatisfied with the state agency's decision, review may then be had by the Secretary of Health and Human Services, acting through a federal ALJ; at this stage, the claimant is again free to introduce new evidence or raise new issues. 42 U. S. C. § 421(d) (1982 ed., Supp. IV); 20 CFR §§ 404.929–404.965 (1987). If the claimant is still dissatisfied, a hearing may be sought before the Appeals Council of the Social Security Administration. §§ 404.967–404.983. Once these elaborate administrative remedies have been exhausted, a claimant is entitled to seek judicial review, including review of constitutional claims. 42 U. S. C. §§ 405(g), 421(d) (1982 ed. and Supp. IV); *Heckler* v. *Ringer*, 466 U. S. 602, 615 (1984); *Mathews* v. *Eldridge*, 424 U. S., at 332; *Weinberger* v. *Salfi*, 422 U. S. 749, 762 (1975). The Act, however, makes no provision for remedies in money damages against officials responsible for unconstitutional conduct that leads to the wrongful denial of benefits. As respondents concede, claimants whose benefits have been fully restored through the administrative process would lack stand-

ing to invoke the Constitution under the statute's administrative review provision. See Brief for Respondents 32–33.

The case before us cannot reasonably be distinguished from *Bush* v. *Lucas*. Here, exactly as in *Bush*, Congress has failed to provide for "complete relief": respondents have not been given a remedy in damages for emotional distress or for other hardships suffered because of delays in their receipt of Social Security benefits. Compare *Bush*, 462 U. S., at 372, n. 9, with 796 F. 2d, at 1134, n. 2 (opinion below). The creation of a *Bivens* remedy would obviously offer the prospect of relief for injuries that must now go unredressed. Congress, however, has not failed to provide meaningful safeguards or remedies for the rights of persons situated as respondents were. Indeed, the system for protecting their rights is, if anything, considerably more elaborate than the civil service system considered in *Bush*. The prospect of personal liability for official acts, moreover, would undoubtedly lead to new difficulties and expense in recruiting administrators for the programs Congress has established. Congressional competence at "balancing governmental efficiency and the rights of [individuals]," *Bush*, *supra*, at 389, is no more questionable in the social welfare context than it is in the civil service context. Cf. *Forrester* v. *White*, 484 U. S. 219, 223–224 (1988).

Congressional attention to problems that have arisen in the administration of CDR (including the very problems that gave rise to this case) has, moreover, been frequent and intense. See, *e. g.*, H. R. Rep. No. 98–618, pp. 2, 4 (1984); S. Rep. No. 98–466, pp. 10, 17–18 (1984). Congress itself required that the CDR program be instituted. Within two years after the program began, Congress enacted emergency legislation providing for the continuation of benefits even after a finding of ineligibility by a state agency. Less than two years after passing that law, and fully aware of the results of extensive investigations of the practices that led to respondents' injuries, Congress again enacted legislation aimed

at reforming the administration of CDR; that legislation again specifically addressed the problem that had provoked the earlier emergency legislation. At each step, Congress chose specific forms and levels of protection for the rights of persons affected by incorrect eligibility determinations under CDR. At no point did Congress choose to extend to any person the kind of remedies that respondents seek in this lawsuit. Cf. 130 Cong. Rec. 6585–6586 (1984) (Rep. Perkins) (expressing regret that the bill eventually enacted as the 1984 Reform Act did not provide additional relief for persons improperly terminated during the early years of CDR). Thus, congressional unwillingness to provide consequential damages for unconstitutional deprivations of a statutory right is at least as clear in the context of this case as it was in *Bush*.

Respondents nonetheless contend that *Bush* should be confined to its facts, arguing that it applies only in the context of what they call "the special nature of federal employee relations." Brief for Respondents 40. Noting that the parties to this case did "not share the sort of close, collaborative, continuing juridical relationship found in the federal civil service," respondents suggest that the availability of *Bivens* remedies would create less "inconvenience" to the Social Security system than it would in the context of the civil service. See Brief for Respondents 44, 46–48. Petitioners are less sanguine, arguing that the creation of *Bivens* remedy in this context would lead to "a complete disruption of [a] carefully crafted and constantly monitored congressional scheme." Reply Brief for Petitioners 15.

We need not choose between these competing predictions, which have little bearing on the applicability of *Bush* to this case. The decision in *Bush* did not rest on this Court's belief that *Bivens* actions would be more disruptive of the civil service than they are in other contexts where they have been allowed, such as federal law enforcement agencies (*Bivens* itself) or the federal prisons (*Carlson* v. *Green*, 446 U. S. 14 (1980)). Rather, we declined in *Bush* "'to create a new sub-

stantive legal liability . . .' because we are convinced that Congress is in a better position to decide whether or not the public interest would be served by creating it." 462 U. S., at 390 (citation omitted). That reasoning applies as much, or more, in this case as it did in *Bush* itself.

Respondents also suggest that this case is distinguishable from *Bush* because the plaintiff in that case received compensation for the constitutional violation itself, while these respondents have merely received that to which they would have been entitled had there been no constitutional violation. See Brief for Respondents 20, n. 26 ("Bush's reinstatement was a remedy for the alleged abuse, not just a restoration of something to which he was entitled . . ."); see also *id.*, at 11 (failure to create a *Bivens* remedy "would give respondents precisely the same thing whether or not they were victims of constitutional deprivation and would thus leave respondents with no post-deprivation remedy at all for the constitutional violations they allege"). The *Bush* opinion, however, drew no distinction between compensation for a "constitutional wrong" and the restoration of statutory rights that had been unconstitutionally taken away. Nor did it suggest that such labels would matter. Indeed, the Court appeared to assume that civil service employees would get "precisely the same thing whether or not they were victims of constitutional deprivation." *Ibid.*; see *Bush*, 462 U. S., at 386 (civil service statute "provides meaningful remedies for employees who may have been *unfairly* disciplined for making critical comments about their agencies") (emphasis added; footnote omitted). *Bush* thus lends no support to the notion that statutory violations caused by unconstitutional conduct necessarily require remedies in addition to the remedies provided generally for such statutory violations. Here, as in *Bush*, it is evident that if we were "to fashion an adequate remedy for every wrong that can be proved in a case . . . [the complaining party] would obviously prevail." *Id.*, at 373. In neither case, however, does the presence of alleged unconstitutional

conduct that is not *separately* remedied under the statutory scheme imply that the statute has provided "no remedy" for the constitutional wrong at issue.

The remedy sought in *Bush* was virtually identical to the one sought by respondents in this case: consequential damages for hardships resulting from an allegedly unconstitutional denial of a statutory right (Social Security benefits in one instance and employment in a particular Government job in the other). In light of the comprehensive statutory schemes involved, the harm resulting from the alleged constitutional violation can in neither case be separated from the harm resulting from the denial of the statutory right. Respondents' effort to separate the two does not distinguish this case from *Bush* in any analytically meaningful sense.

In the end, respondents' various arguments are rooted in their insistent and vigorous contention that they simply have not been adequately recompensed for their injuries. They say, for example:

> "Respondents are disabled workers who were dependent upon their Social Security benefits when petitioners unconstitutionally terminated them. Respondents needed those benefits, at the time they were wrongfully withheld, to purchase food, shelter, medicine, and life's other necessities. The harm they suffered as a result bears no relation to the dollar amount of the benefits unjustly withheld from them. For the Government to offer belated restoration of back benefits in a lump sum and attempt to call it quits, after respondents have suffered deprivation for months on end, is not only to display gross insensitivity to the damage done to respondents' lives, but to trivialize the seriousness of petitioners' offense." Brief for Respondents 11.

We agree that suffering months of delay in receiving the income on which one has depended for the very necessities of life cannot be fully remedied by the "belated restoration of back benefits." The trauma to respondents, and thousands of others like them, must surely have gone beyond what anyone

of normal sensibilities would wish to see imposed on innocent disabled citizens. Nor would we care to "trivialize" the nature of the wrongs alleged in this case. Congress, however, has addressed the problems created by state agencies' wrongful termination of disability benefits. Whether or not we believe that its response was the best response, Congress is the body charged with making the inevitable compromises required in the design of a massive and complex welfare benefits program. Cf. *Dandridge* v. *Williams*, 397 U. S. 471, 487 (1970). Congress has discharged that responsibility to the extent that it affects the case before us, and we see no legal basis that would allow us to revise its decision.[3]

Because the relief sought by respondents is unavailable as a matter of law, the case must be dismissed. The judgment of the Court of Appeals to the contrary is therefore

Reversed.

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[3] The Solicitor General contends that Congress has explicitly precluded the creation of a *Bivens* remedy for respondents' claims. Cf. *Bivens*, 403 U. S., at 397. His argument rests on 42 U. S. C. § 405(h) (1982 ed., Supp. IV), which provides:

"The findings and decision of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under sections 1331 or 1346 of title 28 to recover on any claim arising under [Title II]."

Relying on *Heckler* v. *Ringer*, 466 U. S. 602, 614–616, 620–626 (1984), and *Weinberger* v. *Salfi*, 422 U. S. 749, 756–762 (1975), the Solicitor General has previously argued that the third sentence of this provision prevents any exercise of general federal-question jurisdiction under § 1331. See *Bowen* v. *Michigan Academy of Family Physicians*, 476 U. S. 667, 679 (1986). Without deciding the question, we noted that arguments could be made for and against the Solicitor General's position. *Id.*, at 679–680. We continue to believe that the exact scope of the third sentence's restriction on federal-question jurisdiction is not free from doubt; because we hold on other grounds that a *Bivens* remedy is precluded in this case, we need not decide whether § 405(h) would have the same effect.

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

Respondents have asserted that their claims arise under the Due Process Clause of the Fifth Amendment. In my opinion the Court should not reach the issue whether these claims may be brought directly under the Constitution without first deciding whether the Solicitor General is correct in his submission that Congress has enacted a statute that expressly requires dismissal of the complaint. See, *e. g.*, *Schweiker* v. *Hogan*, 457 U. S. 569, 585 (1982). I agree with the explanation in Part III–A of JUSTICE BRENNAN's opinion of why 42 U. S. C. § 405(h) does not preclude a *Bivens* remedy in this case. Accordingly, I join all of the Court's opinion except footnote 3.

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

Respondents are three individuals who, because they are unable to engage in gainful employment as a result of certain disabilities, rely primarily or exclusively on disability benefits awarded under Title II of the Social Security Act, 42 U. S. C. § 423 (1982 ed. and Supp. IV), for their support and that of their families. Like hundreds of thousands of other such recipients, in the early 1980's they lost this essential source of income following state implementation of a federally mandated "continuing disability review" process (CDR), only to have an administrative law judge (ALJ) ultimately reinstate their benefits after appeal, or to regain them, as respondent James Chilicky did, by filing a new application for benefits. Respondents allege that the initial benefit termination resulted from a variety of unconstitutional actions taken by state and federal officials responsible for administering the CDR program. They further allege, and petitioners do not dispute, that as a result of these deprivations, which lasted from 7 to 19 months, they suffered immediate financial hardship, were unable to purchase food, shelter, and

other necessities, and were unable to maintain themselves in even a minimally adequate fashion.

The Court today reaffirms the availability of a federal action for money damages against federal officials charged with violating constitutional rights. See *ante*, at 421. "'"[W]here legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done."'" *Ibid.* (quoting *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388, 396–397 (1971), in turn quoting *Bell* v. *Hood*, 327 U. S. 678, 684 (1946)). Acknowledging that the trauma respondents and others like them suffered as a result of the allegedly unconstitutional acts of state and federal officials "must surely have gone beyond what anyone of normal sensibilities would wish to see imposed on innocent disabled citizens," *ante*, at 428–429, the Court does not for a moment suggest that the retroactive award of benefits to which respondents were always entitled remotely approximates full compensation for such trauma. Nevertheless, it refuses to recognize a *Bivens* remedy here because the "design of [the disability insurance] program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration." *Ante*, at 423.

I agree that in appropriate circumstances we should defer to a congressional decision to substitute alternative relief for a judicially created remedy. Neither the design of Title II's administrative review process, however, nor the debate surrounding its reform contains any suggestion that Congress meant to preclude recognition of a *Bivens* action for persons whose constitutional rights are violated by those charged with administering the program, or that Congress viewed this process as an adequate substitute remedy for such violations. Indeed, Congress never mentioned, let alone debated, the desirability of providing a statutory remedy for such constitutional wrongs. Because I believe legislators of

"normal sensibilities" would not wish to leave such traumatic injuries unrecompensed, I find it inconceivable that Congress meant by mere silence to bar all redress for such injuries.

I

In response to the escalating costs of the Title II disability insurance program, Congress enacted legislation in 1980 directing state agencies to review the eligibility of Title II beneficiaries at least once every three years in order to ensure that those receiving benefits continued to qualify for such assistance. Pub. L. 96–265, § 311(a), 94 Stat. 460, as amended, 42 U. S. C. § 421(i) (1982 ed. and Supp. IV). Although the CDR program was to take effect January 1, 1982, the then-new administration advanced its starting date to March 1, 1981, and initiated what congressional critics later characterized as a "meat ax approach" to the problem of Social Security fraud. 130 Cong. Rec. 6594 (1984) (remarks of Rep. Alexander); *id.*, at 6595 (remarks of Rep. Anthony). Respondents allege that in the course of their review proceedings, state and federal officials violated their due process rights by judging their eligibility in light of impermissible quotas, disregarding dispositive favorable evidence, selecting biased physicians, purposely using unpublished criteria and rules inconsistent with statutory standards, arbitrarily reversing favorable decisions, and failing impartially to review adverse decisions.

Whatever the merits of these allegations, a question that is not now before us, it is undisputed that by 1984 the CDR program was in total disarray. As the Court recounts, during the three years that followed the inauguration of the program, approximately 200,000 recipients lost their benefits only to have them restored on appeal. See *ante*, at 416. Just under half of all initial reviews resulted in the termination of benefits, H. R. Rep. No. 98–618, p. 10 (1984), yet nearly two-thirds of those who appealed regained their benefits. 130 Cong. Rec. 6598 (1984) (remarks of Rep. Levin);

see also S. Rep. No. 96–466, p. 18 (1984). Typically, appeals took anywhere from 9 to 18 months to process, during which time beneficiaries often lacked sufficient income to purchase necessities and also lost their eligibility for Medicare coverage. 130 Cong. Rec. 25979 (1984) (remarks of Sen. Levin). When Congress enacted the Social Security Disability Benefits Reform Act of 1984, approximately 120,000 contested eligibility decisions were pending on appeal, and federal courts had directed the agency to reopen another 100,000, *id.*, at 6588 (remarks of Rep. Conte); several "massive" class actions were pending in the federal courts challenging a number of the Social Security Administration's (SSA's) disability review policies and standards, Brief for Petitioners 14; and half the States either refused to comply with those standards or were barred by court orders from doing so, 130 Cong. Rec. 13218–13219 (1984) (remarks of Sen. Cohen); *id.*, at 6598 (remarks of Rep. Levin). Indeed, in April 1984, these debilitating challenges prompted the Secretary of Health and Human Services to call a halt to all further reviews by imposing a temporary, nationwide moratorium.

Chief among the problems Congress identified as contributing to this chaotic state of affairs was SSA's stringent medical improvement standard, which the agency applied in an adjudicative climate that some characterized as "rigorous," H. R. Rep. No. 98–618, at 10, and others denounced as "overzealous and callous." 130 Cong. Rec. 6596 (1984) (remarks of Rep. Fowler). Critics charged that under this strict standard, the agency terminated benefits by erroneously deeming medical impairments "slight" without evaluating the recipients' actual ability to work, and that the agency eliminated from the benefit rolls many other recipients whose medical condition had not changed at all by simply reevaluating their eligibility under the new, more stringent criteria. H. R. Rep. No. 98–618, at 6–7, 10–11. The harshness of both the standard and the results it produced led various Federal Courts of Appeals and a number of States to reject

it, which in turn produced widespread confusion and a near total lack of national uniformity in the administration of the disability insurance program itself.

Congress responded to the CDR crisis by establishing, for the first time, a statutory standard governing disability review. Designed primarily to end the practice of terminating benefits based on nothing more than a reassessment of old evidence under new eligibility criteria, the medical improvement standard permits the agency to terminate benefits only where substantial evidence demonstrates that one of four specific conditions is met.[1] In addition to establishing these substantive eligibility criteria and directing SSA to revise certain others,[2] Congress enacted several procedural re-

[1] Under the 1984 standard, the agency may terminate benefits only if (1) substantial evidence demonstrates that the recipient's impairment has medically improved and that he or she is able to engage in substantial gainful activity; (2) new and substantial medical evidence reveals that, although the recipient's condition has not improved medically, he or she has benefitted from medical or vocational therapy and is able to engage in substantial gainful activity; (3) new or improved diagnostic techniques or evaluations demonstrate that the recipient's impairment is not as disabling as was previously determined and that he or she is able to engage in substantial gainful activity; or (4) substantial evidence, including any evidence previously on record, demonstrates that a prior eligibility determination was erroneous. Pub. L. 98–460, § 2, 98 Stat. 1794–1796, 42 U. S. C. § 423(f) (1982 ed., Supp. IV).

Congress also barred any further certification of class actions challenging SSA's medical improvement criteria and directed a remand of all such pending actions in order to afford the agency an opportunity to apply the newly prescribed standard. Pub. L. 98–460, § 2(d), 98 Stat. 1797–1798, note following 42 U. S. C. § 423.

[2] The 1984 legislation directed SSA to revise its mental impairment criteria and extended an administratively imposed moratorium on mental impairment reviews until the new criteria were in place; mandated consideration of the combined effects of multiple impairments in cases where no single disability is sufficiently severe to establish a recipient's eligibility for benefits; and called for a study on the use of subjective evidence of pain in disability evaluations. Pub. L. 98–460, §§ 3, 4, 5, note following 42 U. S. C. § 421, 42 U. S. C. § 423(d)(2)(C), and note following 42 U. S. C. § 423 (1982 ed., Supp. IV).

forms in order to protect recipients from future erroneous deprivations and to ensure that the review process itself would operate in a fairer and more humane manner. The most significant of these protections was a provision allowing recipients to elect to continue to receive benefit payments, subject to recoupment in certain circumstances, through appeal to a federal ALJ, the penultimate stage of administrative review. See *ante*, at 424.[3]

II

A

In *Bivens* itself, we noted that, although courts have the authority to provide redress for constitutional violations in the form of an action for money damages, the exercise of that authority may be inappropriate where Congress has created another remedy that it regards as equally effective, or where "special factors counse[l] hesitation [even] in the absence of affirmative action by Congress." 403 U. S., at 396–397. Among the "special factors" the Court divines today in our prior cases is "an appropriate judicial deference to indications that congressional inaction has not been inadvertent." *Ante*, at 423. Describing congressional attention to the numerous problems the CDR process spawned as "frequent and intense," *ante*, at 425, the Court concludes that the very design of that process "suggests that Congress has provided what it

[3] Congress had previously responded to complaints concerning the high reversal rate of termination decisions by passing temporary legislation in 1983 that provided for interim payments during appeal through the ALJ stage, see Pub. L. 97–455, § 2, 96 Stat. 2498, 42 U. S. C. § 423(g) (1982 ed. and Supp. IV); see also H. R. Conf. Rep. No. 98–1039, p. 33 (1984). The 1984 Reform Act extended this authorization through January 1, 1988, and provided for recoupment of such payments in those cases where termination decisions are affirmed by SSA's Appeals Council, unless the agency determines that such recoupment would work an undue hardship. 42 U. S. C. § 423(g) (1982 ed., Supp. IV). In December 1987, Congress extended the interim payment provision through 1989. See § 9009 of the Omnibus Reconciliation Act of 1987, Pub. L. 100–203, 42 U. S. C. § 423(g)(1)(C) (1982 ed. and Supp. V).

considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration." *Ante*, at 423. The cases setting forth the "special factors" analysis upon which the Court relies, however, reveal, by way of comparison, both the inadequacy of Title II's "remedial mechanism" and the wholly inadvertent nature of Congress' failure to provide any statutory remedy for constitutional injuries inflicted during the course of previous review proceedings.

In *Chappell* v. *Wallace*, 462 U. S. 296 (1983), where we declined to permit an action for damages by enlisted military personnel seeking redress from their superior officers for constitutional injuries, we noted that Congress, in the exercise of its "plenary constitutional authority over the military, has enacted statutes regulating military life, and has established a comprehensive internal system of justice to regulate military life . . . . The resulting system provides for the review and remedy of complaints and grievances such as [the equal protection claim] presented by respondents." *Id.*, at 302. That system not only permits aggrieved military personnel to raise constitutional challenges in administrative proceedings, it authorizes recovery of significant consequential damages, notably retroactive promotions. *Id.*, at 303. Similarly, in *Bush* v. *Lucas*, 462 U. S. 367 (1983), we concluded that, in light of the "elaborate, comprehensive scheme" governing federal employment relations, *id.*, at 385, recognition of any supplemental judicial remedy for constitutional wrongs was inappropriate. Under that scheme—which Congress has "constructed step-by-step, with careful attention to conflicting policy considerations," see *id.*, at 388, over the course of nearly 100 years—"[c]onstitutional challenges . . . are fully cognizable" and prevailing employees are entitled not only to full backpay, but to retroactive promotions, seniority, pay raises, and accumulated leave. *Id.*, at 386, 388. Indeed, Congress expressly "intended [to] put the employee 'in the same position he would have been in had the

unjustified or erroneous personnel action not taken place.'" *Id.*, at 388 (quoting S. Rep. No. 1062, 89th Cong., 2d Sess., 1 (1966)).

It is true that neither the military justice system nor the federal employment relations scheme affords aggrieved parties full compensation for constitutional injuries; nevertheless, the relief provided in both is far more complete than that available under Title II's review process. Although federal employees may not recover damages for any emotional or dignitary harms they might suffer as a result of a constitutional injury, see *Bush*, *supra*, at 372, n. 9, they, like their military counterparts, are entitled to redress for most economic consequential damages, including, most significantly, consequential damage to their Government careers. Here, by stark contrast, Title II recipients cannot even raise constitutional challenges to agency action in any of the four tiers of administrative review, see *ante*, at 424, and if they ultimately prevail on their eligibility claims in those administrative proceedings they can recover no consequential damages whatsoever. The only relief afforded persons unconstitutionally deprived of their disability benefits is retroactive payment of the very benefits they should have received all along. Such an award, of course, fails miserably to compensate disabled persons illegally stripped of the income upon which, in many cases, their very subsistence depends.[4]

The inadequacy of this relief is by no means a product of "the inevitable compromises required in the design of a massive and complex welfare benefits program." *Ante*, at 429. In *Chappell* and *Bush*, we dealt with elaborate administrative systems in which Congress anticipated that federal officials might engage in unconstitutional conduct, and in which

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[4] The legislative debate over the 1984 Reform Act is replete with anecdotal evidence of recipients who lost their cars and homes, and of some who may even have died as a result of benefit terminations. See, *e. g.*, 130 Cong. Rec. 6588 (1984) (remarks of Rep. Regula); *id.*, at 6596 (remarks of Rep. Glickman).

it accordingly sought to afford injured persons a form of redress as complete as the Government's institutional concerns would allow. In the federal employment context, for example, Congress carefully "balanc[ed] governmental efficiency and the rights of employees," *Bush*, 462 U. S., at 389, paying "careful attention to conflicting policy considerations," *id.*, at 388, and in the military setting it "established a comprehensive internal system of justice to regulate military life, taking into account the special patterns that define the military structure." *Chappell*, *supra*, at 302.

Here, as the legislative history of the 1984 Reform Act makes abundantly clear, Congress did not attempt to achieve a delicate balance between the constitutional rights of Title II beneficiaries on the one hand, and administrative concerns on the other. Rather than fine-tuning "an elaborate remedial scheme that ha[d] been constructed step-by-step" over the better part of a century, Congress confronted a paralyzing breakdown in a vital social program, which it sought to rescue from near-total anarchy. Although the legislative debate surrounding the 1984 Reform Act is littered with references to "arbitrary," "capricious," and "wrongful" terminations of benefits, it is clear that neither Congress nor anyone else identified unconstitutional conduct by state agencies as the cause of this paralysis. Rather, Congress blamed the systemic problems it faced in 1984 on SSA's determination to control the cost of the disability insurance program by accelerating the CDR process and mandating more restrictive reviews. Legislators explained that, "[b]ecause of the abrupt acceleration of the reviews, . . . [s]tate disability determinations offices were forced to accept a three-fold increase in their workloads," 130 Cong. Rec. 13241 (1984) (remarks of Sen. Bingaman); yet despite this acceleration, SSA took no steps to "assur[e] that the State agencies had the resources to handle the greatly increased workloads," *id.*, at 13229 (remarks of Sen. Cranston), and instead put "pressure upon

[those] agencies to make inaccurate and unfair decisions." *Id.*, at 13221 (remarks of Sen. Heinz).

Legislating in a near-crisis atmosphere, Congress saw itself as wrestling with the Executive Branch for control of the disability insurance program. It emphatically repudiated SSA's policy of restrictive, illiberal, and hasty benefit reviews, and adopted a number of prospective measures designed "to prevent further reckless reviews," *id.*, at 13229 (remarks of Sen. Cranston), and to ensure that recipients dependent on disability benefits for their sustenance would be adequately protected in any future review proceedings.

At no point during the lengthy legislative debate, however, did any Member of Congress so much as hint that the substantive eligibility criteria, notice requirements, and interim payment provisions that would govern *future* disability reviews adequately redressed the harms that beneficiaries may have suffered as a result of the unconstitutional actions of individual state and federal officials in *past* proceedings, or that the constitutional rights of those unjustly deprived of benefits in the past had to be sacrificed in the name of administrative efficiency or any other governmental interest. The Court today identifies no legislative compromise, "inevitable" or otherwise, in which lawmakers expressly declined to afford a remedy for such past wrongs. Nor can the Court point to any legislator who suggested that state and federal officials should be shielded from liability for any unconstitutional acts taken in the course of administering the review program, or that exposure to liability for such acts would be inconsistent with Congress' comprehensive and carefully crafted remedial scheme.

Although the Court intimates that Congress consciously chose not to afford any remedies beyond the prospective protections set out in the 1984 Reform Act itself, see *ante*, at 426, the one legislator the Court identifies as bemoaning the Act's inadequate response to past wrongs argued only that the legislation should have permitted all recipients, including

those whose benefits were terminated before December 31, 1984, to seek a redetermination of their eligibility under the new review standards. See 130 Cong. Rec. 6586 (1984) (remarks of Rep. Perkins). Neither this legislator nor any other, however, discussed the possibility or desirability of redressing injuries flowing from the temporary loss of benefits in those cases where the benefits were ultimately restored on administrative appeal. The possibility that courts might act in the absence of congressional measures was never even discussed, let alone factored into Congress' response to the emergency it faced.

The mere fact that Congress was aware of the prior injustices and failed to provide a form of redress for them, standing alone, is simply not a "special factor counselling hesitation" in the judicial recognition of a remedy. Inaction, we have repeatedly stated, is a notoriously poor indication of congressional intent, see, *e. g.*, *Bob Jones University* v. *United States*, 461 U. S. 574, 600 (1983); *Zuber* v. *Allen*, 396 U. S. 168, 185–186, n. 21 (1969), all the more so where Congress is legislating in the face of a massive breakdown calling for prompt and sweeping corrective measures. In 1984, Congress undertook to resuscitate a disability review process that had ceased functioning: that the prospective measures it prescribed to prevent future dislocations included no remedy for past wrongs in no way suggests a conscious choice to leave those wrongs unremedied. I therefore think it altogether untenable to conclude, on the basis of mere legislative silence and inaction, that Congress intended an administrative scheme that does not even take cognizance of constitutional claims to displace a damages action for constitutional deprivations that might arise in the administration of the disability insurance program.

B

Our decisions in *Chappell* and *Bush* reveal yet another flaw in the "special factors" analysis the Court employs

today. In both those cases, we declined to legislate in areas in which Congress enjoys a special expertise that the Judiciary clearly lacks. Thus, in *Chappell*, we dealt with military affairs, a subject over which "[i]t is clear that the Constitution contemplated that the Legislative Branch have plenary control." 462 U. S., at 301. Indeed, as we reaffirmed:

> "'[I]t is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches.'" *Id.*, at 302 (quoting *Gilligan* v. *Morgan*, 413 U. S. 1, 10 (1973)) (emphasis in original).

Similarly, in *Bush* we dealt with the unique area of federal employment relations, where the Government acts not as governor but as employer. We observed that Congress had devoted a century to studying the problems peculiar to this subject, during the course of which it had "developed considerable familiarity with balancing governmental efficiency and the rights of employees." 462 U. S., at 389. In addition, Congress "has a special interest in informing itself about the efficiency and morale of the Executive Branch," and is far more capable than courts of apprising itself of such matters "through factfinding procedures such as hearings that are not available to the courts." *Ibid.* In declining to recognize a cause of action for constitutional violations that might arise in the civil service context, therefore, we reasoned that the recognition of such an action could upset Congress' careful structuring of federal employment relations, and concluded that "Congress is in a far better position to evaluate the impact of a new species of litigation between federal employees on the efficiency of the civil service." *Ibid.*

Ignoring the unique characteristics of the military and civil service contexts that made judicial recognition of a *Bivens* action inappropriate in those cases, the Court today observes that "[c]ongressional competence at 'balancing governmental efficiency and the rights of [individuals]' is no more questionable in the social welfare context than it is in the civil service context." *Ante*, at 425 (quoting *Bush*, *supra*, at 389). This observation, however, avails the Court nothing, for in *Bush* we declined to create a *Bivens* action for aggrieved federal employees not because Congress is simply competent to legislate in the area of federal employment relations, but because Congress is far more capable of addressing the special problems that arise in those relations than are courts. Thus, I have no quarrel with the Court's assertion that in *Bush* we did not decline to create a *Bivens* action because we believed such an action would be more disruptive in the civil service context than elsewhere, but because we were "'convinced that Congress is in a better position to decide whether or not the public interest would be served by creating [such an action.]'" *Ante*, at 427 (quoting *Bush*, *supra*, at 390). That conviction, however, flowed not from mere congressional competence to legislate in the area of federal employment relations, but from our recognition that we lacked the special expertise Congress had developed in such matters, as well as the ability to evaluate the impact such a right of action would have on the civil service. See *Bush*, *supra*, at 389.

The Court's suggestion, therefore, that congressional authority over a given subject is itself a "special factor" that "counsel[s] hesitation [even] in the absence of affirmative action by Congress," see *Bivens*, 403 U. S., at 396, is clearly mistaken. In *Davis* v. *Passman*, 442 U. S. 228 (1979), we recognized a cause of action under the Fifth Amendment's Due Process Clause for a congressional employee who alleged that she had been discriminated against on the basis of her sex, even though Congress is competent to pass legislation governing the employment relations of its own Members, see

42 U. S. C. § 2000e–16(a) (excluding congressional employees from the coverage of § 717 of Title VII). Likewise, in *Carlson* v. *Green*, 446 U. S. 14 (1980), we created a *Bivens* action for redress of injuries flowing from the allegedly unconstitutional conduct of federal prison officials, notwithstanding the fact that Congress had expressly (and competently) provided a statutory remedy in the Federal Tort Claims Act for injuries inflicted by such officials. In neither case was it necessary to inquire into Congress' competence over the subject matter. Rather, we permitted the claims because they arose in areas in which congressional competence is no greater than that of the courts, and in which, therefore, courts need not fear to tread even in the absence of congressional action.

The same is true here. Congress, of course, created the disability insurance program and obviously may legislate with respect to it. But unlike the military setting, where Congress' authority is plenary and entitled to considerable judicial deference, or the federal employment context, where Congress enjoys special expertise, social welfare is hardly an area in which the courts are largely incompetent to act. The disability insurance program is concededly large, but it does not involve necessarily unique relationships like those between enlisted military personnel and their superior officers, or Government workers and their federal employers. Rather, like the federal law enforcement and penal systems that gave rise to the constitutional claims in *Bivens* and *Carlson*, *supra*, the constitutional issues that surface in the social welfare system turn on the relationship of the Government and those it governs—the relationship that lies at the heart of constitutional adjudication. Moreover, courts do not lack familiarity or expertise in determining what the dictates of the Due Process Clause are. In short, the social welfare context does not give rise to the types of concerns that make it an area where courts should refrain from creat-

ing a damages action even in the absence of congressional action.

III

Because I do not agree that the scope and design of Title II's administrative review process is a "special factor" precluding recognition of a *Bivens* action, I turn to petitioners' remaining arguments as to why we should not recognize such an action here.

A

Petitioners contend that Congress has explicitly precluded the creation of a *Bivens* remedy in Title II itself. Section 405(h) provides:

> "The findings and decision of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under section 1331 or 1346 of title 28 to recover on any claim arising under [Title II]." 42 U. S. C. § 405(h) (1982 ed., Supp. IV).

The only provision in Title II for judicial review of the Secretary's decisions is set out in 42 U. S. C. § 405(g). Petitioners argue that because the second sentence of § 405(h) precludes review of any agency decision except as provided under § 405 (g), and that because the full remedy available following administrative or judicial review under the latter subsection is retroactive payment of any wrongfully terminated disability benefits, Congress has expressly precluded all other remedies for such wrongful terminations.

We just recently rejected this argument, explaining that "[t]he purpose of 'the first two sentences of § 405(h),' as we made clear in *Weinberger* v. *Salfi*, 422 U. S. 749, 757 (1975), is to 'assure that administrative exhaustion will be re-

quired.'" *Bowen* v. *Michigan Academy of Family Physicians*, 476 U. S. 667, 679, n. 8 (1986). The exhaustion requirement, however, does not apply where "there is no hearing, and thus no administrative remedy, to exhaust." *Ibid.* As in *Michigan Academy*, respondents here do not contest any decision reached after a hearing to which they were parties, for those decisions resulted in the full restoration of their benefits. Instead, they seek review of allegedly unconstitutional conduct and decisions that preceded the initial termination of their benefits. Their constitutional challenge to such conduct, like the attack on the agency regulation in *Michigan Academy*, is simply not cognizable in the administrative process, and thus any limitations the exhaustion requirement might impose on remedies available through that process are inapplicable here. Cf. *Heckler* v. *Ringer*, 466 U. S. 602, 617 (1984) (where parties "have an adequate remedy in § 405(g) for challenging *all* aspects of the Secretary's *denial* of their claims . . . [,] § 405(g) is the only avenue for judicial review of [their] claims for *benefits*") (emphasis added). Moreover, § 405(g) itself says nothing whatever about remedies, but rather establishes a limitations period and defines the scope of review governing judicial challenges to final agency decisions. Had Congress set out remedies in § 405(g) and declared them exclusive, I might agree that we would be precluded from recognizing a *Bivens* action. But limitations on a specific remedy—judicial review of agency decisions after a hearing—do not in and of themselves amount to an express preclusion of other, unspecified, remedies such as *Bivens* actions.

Petitioners also contend that the final sentence of § 405(h) establishes another, independent bar to creation of a *Bivens* action. In isolation, the sentence might well suggest such a broad preclusion, for it bars resort to federal-question jurisdiction—the jurisdictional basis of *Bivens* actions—for recovery on any claims arising under Title II. The sentence, however, does not appear in isolation, but is rather part of a

subsection governing a discrete category of claims: those brought to findings of fact or final decisions of the Secretary after a hearing to which the claimant was a party. Read in context, therefore, the final sentence serves as an adjunct to the exhaustion requirement established in the first two sentences by channeling any and all challenges to benefits determinations through the administrative process and thereby forestalling attempts to circumvent that process under the guise of independent constitutional challenges. See *Heckler* v. *Ringer*, *supra*, at 615–616 (§ 405(h) barred federal-question jurisdiction over constitutional challenge to Secretary's refusal to provide reimbursement for certain medical procedures); *Weinberger* v. *Salfi*, *supra*, at 760–761 (§ 405(h) barred federal-question jurisdiction over constitutional challenge leveled at regulation that rendered claimant ineligible for benefits). Respondents here do not contest any benefits determination, nor have they attempted to bypass the administrative review process: rather, having exhausted the remedies that process provides, they now seek relief for constitutional injuries they suffered in the course of their benefits determinations which the administrative scheme left unredressed. In *Michigan Academy*, *supra*, we declined to conclude that the last sentence of § 405(h) "by its terms prevents any resort to the grant of federal-question jurisdiction contained in 28 U. S. C. § 1331," *id.*, at 679–680; because I do not believe that the sentence in question applies to claims such as these respondents assert, I conclude that Congress has not expressly precluded the *Bivens* remedy respondents seek.

B

Finally, petitioners argue that the sheer size of the disability insurance program is a special factor militating against recognition of a *Bivens* action for respondents' claims. SSA is "probably the largest adjudicative agency in the western world," *Heckler* v. *Campbell*, 461 U. S. 458, 461, n. 2 (1983) (internal quotations and citation omitted), responsible for

processing over 2 million disability claims each year. *Heckler* v. *Day*, 467 U. S. 104, 106 (1984). Accordingly, petitioners argue, recognition of a *Bivens* action for any due process violations that might occur in the course of this processing would have an intolerably disruptive impact on the administration of the disability insurance program. Thousands of such suits could potentially be brought, diverting energy and money from the goals of the program itself, discouraging public service in the agency, and deterring those officials brave enough to accept such employment from "legitimate efforts" to ensure that only those truly unable to work receive benefits. Brief for Petitioners 47.

Petitioners' dire predictions are overblown in several respects. To begin with, Congress' provision for interim payments in both the 1983 emergency legislation, see n. 3, *supra*, and the 1984 Reform Act dramatically reduced the number of recipients who suffered consequential damages as a result of initial unconstitutional benefits termination. Similarly, the various other corrective measures incorporated in the 1984 legislation, which petitioners champion here as a complete remedy for past wrongs, should forestall future constitutional deprivations. Moreover, in order to prevail in any *Bivens* action, recipients such as respondents must both prove a deliberate abuse of governmental power rather than mere negligence, see *Daniels* v. *Williams*, 474 U. S. 327 (1986), and overcome the defense of qualified immunity.[5] See *Harlow* v. *Fitzgerald*, 457 U. S. 800 (1982). Indeed, these very requirements are designed to protect Government officials from liability for their "legitimate" actions; the prospect of liability for deliberate violations of known constitutional rights, therefore, will not dissuade well-intentioned civil servants either from accepting such employment or from carrying out the legitimate duties that employment imposes.

[5] Two of respondents' claims, those challenging the acceleration of the CDR program and the nonacquiescence in Ninth Circuit decisions, have already fallen to this defense. See *ante*, at 419.

Petitioners' argument, however, is more fundamentally flawed. Both the federal law enforcement system involved in *Bivens* and the federal prison system involved in *Carlson* v. *Green*, 446 U. S. 14 (1980), are vast undertakings, and the possibility that individuals who come in contact with these Government entities will consider themselves aggrieved by the misuse of official power is at least as great as that presented by the social welfare program involved here. Yet in neither case did we even hint that such factors might legitimately counsel against recognition of a remedy for those actually injured by the abuse of such authority. See *Bivens*, 403 U. S., at 410 (Harlan, J., concurring in judgment) ("I . . . cannot agree . . . that the possibility of 'frivolous' claims . . . warrants closing the courthouse doors to people in Bivens' situation. There are other ways, short of that, of coping with frivolous lawsuits"). Indeed, in *Bivens* itself we rejected the suggestion that state law should govern the liability of federal officials charged with unconstitutional conduct precisely because officials "acting . . . in the name of the United States posses[s] a far greater capacity for harm than [a private] individual . . . exercising no authority other than his own." *Id.*, at 392. That the authority wielded by officials in this case may be used to harm an especially large number of innocent citizens, therefore, militates in *favor* of a cause of action, not against one, and petitioners' argument to the contrary perverts the entire purpose underlying our recognition of *Bivens* actions. In the modern welfare society in which we live, where many individuals such as respondents depend on government benefits for their sustenance, the Due Process Clause stands as an essential guarantee against arbitrary governmental action. The scope of any given welfare program is relevant to determining what process is due those dependent upon it, see *Mathews* v. *Eldridge*, 424 U. S. 319, 335 (1976), but it can never free the administrators of that program from all constitutional restraints, and should likewise not excuse those administrators from liability when they

act in clear contravention of the Due Process Clause's commands.

IV

After contributing to the disability insurance program throughout their working lives, respondents turned to it for essential support when disabling medical conditions prevented them from providing for themselves. If the allegations of their complaints are true, they were unjustly deprived of this essential support by state and federal officials acting beyond the bounds of their authority and in violation of respondents' constitutional rights. That respondents suffered grievous harm as a result of these actions—harm for which the belated restoration of disability benefits in no way compensated them—is undisputed and indisputable. Yet the Court today declares that respondents and others like them may recover nothing from the officials allegedly responsible for these injuries because Congress failed to include such a remedy among the reforms it enacted in an effort to rescue the disability insurance program from a paralyzing breakdown. Because I am convinced that Congress did not intend to preclude judicial recognition of a cause of action for such injuries, and because I believe there are no special factors militating against the creation of such a remedy here, I dissent.

KADRMAS ET AL. *v.* DICKINSON PUBLIC SCHOOLS ET AL.

APPEAL FROM THE SUPREME COURT OF NORTH DAKOTA

No. 86-7113. Argued March 30, 1988—Decided June 24, 1988

Under North Dakota statutes, thinly populated school districts are authorized to "reorganize" themselves into larger districts so that education can be provided more efficiently. Reorganization proposals must include provisions for transporting students to and from their homes. Appellee Dickinson Public Schools, which is relatively populous, has chosen not to participate in such a reorganization. In 1973 Dickinson's School Board instituted door-to-door bus service and began charging a fee for such transportation. In 1979, the State enacted a statute authorizing nonreorganized school districts like Dickinson to charge a fee for schoolbus service, not to exceed the district's estimated cost of providing the service. Appellants are a Dickinson schoolchild (Sarita Kadrmas) and her mother. In 1985, when the Kadrmas family refused to agree to the busing fee and began transporting Sarita to school privately, appellants filed a state-court action seeking to enjoin appellees from collecting any fee for the bus service. The action was dismissed on the merits, and the Supreme Court of North Dakota affirmed, holding that the 1979 statute does not violate state law or the Equal Protection Clause of the Fourteenth Amendment. The court rejected appellants' contention that the statute unconstitutionally discriminates on the basis of wealth. It also rejected the contention that the distinction drawn by the statute between reorganized and nonreorganized school districts violates the Equal Protection Clause.

Held:

1. There is no merit to appellees' contention that, because Mrs. Kadrmas signed contracts for schoolbus service, and made partial payments thereon, after the State Supreme Court's decision, and because Sarita has since been "enjoying the benefits" of the bus service, appellants are estopped from pursuing this appeal. The school board's authority to offer the benefit of subsidized bus transportation is not given by the challenged statute, but by other provisions of state law. The fee that Dickinson is permitted to charge under the 1979 statute is a burden rather than a benefit to appellants, and they are not estopped from raising an equal protection challenge to the statute that imposes that burden on them. *Fahey* v. *Mallonee*, 332 U. S. 245, distinguished. Nor is there any merit to appellees' suggestion that an Article III "case or con-

troversy" is lacking because execution of the bus service contracts rendered this case "moot." A decision in appellants' favor may relieve them from paying the balance owing under the bus service contracts, and would relieve them of future assessments under the authority of the 1979 statute. Because Sarita was only nine years old at the time of trial, and because there are younger children in the family, the ongoing and concrete nature of the controversy is readily apparent. Pp. 456–457.

2. The 1979 statute does not violate the Equal Protection Clause. Pp. 457–465.

(a) Applying a form of strict or "heightened" scrutiny to the North Dakota statute would not be supported by precedent. Statutes having different effects on the wealthy and the poor are not, on that account alone, subject to strict equal protection scrutiny. Nor is education a "fundamental right" that triggers strict scrutiny when government interferes with an individual's access to it. The "heightened scrutiny" standard of review—which is less demanding than "strict scrutiny" but more demanding that the standard rational relation test—has generally been applied only in cases that involved discriminatory classifications based on sex or illegitimacy. *Plyler* v. *Doe*, 457 U. S. 202, where a heightened scrutiny standard was used to invalidate a State's denial to the children of illegal aliens of the free public education that it made available to other residents, has not been extended beyond its unique circumstances, and does not control here. Moreover, decisions invalidating laws that barred indigent litigants from using the judicial process in circumstances where they had no alternative to that process are inapposite here. Applying the rational relation test, a State's decision to allow local school boards the option of charging patrons a user fee for bus service is constitutionally permissible. The Constitution does not require that such service be provided at all, and choosing to offer the service does not entail a constitutional obligation to offer it for free. Encouraging local school districts to provide bus service is a legitimate state purpose, and it is rational for the State to refrain from undermining its objective with a rule requiring that general revenues be used to subsidize an optional service that will benefit a minority of the district's families. Pp. 457–462.

(b) The distinction drawn in the 1979 statute between reorganized and nonreorganized school districts does not create an equal protection violation. Social and economic legislation like the 1979 statute carries with it a presumption of constitutionality that can only be overcome by a clear showing of arbitrariness and irrationality. The explanation of the statute offered by appellees and the State—which relates to encouraging school district reorganization and more effective school systems—is adequate to justify the distinction it draws among districts. Appellants

have failed to carry the heavy burden of demonstrating that the statute is both arbitrary and irrational. Pp. 462–465.

402 N. W. 2d 897, affirmed.

O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, SCALIA, and KENNEDY, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 466. STEVENS, J., filed a dissenting opinion, in which BLACKMUN, J., joined, *post*, p. 472.

Duane Houdek argued the cause for appellants. With him on the briefs was *Edward B. Reinhardt, Jr.*

George T. Dynes argued the cause and filed a brief for appellees.

Nicholas J. Spaeth, Attorney General, argued the cause for the State of North Dakota as *amicus curiae* urging affirmance. With him on the brief was *Laurie J. Loveland*, Assistant Attorney General.*

JUSTICE O'CONNOR delivered the opinion of the Court.

Appellants urge us to hold that the Equal Protection Clause forbids a State to allow some local school boards, but not others, to assess a fee for transporting pupils between their homes and the public schools. Applying well-established equal protection principles, we reject this claim and affirm the constitutionality of the challenged statute.

I

North Dakota is a sparsely populated State, with many people living on isolated farms and ranches. One result has

*Briefs of *amici curiae* urging reversal were filed for the American Civil Liberties Union Foundation et al. by *C. Edwin Baker, John A. Powell, Helen Hershkoff, Steven R. Shapiro*, and *Robert Vogel;* and for the Children's Defense Fund et al. by *Julius L. Chambers* and *John Charles Boger*.

Solicitor General Fried, Assistant Attorney General Reynolds, Deputy Solicitor General Ayer, Deputy Assistant Attorney General Clegg, Paul J. Larkin, Jr., and *David K. Flynn* filed a brief for the United States as *amicus curiae* urging affirmance.

been that some children, as late as the mid-20th century, were educated in "the one-room school where, in many cases, there [we]re twenty or more pupils with one teacher attempting in crowded conditions and under other disadvantages to give instructions in all primary grades." *Herman* v. *Medicine Lodge School Dist. No. 8*, 71 N. W. 2d 323, 328 (N.D. 1955). The State has experimented with various ameliorative devices at different times in its history. Beginning in 1907, for example, it has adopted a series of policies that "in certain circumstances required and in other circumstances merely authorized [local public] school districts to participate in transporting or providing compensation for transporting students to school." 402 N. W. 2d 897, 900 (N.D. 1987) (opinion below).

Since 1947, the legislature has authorized and encouraged thinly populated school districts to consolidate or "reorganize" themselves into larger districts so that education can be provided more efficiently. See *Herman*, *supra*, at 328; N.D. Cent. Code, ch. 15–27.3 (Supp. 1987). Reorganization proposals, which obviously must contemplate an increase in the distance that some children travel to school, are required by law to include provisions for transporting students back and forth from their homes. See § 15–27.3–10. The details of these provisions may vary from district to district, but once a reorganization plan is adopted the transportation provisions can be changed only with the approval of the voters. See §§ 15–27.3–10 and 15–27.3–19.

Appellee Dickinson Public Schools, which serves a relatively populous area, has chosen not to participate in such a reorganization. Until 1973, this school system provided free bus service to students in outlying areas, but the "pickup points" for this service were often at considerable distances from the students' homes. After a plebiscite of the bus users, Dickinson's School Board instituted door-to-door bus service and began charging a fee. During the period relevant to this case, about 13% of the students rode the bus;

their parents were charged $97 per year for one child or $150 per year for two children. 402 N. W. 2d, at 898. Such fees covered approximately 11% of the cost of providing the bus service, and the remainder was provided from state and local tax revenues. *Ibid.*

In 1979, the State enacted the legislation at issue in this case. This statute expressly indicates that nonreorganized school districts, like Dickinson, may charge a fee for transporting students to school; such fees, however, may not exceed the estimated cost to the school district of providing the service. See N. D. Cent. Code § 15–34.2–06.1 (1981 and Supp. 1987). The current version of this provision, which for convenience will be referred to as the "1979 statute," states in full:

> "Charge for bus transportation optional. The school board of any school district which has not been reorganized may charge a fee for schoolbus service provided to anyone riding on buses provided by the school district. For schoolbus service which was started prior to July 1, 1981, the total fees collected may not exceed an amount equal to the difference between the state transportation payment and the state average cost for transportation or the local school district's cost, whichever is the lesser amount. For schoolbus service started on or after July 1, 1981, the total fees collected may not exceed an amount equal to the difference between the state transportation payment and the local school district's cost for transportation during the preceding school year. Any districts that have not previously provided transportation for pupils may establish charges based on costs estimated by the school board during the first year that transportation is provided."

Appellants are a Dickinson schoolchild, Sarita Kadrmas, and her mother, Paula. The Kadrmas family, which also includes Mrs. Kadrmas' husband and two preschool children, lives about 16 miles from Sarita's school. Mr. Kadrmas

works sporadically in the North Dakota oil fields, and the family's annual income at the time of trial was at or near the officially defined poverty level. Until 1985, the Kadrmas family had agreed each year to pay the fee for busing Sarita to school. Having fallen behind on these and other bills, however, the family refused to sign a contract obligating them to pay $97 for the 1985 school year. Accordingly, the school bus no longer stopped for Sarita, and the family arranged to transport her to school privately. The costs they incurred that year for Sarita's transportation exceeded $1,000, or about 10 times the fee charged by the school district for bus service. This arrangement continued until the spring of 1987, when Paula Kadrmas signed a bus service contract for the remainder of the 1986 school year and paid part of the fee. Mrs. Kadrmas later signed another contract for the 1987 school year, and paid about half of the fee for that period.

In September 1985, appellants, along with others who have since withdrawn from the case, filed an action in state court seeking to enjoin appellees—the Dickinson Public Schools and various school district officials—from collecting any fee for the bus service. The action was dismissed on the merits, and an appeal was taken to the Supreme Court of North Dakota. After rejecting a state-law challenge, which is not at issue here, the court considered appellants' claim that the busing fee violates the Equal Protection Clause of the Fourteenth Amendment. The court characterized the 1979 statute as "purely economic legislation," which "must be upheld unless it is patently arbitrary and fails to bear a rational relationship to any legitimate government purpose." 402 N. W. 2d, at 902. The court then concluded "that the charges authorized [by the statute] are rationally related to the legitimate governmental objective of allocating limited resources and that the statute does not discriminate on the basis of wealth so as to violate federal or state equal protection rights." *Id.*, at 903. The court also rejected the contention

that the distinction drawn by the statute between reorganized and nonreorganized school districts violates the Equal Protection Clause. The distinction, the court found, serves the legitimate objective of promoting reorganization "by alleviating parental concerns regarding the cost of student transportation in the reorganized district." *Ibid.* Three justices dissented on state-law grounds. We noted probable jurisdiction, 484 U. S. 813 (1987), and now affirm.

II

A

Before addressing the merits, we must consider appellees' suggestion that this appeal should be dismissed on procedural grounds. After the decision of the Supreme Court of North Dakota in this case, Mrs. Kadrmas signed two bus service contracts and made partial payment on each. Since the execution of the first contract on April 6, 1987, Sarita has been riding the bus to school, or as appellees put it, "has been continuously enjoying the benefits of such bus service." Motion to Dismiss 1. Relying on *Fahey* v. *Mallonee*, 332 U. S. 245 (1947), appellees contend that appellants are "estopped" from pursuing their constitutional claims because "[i]t is well established that one may not retain benefits of an act while attacking the constitutionality of the same act." Motion to Dismiss 1–3.

Fahey was a shareholders' derivative suit in which a savings and loan association created under an Act of Congress sought to challenge the constitutionality of that same Act. This Court refused to consider the challenge, saying: "It would be difficult to imagine a more appropriate situation in which to apply the doctrine that one who utilizes an Act *to gain advantages of corporate existence* is estopped from questioning the validity of its vital conditions." 332 U. S., at 256 (emphasis added). The case before us today is not analogous. Appellants obviously are not creatures of any statute, and we doubt that plaintiffs are generally forbidden to challenge a statute simply because they are deriving some benefit

from it. Cf. *United States* v. *San Francisco*, 310 U. S. 16, 28–30 (1940); *Arnett* v. *Kennedy*, 416 U. S. 134, 152–153 (1974) (plurality opinion). The "benefit" derived by appellants from the challenged statute, moreover, is inapparent. The Dickinson School Board's authority to provide bus transportation is not given by the challenged statute, but by a different provision of state law. See N. D. Cent. Code § 15–34.2–01 (1981). Nor does the 1979 statute itself authorize the tax-supported subsidies that make the Dickinson school bus particularly attractive to parents in outlying areas. The fee that Dickinson is permitted to charge under the 1979 statute is itself a burden rather than a benefit to appellants, and they are not estopped from raising an equal protection challenge to the statute that imposes that burden on them.

Appellees also assert that execution of the bus service contracts rendered this case "moot." Brief for Appellees 32. Although appellees do not elaborate this contention or distinguish it from the estoppel argument just considered, they may be suggesting the absence of an Article III "case or controversy." If so, they are mistaken. Appellants claim that the 1979 statute is unconstitutional to the extent that it authorizes Dickinson to charge a fee for bus service, and they seek to prevent such fees from being collected. A decision in their favor might relieve them from paying the balance still owing under the two contracts that were executed in 1987, and would certainly relieve them from future assessments for bus service under the authority of the challenged statute. Because Sarita was only nine years old at the time of trial, and because there are two younger children in the family, the ongoing and concrete nature of the controversy between appellants and the Dickinson Public Schools is readily apparent.

B

Unless a statute provokes "strict judicial scrutiny" because it interferes with a "fundamental right" or discriminates against a "suspect class," it will ordinarily survive an equal

protection attack so long as the challenged classification is rationally related to a legitimate governmental purpose. See, *e. g.*, *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U. S. 1, 16–17 (1973); *Plyler* v. *Doe*, 457 U. S. 202, 216–217 (1982); *Lyng* v. *Automobile Workers*, 485 U. S. 360, 370 (1988). Appellants contend that Dickinson's user fee for bus service unconstitutionally deprives those who cannot afford to pay it of "minimum access to education." See Brief for Appellants i. Sarita Kadrmas, however, continued to attend school during the time that she was denied access to the school bus. Appellants must therefore mean to argue that the busing fee unconstitutionally places a greater obstacle to education in the path of the poor than it does in the path of wealthier families. Alternatively, appellants may mean to suggest that the Equal Protection Clause affirmatively requires government to provide free transportation to school, at least for some class of students that would include Sarita Kadrmas. Under either interpretation of appellants' position, we are evidently being urged to apply a form of strict or "heightened" scrutiny to the North Dakota statute. Doing so would require us to extend the requirements of the Equal Protection Clause beyond the limits recognized in our cases, a step we decline to take.

We have previously rejected the suggestion that statutes having different effects on the wealthy and the poor should on that account alone be subjected to strict equal protection scrutiny. See, *e. g.*, *Harris* v. *McRae*, 448 U. S. 297, 322–323 (1980); *Ortwein* v. *Schwab*, 410 U. S. 656, 660 (1973). Nor have we accepted the proposition that education is a "fundamental right," like equality of the franchise, which should trigger strict scrutiny when government interferes with an individual's access to it. See *Papasan* v. *Allain*, 478 U. S. 265, 284 (1986); *Plyler* v. *Doe*, *supra*, at 223; *San Antonio Independent School Dist.* v. *Rodriguez*, *supra*, at 16, 33–36.

Relying primarily on *Plyler* v. *Doe*, *supra*, however, appellants suggest that North Dakota's 1979 statute should be subjected to "heightened" scrutiny. This standard of review, which is less demanding than "strict scrutiny" but more demanding than the standard rational relation test, has generally been applied only in cases that involved discriminatory classifications based on sex or illegitimacy. See, *e. g.*, *Clark* v. *Jeter*, 486 U. S. 456, 461 (1988); *Mississippi University for Women* v. *Hogan*, 458 U. S. 718, 723–724, and n. 9 (1982); *Mills* v. *Habluetzel*, 456 U. S. 91, 101, and n. 8 (1982); *Craig* v. *Boren*, 429 U. S. 190, 197 (1976). In *Plyler*, which did not fit this pattern, the State of Texas had denied to the children of illegal aliens the free public education that it made available to other residents. Applying a heightened level of equal protection scrutiny, the Court concluded that the State had failed to show that its classification advanced a substantial state interest. 457 U. S., at 217–218, and n. 16, 224, 230. We have not extended this holding beyond the "unique circumstances," *id.*, at 239 (Powell, J., concurring), that provoked its "unique confluence of theories and rationales," *id.*, at 243 (Burger, C. J., dissenting). Nor do we think that the case before us today is governed by the holding in *Plyler*. Unlike the children in that case, Sarita Kadrmas has not been penalized by the government for illegal conduct by her parents. See *id.*, at 220; *id.*, at 238 (Powell, J., concurring). On the contrary, Sarita was denied access to the school bus only because her parents would not agree to pay the same user fee charged to all other families that took advantage of the service. Nor do we see any reason to suppose that this user fee will "promot[e] the creation and perpetuation of a subclass of illiterates within our boundaries, surely adding to the problems and costs of unemployment, welfare, and crime." *Id.*, at 230; see also *id.*, at 239 (Powell, J., concurring). Cf. N. D. Cent. Code § 15–43–11.2 (1981) ("A [school]

board may waive any fee if any pupil or his parent or guardian shall be unable to pay such fees. No pupil's rights or privileges, including the receipt of grades or diplomas, may be denied or abridged for nonpayment of fees"). The case before us does not resemble *Plyler*, and we decline to extend the rationale of that decision to cover this case.

Appellants contend, finally, that whatever label is placed on the standard of review, this case is analogous to decisions in which we have held that government may not withhold certain especially important services from those who are unable to pay for them. Appellants cite *Griffin* v. *Illinois*, 351 U. S. 12 (1956) (right to appellate review of a criminal conviction conditioned on the purchase of a trial transcript); *Smith* v. *Bennett*, 365 U. S. 708 (1961) (application for writ of habeas corpus accepted only when accompanied by a filing fee); *Boddie* v. *Connecticut*, 401 U. S. 371 (1971) (action for dissolution of marriage could be pursued only upon payment of court fees and costs for service of process); *Lindsey* v. *Normet*, 405 U. S. 56 (1972) (appeal from civil judgments in certain landlord-tenant disputes conditioned on the posting of a bond for twice the amount of rent expected to accrue during the appellate process); and *Little* v. *Streater*, 452 U. S. 1 (1981) (fee for blood test in quasi-criminal paternity action brought against the putative father of a child receiving public assistance). See Brief for Appellants 22–23.

Leaving aside other distinctions that might be found between these cases and the one before us today, each involved a rule that barred indigent litigants from using the judicial process in circumstances where they had no alternative to that process. Decisions invalidating such rules are inapposite here. In contrast to the "utter exclusiveness of court access and court remedy," *United States* v. *Kras*, 409 U. S. 434, 445 (1973), North Dakota does not maintain a legal or a practical monopoly on the means of transporting children to

school. Thus, unlike the complaining parties in all the cases cited by appellants, the Kadrmas family could and did find a private alternative to the public school bus service for which Dickinson charged a fee. That alternative was more expensive, to be sure, and we have no reason to doubt that genuine hardships were endured by the Kadrmas family when Sarita was denied access to the bus. Such facts, however, do not imply that the Equal Protection Clause has been violated. In upholding a filing fee for voluntary bankruptcy actions, for example, we observed: "[B]ankruptcy is not the only method available to a debtor for the adjustment of his legal relationship with his creditors. . . . However unrealistic the remedy may be in a particular situation, a debtor, in theory, and often in actuality, may adjust his debts by negotiated agreement with his creditors." *Ibid.* Similarly, we upheld a statute that required indigents to pay a filing fee for appellate review of adverse welfare benefits decisions. *Ortwein* v. *Schwab*, 410 U. S. 656 (1973). Noting that the case did not involve a "suspect classification," we held that the "applicable standard is that of rational justification." *Id.*, at 660. It is plain that the busing fee in this case more closely resembles the fees that were upheld in *Kras* and *Ortwein* than it resembles the fees that were invalidated in the cases on which appellants rely. Those cases therefore do not support the suggestion that North Dakota's 1979 statute violates the Equal Protection Clause.*

Applying the appropriate test—under which a statute is upheld if it bears a rational relation to a legitimate govern-

*Appellants also suggest that their position is supported by *Bearden* v. *Georgia*, 461 U. S. 660 (1983). We disagree. In *Bearden*, we held that a trial court erred "in automatically revoking probation because the [offender] could not pay his fine, without determining that [he] had not made sufficient bona fide efforts to pay or that adequate alternative forms of punishment did not exist." *Id.*, at 662. Whether this decision is considered under equal protection or due process principles, see *id.*, at 664–667, the criminal-sentencing decision at issue in *Bearden* is not analogous to the user fee at issue in the case before us.

ment objective—we think it is quite clear that a State's decision to allow local school boards the option of charging patrons a user fee for bus service is constitutionally permissible. The Constitution does not require that such service be provided at all, and it is difficult to imagine why choosing to offer the service should entail a constitutional obligation to offer it for free. No one denies that encouraging local school districts to provide school bus service is a legitimate state purpose or that such encouragement would be undermined by a rule requiring that general revenues be used to subsidize an optional service that will benefit a minority of the district's families. It is manifestly rational for the State to refrain from undermining its legitimate objective with such a rule.

C

Appellants contend that, even without the application of strict or heightened scrutiny, the 1979 statute violates equal protection because it permits user fees for bus service *only* in nonreorganized school districts. This distinction, they say, can be given no rational justification whatsoever. Brief for Appellants 19–22. The principles governing our review of this claim are well established. "'The Fourteenth Amendment does not prohibit legislation merely because it is special, or limited in its application to a particular geographical or political subdivision of the state.' *Fort Smith Light Co.* v. *Paving Dist.*, 274 U. S. 387, 391 (1927). Rather, the Equal Protection Clause is offended only if the statute's classification 'rests on grounds wholly irrelevant to the achievement of the State's objective.' *McGowan* v. *Maryland*, 366 U. S. 420, 425 (1961); *Kotch* v. *Board of River Port Pilot Comm'rs*, 330 U. S. 552, 556 (1947)." *Holt Civic Club* v. *Tuscaloosa*, 439 U. S. 60, 71 (1978). Social and economic legislation like the statute at issue in this case, moreover, "carries with it a presumption of rationality that can only be overcome by a clear showing of arbitrariness and irrationality." *Hodel* v. *Indiana*, 452 U. S. 314, 331–332 (1981). "[W]e will not over-

turn such a statute 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." *Vance* v. *Bradley*, 440 U. S. 93, 97 (1979). In performing this analysis, we are not bound by explanations of the statute's rationality that may be offered by litigants or other courts. Rather, those challenging the legislative judgment must convince us "that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." *Id.*, at 111.

Applying these principles to the present case, we conclude that appellants have failed to carry the "heavy burden" of demonstrating that the challenged statute is both arbitrary and irrational. *Hodel* v. *Indiana*, *supra*, at 332. The court below offered the following justification for the distinction drawn between reorganized and nonreorganized districts:

> "The obvious purpose of [statutes treating reorganized and nonreorganized schools differently] is to encourage school district reorganization with a concomitant tax base expansion and an enhanced and more effective school system. The legislation provides incentive for the people to approve school district reorganization by alleviating parental concerns regarding the cost of student transportation in the reorganized district." 402 N. W. 2d, at 903.

Appellees offer a more elaborate, but not incompatible, explanation:

> "[T]he authorization of the bus fee to be charged by districts such as Dickinson has nothing to do with the reorganization of school districts. The reasoning for it is to simply have the few that use the service pay a small portion of that cost in exchange for the substantial benefits received.

> "The only reason that the fee authorization was not extended to reorganized districts is that those districts, prior to the passage of the statute permitting fees, were already committed on an individual district basis to some type of transportation system which had been submitted to and approved by the voters in each separate district. To permit the 1979 statute authorizing fees to be retroactively effective in reorganized districts would have been an obvious impairment of existing legal relationships since the already established transportation systems in the various reorganized districts did not include any authority to charge a fee." Brief for Appellees 16.

The State of North Dakota informs us that the 1979 legislation was proposed to the legislature by the Dickinson School District itself, which had for several years been charging transportation fees and which "became concerned when it appeared that the 1979 Legislature would enact a statute prohibiting charging the fee." Brief for State of North Dakota as *Amicus Curiae* 6–7 (citations to legislative history omitted). The State's account of the reason for confining the express authorization of fees to nonreorganized schools districts is the same as the account offered by appellees. *Id.*, at 9.

The explanation offered by appellees and the State is adequate to rebut appellants' contention that the distinction drawn between reorganized and nonreorganized districts is arbitrary and irrational. The Supreme Court of North Dakota has said, and the State agrees, that all reorganized school districts are presently required to furnish or pay for transportation for students living as far away from school as Sarita Kadrmas does. See 402 N. W. 2d, at 903 (citing N. D. Cent. Code § 15–27.3–10 (Supp. 1987)); Tr. of Oral Arg. 32. This requirement, however, is not imposed directly by statute, but rather by the reorganization plans that are statutorily required in the reorganization process. With

certain specified exceptions (not including the transportation provisions), those reorganization plans may be changed by the voters in the affected districts. N. D. Cent. Code § 15–27.3–19 (Supp. 1987). Although it appears that no reorganized district has ever used this mechanism to adopt a user fee like Dickinson's, we have not been informed that such a step could not legally be taken. Thus, the one definitely established difference between reorganized and nonreorganized districts is this: in the latter, local school boards may impose a bus service user fee on their own authority, while the direct approval of the voters would be required in reorganized districts. That difference, however, simply reflects voluntary agreements made during the history of North Dakota's reorganization process, and it could scarcely be thought to make the State's laws arbitrary or irrational.

Even if we assume, as appellants apparently do, that the State has forbidden reorganized school districts to charge user fees for bus service under any circumstances, it is evident that the legislature could conceivably have believed that such a policy would serve the legitimate purpose of fulfilling the reasonable expectations of those residing in districts with free busing arrangements imposed by reorganization plans. Because this purpose could have no application to nonreorganized districts, the legislature could just as rationally conclude that those districts should have the option of imposing user fees on those who take advantage of the service they are offered.

In sum, the statute challenged in this case discriminates against no suspect class and interferes with no fundamental right. Appellants have failed to carry the heavy burden of demonstrating that the statute is arbitrary and irrational. The Supreme Court of North Dakota correctly concluded that the statute does not violate the Equal Protection Clause of the Fourteenth Amendment, and its judgment is

Affirmed.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

In *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U. S. 1 (1973), I wrote that the Court's holding was a "retreat from our historic commitment to equality of educational opportunity and [an] unsupportable acquiescence in a system which deprives children in their earliest years of the chance to reach their full potential." *Id.*, at 71 (dissenting). Today, the Court continues the retreat from the promise of equal educational opportunity by holding that a school district's refusal to allow an indigent child who lives 16 miles from the nearest school to use a school-bus service without paying a fee does not violate the Fourteenth Amendment's Equal Protection Clause. Because I do not believe that this Court should sanction discrimination against the poor with respect to "perhaps the most important function of state and local governments," *Brown* v. *Board of Education*, 347 U. S. 483, 493 (1954), I dissent.

The Court's opinion suggests that this case does not concern state action that discriminates against the poor with regard to the provision of a basic education. The Court notes that the particular governmental action challenged in this case involves the provision of transportation, rather than the provision of educational services. See *ante*, at 459–460, 460–461. Moreover, the Court stresses that the denial of transportation to Sarita Kadrmas did not in fact prevent her from receiving an education; notwithstanding the denial of bus service, Sarita's family ensured that she attended school each day. See *ante*, at 458, 460–461.[1] To the Court, then,

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[1] The Court therefore does not address the question whether a State constitutionally could deny a child access to a minimally adequate education. In prior cases, this Court explicitly has left open the question whether such a deprivation of access would violate a fundamental constitutional right. See *Papasan* v. *Allain*, 478 U. S. 265, 284 (1986); *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U. S. 1, 25, n. 60, 36–37 (1973). That question remains open today.

this case presents no troublesome questions; indeed, the Court's facile analysis suggests some perplexity as to why this case ever reached this Court.

I believe the Court's approach forgets that the Constitution is concerned with "sophisticated as well as simple-minded modes of discrimination." *Lane* v. *Wilson*, 307 U. S. 268, 275 (1939). This case involves state action that places a special burden on poor families in their pursuit of education. Children living far from school can receive a public education only if they have access to transportation; as the state court noted in this case, "a child must reach the schoolhouse door as a prerequisite to receiving the educational opportunity offered therein." 402 N. W. 2d 897, 901 (N.D. 1987). Indeed, for children in Sarita's position, imposing a fee for transportation is no different in practical effect from imposing a fee directly for education. Moreover, the fee involved in this case discriminated against Sarita's family because it necessarily fell more heavily upon the poor than upon wealthier members of the community.[2] Cf. *Bullock* v. *Carter*, 405 U. S. 134, 144 (1972) (voting system based on flat fees "falls with unequal weight on voters, as well as candidates, according to their economic status"); *Griffin* v. *Illinois*, 351 U. S. 12, 17, n. 11 (1956) (opinion of Black, J.) (state law imposing flat fee for trial transcript is "nondiscriminatory on its face," but "grossly discriminatory in its operation"). This case therefore presents the question whether a State may discriminate against the poor in providing access to education. I regard this question as one of great urgency.

As I have stated on prior occasions, proper analysis of equal protection claims depends less on choosing the "formal label" under which the claim should be reviewed than upon identifying and carefully analyzing the real interests at stake.

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[2] There is no dispute that the Kadrmas family was indigent at the time relevant to this litigation. The family's annual income at the time of trial was at or near the poverty line. In addition, the family was heavily in debt, owing a total of $13,000.

Cleburne v. *Cleburne Living Center, Inc.*, 473 U. S. 432, 478 (1985) (MARSHALL, J., dissenting); see *Selective Service System* v. *Minnesota Public Interest Research Group*, 468 U. S. 841, 876 (1984) (MARSHALL, J., dissenting). In particular, the Court should focus on "the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state interests in support of the classification." *Dandridge* v. *Williams*, 397 U. S. 471, 521 (1970) (MARSHALL, J., dissenting); see *San Antonio Independent School Dist.* v. *Rodriguez*, *supra*, at 98–99 (MARSHALL, J., dissenting). Viewed from this perspective, the discrimination inherent in the North Dakota statute fails to satisfy the dictates of the Equal Protection Clause.

The North Dakota statute discriminates on the basis of economic status. This Court has determined that classifications based on wealth are not automatically suspect. See, *e. g.*, *Maher* v. *Roe*, 432 U. S. 464, 470–471 (1977). Such classifications, however, have a measure of special constitutional significance. See, *e. g.*, *McDonald* v. *Board of Election Comm'rs of Chicago*, 394 U. S. 802, 807 (1969) ("[A] careful examination on our part is especially warranted where lines are drawn on the basis of wealth . . ."); *Harper* v. *Virginia Bd. of Elections*, 383 U. S. 663, 668 (1966) ("Lines drawn on the basis of wealth or property . . . are traditionally disfavored"). This Court repeatedly has invalidated statutes, on their face or as applied, that discriminated against the poor. See, *e. g.*, *Little* v. *Streater*, 452 U. S. 1 (1981); *Bullock* v. *Carter*, *supra*; *Harper* v. *Virginia Bd. of Elections*, *supra*; *Griffin* v. *Illinois*, *supra*. The Court has proved most likely to take such action when the laws in question interfered with the access of the poor to the political and judicial processes. One source of these decisions, in my view, is a deep distrust of policies that specially burden the access of disadvantaged persons to the governmental institutions and processes that offer members of our society an

opportunity to improve their status and better their lives. The intent of the Fourteenth Amendment was to abolish caste legislation. See *Plyler* v. *Doe*, 457 U. S. 202, 213 (1982). When state action has the predictable tendency to entrap the poor and create a permanent underclass, that intent is frustrated. See *id.*, at 234 (BLACKMUN, J., concurring). Thus, to the extent that a law places discriminatory barriers between indigents and the basic tools and opportunities that might enable them to rise, exacting scrutiny should be applied.

The statute at issue here burdens a poor person's interest in an education. The extraordinary nature of this interest cannot be denied. This Court's most famous statement on the subject is contained in *Brown* v. *Board of Education*, 347 U. S., at 493:

> "[E]ducation is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."

Since *Brown*, we frequently have called attention to the vital role of education in our society. We have noted that "education is necessary to prepare citizens to participate effectively and intelligently in our open political system . . . ." *Wisconsin* v. *Yoder*, 406 U. S. 205, 221 (1972); see *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U. S., at 112–115 (MARSHALL, J., dissenting). We also have recognized that

education prepares individuals to become self-reliant participants in our economy. See *Plyler* v. *Doe*, *supra*, at 221–222; *Wisconsin* v. *Yoder*, *supra*, at 221. A statute that erects special obstacles to education in the path of the poor naturally tends to consign such persons to their current disadvantaged status. By denying equal opportunity to exactly those who need it most, the law not only militates against the ability of each poor child to advance herself or himself, but also increases the likelihood of the creation of a discrete and permanent underclass. Such a statute is difficult to reconcile with the framework of equality embodied in the Equal Protection Clause.

This Court's decision in *Plyler* v. *Doe*, *supra*, supports these propositions. The Court in *Plyler* upheld the right of the children of illegal aliens to receive the free public education that the State of Texas made available to other residents. The Court in that case engaged in some discussion of alienage, a classification not relevant here. The decision, however, did not rest upon this basis. Rather, the Court made clear that the infirmity of the Texas law stemmed from its differential treatment of a discrete and disadvantaged group of children with respect to the provision of education. The Court stated that education is not "merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation." *Id.*, at 221. The Court further commented that the state law "poses an affront to one of the goals of the Equal Protection Clause: the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit." *Id.*, at 221–222. Finally, the Court called attention to the tendency of the Texas law to create a distinct underclass of impoverished illiterates who would be unable to participate in and contribute to society. See *id.*, at 222–224. The *Plyler* Court's reasoning is fully applicable here. As in *Plyler*, the State in this case has acted to burden the educational opportunities of a

disadvantaged group of children, who need an education to become full participants in society.

The State's rationale for this policy is based entirely on fiscal considerations. The State has allowed Dickinson and certain other school districts to charge a nonwaivable flat fee for bus service so that these districts may recoup part of the costs of the service. The money that Dickinson collects from applying the busing fee to indigent families, however, represents a minuscule proportion of the costs of the bus service. As the Court notes, *ante*, at 454, all of the fees collected by Dickinson amount to only 11% of the cost of providing the bus service, and the fees collected from poor families represent a small fraction of the total fees. Exempting indigent families from the busing fee therefore would not require Dickinson to make any significant adjustments in either the operation or the funding of the bus service. Indeed, as the Court states, most school districts in the State provide full bus service without charging any fees at all. See *ante*, at 465. The state interest involved in this case is therefore insubstantial; it does not begin to justify the discrimination challenged here.

The Court's decision to the contrary "demonstrates once again a 'callous indifference to the realities of life for the poor.'" *Selective Service System* v. *Minnesota Public Interest Research Group*, 468 U. S., at 876 (MARSHALL, J., dissenting), quoting *Flagg Bros., Inc.* v. *Brooks*, 436 U. S. 149, 166 (1978) (MARSHALL, J., dissenting). These realities may not always be obvious from the Court's vantage point, but the Court fails in its constitutional duties when it refuses, as it does today, to make even the effort to see. For the poor, education is often the only route by which to become full participants in our society. In allowing a State to burden the access of poor persons to an education, the Court denies equal opportunity and discourages hope. I do not believe the Equal Protection Clause countenances such a result. I therefore dissent.

JUSTICE STEVENS, with whom JUSTICE BLACKMUN joins, dissenting.

When the sovereign applies different rules to different segments of its jurisdiction, it must have a rational basis for doing so. "The term 'rational,' of course, includes a requirement that an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class." *Cleburne* v. *Cleburne Living Center, Inc.*, 473 U. S. 432, 452 (1985) (STEVENS, J., concurring) (footnote omitted). In this case, JUSTICE MARSHALL accurately explicates the harm to certain members of the disadvantaged class. And since the Supreme Court of the State of North Dakota has unequivocally identified the actual purpose of the geographic discrimination, I would not second-guess that conclusion and presume that the harm JUSTICE MARSHALL describes has been imposed for other reasons.

The State Supreme Court explained:

> "The obvious purpose of such legislation is to encourage school district reorganization with a concomitant tax base expansion and an enhanced and more effective school system. The legislation provides incentive for the people to approve school district reorganization by alleviating parental concerns regarding the cost of student transportation in the reorganized district." 402 N. W. 2d 897, 903 (1987).

This explanation of the state legislative purpose makes two propositions perfectly clear. First, free bus transportation is an important component of public education in a sparsely populated State; otherwise the alleviation of parental concerns regarding the cost of student transportation in a reorganized district could not have been expected to motivate a significant number of voters. Second, after the voters in a school district have had a fair opportunity to decide whether

or not to reorganize,* there is no longer any justification at all for allowing the nonreorganized districts to place an obstacle in the paths of poor children seeking an education in some parts of the State that has been removed in other parts of the State. Cf. *G. D. Searle & Co.* v. *Cohn*, 455 U. S. 404, 420 (1982) (STEVENS, J., dissenting) ("[T]he Constitution requires a rational basis for the special burden imposed on the disfavored class as well as a reason for treating that class differently").

Thus, the State Supreme Court's explanation of the purpose of this discrimination does not include the "elements of legitimacy and neutrality that must always characterize the performance of the sovereign's duty to govern impartially." *Cleburne*, *supra*, at 452 (footnote omitted). Accordingly, I respectfully dissent.

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*As the majority recognizes, the North Dakota Legislature has encouraged reorganization since 1947. See *ante*, at 453.

FRISBY ET AL. *v.* SCHULTZ ET AL.

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

No. 87–168. Argued April 20, 1988—Decided June 27, 1988

Brookfield, Wisconsin, enacted an ordinance making it "unlawful for any person to engage in picketing before or about the residence or dwelling of any individual," and declaring that the primary purpose of the ban is to "protec[t] and preserv[e] the home" through assurance "that members of the community enjoy in their homes . . . a feeling of well-being, tranquility, and privacy." Appellees, who wish to picket a particular home in Brookfield, filed suit under 42 U. S. C. § 1983 against appellants, the town and several of its officials, alleging that the ordinance violated the First Amendment. The Federal District Court granted appellees' motion for a preliminary injunction, concluding that the ordinance was not narrowly tailored enough to restrict protected speech in a public forum. The Court of Appeals ultimately affirmed.

Held: The ordinance is not facially invalid under the First Amendment. Pp. 479–488.

(a) Although the town's streets are narrow and of a residential character, they are nevertheless traditional public fora, *Carey* v. *Brown*, 447 U. S. 455, and, therefore, the ordinance must be judged against the stringent standards this Court has established for restrictions on speech in such fora. *Perry Education Assn.* v. *Perry Local Educators' Assn.*, 460 U. S. 37. Pp. 480–481.

(b) The ordinance is content neutral and cannot be read as containing an implied exception for peaceful labor picketing on the theory that an express state law protection for such picketing takes precedence. This Court will defer to the rejection of that theory by the lower courts, which are better schooled in and more able to interpret Wisconsin law. Pp. 481–482.

(c) The ordinance leaves open ample alternative channels of communication. Although the precise scope of the ordinance's ban is not further described within its text, its use of the singular form of the words "residence" and "dwelling" suggests that it is intended to prohibit only picketing focused on, and taking place in front of, a particular residence, a reading which is supported by appellants' representations at oral argument. The lower courts' contrary interpretation of the ordinance as banning "all picketing in residential areas" constitutes plain error, and runs afoul of the well-established principle that statutes will be

interpreted to avoid constitutional difficulties. Viewed in the light of the narrowing construction, the ordinance allows protestors to enter residential neighborhoods, either alone or marching in groups; to go door-to-door to proselytize their views or distribute literature; and to contact residents through the mails or by telephone, short of harassment. Pp. 482–484.

(d) As is evidenced by its text, the ordinance serves the significant government interest of protecting residential privacy. An important aspect of such privacy is the protection of unwilling listeners within their homes from the intrusion of objectionable or unwanted speech. See, *e. g.*, *FCC* v. *Pacifica Foundation*, 438 U. S. 726. Moreover, the ordinance is narrowly tailored to serve that governmental interest, since, although its ban is complete, it targets and eliminates no more than the exact source of the "evil" it seeks to remedy: offensive and disturbing picketing focused on a "captive" home audience. It does not prohibit more generally directed means of public communication that may not be completely banned in residential areas. Pp. 484–488.

822 F. 2d 642, reversed.

O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BLACKMUN, SCALIA, and KENNEDY, JJ., joined. WHITE, J., filed an opinion concurring in the judgment, *post*, p. 488. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 491. STEVENS, J., filed a dissenting opinion, *post*, p. 496.

Harold H. Fuhrman argued the cause and filed briefs for appellants.

Steven Frederick McDowell argued the cause for appellees. With him on the brief was *Walter M. Weber.**

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*Briefs of *amici curiae* urging reversal were filed for the National Institute of Municipal Law Officers by *William I. Thornton, Jr.*, *Roy D. Bates*, *William H. Taube*, *Roger F. Cutler*, *Robert J. Alfton*, *James K. Baker*, *Joseph N. deRaismes*, *Frank B. Gummey III*, *Robert J. Mangler*, *Neal E. McNeill*, *Analeslie Muncy*, *Dante R. Pellegrini*, *Clifford D. Pierce, Jr.*, *Charles S. Rhyne*, and *Benjamin L. Brown;* for the National League of Cities et al. by *Benna Ruth Solomon* and *Mark B. Rotenberg;* and for the Pacific Legal Foundation by *Ronald A. Zumbrun* and *Robin L. Rivett.*

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *Harvey Grossman*, *Jane M. Whicher*, *Jonathan K. Baum*, *John A. Powell*, *Steven R. Shapiro*, and *William Lynch;* for the American Federation of Labor and Congress of Industrial Orga-

JUSTICE O'CONNOR delivered the opinion of the Court.

Brookfield, Wisconsin, has adopted an ordinance that completely bans picketing "before or about" any residence. This case presents a facial First Amendment challenge to that ordinance.

I

Brookfield, Wisconsin, is a residential suburb of Milwaukee with a population of approximately 4,300. The appellees, Sandra C. Schultz and Robert C. Braun, are individuals strongly opposed to abortion and wish to express their views on the subject by picketing on a public street outside the Brookfield residence of a doctor who apparently performs abortions at two clinics in neighboring towns. Appellees and others engaged in precisely that activity, assembling outside the doctor's home on at least six occasions between April 20, 1985, and May 20, 1985, for periods ranging from one to one and a half hours. The size of the group varied from 11 to more than 40. The picketing was generally orderly and peaceful; the town never had occasion to invoke any of its various ordinances prohibiting obstruction of the streets, loud and unnecessary noises, or disorderly conduct. Nonetheless, the picketing generated substantial controversy and numerous complaints.

The Town Board therefore resolved to enact an ordinance to restrict the picketing. On May 7, 1985, the town passed an ordinance that prohibited all picketing in residential neighborhoods except for labor picketing. But after reviewing this Court's decision in *Carey* v. *Brown*, 447 U. S. 455 (1980), which invalidated a similar ordinance as a violation of the

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nizations by *Marsha S. Berzon* and *Laurence Gold;* and for the Rutherford Institute et al. by *Robert R. Melnick, William Bonner, John F. Southworth, Jr., W. Charles Bundren, Alfred J. Lindh, Ira W. Still III, William B. Hollberg, Randall A. Pentiuk, Thomas W. Strahan, John W. Whitehead, A. Eric Johnston,* and *David E. Morris.*

Charles E. Rice, Thomas Patrick Monaghan, and *James M. Henderson, Sr.*, filed a brief for the American Life League, Inc., et al. as *amici curiae.*

Equal Protection Clause, the town attorney instructed the police not to enforce the new ordinance and advised the Town Board that the ordinance's labor picketing exception likely rendered it unconstitutional. This ordinance was repealed on May 15, 1985, and replaced with the following flat ban on all residential picketing:

> "It is unlawful for any person to engage in picketing before or about the residence or dwelling of any individual in the Town of Brookfield." App. to Juris. Statement A–28.

The ordinance itself recites the primary purpose of this ban: "the protection and preservation of the home" through assurance "that members of the community enjoy in their homes and dwellings a feeling of well-being, tranquility, and privacy." *Id.*, at A–26. The Town Board believed that a ban was necessary because it determined that "the practice of picketing before or about residences and dwellings causes emotional disturbance and distress to the occupants . . . [and] has as its object the harassing of such occupants." *Id.*, at A–26—A–27. The ordinance also evinces a concern for public safety, noting that picketing obstructs and interferes with "the free use of public sidewalks and public ways of travel." *Id.*, at A–27.

On May 18, 1985, appellees were informed by the town attorney that enforcement of the new, revised ordinance would begin on May 21, 1985. Faced with this threat of arrest and prosecution, appellees ceased picketing in Brookfield and filed this lawsuit in the United States District Court for the Eastern District of Wisconsin. The complaint was brought under 42 U. S. C. § 1983 and sought declaratory as well as preliminary and permanent injunctive relief on the grounds that the ordinance violated the First Amendment. Appellees named appellants—the three members of the Town Board, the Chief of Police, the town attorney, and the town itself—as defendants.

The District Court granted appellees' motion for a preliminary injunction. The court concluded that the ordinance was not narrowly tailored enough to restrict protected speech in a public forum. 619 F. Supp. 792, 797 (1985). The District Court's order specified that unless the appellants requested a trial on the merits within 60 days or appealed, the preliminary injunction would become permanent. Appellants requested a trial and also appealed the District Court's entry of a preliminary injunction.

A divided panel of the United States Court of Appeals for the Seventh Circuit affirmed. 807 F. 2d 1339 (1986). The Court of Appeals subsequently vacated this decision, however, and ordered a rehearing en banc. 818 F. 2d 1284 (1987). After rehearing, the Court of Appeals affirmed the judgment of the District Court by an equally divided vote. 822 F. 2d 642 (1987). Contending that the Court of Appeals had rendered a final judgment holding the ordinance "to be invalid as repugnant to the Constitution," 28 U. S. C. § 1254 (2), appellants attempted to invoke our mandatory appellate jurisdiction. App. to Juris. Statement A–25 (citing § 1254 (2)). We postponed further consideration of our appellate jurisdiction until the hearing on the merits. 484 U. S. 1003 (1988).

Appellees argue that there is no jurisdiction under § 1254 (2) due to the lack of finality. They point out that the District Court entered only a preliminary injunction and that appellants requested a trial on the merits, which has yet to be conducted. These considerations certainly suggest a lack of finality. Yet despite the formally tentative nature of its order, the District Court appeared ready to enter a final judgment since it indicated that unless a trial was requested a permanent injunction would issue. In addition, while appellants initially requested a trial, they no longer adhere to this position and now say that they would have no additional arguments to offer at such a trial. Tr. of Oral Arg. 7. In the context of this case, however, there is no need to decide

whether jurisdiction is proper under § 1254(2). Because the question presented is of substantial importance, and because further proceedings below would not likely aid our consideration of it, we choose to avoid the finality issue simply by granting certiorari. Accordingly, we dismiss the appeal and, treating the jurisdictional statement as a petition for certiorari, now grant the petition. See 28 U. S. C. § 2103. Cf. *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, *ante*, at 369, n. 10. For convenience, however, we shall continue to refer to the parties as appellants and appellees, as we have in previous cases. See *ibid.*; *Peralta* v. *Heights Medical Center, Inc.*, 485 U. S. 80, 84, n. 4 (1988).

II

The antipicketing ordinance operates at the core of the First Amendment by prohibiting appellees from engaging in picketing on an issue of public concern. Because of the importance of "uninhibited, robust, and wide-open" debate on public issues, *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 270 (1964), we have traditionally subjected restrictions on public issue picketing to careful scrutiny. See, *e. g.*, *Boos* v. *Barry*, 485 U. S. 312, 318 (1988); *United States* v. *Grace*, 461 U. S. 171 (1983); *Carey* v. *Brown*, 447 U. S. 455 (1980). Of course, "[e]ven protected speech is not equally permissible in all places and at all times." *Cornelius* v. *NAACP Legal Defense & Educational Fund, Inc.*, 473 U. S. 788, 799 (1985).

To ascertain what limits, if any, may be placed on protected speech, we have often focused on the "place" of that speech, considering the nature of the forum the speaker seeks to employ. Our cases have recognized that the standards by which limitations on speech must be evaluated "differ depending on the character of the property at issue." *Perry Education Assn.* v. *Perry Local Educators' Assn.*, 460 U. S. 37, 44 (1983). Specifically, we have identified three types of fora: "the traditional public forum, the public forum created

by government designation, and the nonpublic forum." *Cornelius*, *supra*, at 802.

The relevant forum here may be easily identified: appellees wish to picket on the public streets of Brookfield. Ordinarily, a determination of the nature of the forum would follow automatically from this identification; we have repeatedly referred to public streets as the archetype of a traditional public forum. See, *e. g.*, *Boos* v. *Barry*, *supra*, at 318; *Cornelius*, *supra*, at 802; *Perry*, 460 U. S., at 45. "[T]ime out of mind" public streets and sidewalks have been used for public assembly and debate, the hallmarks of a traditional public forum. See *ibid.*; *Hague* v. *CIO*, 307 U. S. 496, 515 (1939) (Roberts, J.). Appellants, however, urge us to disregard these "clichés." Tr. of Oral Arg. 16. They argue that the streets of Brookfield should be considered a nonpublic forum. Pointing to the physical narrowness of Brookfield's streets as well as to their residential character, appellants contend that such streets have not by tradition or designation been held open for public communication. See Brief for Appellants 23 (citing *Perry*, *supra*, at 46).

We reject this suggestion. Our prior holdings make clear that a public street does not lose its status as a traditional public forum simply because it runs through a residential neighborhood. In *Carey* v. *Brown*—which considered a statute similar to the one at issue here, ultimately striking it down as a violation of the Equal Protection Clause because it included an exception for labor picketing—we expressly recognized that "public streets and sidewalks in residential neighborhoods," were "public for[a]." 447 U. S., at 460–461. This rather ready identification virtually forecloses appellants' argument. See also *Perry*, *supra*, at 54–55 (noting that the "key" to *Carey* "was the presence of a public forum").

In short, our decisions identifying public streets and sidewalks as traditional public fora are not accidental invocations of a "cliché," but recognition that "[w]herever the title of

streets and parks may rest, they have immemorially been held in trust for the use of the public." *Hague* v. *CIO*, *supra*, at 515 (Roberts, J.). No particularized inquiry into the precise nature of a specific street is necessary; all public streets are held in the public trust and are properly considered traditional public fora. Accordingly, the streets of Brookfield are traditional public fora. The residential character of those streets may well inform the application of the relevant test, but it does not lead to a different test; the anti-picketing ordinance must be judged against the stringent standards we have established for restrictions on speech in traditional public fora:

> "In these quintessential public for[a], the government may not prohibit all communicative activity. For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. . . . The State may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Perry*, *supra*, at 45 (citations omitted).

As *Perry* makes clear, the appropriate level of scrutiny is initially tied to whether the statute distinguishes between prohibited and permitted speech on the basis of content. Appellees argue that despite its facial content-neutrality, the Brookfield ordinance must be read as containing an implied exception for labor picketing. See Brief for Appellees 20–26. The basis for appellees' argument is their belief that an express protection of peaceful labor picketing in state law, see Wis. Stat. § 103.53(1) (1985–1986), must take precedence over Brookfield's contrary efforts. The District Court, however, rejected this suggested interpretation of state law, 619 F. Supp., at 796, and the Court of Appeals affirmed, albeit ultimately by an equally divided court. 822 F. 2d 642 (1987).

See also 807 F. 2d, at 1347 (original panel opinion declining to reconsider District Court's construction of state law). Following our normal practice, "we defer to the construction of a state statute given it by the lower federal courts . . . to reflect our belief that district courts and courts of appeals are better schooled in and more able to interpret the laws of their respective States." *Brockett* v. *Spokane Arcades, Inc.*, 472 U. S. 491, 499–500 (1985). See *Virginia* v. *American Booksellers Assn.*, 484 U. S. 383, 395 (1988) ("This Court rarely reviews a construction of state law agreed upon by the two lower federal courts"). Thus, we accept the lower courts' conclusion that the Brookfield ordinance is content neutral. Accordingly, we turn to consider whether the ordinance is "narrowly tailored to serve a significant government interest" and whether it "leave[s] open ample alternative channels of communication." *Perry*, 460 U. S., at 45.

Because the last question is so easily answered, we address it first. Of course, before we are able to assess the available alternatives, we must consider more carefully the reach of the ordinance. The precise scope of the ban is not further described within the text of the ordinance, but in our view the ordinance is readily subject to a narrowing construction that avoids constitutional difficulties. Specifically, the use of the singular form of the words "residence" and "dwelling" suggests that the ordinance is intended to prohibit only picketing focused on, and taking place in front of, a particular residence. As JUSTICE WHITE's concurrence recounts, the lower courts described the ordinance as banning "all picketing in residential areas." *Post*, at 490. But these general descriptions do not address the exact scope of the ordinance and are in no way inconsistent with our reading of its text. "Picketing," after all, is defined as posting at a particular place, see Webster's Third New International Dictionary 1710 (1981), a characterization in line with viewing the ordinance as limited to activity focused on a single residence.

Moreover, while we ordinarily defer to lower court constructions of state statutes, see *supra*, at 482, we do not invariably do so, see *Virginia* v. *American Booksellers Assn.*, *supra*, at 395. We are particularly reluctant to defer when the lower courts have fallen into plain error, see *Brockett* v. *Spokane Arcades, Inc.*, *supra*, at 500, n. 9, which is precisely the situation presented here. To the extent they endorsed a broad reading of the ordinance, the lower courts ran afoul of the well-established principle that statutes will be interpreted to avoid constitutional difficulties. See, *e. g.*, *Erznoznik* v. *City of Jacksonville*, 422 U. S. 205, 216 (1975); *Broadrick* v. *Oklahoma*, 413 U. S. 601, 613 (1973). Cf. *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Construction Trades Council*, 485 U. S. 568, 575 (1988). Thus, unlike the lower courts' judgment that the ordinance does not contain an implied exception for labor picketing, we are unable to accept their potentially broader view of the ordinance's scope. We instead construe the ordinance more narrowly. This narrow reading is supported by the representations of counsel for the town at oral argument, which indicate that the town takes, and will enforce, a limited view of the "picketing" proscribed by the ordinance. Thus, generally speaking, "picketing would be having the picket proceed on a definite course or route in front of a home." Tr. of Oral Arg. 8. The picket need not be carrying a sign, *id.*, at 14, but in order to fall within the scope of the ordinance the picketing must be directed at a single residence, *id.*, at 9. General marching through residential neighborhoods, or even walking a route in front of an entire block of houses, is not prohibited by this ordinance. *Id.*, at 15. Accordingly, we construe the ban to be a limited one; only focused picketing taking place solely in front of a particular residence is prohibited.

So narrowed, the ordinance permits the more general dissemination of a message. As appellants explain, the limited nature of the prohibition makes it virtually self-evident that ample alternatives remain:

"Protestors have not been barred from the residential neighborhoods. They may enter such neighborhoods, alone or in groups, even marching. . . . They may go door-to-door to proselytize their views. They may distribute literature in this manner . . . or through the mails. They may contact residents by telephone, short of harassment." Brief for Appellants 41–42 (citations omitted).

We readily agree that the ordinance preserves ample alternative channels of communication and thus move on to inquire whether the ordinance serves a significant government interest. We find that such an interest is identified within the text of the ordinance itself: the protection of residential privacy. See App. to Juris. Statement A–26.

"The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society." *Carey* v. *Brown*, 447 U. S., at 471. Our prior decisions have often remarked on the unique nature of the home, "the last citadel of the tired, the weary, and the sick," *Gregory* v. *Chicago*, 394 U. S. 111, 125 (1969) (Black, J., concurring), and have recognized that "[p]reserving the sanctity of the home, the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits, is surely an important value." *Carey*, *supra*, at 471.

One important aspect of residential privacy is protection of the unwilling listener. Although in many locations, we expect individuals simply to avoid speech they do not want to hear, cf. *Erznoznik* v. *City of Jacksonville*, *supra*, at 210–211; *Cohen* v. *California*, 403 U. S. 15, 21–22 (1971), the home is different. "That we are often 'captives' outside the sanctuary of the home and subject to objectionable speech . . . does not mean we must be captives everywhere." *Rowan* v. *Post Office Dept.*, 397 U. S. 728, 738 (1970). Instead, a special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an abil-

ity to avoid intrusions. Thus, we have repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom. See, *e. g.*, *FCC* v. *Pacifica Foundation*, 438 U. S. 726, 748–749 (1978) (offensive radio broadcasts); *id.*, at 759–760 (Powell, J., concurring in part and concurring in judgment) (same); *Rowan*, *supra* (offensive mailings); *Kovacs* v. *Cooper*, 336 U. S. 77, 86–87 (1949) (sound trucks).

This principle is reflected even in prior decisions in which we have invalidated complete bans on expressive activity, including bans operating in residential areas. See, *e. g.*, *Schneider* v. *State*, 308 U. S. 147, 162–163 (1939) (handbilling); *Martin* v. *Struthers*, 319 U. S. 141 (1943) (door-to-door solicitation). In all such cases, we have been careful to acknowledge that unwilling listeners may be protected when within their own homes. In *Schneider*, for example, in striking down a complete ban on handbilling, we spoke of a right to distribute literature only "to one willing to receive it." Similarly, when we invalidated a ban on door-to-door solicitation in *Martin*, we did so on the basis that the "home owner could protect himself from such intrusion by an appropriate sign 'that he is unwilling to be disturbed.'" *Kovacs*, 336 U. S., at 86. We have "never intimated that the visitor could insert a foot in the door and insist on a hearing." *Ibid.* There simply is no right to force speech into the home of an unwilling listener.

It remains to be considered, however, whether the Brookfield ordinance is narrowly tailored to protect only unwilling recipients of the communications. A statute is narrowly tailored if it targets and eliminates no more than the exact source of the "evil" it seeks to remedy. *City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U. S. 789, 808–810 (1984). A complete ban can be narrowly tailored, but only if each activity within the proscription's scope is an appropriately targeted evil. For example, in *Taxpayers for Vincent* we upheld an ordinance that banned all signs on public prop-

erty because the interest supporting the regulation, an esthetic interest in avoiding visual clutter and blight, rendered each sign an evil. Complete prohibition was necessary because "the substantive evil—visual blight—[was] not merely a possible byproduct of the activity, but [was] created by the medium of expression itself." *Id.*, at 810.

The same is true here. The type of focused picketing prohibited by the Brookfield ordinance is fundamentally different from more generally directed means of communication that may not be completely banned in residential areas. See, *e. g.*, *Schneider*, *supra*, at 162–163 (handbilling); *Martin*, *supra* (solicitation); *Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943) (solicitation). See also *Gregory* v. *Chicago*, *supra* (marching). Cf. *Perry*, 460 U. S., at 45 (in traditional public forum, "the government may not prohibit all communicative activity"). In such cases "the flow of information [is not] into . . . household[s], but to the public." *Organization for a Better Austin* v. *Keefe*, 402 U. S. 415, 420 (1971). Here, in contrast, the picketing is narrowly directed at the household, not the public. The type of picketers banned by the Brookfield ordinance generally do not seek to disseminate a message to the general public, but to intrude upon the targeted resident, and to do so in an especially offensive way. Moreover, even if some such picketers have a broader communicative purpose, their activity nonetheless inherently and offensively intrudes on residential privacy. The devastating effect of targeted picketing on the quiet enjoyment of the home is beyond doubt:

> "'To those inside . . . the home becomes something less than a home when and while the picketing . . . continue[s]. . . . [The] tensions and pressures may be psychological, not physical, but they are not, for that reason, less inimical to family privacy and truly domestic tranquility.'" *Carey*, *supra*, at 478 (REHNQUIST, J., dissenting) (quoting *Wauwatosa* v. *King*, 49 Wis. 2d 398, 411–412, 182 N. W. 2d 530, 537 (1971)).

In this case, for example, appellees subjected the doctor and his family to the presence of a relatively large group of protesters on their doorstep in an attempt to force the doctor to cease performing abortions. But the actual size of the group is irrelevant; even a solitary picket can invade residential privacy. See *Carey*, 447 U. S., at 478–479 (REHNQUIST, J., dissenting) ("Whether . . . alone or accompanied by others . . . there are few of us that would feel comfortable knowing that a stranger lurks outside our home"). The offensive and disturbing nature of the form of the communication banned by the Brookfield ordinance thus can scarcely be questioned. Cf. *Bolger* v. *Youngs Drug Products Corp.*, 463 U. S. 60, 83–84 (1983) (STEVENS, J., concurring in judgment) (as opposed to regulation of communications due to the ideas expressed, which "strikes at the core of First Amendment values," "regulations of form and context may strike a constitutionally appropriate balance between the advocate's right to convey a message and the recipient's interest in the quality of his environment").

The First Amendment permits the government to prohibit offensive speech as intrusive when the "captive" audience cannot avoid the objectionable speech. See *Consolidated Edison Co.* v. *Public Service Comm'n of New York*, 447 U. S. 530, 542 (1980). Cf. *Bolger* v. *Youngs Drug Products Corp.*, *supra*, at 72. The target of the focused picketing banned by the Brookfield ordinance is just such a "captive." The resident is figuratively, and perhaps literally, trapped within the home, and because of the unique and subtle impact of such picketing is left with no ready means of avoiding the unwanted speech. Cf. *Cohen* v. *California*, 403 U. S., at 21–22 (noting ease of avoiding unwanted speech in other circumstances). Thus, the "evil" of targeted residential picketing, "the very presence of an unwelcome visitor at the home," *Carey*, *supra*, at 478 (REHNQUIST, J., dissenting), is "created by the medium of expression itself." See *Taxpayers for Vincent*, *supra*, at 810. Accordingly, the Brookfield ordinance's

complete ban of that particular medium of expression is narrowly tailored.

Of course, this case presents only a facial challenge to the ordinance. Particular hypothetical applications of the ordinance—to, for example, a particular resident's use of his or her home as a place of business or public meeting, or to picketers present at a particular home by invitation of the resident—may present somewhat different questions. Initially, the ordinance by its own terms may not apply in such circumstances, since the ordinance's goal is the protection of residential privacy, App. to Juris. Statement A–26, and since it speaks only of a "residence or dwelling," not a place of business, *id.*, at A–28. Cf. *Carey*, *supra*, at 457 (quoting an antipicketing ordinance expressly rendered inapplicable by use of home as a place of business or to hold a public meeting). Moreover, since our First Amendment analysis is grounded in protection of the unwilling residential listener, the constitutionality of applying the ordinance to such hypotheticals remains open to question. These are, however, questions we need not address today in order to dispose of appellees' facial challenge.

Because the picketing prohibited by the Brookfield ordinance is speech directed primarily at those who are presumptively unwilling to receive it, the State has a substantial and justifiable interest in banning it. The nature and scope of this interest make the ban narrowly tailored. The ordinance also leaves open ample alternative channels of communication and is content neutral. Thus, largely because of its narrow scope, the facial challenge to the ordinance must fail. The contrary judgment of the Court of Appeals is

Reversed.

JUSTICE WHITE, concurring in the judgment.

I agree with the Court that an ordinance which only forbade picketing before a single residence would not be unconstitutional on its face. If such an ordinance were applied to the kind of picketing that appellees carried out here, it

clearly would not be invalid under the First Amendment, for the picketing in this case involved large groups of people, ranging at various times from 11 individuals to more than 40. I am convinced, absent more than this record indicates, that if some single-residence picketing by smaller groups could not be forbidden, the range of possibly unconstitutional application of such an ordinance would not render it substantially overbroad and thus unconstitutional on its face.

This leaves the question, however, whether the ordinance at issue in this case forbids only single-residence picketing. The Court says that the language of the ordinance suggests that it is so limited. But the ordinance forbids "any person to engage in picketing before or about the residence or dwelling of any individual in the Town of Brookfield." Brookfield, Wis., Gen. Code § 9.17(2), App. to Juris. Statement A–28. That language could easily be construed to reach not only picketing before a single residence, but also picketing that would deliver the desired message about a particular residence to the neighbors and to other passersby. Arguably, it would also reach picketing that is directed at the residences which are located in entire blocks or in larger residential areas. Indeed, the latter is the more natural reading of the ordinance, which seems to prohibit picketing in any area that is located "before or about" any residence or dwelling in the town, *i. e.*, any picketing that occurs either in front of or anywhere around the residences that are located within the town.

Furthermore, there is no authoritative construction of this ordinance by the Wisconsin state courts that limits the scope of the proscription. There is, however, the interpretation that has been rendered in this case by both the lower federal courts with jurisdiction over the town whose law is at issue, which we rarely overturn and to which we routinely defer unless there is some fairly compelling argument for not doing so—an established practice that the Court relies on to resolve another aspect of this case. *Ante*, at 482. As I understand

the District Court, it did not accept the construction of the ordinance which is urged here, holding instead that the ordinance was not narrowly tailored to meet the town's stated objectives, but "completely bans all picketing in residential neighborhoods," 619 F. Supp. 792, 797 (ED Wis. 1985), and is not "a constitutional time, place, and manner regulation of speech in a public forum," *id.*, at 798. The panel that heard this case in the Court of Appeals, the opinion of which was of course vacated below, also thought that the question raised by the ordinance concerned the general validity of picketing "*in a residential neighborhood*," 807 F. 2d 1339, 1348 (CA7 1986) (emphasis in original), and observed that the ordinance "restricts picketing" in the town "to the commercial strip along West Bluemound Road," *ibid.* The dissenting judge also understood the ordinance to have confined the ambit of lawful picketing to "any non-residential area." *Id.*, at 1356 (Coffey, J., dissenting). Finally, I do not read the briefs filed by appellants in this Court to have argued that the ordinance should be narrowly construed to apply only to single-residence picketing. To the contrary, appellants' briefs in this Court repeatedly refer to the ordinance as banning all picketing in residential areas. Brief for Appellants 12–13, 13, 41, 42, 43; Reply Brief for Appellants 2, 8.

The Court endorses a narrow construction of the ordinance by relying on the town counsel's representations, made at oral argument, that the ordinance forbids only single-residence picketing. In light of the view taken by the lower federal courts and the apparent failure of counsel below to press on those courts the narrowing construction that has been suggested here, I have reservations about relying on counsel's statements as an authoritative statement of the law. It is true that several times in the past the Court, in reaching its decision on the validity of a statute, has relied on what it considered to be reliable and perhaps binding representations made by state and federal officials as to how a particular statute will be enforced. *DeFunis* v. *Odegaard*, 416 U. S. 312,

317–318 (1974); *Ehlert* v. *United States*, 402 U. S. 99, 107 (1971); *Gerende* v. *Board of Supervisors of Elections of Baltimore*, 341 U. S. 56 (1951). But in none of these cases did the Court accept a suggested limiting construction of a state law that appears to be contrary to the views of the lower federal courts.

There is nevertheless sufficient force in the town counsel's representations about the reach of the ordinance to avoid application of the overbreadth doctrine in this case, which as we have frequently emphasized is such "strong medicine" that it "has been employed by the Court sparingly and only as a last resort." *Broadrick* v. *Oklahoma*, 413 U. S. 601, 613 (1973). In my view, if the ordinance were construed to forbid all picketing in residential neighborhoods, the overbreadth doctrine would render it unconstitutional on its face and hence prohibit its enforcement against those, like appellees, who engage in single-residence picketing. At least this would be the case until the ordinance is limited in some authoritative manner. Because the representations made in this Court by the town's legal officer create sufficient doubts in my mind, however, as to how the ordinance will be enforced by the town or construed by the state courts, I would put aside the overbreadth approach here, sustain the ordinance as applied in this case, which the Court at least does, and await further developments.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

The Court today sets out the appropriate legal tests and standards governing the question presented, and proceeds to apply most of them correctly. Regrettably, though, the Court errs in the final step of its analysis, and approves an ordinance banning significantly more speech than is necessary to achieve the government's substantial and legitimate goal. Accordingly, I must dissent.

The ordinance before us absolutely prohibits picketing "before or about" any residence in the town of Brookfield,

thereby restricting a manner of speech in a traditional public forum.[1] Consequently, as the Court correctly states, the ordinance is subject to the well-settled time, place, and manner test: the restriction must be content and viewpoint neutral,[2] leave open ample alternative channels of communication, and be narrowly tailored to further a substantial governmental interest. *Ante*, at 482; *Perry Education Assn.* v. *Perry Local Educators' Assn.*, 460 U. S. 37, 45 (1983).

Assuming one construes the ordinance as the Court does,[3] I agree that the regulation reserves ample alternative channels of communication. *Ante*, at 482–484. I also agree with the Court that the town has a substantial interest in protecting its residents' right to be left alone in their homes. *Ante*, at 484–485; *Carey* v. *Brown*, 447 U. S. 455, 470–471 (1980). It is, however, critical to specify the precise scope of this interest. The mere fact that speech takes place in a residential neighborhood does not automatically implicate a residential privacy interest. It is the intrusion of speech into the

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[1] The Court today soundly rejects the town's rogue argument that residential streets are something less than public fora. *Ante*, at 479–481. I wholeheartedly agree with this portion of the Court's opinion.

[2] The Court relies on our "two-court rule" to avoid appellees' argument that state law creates a labor picketing exception to the Brookfield ordinance, and thus that the law is not content neutral. *Ante*, at 481–482. However, I would not be as quick to apply the rule here. The District Court's opinion focuses solely on the language and history of the town ordinance and does not refer to state law, 619 F. Supp. 792, 796 (ED Wis. 1985); the panel simply deferred to the District Court; and the en banc court issued no opinion. I cannot find even *one* court, let alone two, that has clearly passed on appellees' argument. Cf. *Virginia* v. *American Booksellers Assn.*, 484 U. S. 383, 395 (1988). However, nothing in the Court's opinion forecloses consideration of this question on remand.

[3] Like JUSTICE WHITE, I am wary of the Court's rather strained "single-residence" construction of the ordinance. Moreover, I give little weight to the town attorney's interpretation of the law; his legal interpretations do not bind the state courts, and therefore they cannot bind us. *American Booksellers*, *supra*, at 395. However, for purposes of this dissent, I will accept the Court's reading.

home or the unduly coercive nature of a particular manner of speech around the home that is subject to more exacting regulation. Thus, the intrusion into the home of an unwelcome solicitor, *Martin* v. *Struthers*, 319 U. S. 141 (1943), or unwanted mail, *Rowan* v. *Post Office Dept.*, 397 U. S. 728 (1970), may be forbidden. Similarly, the government may forbid the intrusion of excessive noise into the home, *Kovacs* v. *Cooper*, 336 U. S. 77 (1949), or, in appropriate circumstances, perhaps even radio waves, *FCC* v. *Pacifica Foundation*, 438 U. S. 726 (1978). Similarly, the government may prohibit unduly coercive conduct around the home, even though it involves expressive elements. A crowd of protesters need not be permitted virtually to imprison a person in his or her own house merely because they shout slogans or carry signs. But so long as the speech remains outside the home and does not unduly coerce the occupant, the government's heightened interest in protecting residential privacy is not implicated. See *Organization for a Better Austin* v. *Keefe*, 402 U. S. 415, 420 (1971).

The foregoing distinction is crucial here because it directly affects the last prong of the time, place, and manner test: whether the ordinance is narrowly tailored to achieve the governmental interest. I do not quarrel with the Court's reliance on *City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U. S. 789 (1984), for the proposition that a blanket prohibition of a manner of speech in particular public fora may nonetheless be "narrowly tailored" if in each case the manner of speech forbidden necessarily produces the very "evil" the government seeks to eradicate. *Ante*, at 485–486; *Vincent*, 466 U. S., at 808; *id.*, at 830 (BRENNAN, J., dissenting). However, the application of this test requires that the government demonstrate that the offending aspects of the prohibited manner of speech cannot be separately, and less intrusively, controlled. Thus here, if the intrusive and unduly coercive elements of residential picketing can be eliminated without simultaneously eliminating residential picket-

ing completely, the Brookfield ordinance fails the *Vincent* test.

Without question there are many aspects of residential picketing that, if unregulated, might easily become intrusive or unduly coercive. Indeed, some of these aspects are illustrated by this very case. As the District Court found, before the ordinance took effect up to 40 sign-carrying, slogan-shouting protesters regularly converged on Dr. Victoria's home and, in addition to protesting, warned young children not to go near the house because Dr. Victoria was a "baby killer." Further, the throng repeatedly trespassed onto the Victorias' property and at least once blocked the exits to their home. 619 F. Supp. 792, 795 (ED Wis. 1985). Surely it is within the government's power to enact regulations as necessary to prevent such intrusive and coercive abuses. Thus, for example, the government could constitutionally regulate the number of residential picketers, the hours during which a residential picket may take place, or the noise level of such a picket. In short, substantial regulation is permitted to neutralize the intrusive or unduly coercive aspects of picketing around the home. But to say that picketing may be substantially regulated is not to say that it may be prohibited in its entirety. Once size, time, volume, and the like have been controlled to ensure that the picket is no longer intrusive or coercive, only the speech itself remains, conveyed perhaps by a lone, silent individual, walking back and forth with a sign. Cf. *NLRB* v. *Retail Store Employees*, 447 U. S. 607, 618 (1980) (STEVENS, J., concurring in part and concurring in result). Such speech, which no longer implicates the heightened governmental interest in residential privacy, is nevertheless banned by the Brookfield law. Therefore, the ordinance is not narrowly tailored.

The Court nonetheless attempts to justify the town's sweeping prohibition. Central to the Court's analysis is the determination that:

"[I]n contrast [to other forms of communication], the picketing [here] is narrowly directed at the household, not the public. The type of picketers banned by the Brookfield ordinance generally do not seek to disseminate a message to the general public, but to intrude upon the targeted resident, and to do so in an especially offensive way. Moreover, even if some such picketers have a broader communicative purpose, their activity nonetheless inherently and offensively intrudes on residential privacy." *Ante*, at 486.

That reasoning is flawed. First, the ordinance applies to all picketers, not just those engaged in the protest giving rise to this challenge. Yet the Court cites no evidence to support its assertion that picketers generally, or even appellees specifically, desire to communicate only with the "targeted resident." (In fact, the District Court, on the basis of an uncontradicted affidavit, found that appellees sought to communicate with *both* Dr. Victoria and with the public. 619 F. Supp., at 795.) While picketers' signs might be seen from the resident's house, they are also visible to passersby. To be sure, the audience is limited to those within sight of the picket, but focusing speech does not strip it of constitutional protection. Even the site-specific aspect of the picket identifies to the public the object of the picketers' attention. Cf. *Boos* v. *Barry*, 485 U. S. 312, 331 (1988). Nor does the picketers' ultimate goal—to influence the resident's conduct—change the analysis; as the Court held in *Keefe*, *supra*, at 419, such a goal does not defeat First Amendment protection.

A second flaw in the Court's reasoning is that it assumes that the intrusive elements of a residential picket are "inherent." However, in support of this crucial conclusion the Court only briefly examines the effect of a narrowly tailored ordinance: "[E]ven a solitary picket can invade residential privacy. See *Carey*, *supra*, at 478–479 (REHNQUIST, J., dissenting) ('Whether . . . alone or accompanied by others . . . there are few of us that would feel comfortable knowing that

a stranger lurks outside our home')." *Ante*, at 487 (ellipses in Court's opinion). The Court's reference to the *Carey* dissent, its sole support for this assertion, conjures up images of a "lurking" stranger, secreting himself or herself outside a residence like a thief in the night, threatening physical harm. This hardly seems an apt depiction of a solitary picket, especially at midafternoon, whose presence is objectionable because it is notorious. Contrary to the Court's declaration in this regard, it seems far more likely that a picketer who truly desires only to harass those inside a particular residence will find that goal unachievable in the face of a narrowly tailored ordinance substantially limiting, for example, the size, time, and volume of the protest. If, on the other hand, the picketer intends to communicate generally, a carefully crafted ordinance will allow him or her to do so without intruding upon or unduly harassing the resident. Consequently, the discomfort to which the Court must refer is merely that of knowing there is a person outside who disagrees with someone inside. This may indeed be uncomfortable, but it does not implicate the town's interest in residential privacy and therefore does not warrant silencing speech.

A valid time, place, or manner law neutrally regulates speech only to the extent necessary to achieve a substantial governmental interest, and no further. Because the Court is unwilling to examine the Brookfield ordinance in light of the precise governmental interest at issue, it condones a law that suppresses substantially more speech than is necessary. I dissent.

JUSTICE STEVENS, dissenting.

"GET WELL CHARLIE—OUR TEAM NEEDS YOU."

In Brookfield, Wisconsin, it is unlawful for a fifth grader to carry such a sign in front of a residence for the period of time necessary to convey its friendly message to its intended audience.

The Court's analysis of the question whether Brookfield's ban on picketing is constitutional begins with an acknowledgment that the ordinance "operates at the core of the First Amendment," *ante*, at 479, and that the streets of Brookfield are a "traditional public forum," *ante*, at 480. It concludes, however, that the total ban on residential picketing is "narrowly tailored" to protect "only unwilling recipients of the communications." *Ante*, at 485. The plain language of the ordinance, however, applies to communications to willing and indifferent recipients as well as to the unwilling.

I do not believe we advance the inquiry by rejecting what JUSTICE BRENNAN calls the "rogue argument that residential streets are something less than public fora," *ante*, at 492, n. 1. See *Cornelius* v. *NAACP Legal Defense & Educational Fund, Inc.*, 473 U. S. 788, 833 (1985) (STEVENS, J., dissenting). The streets in a residential neighborhood that has no sidewalks are quite obviously a different type of forum than a stadium or a public park. Attaching the label "public forum" to the area in front of a single family dwelling does not help us decide whether the town's interest in the safe and efficient flow of traffic or its interest in protecting the privacy of its citizens justifies denying picketers the right to march up and down the streets at will.

Two characteristics of picketing—and of speech more generally—make this a difficult case. First, it is important to recognize that, "[l]ike so many other kinds of expression, picketing is a mixture of conduct and communication." *NLRB* v. *Retail Store Employees*, 447 U. S. 607, 618–619 (1980) (STEVENS, J., concurring in part and concurring in result). If we put the speech element to one side, I should think it perfectly clear that the town could prohibit pedestrians from loitering in front of a residence. On the other hand, it seems equally clear that a sign carrier has a right to march past a residence—and presumably pause long enough to give the occupants an opportunity to read his or her message—regardless of whether the reader agrees, disagrees, or is sim-

ply indifferent to the point of view being expressed. Second, it bears emphasis that:

> "[A] communication may be offensive in two different ways. Independently of the message the speaker intends to convey, the form of his communication may be offensive—perhaps because it is too loud or too ugly in a particular setting. Other speeches, even though elegantly phrased in dulcet tones, are offensive simply because the listener disagrees with the speaker's message." *Consolidated Edison Co.* v. *Public Service Comm'n of New York*, 447 U. S. 530, 546–547 (STEVENS, J., concurring in judgment) (footnotes omitted).

Picketing is a form of speech that, by virtue of its repetition of message and often hostile presentation, may be disruptive of an environment irrespective of the substantive message conveyed.

The picketing that gave rise to the ordinance enacted in this case was obviously intended to do more than convey a message of opposition to the character of the doctor's practice; it was intended to cause him and his family substantial psychological distress. As the record reveals, the picketers' message was repeatedly redelivered by a relatively large group—in essence, increasing the volume and intrusiveness of the same message with each repeated assertion, cf. *Kovacs* v. *Cooper*, 336 U. S. 77 (1949). As is often the function of picketing, during the periods of protest the doctor's home was held under a virtual siege. I do not believe that picketing for the sole purpose of imposing psychological harm on a family in the shelter of their home is constitutionally protected. I do believe, however, that the picketers have a right to communicate their strong opposition to abortion to the doctor, but after they have had a fair opportunity to communicate that message, I see little justification for allowing them to remain in front of his home and repeat it over and over again simply to harm the doctor and his family. Thus, I

agree that the ordinance may be constitutionally applied to the kind of picketing that gave rise to its enactment.

On the other hand, the ordinance is unquestionably "overbroad" in that it prohibits some communication that is protected by the First Amendment. The question, then, is whether to apply the overbreadth doctrine's "strong medicine," see *Broadrick* v. *Oklahoma*, 413 U. S. 601, 613 (1973), or to put that approach aside "and await further developments," see *ante*, at 491 (WHITE, J., concurring in judgment). In *Broadrick*, the Court framed the inquiry thusly:

> "To put the matter another way, particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." 413 U. S., at 615.

In this case the overbreadth is unquestionably "real." Whether or not it is "substantial" in relation to the "plainly legitimate sweep" of the ordinance is a more difficult question. My hunch is that the town will probably not enforce its ban against friendly, innocuous, or even brief unfriendly picketing, and that the Court may be right in concluding that its legitimate sweep makes its overbreadth insubstantial. But there are two countervailing considerations that are persuasive to me. The scope of the ordinance gives the town officials far too much discretion in making enforcement decisions; while we sit by and await further developments, potential picketers must act at their peril. Second, it is a simple matter for the town to amend its ordinance and to limit the ban to conduct that unreasonably interferes with the privacy of the home and does not serve a reasonable communicative purpose. Accordingly, I respectfully dissent.

BOYLE, PERSONAL REPRESENTATIVE OF THE HEIRS AND ESTATE OF BOYLE *v.* UNITED TECHNOLOGIES CORP.

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

No. 86–492. Argued October 13, 1987—Reargued April 27, 1988—Decided June 27, 1988

David A. Boyle, a United States Marine helicopter copilot, drowned when his helicopter crashed off the Virginia coast. Petitioner, the personal representative of the heirs and estate of Boyle, brought this diversity action in Federal District Court against the Sikorsky Division of respondent corporation (Sikorsky), alleging, *inter alia*, under Virginia tort law, that Sikorsky had defectively designed the helicopter's copilot emergency escape-hatch system. The jury returned a general verdict for petitioner, and the court denied Sikorsky's motion for judgment notwithstanding the verdict. The Court of Appeals reversed and remanded with directions that judgment be entered for Sikorsky. It found that, as a matter of federal law, Sikorsky could not be held liable for the allegedly defective design because Sikorsky satisfied the requirements of the "military contractor defense."

Held:

1. There is no merit to petitioner's contention that, in the absence of federal legislation specifically immunizing Government contractors, federal law cannot shield contractors from liability for design defects in military equipment. In a few areas involving "uniquely federal interests," state law is pre-empted and replaced, where necessary, by federal law of a content prescribed (absent explicit statutory directive) by the courts. The procurement of equipment by the United States is an area of uniquely federal interest. A dispute such as the present one, even though between private parties, implicates the interests of the United States in this area. Once it is determined that an area of uniquely federal interest is implicated, state law will be displaced only where a "significant conflict" exists between an identifiable federal policy or interest and the operation of state law, or the application of state law would frustrate specific objectives of federal legislation. Here, the state-imposed duty of care that is the asserted basis of the contractor's liability is precisely contrary to the duty imposed by the Government contract. But even in this situation, it would be unreasonable to say that there is always a "significant conflict" between state law and a federal policy or interest. In search of a limiting principle to identify when a significant

conflict is present, the Court of Appeals relied on the rationale of *Feres* v. *United States*, 340 U. S. 135. This produces results that are in some respects too broad and in some respects too narrow. However, the discretionary function exception to the Federal Tort Claims Act does demonstrate the potential for, and suggest the outlines of, "significant conflict" between federal interest and state law in this area. State law is displaced where judgment against the contractor would threaten a discretionary function of the Government. In sum, state law which imposes liability for design defects in military equipment is displaced where (a) the United States approved reasonably precise specifications; (b) the equipment conformed to those specifications; and (c) the supplier warned the United States about dangers in the use of the equipment known to the supplier but not to the United States. Pp. 504–513.

2. Also without merit is petitioner's contention that since the Government contractor defense formulated by the Court of Appeals differed from the instructions given by the District Court to the jury, the Seventh Amendment guarantee of jury trial requires a remand for trial on the new theory. If the evidence presented in the first trial would not suffice, as a matter of law, to support a jury verdict under the properly formulated defense, judgment could properly be entered for respondent at once, without a new trial. It is unclear from the Court of Appeals' opinion, however, whether it was in fact deciding that no reasonable jury could, under the properly formulated defense, have found for petitioner on the facts presented, or rather was assessing on its own whether the defense had been established. The latter would be error, since whether the facts established the conditions for the defense is a question for the jury. The case is remanded for clarification of this point. Pp. 513–514.

792 F. 2d 413, vacated and remanded.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, O'CONNOR, and KENNEDY, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL and BLACKMUN, JJ., joined, *post*, p. 515. STEVENS, J., filed a dissenting opinion, *post*, p. 531.

Louis S. Franecke reargued the cause for petitioner. With him on the briefs was *John O. Mack*.

Philip A. Lacovara reargued the cause for respondent. With him on the briefs were *Lewis T. Booker*, *W. Stanfield Johnson*, and *William R. Stein*.

Deputy Solicitor General Ayer reargued 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 Assistant Attorneys General Spears and *Willmore*, and *Christopher J. Wright.**

JUSTICE SCALIA delivered the opinion of the Court.

This case requires us to decide when a contractor providing military equipment to the Federal Government can be held liable under state tort law for injury caused by a design defect.

I

On April 27, 1983, David A. Boyle, a United States Marine helicopter copilot, was killed when the CH–53D helicopter in which he was flying crashed off the coast of Virginia Beach, Virginia, during a training exercise. Although Boyle survived the impact of the crash, he was unable to escape from the helicopter and drowned. Boyle's father, petitioner here, brought this diversity action in Federal District Court against the Sikorsky Division of United Technologies Corporation (Sikorsky), which built the helicopter for the United States.

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*Briefs of *amici curiae* urging reversal were filed for Edwin Lees Shaw by *Joel D. Eaton* and *Robert L. Parks;* and for Joan S. Tozer et al. by *Michael J. Pangia.*

Briefs of *amici curiae* urging affirmance were filed for the Chamber of Commerce of the United States by *Herbert L. Fenster, Raymond B. Biagini,* and *Robin S. Conrad;* for the Defense Research Institute, Inc., by *James W. Morris III, Ann Adams Webster,* and *Donald F. Pierce;* for Grumman Aerospace Corp. by *James M. FitzSimons, Frank J. Chiarchiaro, Charles M. Shaffer, Jr., L. Joseph Loveland,* and *Gary J. Toman;* for the National Security Industrial Association et al. by *Kenneth S. Geller* and *Andrew L. Frey;* and for the Product Liability Advisory Council, Inc., et al. by *Michael Hoenig, David B. Hamm, William H. Crabtree,* and *Edward P. Good.*

Briefs of *amici curiae* were filed for the Association of Trial Lawyers of America by *Robert L. Habush, Dale Haralson,* and *Denneen L. Peterson;* for Bell Helicopter Textron Inc. by *R. David Broiles, George Galerstein,* and *James W. Hunt;* and for UNR Industries, Inc., by *Joe G. Hollingsworth.*

At trial, petitioner presented two theories of liability under Virginia tort law that were submitted to the jury. First, petitioner alleged that Sikorsky had defectively repaired a device called the servo in the helicopter's automatic flight control system, which allegedly malfunctioned and caused the crash. Second, petitioner alleged that Sikorsky had defectively designed the copilot's emergency escape system: the escape hatch opened out instead of in (and was therefore ineffective in a submerged craft because of water pressure), and access to the escape hatch handle was obstructed by other equipment. The jury returned a general verdict in favor of petitioner and awarded him $725,000. The District Court denied Sikorsky's motion for judgment notwithstanding the verdict.

The Court of Appeals reversed and remanded with directions that judgment be entered for Sikorsky. 792 F. 2d 413 (CA4 1986). It found, as a matter of Virginia law, that Boyle had failed to meet his burden of demonstrating that the repair work performed by Sikorsky, as opposed to work that had been done by the Navy, was responsible for the alleged malfunction of the flight control system. *Id.*, at 415–416. It also found, as a matter of federal law, that Sikorsky could not be held liable for the allegedly defective design of the escape hatch because, on the evidence presented, it satisfied the requirements of the "military contractor defense," which the court had recognized the same day in *Tozer* v. *LTV Corp.*, 792 F. 2d 403 (CA4 1986). 792 F. 2d, at 414–415.

Petitioner sought review here, challenging the Court of Appeals' decision on three levels: First, petitioner contends that there is no justification in federal law for shielding Government contractors from liability for design defects in military equipment. Second, he argues in the alternative that even if such a defense should exist, the Court of Appeals' formulation of the conditions for its application is inappropriate. Finally, petitioner contends that the Court of Appeals erred in not remanding for a jury determination of whether the ele-

ments of the defense were met in this case. We granted certiorari, 479 U. S. 1029 (1986).

II

Petitioner's broadest contention is that, in the absence of legislation specifically immunizing Government contractors from liability for design defects, there is no basis for judicial recognition of such a defense. We disagree. In most fields of activity, to be sure, this Court has refused to find federal pre-emption of state law in the absence of either a clear statutory prescription, see, *e. g.*, *Jones* v. *Rath Packing Co.*, 430 U. S. 519, 525 (1977); *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947), or a direct conflict between federal and state law, see, *e. g.*, *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U. S. 132, 142–143 (1963); *Hines* v. *Davidowitz*, 312 U. S. 52, 67 (1941). But we have held that a few areas, involving "uniquely federal interests," *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U. S. 630, 640 (1981), are so committed by the Constitution and laws of the United States to federal control that state law is pre-empted and replaced, where necessary, by federal law of a content prescribed (absent explicit statutory directive) by the courts—so-called "federal common law." See, *e. g.*, *United States* v. *Kimbell Foods, Inc.*, 440 U. S. 715, 726–729 (1979); *Banco Nacional* v. *Sabbatino*, 376 U. S. 398, 426–427 (1964); *Howard* v. *Lyons*, 360 U. S. 593, 597 (1959); *Clearfield Trust Co.* v. *United States*, 318 U. S. 363, 366–367 (1943); *D'Oench, Duhme & Co.* v. *FDIC*, 315 U. S. 447, 457–458 (1942).

The dispute in the present case borders upon two areas that we have found to involve such "uniquely federal interests." We have held that obligations to and rights of the United States under its contracts are governed exclusively by federal law. See, *e. g.*, *United States* v. *Little Lake Misere Land Co.*, 412 U. S. 580, 592–594 (1973); *Priebe & Sons, Inc.* v. *United States*, 332 U. S. 407, 411 (1947); *National Metropolitan Bank* v. *United States*, 323 U. S. 454,

456 (1945); *Clearfield Trust*, *supra*. The present case does not involve an obligation to the United States under its contract, but rather liability to third persons. That liability may be styled one in tort, but it arises out of performance of the contract—and traditionally has been regarded as sufficiently related to the contract that until 1962 Virginia would generally allow design defect suits only by the purchaser and those in privity with the seller. See *General Bronze Corp.* v. *Kostopulos*, 203 Va. 66, 69–70, 122 S. E. 2d 548, 551 (1961); see also Va. Code § 8.2–318 (1965) (eliminating privity requirement).

Another area that we have found to be of peculiarly federal concern, warranting the displacement of state law, is the civil liability of federal officials for actions taken in the course of their duty. We have held in many contexts that the scope of that liability is controlled by federal law. See, *e. g.*, *Westfall* v. *Erwin*, 484 U. S. 292, 295 (1988); *Howard* v. *Lyons*, *supra*, at 597; *Barr* v. *Matteo*, 360 U. S. 564, 569–574 (1959) (plurality opinion); *id.*, at 577 (Black, J., concurring); see also *Yaselli* v. *Goff*, 12 F. 2d 396 (CA2 1926), aff'd, 275 U. S. 503 (1927) *(per curiam)*; *Spalding* v. *Vilas*, 161 U. S. 483 (1896); *Bradley* v. *Fisher*, 13 Wall. 335 (1872). The present case involves an independent contractor performing its obligation under a procurement contract, rather than an official performing his duty as a federal employee, but there is obviously implicated the same interest in getting the Government's work done.[1]

We think the reasons for considering these closely related areas to be of "uniquely federal" interest apply as well to

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[1] JUSTICE BRENNAN's dissent misreads our discussion here to "intimat[e] that the immunity [of federal officials] . . . might extend . . . [to] nongovernment employees" such as a Government contractor. *Post*, at 523. But we do not address this issue, as it is not before us. We cite these cases merely to demonstrate that the liability of independent contractors performing work for the Federal Government, like the liability of federal officials, is an area of uniquely federal interest.

the civil liabilities arising out of the performance of federal procurement contracts. We have come close to holding as much. In *Yearsley* v. *W. A. Ross Construction Co.*, 309 U. S. 18 (1940), we rejected an attempt by a landowner to hold a construction contractor liable under state law for the erosion of 95 acres caused by the contractor's work in constructing dikes for the Government. We said that "if [the] authority to carry out the project was validly conferred, that is, if what was done was within the constitutional power of Congress, there is no liability on the part of the contractor for executing its will." *Id.*, at 20–21. The federal interest justifying this holding surely exists as much in procurement contracts as in performance contracts; we see no basis for a distinction.

Moreover, it is plain that the Federal Government's interest in the procurement of equipment is implicated by suits such as the present one—even though the dispute is one between private parties. It is true that where "litigation is purely between private parties and does not touch the rights and duties of the United States," *Bank of America Nat. Trust & Sav. Assn.* v. *Parnell*, 352 U. S. 29, 33 (1956), federal law does not govern. Thus, for example, in *Miree* v. *DeKalb County*, 433 U. S. 25, 30 (1977), which involved the question whether certain private parties could sue as third-party beneficiaries to an agreement between a municipality and the Federal Aviation Administration, we found that state law was not displaced because "the operations of the United States in connection with FAA grants such as these . . . would [not] be burdened" by allowing state law to determine whether third-party beneficiaries could sue, *id.*, at 30, and because "any federal interest in the outcome of the [dispute] before us '[was] far too speculative, far too remote a possibility to justify the application of federal law to transactions essentially of local concern.'" *Id.*, at 32–33, quoting *Parnell*, *supra*, at 33–34; see also *Wallis* v. *Pan American Petro-*

leum Corp., 384 U. S. 63, 69 (1966).[2] But the same is not true here. The imposition of liability on Government contractors will directly affect the terms of Government contracts: either the contractor will decline to manufacture the design specified by the Government, or it will raise its price. Either way, the interests of the United States will be directly affected.

That the procurement of equipment by the United States is an area of uniquely federal interest does not, however, end the inquiry. That merely establishes a necessary, not a sufficient, condition for the displacement of state law.[3] Displacement will occur only where, as we have variously described, a "significant conflict" exists between an identifiable "federal policy or interest and the [operation] of state law," *Wallis*, *supra*, at 68, or the application of state law would "frustrate specific objectives" of federal legislation, *Kimbell Foods*, 440 U. S., at 728. The conflict with federal policy need not be as sharp as that which must exist for ordinary pre-emption when Congress legislates "in a field which the States have traditionally occupied." *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S., at 230. Or to put the point differently, the

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[2] As this language shows, JUSTICE BRENNAN's dissent is simply incorrect to describe *Miree* and other cases as declining to apply federal law despite the assertion of interests "comparable" to those before us here. *Post*, at 521–522.

[3] We refer here to the displacement of state law, although it is possible to analyze it as the displacement of federal-law reference to state law for the rule of decision. Some of our cases appear to regard the area in which a uniquely federal interest exists as being entirely governed by federal law, with federal law deigning to "borro[w]," *United States* v. *Little Lake Misere Land Co.*, 412 U. S. 580, 594 (1973), or "incorporat[e]" or "adopt" *United States* v. *Kimbell Foods, Inc.*, 440 U. S. 715, 728, 729, 730 (1979), state law except where a significant conflict with federal policy exists. We see nothing to be gained by expanding the theoretical scope of the federal pre-emption beyond its practical effect, and so adopt the more modest terminology. If the distinction between displacement of state law and displacement of federal law's incorporation of state law ever makes a practical difference, it at least does not do so in the present case.

fact that the area in question *is* one of unique federal concern changes what would otherwise be a conflict that cannot produce pre-emption into one that can.[4] But conflict there must be. In some cases, for example where the federal interest requires a uniform rule, the entire body of state law applicable to the area conflicts and is replaced by federal rules. See, *e. g.*, *Clearfield Trust*, 318 U. S., at 366–367 (rights and obligations of United States with respect to commercial paper must be governed by uniform federal rule). In others, the conflict is more narrow, and only particular elements of state law are superseded. See, *e. g.*, *Little Lake Misere Land Co.*, 412 U. S., at 595 (even assuming state law should generally govern federal land acquisitions, particular state law at issue may not); *Howard* v. *Lyons*, 360 U. S., at 597 (state defamation law generally applicable to federal official, but federal privilege governs for statements made in the course of federal official's duties).

In *Miree*, *supra*, the suit was not seeking to impose upon the person contracting with the Government a duty contrary to the duty imposed by the Government contract. Rather, it was the contractual duty *itself* that the private plaintiff (as third-party beneficiary) sought to enforce. Between *Miree*

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[4] Even before our landmark decision in *Clearfield Trust Co.* v. *United States*, 318 U. S. 363 (1943), the distinctive federal interest in a particular field was used as a significant factor giving broad pre-emptive effect to federal legislation in that field:

"It cannot be doubted that both the state and the federal [alien] registration laws belong 'to that class of laws which concern the exterior relation of this whole nation with other nations and governments.' Consequently the regulation of aliens is . . . intimately blended and intertwined with responsibilities of the national government . . . . And where the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation and has therein provided a standard for the registration of aliens, states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations." *Hines* v. *Davidowitz*, 312 U. S. 52, 66–67 (1941) (citation omitted).

and the present case, it is easy to conceive of an intermediate situation, in which the duty sought to be imposed on the contractor is not identical to one assumed under the contract, but is also not contrary to any assumed. If, for example, the United States contracts for the purchase and installation of an air-conditioning unit, specifying the cooling capacity but not the precise manner of construction, a state law imposing upon the manufacturer of such units a duty of care to include a certain safety feature would not be a duty identical to anything promised the Government, but neither would it be contrary. The contractor could comply with both its contractual obligations and the state-prescribed duty of care. No one suggests that state law would generally be pre-empted in this context.

The present case, however, is at the opposite extreme from *Miree*. Here the state-imposed duty of care that is the asserted basis of the contractor's liability (specifically, the duty to equip helicopters with the sort of escape-hatch mechanism petitioner claims was necessary) is precisely contrary to the duty imposed by the Government contract (the duty to manufacture and deliver helicopters with the sort of escape-hatch mechanism shown by the specifications). Even in this sort of situation, it would be unreasonable to say that there is always a "significant conflict" between the state law and a federal policy or interest. If, for example, a federal procurement officer orders, by model number, a quantity of stock helicopters that happen to be equipped with escape hatches opening outward, it is impossible to say that the Government has a significant interest in that particular feature. That would be scarcely more reasonable than saying that a private individual who orders such a craft by model number cannot sue for the manufacturer's negligence because he got precisely what he ordered.

In its search for the limiting principle to identify those situations in which a "significant conflict" with federal policy or interests does arise, the Court of Appeals, in the lead case

upon which its opinion here relied, identified as the source of the conflict the *Feres* doctrine, under which the Federal Tort Claims Act (FTCA) does not cover injuries to Armed Services personnel in the course of military service. See *Feres* v. *United States*, 340 U. S. 135 (1950). Military contractor liability would conflict with this doctrine, the Fourth Circuit reasoned, since the increased cost of the contractor's tort liability would be added to the price of the contract, and "[s]uch pass-through costs would . . . defeat the purpose of the immunity for military accidents conferred upon the government itself." *Tozer*, 792 F. 2d, at 408. Other courts upholding the defense have embraced similar reasoning. See, *e. g.*, *Bynum* v. *FMC Corp.*, 770 F. 2d 556, 565–566 (CA5 1985); *Tillett* v. *J. I. Case Co.*, 756 F. 2d 591, 596–597 (CA7 1985); *McKay* v. *Rockwell Int'l Corp.*, 704 F. 2d 444, 449 (CA9 1983), cert. denied, 464 U. S. 1043 (1984). We do not adopt this analysis because it seems to us that the *Feres* doctrine, in its application to the present problem, logically produces results that are in some respects too broad and in some respects too narrow. Too broad, because if the Government contractor defense is to prohibit suit against the manufacturer whenever *Feres* would prevent suit against the Government, then even injuries caused to military personnel by a helicopter purchased from stock (in our example above), or by any standard equipment purchased by the Government, would be covered. Since *Feres* prohibits all service-related tort claims against the Government, a contractor defense that rests upon it should prohibit all service-related tort claims against the manufacturer—making inexplicable the three limiting criteria for contractor immunity (which we will discuss presently) that the Court of Appeals adopted. On the other hand, reliance on *Feres* produces (or logically should produce) results that are in another respect too narrow. Since that doctrine covers only service-related injuries, and not injuries caused by the military to civilians, it could not be invoked to prevent, for example, a civilian's suit against the manufacturer of fighter planes, based on a state

tort theory, claiming harm from what is alleged to be needlessly high levels of noise produced by the jet engines. Yet we think that the character of the jet engines the Government orders for its fighter planes cannot be regulated by state tort law, no more in suits by civilians than in suits by members of the Armed Services.

There is, however, a statutory provision that demonstrates the potential for, and suggests the outlines of, "significant conflict" between federal interests and state law in the context of Government procurement. In the FTCA, Congress authorized damages to be recovered against the United States for harm caused by the negligent or wrongful conduct of Government employees, to the extent that a private person would be liable under the law of the place where the conduct occurred. 28 U. S. C. § 1346(b). It excepted from this consent to suit, however,

> "[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U. S. C. § 2680(a).

We think that the selection of the appropriate design for military equipment to be used by our Armed Forces is assuredly a discretionary function within the meaning of this provision. It often involves not merely engineering analysis but judgment as to the balancing of many technical, military, and even social considerations, including specifically the trade-off between greater safety and greater combat effectiveness. And we are further of the view that permitting "second-guessing" of these judgments, see *United States* v. *Varig Airlines*, 467 U. S. 797, 814 (1984), through state tort suits against contractors would produce the same effect sought to be avoided by the FTCA exemption. The financial burden of judgments against the contractors would ultimately be passed through, substantially if not totally, to the

United States itself, since defense contractors will predictably raise their prices to cover, or to insure against, contingent liability for the Government-ordered designs. To put the point differently: It makes little sense to insulate the Government against financial liability for the judgment that a particular feature of military equipment is necessary when the Government produces the equipment itself, but not when it contracts for the production. In sum, we are of the view that state law which holds Government contractors liable for design defects in military equipment does in some circumstances present a "significant conflict" with federal policy and must be displaced.[5]

We agree with the scope of displacement adopted by the Fourth Circuit here, which is also that adopted by the Ninth Circuit, see *McKay* v. *Rockwell Int'l Corp.*, *supra*, at 451. Liability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States. The first two of these conditions assure that the suit is within the area where the policy of the "discretionary function" would be frustrated—*i. e.*, they assure that the design feature in question was considered by a Government officer, and not merely by the contractor itself. The third condition is necessary because, in its absence, the displacement of state tort law would create some incentive for the manufacturer to withhold knowledge of risks, since conveying that knowledge might disrupt the contract but withholding it would produce no liability. We adopt this provision lest our effort to pro-

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[5] JUSTICE BRENNAN's assumption that the outcome of this case would be different if it were brought under the Death on the High Seas Act, Act of Mar. 30, 1920, ch. 111, § 1 *et seq.* (1982 ed., Supp. IV), 41 Stat. 537, codified at 46 U. S. C. App. § 761 *et seq.*, is not necessarily correct. That issue is not before us, and we think it inappropriate to decide it in order to refute (or, for that matter, to construct) an alleged inconsistency.

tect discretionary functions perversely impede them by cutting off information highly relevant to the discretionary decision.

We have considered the alternative formulation of the Government contractor defense, urged upon us by petitioner, which was adopted by the Eleventh Circuit in *Shaw* v. *Grumman Aerospace Corp.*, 778 F. 2d 736, 746 (1985), cert. pending, No. 85–1529. That would preclude suit only if (1) the contractor did not participate, or participated only minimally, in the design of the defective equipment; *or* (2) the contractor timely warned the Government of the risks of the design and notified it of alternative designs reasonably known by it, *and* the Government, although forewarned, clearly authorized the contractor to proceed with the dangerous design. While this formulation may represent a perfectly reasonable tort rule, it is not a rule designed to protect the federal interest embodied in the "discretionary function" exemption. The design ultimately selected may well reflect a significant policy judgment by Government officials whether or not the contractor rather than those officials developed the design. In addition, it does not seem to us sound policy to penalize, and thus deter, active contractor participation in the design process, placing the contractor at risk unless it identifies all design defects.

III

Petitioner raises two arguments regarding the Court of Appeals' application of the Government contractor defense to the facts of this case. First, he argues that since the formulation of the defense adopted by the Court of Appeals differed from the instructions given by the District Court to the jury, the Seventh Amendment guarantee of jury trial required a remand for trial on the new theory. We disagree. If the evidence presented in the first trial would not suffice, as a matter of law, to support a jury verdict under the properly formulated defense, judgment could properly be entered for the respondent at once, without a new trial. And that is so even though (as petitioner claims) respondent failed to

object to jury instructions that expressed the defense differently, and in a fashion that would support a verdict. See *St. Louis* v. *Praprotnik*, 485 U. S. 112, 118–120 (1988) (plurality opinion of O'CONNOR, J., joined by REHNQUIST, C. J., WHITE, and SCALIA, JJ.); *Ebker* v. *Tan Jay Int'l, Ltd.*, 739 F. 2d 812, 825–826, n. 17 (CA2 1984) (Friendly, J.); 9 C. Wright & A. Miller, Federal Practice and Procedure § 2537, pp. 599–600 (1971).

It is somewhat unclear from the Court of Appeals' opinion, however, whether it was in fact deciding that no reasonable jury could, under the properly formulated defense, have found for the petitioner on the facts presented, or rather was assessing on its own whether the defense had been established. The latter, which is what petitioner asserts occurred, would be error, since whether the facts establish the conditions for the defense is a question for the jury. The critical language in the Court of Appeals' opinion was that "[b]ecause Sikorsky has satisfied the requirements of the military contractor defense, it can incur no liability for . . . the allegedly defective design of the escape hatch." 792 F. 2d, at 415. Although it seems to us doubtful that the Court of Appeals was conducting the factual evaluation that petitioner suggests, we cannot be certain from this language, and so we remand for clarification of this point. If the Court of Appeals was saying that no reasonable jury could find, under the principles it had announced and on the basis of the evidence presented, that the Government contractor defense was inapplicable, its judgment shall stand, since petitioner did not seek from us, nor did we grant, review of the sufficiency-of-the-evidence determination. If the Court of Appeals was not saying that, it should now undertake the proper sufficiency inquiry.

Accordingly, the judgment is vacated and the case is remanded.

So ordered.

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

Lieutenant David A. Boyle died when the CH–53D helicopter he was copiloting spun out of control and plunged into the ocean. We may assume, for purposes of this case, that Lt. Boyle was trapped under water and drowned because respondent United Technologies negligently designed the helicopter's escape hatch. We may further assume that any competent engineer would have discovered and cured the defects, but that they inexplicably escaped respondent's notice. Had respondent designed such a death trap for a commercial firm, Lt. Boyle's family could sue under Virginia tort law and be compensated for his tragic and unnecessary death. But respondent designed the helicopter for the Federal Government, and that, the Court tells us today, makes all the difference: Respondent is immune from liability so long as it obtained approval of "reasonably precise specifications"—perhaps no more than a rubber stamp from a federal procurement officer who might or might not have noticed or cared about the defects, or even had the expertise to discover them.

If respondent's immunity "bore the legitimacy of having been prescribed by the people's elected representatives," we would be duty bound to implement their will, whether or not we approved. *United States* v. *Johnson*, 481 U. S. 681, 703 (1987) (dissenting opinion of SCALIA, J.). Congress, however, has remained silent—and conspicuously so, having resisted a sustained campaign by Government contractors to legislate for them some defense.[1] The Court—unelected and unaccountable to the people—has unabashedly stepped into

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[1] See, *e. g.*, H. R. 4765, 99th Cong., 2d Sess. (1986) (limitations on civil liability of Government contractors); S. 2441, 99th Cong., 2d Sess. (1986) (same). See also H. R. 2378, 100th Cong., 1st Sess. (1987) (indemnification of civil liability for Government contractors); H. R. 5883, 98th Cong., 2d Sess. (1984) (same); H. R. 1504, 97th Cong., 1st Sess. (1981) (same); H. R. 5351, 96th Cong., 1st Sess. (1979) (same).

the breach to legislate a rule denying Lt. Boyle's family the compensation that state law assures them. This time the injustice is of this Court's own making.

Worse yet, the injustice will extend far beyond the facts of this case, for the Court's newly discovered Government contractor defense is breathtakingly sweeping. It applies not only to military equipment like the CH–53D helicopter, but (so far as I can tell) to any made-to-order gadget that the Federal Government might purchase after previewing plans—from NASA's Challenger space shuttle to the Postal Service's old mail cars. The contractor may invoke the defense in suits brought not only by military personnel like Lt. Boyle, or Government employees, but by anyone injured by a Government contractor's negligent design, including, for example, the children who might have died had respondent's helicopter crashed on the beach. It applies even if the Government has not intentionally sacrificed safety for other interests like speed or efficiency, and, indeed, even if the equipment is not of a type that is typically considered dangerous; thus, the contractor who designs a Government building can invoke the defense when the elevator cable snaps or the walls collapse. And the defense is invocable regardless of how blatant or easily remedied the defect, so long as the contractor missed it and the specifications approved by the Government, however unreasonably dangerous, were "reasonably precise." *Ante*, at 512.

In my view, this Court lacks both authority and expertise to fashion such a rule, whether to protect the Treasury of the United States or the coffers of industry. Because I would leave that exercise of legislative power to Congress, where our Constitution places it, I would reverse the Court of Appeals and reinstate petitioner's jury award.

I

Before our decision in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938), federal courts sitting in diversity were generally free, in the absence of a controlling state statute, to fashion

rules of "general" federal common law. See, *e. g.*, *Swift* v. *Tyson*, 16 Pet. 1 (1842). *Erie* renounced the prevailing scheme: "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State." 304 U. S., at 78. The Court explained that the expansive power that federal courts had theretofore exercised was an unconstitutional "'invasion of the authority of the State and, to that extent, a denial of its independence.'" *Id.*, at 79 (citation omitted). Thus, *Erie* was deeply rooted in notions of federalism, and is most seriously implicated when, as here, federal judges displace the state law that would ordinarily govern with their own rules of federal common law. See, *e. g.*, *United States* v. *Standard Oil Co.*, 332 U. S. 301, 307 (1947).[2]

In pronouncing that "[t]here is no federal general common law," 304 U. S., at 78, *Erie* put to rest the notion that the grant of diversity jurisdiction to federal courts is itself authority to fashion rules of substantive law. See *United States* v. *Little Lake Misere Land Co.*, 412 U. S. 580, 591 (1973). As the author of today's opinion for the Court pronounced for a unanimous Court just two months ago, "'"'"'we start with the assumption that the historic police powers of the States were not to be superseded . . . unless that was the clear and manifest purpose of Congress.'"'" *Puerto Rico Dept. of Consumer Affairs* v. *Isla Petroleum Corp.*, 485 U. S. 495, 500 (1988) (citations omitted). Just as "[t]here is no federal pre-emption *in vacuo*, without a constitutional text or a federal statute to assert it," *id.*, at 503, federal common law cannot supersede state law *in vacuo* out of no

[2] Not all exercises of our power to fashion federal common law displace state law in the same way. For example, our recognition of federal causes of action based upon either the Constitution, see, *e. g.*, *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971), or a federal statute, see *Cort* v. *Ash*, 422 U. S. 66 (1975), supplements whatever rights state law might provide, and therefore does not implicate federalism concerns in the same way as does pre-emption of a state-law rule of decision or cause of action. Throughout this opinion I use the word "displace" in the latter sense.

more than an idiosyncratic determination by five Justices that a particular area is "uniquely federal."

Accordingly, we have emphasized that federal common law can displace state law in "few and restricted" instances. *Wheeldin* v. *Wheeler*, 373 U. S. 647, 651 (1963). "[A]bsent some congressional authorization to formulate substantive rules of decision, federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating conflicting rights of States or our relations with foreign nations, and admiralty cases." *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U. S. 630, 641 (1981) (footnotes omitted). "The enactment of a federal rule in an area of national concern, and the decision whether to displace state law in doing so, is generally made not by the federal judiciary, purposefully insulated from democratic pressures, but by the people through their elected representatives in Congress." *Milwaukee* v. *Illinois*, 451 U. S. 304, 312–313 (1981). See also *Wallis* v. *Pan American Petroleum Corp.*, 384 U. S. 63, 68 (1966); *Miree* v. *DeKalb County*, 433 U. S. 25, 32 (1977). State laws "should be overridden by the federal courts only where clear and substantial interests of the National Government, which cannot be served consistently with respect for such state interests, will suffer major damage if the state law is applied." *United States* v. *Yazell*, 382 U. S. 341, 352 (1966).

II

Congress has not decided to supersede state law here (if anything, it has decided not to, see n. 1, *supra*) and the Court does not pretend that its newly manufactured "Government contractor defense" fits within any of the handful of "narrow areas," *Texas Industries*, *supra*, at 641, of "uniquely federal interests" in which we have heretofore done so, 451 U. S., at 640. Rather, the Court creates a new category of "uniquely federal interests" out of a synthesis of two whose origins predate *Erie* itself: the interest in administering the "obligations to and rights of the United States under its contracts," *ante*,

at 504, and the interest in regulating the "civil liability of federal officials for actions taken in the course of their duty," *ante*, at 505. This case is, however, simply a suit between two private parties. We have steadfastly declined to impose federal contract law on relationships that are collateral to a federal contract, or to extend the federal employee's immunity beyond federal employees. And the Court's ability to list 2, or 10, inapplicable areas of "uniquely federal interest" does not support its conclusion that the liability of Government contractors is so "clear and substantial" an interest that this Court must step in lest state law does "major damage." *Yazell*, *supra*, at 352.

A

The proposition that federal common law continues to govern the "obligations to and rights of the United States under its contracts" is nearly as old as *Erie* itself. Federal law typically controls when the Federal Government is a party to a suit involving its rights or obligations under a contract, whether the contract entails procurement, see *Priebe & Sons* v. *United States*, 332 U. S. 407 (1947), a loan, see *United States* v. *Kimbell Foods, Inc.*, 440 U. S. 715, 726 (1979), a conveyance of property, see *Little Lake Misere*, *supra*, at 591–594, or a commercial instrument issued by the Government, see *Clearfield Trust Co.* v. *United States*, 318 U. S. 363, 366 (1943), or assigned to it, see *D'Oench, Duhme & Co.* v. *FDIC*, 315 U. S. 447, 457 (1942). Any such transaction necessarily "radiate[s] interests in transactions between private parties." *Bank of America Nat. Trust & Sav. Assn.* v. *Parnell*, 352 U. S. 29, 33 (1956). But it is by now established that our power to create federal common law controlling the *Federal Government's* contractual rights and obligations does not translate into a power to prescribe rules that cover all transactions or contractual relationships collateral to Government contracts.

In *Miree* v. *DeKalb County*, *supra*, for example, the county was contractually obligated under a grant agreement with the Federal Aviation Administration (FAA) to "'restrict

the use of land adjacent to . . . the Airport to activities and purposes compatible with normal airport operations including landing and takeoff of aircraft.'" *Id.*, at 27 (citation omitted). At issue was whether the county breached its contractual obligation by operating a garbage dump adjacent to the airport, which allegedly attracted the swarm of birds that caused a plane crash. Federal common law would undoubtedly have controlled in any suit by the Federal Government to enforce the provision against the county or to collect damages for its violation. The diversity suit, however, was brought not by the Government, but by assorted private parties injured in some way by the accident. We observed that "the operations of the United States in connection with FAA grants such as these are undoubtedly of considerable magnitude," *id.*, at 30, and that "the United States has a substantial interest in regulating aircraft travel and promoting air travel safety," *id.*, at 31. Nevertheless, we held that state law should govern the claim because "only the rights of private litigants are at issue here," *id.*, at 30, and the claim against the county "will have *no direct effect upon the United States or its Treasury*," *id.*, at 29 (emphasis added).

Miree relied heavily on *Parnell*, *supra*, and *Wallis* v. *Pan American Petroleum Corp.*, *supra*, the former involving commercial paper issued by the United States and the latter involving property rights in federal land. In the former case, Parnell cashed certain bonds guaranteed by the Government that had been stolen from their owner, a bank. It is beyond dispute that federal law would have governed the United States' duty to pay the value bonds upon presentation; we held as much in *Clearfield Trust*, *supra*. Cf. *Parnell*, *supra*, at 34. But the central issue in *Parnell*, a diversity suit, was whether the victim of the theft could recover the money paid to Parnell. That issue, we held, was governed by state law, because the "litigation [was] purely between private parties and [did] *not touch the rights and duties of the United States*." 352 U. S., at 33 (emphasis added).

The same was true in *Wallis*, which also involved a Government contract—a lease issued by the United States to a private party under the Mineral Leasing Act of 1920, 30 U. S. C. § 181 *et seq.* (1982 ed. and Supp. IV)—governed entirely by federal law. See 384 U. S., at 69. Again, the relationship at issue in this diversity case was collateral to the Government contract: It involved the validity of contractual arrangements between the lessee and other private parties, not between the lessee and the Federal Government. Even though a federal statute authorized certain assignments of lease rights, see *id.*, at 69, 70, and n. 8, and imposed certain conditions on their validity, see *id.*, at 70, we held that state law, not federal common law, governed their validity because application of state law would present "no significant threat to any identifiable federal policy or interest," *id.*, at 68.

Here, as in *Miree*, *Parnell*, and *Wallis*, a Government contract governed by federal common law looms in the background. But here, too, the United States is not a party to the suit and the suit neither "touch[es] the rights and duties of the United States," *Parnell*, *supra*, at 33, nor has a "direct effect upon the United States or its Treasury," *Miree*, 433 U. S., at 29. The relationship at issue is at best collateral to the Government contract.[3] We have no greater power to displace state law governing the collateral relationship in the Government procurement realm than we had to dictate federal rules governing equally collateral relationships in the areas of aviation, Government-issued commercial paper, or federal lands.

That the Government might have to pay higher prices for what it orders if delivery in accordance with the contract ex-

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[3] True, in this case the collateral relationship is the relationship between victim and tortfeasor, rather than between contractors, but that distinction makes no difference. We long ago established that the principles governing application of federal common law in "contractual relations of the Government . . . are equally applicable . . . where the relations affected are noncontractual or tortious in character." *United States* v. *Standard Oil Co.*, 332 U. S. 301, 305 (1947).

poses the seller to potential liability, see *ante*, at 507, does not distinguish this case. Each of the cases just discussed declined to extend the reach of federal common law despite the assertion of comparable interests that would have affected the terms of the Government contract—whether its price or its substance—just as "directly" (or indirectly). *Ibid.* Third-party beneficiaries can sue under a county's contract with the FAA, for example, even though—as the Court's focus on the absence of "*direct* effect on the United States or its Treasury," 433 U. S., at 29 (emphasis added), suggests—counties will likely pass on the costs to the Government in future contract negotiations. Similarly, we held that state law may govern the circumstances under which stolen federal bonds can be recovered, notwithstanding Parnell's argument that "the value of bonds to the first purchaser and hence their salability by the Government would be materially affected." Brief for Respondent Parnell in *Bank of America Nat'l Trust & Sav. Assn.* v. *Parnell*, O. T. 1956, No. 21, pp. 10–11. As in each of the cases declining to extend the traditional reach of federal law of contracts beyond the rights and duties of the *Federal Government*, "any federal interest in the outcome of the question before us 'is far too speculative, far too remote a possibility to justify the application of federal law to transactions essentially of local concern.'" *Miree*, *supra*, at 32–33, quoting *Parnell*, 352 U. S., at 33–34.

B

Our "uniquely federal interest" in the tort liability of affiliates of the Federal Government is equally narrow. The immunity we have recognized has extended no further than a subset of "officials of the Federal Government" and has covered only "discretionary" functions within the scope of their legal authority. See, *e. g.*, *Westfall* v. *Erwin*, 484 U. S. 292 (1988); *Howard* v. *Lyons*, 360 U. S. 593 (1959); *Barr* v. *Matteo*, 360 U. S. 564, 571 (1959) (plurality); *Yaselli* v. *Goff*, 12 F. 2d 396 (CA2 1926), aff'd, 275 U. S. 503 (1927) *(per curiam)*; *Spalding* v. *Vilas*, 161 U. S. 483 (1896). Never be-

fore have we so much as intimated that the immunity (or the "uniquely federal interest" that justifies it) might extend beyond that narrow class to cover also nongovernment employees whose authority to act is independent of any source of federal law and that are as far removed from the "functioning of the Federal Government" as is a Government contractor, *Howard*, *supra*, at 597.

The historical narrowness of the federal interest and the immunity is hardly accidental. A federal officer exercises statutory authority, which not only provides the necessary basis for the immunity in positive law, but also permits us confidently to presume that interference with the exercise of discretion undermines congressional will. In contrast, a Government contractor acts independently of any congressional enactment. Thus, immunity for a contractor lacks both the positive law basis and the presumption that it furthers congressional will.

Moreover, even within the category of congressionally authorized tasks, we have deliberately restricted the scope of immunity to circumstances in which "the contributions of immunity to effective government in particular contexts outweigh the perhaps recurring harm to individual citizens," *Doe* v. *McMillan*, 412 U. S. 306, 320 (1973); see *Barr*, *supra*, at 572–573, because immunity "contravenes the basic tenet that individuals be held accountable for their wrongful conduct," *Westfall*, *supra*, at 295. The extension of immunity to Government contractors skews the balance we have historically struck. On the one hand, whatever marginal effect contractor immunity might have on the "effective administration of policies of government," its "harm to individual citizens" is more severe than in the Government-employee context. Our observation that "there are . . . other sanctions than civil tort suits available to deter the executive official who may be prone to exercise his functions in an unworthy and irresponsible manner," *Barr*, 360 U. S., at 576; see also *id.*, at 571, offers little deterrence to the Government contractor. On the other hand, a grant of immunity to Gov-

ernment contractors could not advance "the fearless, vigorous, and effective administration of policies of government" nearly as much as does the current immunity for Government employees. *Ibid.* In the first place, the threat of a tort suit is less likely to influence the conduct of an industrial giant than that of a lone civil servant, particularly since the work of a civil servant is significantly less profitable, and significantly more likely to be the subject of a vindictive lawsuit. In fact, were we to take seriously the Court's assertion that contractors pass their costs—including presumably litigation costs—through, "substantially if not totally, to the United States," *ante*, at 511, the threat of a tort suit should have only marginal impact on the conduct of Government contractors. More importantly, inhibition of the Government official who actually sets Government policy presents a greater threat to the "administration of policies of government," than does inhibition of a private contractor, whose role is devoted largely to assessing the technological feasibility and cost of satisfying the Government's predetermined needs. Similarly, unlike tort suits against Government officials, tort suits against Government contractors would rarely "consume time and energies" that "would otherwise be devoted to governmental service." 360 U. S., at 571.

In short, because the essential justifications for official immunity do not support an extension to the Government contractor, it is no surprise that we have never extended it that far.

C

Yearsley v. *W. A. Ross Construction Co.*, 309 U. S. 18 (1940), the sole case cited by the Court immunizing a Government contractor, is a slender reed on which to base so drastic a departure from precedent. In *Yearsley* we barred the suit of landowners against a private Government contractor alleging that its construction of a dam eroded their land without just compensation in violation of the Takings Clause of the Fifth Amendment. We relied in part on the observation that the plaintiffs failed to state a Fifth Amendment claim

(since just compensation had never been requested, much less denied) and at any rate the cause of action lay against the Government, not the contractor. See *id.*, at 21 ("[T]he Government has impliedly promised to pay [the plaintiffs] compensation and has afforded a remedy for its recovery by a suit in the Court of Claims") (citations omitted). It is therefore unlikely that the Court intended *Yearsley* to extend anywhere beyond the takings context, and we have never applied it elsewhere.

Even if *Yearsley* were applicable beyond the unique context in which it arose, it would have little relevance here. The contractor's work "was done pursuant to a contract with the United States Government, and under the direction of the Secretary of War and the supervision of the Chief of Engineers of the United States, . . . as authorized by an Act of Congress." *Id.*, at 19. See also *W. A. Ross Construction Co.* v. *Yearsley*, 103 F. 2d 589, 591 (CA8 1939) (undisputed allegation that contractor implemented "stabilized bank lines as set and defined by the Government Engineers in charge of this work for the Government"). In other words, unlike respondent here, the contractor in *Yearsley* was following, not formulating, the Government's specifications, and (so far as is relevant here) followed them correctly. Had respondent merely manufactured the CH–53D helicopter, following minutely the Government's own in-house specifications, it would be analogous to the contractor in *Yearsley*, although still not analytically identical since *Yearsley* depended upon an actual agency relationship with the Government, see 309 U. S., at 22 ("The action of the agent is 'the act of the government'") (citation omitted), which plainly was never established here. See, *e. g.*, *Bynum* v. *FMC Corp.*, 770 F. 2d 556, 564 (CA5 1985). Cf. *United States* v. *New Mexico*, 455 U. S. 720, 735 (1982). But respondent's participation in the helicopter's design distinguishes this case from *Yearsley*, which has never been read to immunize the discretionary acts of those who perform service contracts for the Government.

III

In a valiant attempt to bridge the analytical canyon between what *Yearsley* said and what the Court wishes it had said, the Court invokes the discretionary function exception of the Federal Tort Claims Act (FTCA), 28 U. S. C. § 2680(a). The Court does not suggest that the exception has any direct bearing here, for petitioner has sued a private manufacturer (not the Federal Government) under Virginia law (not the FTCA). Perhaps that is why respondent has three times disavowed any reliance on the discretionary function exception, even after coaching by the Court,[4] as has the Government.[5]

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[4] "QUESTION: [Would it be] a proper judicial function to craft the contours of the military contractor defense . . . even if there were no discretionary function exemption in the Federal Tort Claims Act?

"MR. LACOVARA: I think, yes. . . . [I]t ought not to make a difference to the contractor, or to the courts, I would submit, whether or not the Government has a discretionary function exception under the Federal Tort Claims Act. . . .

"QUESTION: I think your position would be the same if Congress had never waived its sovereign immunity in the Federal Tort Claims Act. . . .

"MR. LACOVARA: That's correct. . . .

"QUESTION: Now wait. I really don't understand that. It seems to me you can make the argument that there should be preemption if Congress wanted it, but how are we to perceive that's what Congress wanted if in the Tort Claims Act, Congress had said the Government itself should be liable for an ill designed helicopter? Why would we have any reason to think that Congress wanted to preempt liability of a private contractor for an ill designed helicopter?

. . . . . .

"QUESTION: . . . [Y]our preemption argument, I want to be sure I understand it—does not depend at all on the Federal Tort Claims Act, as I understand it. . . .

"MR. LACOVARA: That's correct." Tr. of Oral Arg. 33–35 (reargument Apr. 27, 1988).

[5] "QUESTION: Does the Government's position depend at all on the discretionary function exemption in the Federal Tort Claims Act?

"MR. AYER: Well, that's a hard question to answer. . . . I think my answer to you is, no, ultimately it should not." *Id.*, at 40–41.

Notwithstanding these disclaimers, the Court invokes the exception, reasoning that federal common law must immunize Government contractors from state tort law to prevent erosion of the discretionary function exception's *policy* of foreclosing judicial "'second-guessing'" of discretionary governmental decisions. *Ante*, at 511, quoting *United States* v. *Varig Airlines*, 467 U. S. 797, 814 (1984). The erosion the Court fears apparently is rooted not in a concern that suits against Government contractors will prevent them from designing, or the Government from commissioning the design of, precisely the product the Government wants, but in the concern that such suits might preclude the Government from purchasing the desired product at the price it wants: "The financial burden of judgments against the contractors," the Court fears, "would ultimately be passed through, substantially if not totally, to the United States itself." *Ante*, at 511.

Even granting the Court's factual premise, which is by no means self-evident, the Court cites no authority for the proposition that burdens imposed on Government contractors, but passed on to the Government, burden the Government in a way that justifies extension of its immunity. However substantial such indirect burdens may be, we have held in other contexts that they are legally irrelevant. See, *e. g.*, *South Carolina* v. *Baker*, 485 U. S. 505, 521 (1988) (our cases have "completely foreclosed any claim that the nondiscriminatory imposition of costs on private entities that pass them on to . . . the Federal Government unconstitutionally burdens . . . federal functions").

Moreover, the statutory basis on which the Court's rule of federal common law totters is more unstable than any we have ever adopted. In the first place, we rejected an analytically similar attempt to construct federal common law out of the FTCA when we held that the Government's waiver

of sovereign immunity for the torts of its employees does not give the Government an implied right of indemnity from them, even though the "[t]he financial burden placed on the United States by the Tort Claims Act [could conceivably be] so great that government employees should be required to carry part of the burden." *United States* v. *Gilman*, 347 U. S. 507, 510 (1954). So too here, the FTCA's retention of sovereign immunity for the Government's discretionary acts does not imply a defense for the benefit of contractors who participate in those acts, even though they might pass on the financial burden to the United States. In either case, the most that can be said is that the position "asserted, though the product of a law Congress passed, is a matter on which Congress has not taken a position." *Id.*, at 511 (footnote omitted).

Here, even that much is an overstatement, for the Government's immunity for discretionary functions is not even "a product of" the FTCA. Before Congress enacted the FTCA (when sovereign immunity barred any tort suit against the Federal Government) we perceived no need for a rule of federal common law to reinforce the Government's immunity by shielding also parties who might contractually pass costs on to it. Nor did we (or any other court of which I am aware) identify a special category of "discretionary" functions for which sovereign immunity was so crucial that a Government contractor who exercised discretion should share the Government's immunity from state tort law.[6]

Now, as before the FTCA's enactment, the Federal Government is immune from "[a]ny claim . . . based upon the exercise or performance [of] a discretionary function," including presumably any claim that petitioner might have brought against the Federal Government based upon respondent's negligent design of the helicopter in which Lt. Boyle died.

[6] Some States, of course, would not have permitted a stranger to the contract to bring such a tort suit at all, but no one suggested that this rule of state tort law was compelled by federal law.

There is no more reason for federal common law to shield contractors now that the Government is liable for some torts than there was when the Government was liable for none. The discretionary function exception does not support an immunity for the discretionary acts of Government *contractors* any more than the exception for "[a]ny claim [against the Government] arising out of assault," §2680(h), supports a personal immunity for Government employees who commit assaults. Cf. *Sheridan* v. *United States*, *ante*, at 400. In short, while the Court purports to divine whether Congress would object to this suit, it inexplicably begins and ends its sortilege with an exception to a statute that is itself inapplicable and whose repeal would leave unchanged every relationship remotely relevant to the accident underlying this suit.

Far more indicative of Congress' views on the subject is the wrongful-death cause of action that Congress itself has provided under the Death on the High Seas Act (DOHSA), Act of Mar. 30, 1920, ch. 111, §1 *et seq.*, 41 Stat. 537, codified at 46 U. S. C. App. §761 *et seq.* (1982 ed., Supp. IV)—a cause of action that could have been asserted against United Technologies had Lt. Boyle's helicopter crashed a mere three miles further off the coast of Virginia Beach. It is beyond me how a state-law tort suit against the designer of a military helicopter could be said to present any conflict, much less a "'significant conflict,'" with "federal interests . . . in the context of Government procurement," *ante*, at 511, when federal law itself would provide a tort suit, but no (at least no explicit) Government-contractor defense,[7] against the same

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[7] But cf. *Tozer* v. *LTV Corp.*, 792 F. 2d 403 (CA4 1986) (applying defense in DOHSA case), cert. pending, No. 86–674; *Shaw* v. *Grumman Aerospace Corp.*, 778 F. 2d 736 (CA11 1985) (same), cert. pending, No. 85–1529; *Koutsoubos* v. *Boeing Vertol, Division of Boeing Co.*, 755 F. 2d 352 (CA3) (same), cert. denied, 474 U. S. 821 (1985); *McKay* v. *Rockwell Int'l Corp.*, 704 F. 2d 444 (CA9 1983) (same), cert. denied, 464 U. S. 1043 (1984).

designer for an accident involving the same equipment. See Pet. for Cert. in *Sikorsky Aircraft Division, United Technologies Corp.* v. *Kloss*, O. T. 1987, No. 87–1633, pp. 3–6 (trial court holds that family of marine can bring a wrongful-death cause of action under the DOHSA against United Technologies for the negligent design of a United States Marine Corps CH–53D helicopter in which he was killed when it crashed 21 miles offshore), cert. denied, 486 U. S. 1008 (1988).

IV

At bottom, the Court's analysis is premised on the proposition that any tort liability indirectly absorbed by the Government so burdens governmental functions as to compel us to act when Congress has not. That proposition is by no means uncontroversial. The tort system is premised on the assumption that the imposition of liability encourages actors to prevent any injury whose expected cost exceeds the cost of prevention. If the system is working as it should, Government contractors will design equipment to avoid certain injuries (like the deaths of soldiers or Government employees), which would be certain to burden the Government. The Court therefore has no basis for its assumption that tort liability will result in a net burden on the Government (let alone a clearly excessive net burden) rather than a net gain.

Perhaps tort liability is an inefficient means of ensuring the quality of design efforts, but "[w]hatever the merits of the policy" the Court wishes to implement, "its conversion into law is a proper subject for congressional action, not for any creative power of ours." *Standard Oil*, 332 U. S., at 314–315. It is, after all, "Congress, not this Court or the other federal courts, [that] is the custodian of the national purse. By the same token [Congress] is the primary and most often the exclusive arbiter of federal fiscal affairs. And these comprehend, as we have said, securing the treasury or the Government against financial losses *however inflicted* . . . ." *Ibid.* (emphasis added). See also *Gilman*, *supra*,

at 510–512. If Congress shared the Court's assumptions and conclusion it could readily enact "A BILL [t]o place limitations on the civil liability of government contractors to ensure that such liability does not impede the ability of the United States to procure necessary goods and services," H. R. 4765, 99th Cong., 2d Sess. (1986); see also S. 2441, 99th Cong., 2d Sess. (1986). It has not.

Were I a legislator, I would probably vote against any law absolving multibillion dollar private enterprises from answering for their tragic mistakes, at least if that law were justified by no more than the unsupported speculation that their liability might ultimately burden the United States Treasury. Some of my colleagues here would evidently vote otherwise (as they have here), but that should not matter here. We are judges not legislators, and the vote is not ours to cast.

I respectfully dissent.

JUSTICE STEVENS, dissenting.

When judges are asked to embark on a lawmaking venture, I believe they should carefully consider whether they, or a legislative body, are better equipped to perform the task at hand. There are instances of so-called interstitial lawmaking that inevitably become part of the judicial process.[1] But when we are asked to create an entirely new doctrine—to answer "questions of policy on which Congress has not spoken," *United States* v. *Gilman*, 347 U. S. 507, 511 (1954)—we have a special duty to identify the proper decisionmaker before trying to make the proper decision.

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[1] "I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions. A common-law judge could not say I think the doctrine of consideration a bit of historical nonsense and shall not enforce it in my court. No more could a judge exercising the limited jurisdiction of admiralty say I think well of the common-law rules of master and servant and propose to introduce them here *en bloc*." *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, 221 (1917) (Holmes, J., dissenting).

When the novel question of policy involves a balancing of the conflicting interests in the efficient operation of a massive governmental program and the protection of the rights of the individual—whether in the social welfare context, the civil service context, or the military procurement context—I feel very deeply that we should defer to the expertise of the Congress. That is the central message of the unanimous decision in *Bush* v. *Lucas*, 462 U. S. 367 (1983);[2] that is why I joined the majority in *Schweiker* v. *Chilicky*, *ante*, p. 412,[3] a case decided only three days ago; and that is why I am so distressed by the majority's decision today. For in this case, as in *United States* v. *Gilman*, *supra:* "The selection of that policy which is most advantageous to the whole involves a host of considerations that must be weighed and appraised. That function is more appropriately for those who write the laws, rather than for those who interpret them." *Id.*, at 511–513.

I respectfully dissent.

[2] "[W]e decline to create a new substantive legal liability without legislative aid and as at the common law, because we are convinced that Congress is in a better position to decide whether or not the public interest would be served by creating it." 462 U. S., at 390 (internal quotation omitted).

[3] "Congressional competence at 'balancing governmental efficiency and the rights of [individuals],' *Bush*, 462 U. S., at 389, is no more questionable in the social welfare context than it is in the civil service context. Cf. *Forrester* v. *White*, 484 U. S. 219, 223–224 (1988)." *Ante*, at 425.

MURRAY *v.* UNITED STATES

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

No. 86–995. Argued December 8, 1987—Decided June 27, 1988*

While surveilling petitioner Murray and others suspected of illegal drug activities, federal agents observed both petitioners driving vehicles into, and later out of, a warehouse, and, upon petitioners' exit, saw that the warehouse contained a tractor-trailer rig bearing a long container. Petitioners later turned over their vehicles to other drivers, who were in turn followed and ultimately arrested, and the vehicles were lawfully seized and found to contain marijuana. After receiving this information, several agents forced their way into the warehouse and observed in plain view numerous burlap-wrapped bales. The agents left without disturbing the bales and did not return until they had obtained a warrant to search the warehouse. In applying for the warrant, they did not mention the prior entry or include any recitations of their observations made during that entry. Upon issuance of the warrant, they reentered the warehouse and seized 270 bales of marijuana and other evidence of crime. The District Court denied petitioners' pretrial motion to suppress the evidence, rejecting their arguments that the warrant was invalid because the agents did not inform the Magistrate about their prior warrantless entry, and that the warrant was tainted by that entry. Petitioners were subsequently convicted of conspiracy to possess and distribute illegal drugs. The Court of Appeals affirmed, assuming for purposes of its decision on the suppression question that the first entry into the warehouse was unlawful.

Held: The Fourth Amendment does not require the suppression of evidence initially discovered during police officers' illegal entry of private premises, if that evidence is also discovered during a later search pursuant to a valid warrant that is wholly independent of the initial illegal entry. Pp. 536–544.

(a) The "independent source" doctrine permits the introduction of evidence initially discovered during, or as a consequence of, an unlawful search, but later obtained independently from lawful activities untainted by the initial illegality. *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385. There is no merit to petitioners' contention that allowing the

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*Together with No. 86–1016, *Carter* v. *United States*, also on certiorari to the same court.

doctrine to apply to evidence initially discovered during an illegal search, rather than limiting it to evidence first obtained during a later lawful search, will encourage police routinely to enter premises without a warrant. Pp. 536–541.

(b) Although the federal agents' knowledge that marijuana was in the warehouse was assuredly acquired at the time of the unlawful entry, it was also acquired at the time of entry pursuant to the warrant, and if that later acquisition was not the result of the earlier entry, the independent source doctrine allows the admission of testimony as to that knowledge. This same analysis applies to the tangible evidence, the bales of marijuana. *United States* v. *Silvestri*, 787 F. 2d 736 (CA1), is unpersuasive insofar as it distinguishes between tainted intangible and tangible evidence. The ultimate question is whether the search pursuant to warrant was in fact a genuinely independent source of the information and tangible evidence at issue. This would not have been the case if the agents' decision to seek the warrant was prompted by what they had seen during the initial entry or if information obtained during that entry was presented to the Magistrate and affected his decision to issue the warrant. Because the District Court did not explicitly find that the agents would have sought a warrant if they had not earlier entered the warehouse, the cases are remanded for a determination whether the warrant-authorized search of the warehouse was an independent source in the sense herein described. Pp. 541–544.

803 F. 2d 20, vacated and remanded.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE and BLACKMUN, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which STEVENS and O'CONNOR, JJ., joined, *post*, p. 544. STEVENS, J., filed a dissenting opinion, *post*, p. 551. BRENNAN and KENNEDY, JJ., took no part in the consideration or decision of the cases.

A. Raymond Randolph argued the cause for petitioners in both cases. With him on the briefs was *Susan L. Launer*.

Roy T. Englert, Jr., argued the cause for the United States. With him on the briefs were *Solicitor General Fried, Assistant Attorney General Weld, Deputy Solicitor General Bryson*, and *Patty Merkamp Stemler*.†

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†*Larry W. Yackle, John A. Powell, David B. Goldstein*, and *John Reinstein* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging reversal in No. 86–995.

JUSTICE SCALIA delivered the opinion of the Court.

In *Segura* v. *United States*, 468 U. S. 796 (1984), we held that police officers' illegal entry upon private premises did not require suppression of evidence subsequently discovered at those premises when executing a search warrant obtained on the basis of information wholly unconnected with the initial entry. In these consolidated cases we are faced with the question whether, again assuming evidence obtained pursuant to an independently obtained search warrant, the portion of such evidence that had been observed in plain view at the time of a prior illegal entry must be suppressed.

I

Both cases arise out of the conviction of petitioner Michael F. Murray, petitioner James D. Carter, and others for conspiracy to possess and distribute illegal drugs. Insofar as relevant for our purposes, the facts are as follows: Based on information received from informants, federal law enforcement agents had been surveilling petitioner Murray and several of his co-conspirators. At about 1:45 p.m. on April 6, 1983, they observed Murray drive a truck and Carter drive a green camper, into a warehouse in South Boston. When the petitioners drove the vehicles out about 20 minutes later, the surveilling agents saw within the warehouse two individuals and a tractor-trailer rig bearing a long, dark container. Murray and Carter later turned over the truck and camper to other drivers, who were in turn followed and ultimately arrested, and the vehicles lawfully seized. Both vehicles were found to contain marijuana.

After receiving this information, several of the agents converged on the South Boston warehouse and forced entry. They found the warehouse unoccupied, but observed in plain view numerous burlap-wrapped bales that were later found to contain marijuana. They left without disturbing the bales, kept the warehouse under surveillance, and did not reenter it until they had a search warrant. In applying for

the warrant, the agents did not mention the prior entry, and did not rely on any observations made during that entry. When the warrant was issued—at 10:40 p.m., approximately eight hours after the initial entry—the agents immediately reentered the warehouse and seized 270 bales of marijuana and notebooks listing customers for whom the bales were destined.

Before trial, petitioners moved to suppress the evidence found in the warehouse. The District Court denied the motion, rejecting petitioners' arguments that the warrant was invalid because the agents did not inform the Magistrate about their prior warrantless entry, and that the warrant was tainted by that entry. *United States* v. *Carter*, No. 83–102–S (Mass., Dec. 23, 1983), App. to Pet. for Cert. 44a–45a. The First Circuit affirmed, assuming for purposes of its decision that the first entry into the warehouse was unlawful. *United States* v. *Moscatiello*, 771 F. 2d 589 (1985). Murray and Carter then separately filed petitions for certiorari, which we granted,[1] 480 U. S. 916 (1987), and have consolidated here.

II

The exclusionary rule prohibits introduction into evidence of tangible materials seized during an unlawful search, *Weeks* v. *United States*, 232 U. S. 383 (1914), and of testimony concerning knowledge acquired during an unlawful search, *Silverman* v. *United States*, 365 U. S. 505 (1961). Beyond that, the exclusionary rule also prohibits the introduction of derivative evidence, both tangible and testimonial, that is

[1] The original petitions raised both the present Fourth Amendment claim and a Speedy Trial Act claim. We granted the petitions, vacated the judgment below, and remanded for reconsideration of the Speedy Trial Act issue in light of *Henderson* v. *United States*, 476 U. S. 321 (1986). *Carter* v. *United States* and *Murray* v. *United States*, 476 U. S. 1138 (1986). On remand, the Court of Appeals again rejected the Speedy Trial Act claim and did not reexamine its prior ruling on the Fourth Amendment question. 803 F. 2d 20 (1986). Petitioners again sought writs of certiorari, which we granted limited to the Fourth Amendment question.

the product of the primary evidence, or that is otherwise acquired as an indirect result of the unlawful search, up to the point at which the connection with the unlawful search becomes "so attentuated as to dissipate the taint," *Nardone* v. *United States*, 308 U. S. 338, 341 (1939). See *Wong Sun* v. *United States*, 371 U. S. 471, 484–485 (1963).

Almost simultaneously with our development of the exclusionary rule, in the first quarter of this century, we also announced what has come to be known as the "independent source" doctrine. See *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385, 392 (1920). That doctrine, which has been applied to evidence acquired not only through Fourth Amendment violations but also through Fifth and Sixth Amendment violations, has recently been described as follows:

> "[T]he interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a *worse*, position that they would have been in if no police error or misconduct had occurred. . . . When the challenged evidence has an independent source, exclusion of such evidence would put the police in a worse position than they would have been in absent any error or violation." *Nix* v. *Williams*, 467 U. S. 431, 443 (1984)

The dispute here is over the scope of this doctrine. Petitioners contend that it applies only to evidence obtained for the first time during an independent lawful search. The Government argues that it applies also to evidence initially discovered during, or as a consequence of, an unlawful search, but later obtained independently from activities untainted by the initial illegality. We think the Government's view has better support in both precedent and policy.

Our cases have used the concept of "independent source" in a more general and a more specific sense. The more general sense identifies *all* evidence acquired in a fashion untainted

by the illegal evidence-gathering activity. Thus, where an unlawful entry has given investigators knowledge of facts x and y, but fact z has been learned by other means, fact z can be said to be admissible because derived from an "independent source." This is how we used the term in *Segura* v. *United States*, 468 U. S. 796 (1984). In that case, agents unlawfully entered the defendant's apartment and remained there until a search warrant was obtained. The admissibility of what they discovered while waiting in the apartment was not before us, *id.*, at 802–803, n. 4, but we held that the evidence found for the first time during the execution of the valid and untainted search warrant was admissible because it was discovered pursuant to an "independent source," *id.*, at 813–814. See also *United States* v. *Wade*, 388 U. S. 218, 240–242 (1967); *Costello* v. *United States*, 365 U. S. 265, 280 (1961); *Nardone* v. *United States*, *supra*, at 341.

The original use of the term, however, and its more important use for purposes of these cases, was more specific. It was originally applied in the exclusionary rule context, by Justice Holmes, with reference to that particular category of evidence acquired by an untainted search *which is identical to the evidence unlawfully acquired*—that is, in the example just given, to knowledge of facts x and y derived from an independent source:

> "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others." *Silverthorne Lumber*, *supra*, at 392.

As the First Circuit has observed, "[i]n the classic independent source situation, information which is received through an illegal source is considered to be cleanly obtained when

it arrives through an independent source." *United States* v. *Silvestri*, 787 F. 2d 736, 739 (1986). We recently assumed this application of the independent source doctrine (in the Sixth Amendment context) in *Nix* v. *Williams*, *supra*. There incriminating statements obtained in violation of the defendant's right to counsel had led the police to the victim's body. The body had not in fact been found through an independent source as well, and so the independent source doctrine was not itself applicable. We held, however, that evidence concerning the body was nonetheless admissible because a search had been under way which would have discovered the body, had it not been called off because of the discovery produced by the unlawfully obtained statements. *Id.*, at 448–450. This "inevitable discovery" doctrine obviously assumes the validity of the independent source doctrine as applied to evidence initially acquired unlawfully. It would make no sense to admit the evidence because the independent search, had it not been aborted, would have found the body, but to exclude the evidence if the search had continued and had in fact found the body. The inevitable discovery doctrine, with its distinct requirements, is in reality an extrapolation from the independent source doctrine: *Since* the tainted evidence would be admissible if in fact discovered through an independent source, it should be admissible if it inevitably would have been discovered.

Petitioners' asserted policy basis for excluding evidence which is initially discovered during an illegal search, but is subsequently acquired through an independent and lawful source, is that a contrary rule will remove all deterrence to, and indeed positively encourage, unlawful police searches. As petitioners see the incentives, law enforcement officers will routinely enter without a warrant to make sure that what they expect to be on the premises is in fact there. If it is not, they will have spared themselves the time and trouble of getting a warrant; if it is, they can get the warrant and use the evidence despite the unlawful entry. Brief for Peti-

tioners 42. We see the incentives differently. An officer with probable cause sufficient to obtain a search warrant would be foolish to enter the premises first in an unlawful manner. By doing so, he would risk suppression of all evidence on the premises, both seen and unseen, since his action would add to the normal burden of convincing a magistrate that there is probable cause the much more onerous burden of convincing a trial court that no information gained from the illegal entry affected either the law enforcement officers' decision to seek a warrant or the magistrate's decision to grant it. See Part III, *infra*. Nor would the officer *without* sufficient probable cause to obtain a search warrant have any added incentive to conduct an unlawful entry, since whatever he finds cannot be used to establish probable cause before a magistrate.[2]

It is possible to read petitioners' briefs as asserting the more narrow position that the "independent source" doctrine does apply to independent acquisition of evidence previously

[2] JUSTICE MARSHALL argues, in effect, that where the police cannot point to some historically verifiable fact demonstrating that the subsequent search pursuant to a warrant was wholly unaffected by the prior illegal search—*e. g.*, that they had already sought the warrant before entering the premises—we should adopt a *per se* rule of inadmissibilty. See *post*, at 549. We do not believe that such a prophylatic exception to the independent source rule is necessary. To say that a district court must be satisfied that a warrant would have been sought without the illegal entry is not to give dispositive effect to police officers' assurances on the point. Where the facts render those assurances implausible, the independent source doctrine will not apply.

We might note that there is no basis for pointing to the present cases as an example of a "search first, warrant later" mentality. The District Court found that the agents entered the warehouse "in an effort to apprehend any participants who might have remained inside and to guard against the destruction of possibly critical evidence." *United States* v. *Carter*, No. 83–102–S (Mass., Dec. 23, 1983), App. to Pet. for Cert. 42a. While they may have misjudged the existence of sufficient exigent circumstances to justify the warrantless entry (the Court of Appeals did not reach that issue and neither do we), there is nothing to suggest that they went in merely to see if there was anything worth getting a warrant for.

derived *indirectly* from the unlawful search, but does not apply to what they call "primary evidence," that is, evidence acquired during the course of the search itself. In addition to finding no support in our precedent, see *Silverthorne Lumber*, 251 U. S., at 392 (referring specifically to evidence seized during an unlawful search), this strange distinction would produce results bearing no relation to the policies of the exclusionary rule. It would mean, for example, that the government's knowledge of the existence and condition of a dead body, knowledge lawfully acquired through independent sources, would have to be excluded if government agents had previously observed the body during an unlawful search of the defendant's apartment; but not if they had observed a notation that the body was buried in a certain location, producing consequential discovery of the corpse.

III

To apply what we have said to the present cases: Knowledge that the marijuana was in the warehouse was assuredly acquired at the time of the unlawful entry. But it was also acquired at the time of entry pursuant to the warrant, and if that later acquisition was not the result of the earlier entry there is no reason why the independent source doctrine should not apply. Invoking the exclusionary rule would put the police (and society) not in the *same* position they would have occupied if no violation occurred, but in a *worse* one. See *Nix* v. *Williams*, 467 U. S., at 443.

We think this is also true with respect to the tangible evidence, the bales of marijuana. It would make no more sense to exclude that than it would to exclude tangible evidence found upon the corpse in *Nix*, if the search in that case had not been abandoned and had in fact come upon the body. The First Circuit has discerned a difference between tangible and intangible evidence that has been tainted, in that objects "once seized cannot be cleanly reseized without returning the objects to private control." *United States* v. *Silvestri*, 787

F. 2d, at 739. It seems to us, however, that reseizure of tangible evidence already seized is no more impossible than rediscovery of intangible evidence already discovered. The independent source doctrine does not rest upon such metaphysical analysis, but upon the policy that, while the government should not profit from its illegal activity, neither should it be placed in a worse position than it would otherwise have occupied. So long as a later, lawful seizure is genuinely independent of an earlier, tainted one (which may well be difficult to establish where the seized goods are kept in the police's possession) there is no reason why the independent source doctrine should not apply.

The ultimate question, therefore, is whether the search pursuant to warrant was in fact a genuinely independent source of the information and tangible evidence at issue here. This would not have been the case if the agents' decision to seek the warrant was prompted by what they had seen during the initial entry,[3] or if information obtained during that entry was presented to the Magistrate and affected his decision to issue the warrant. On this point the Court of Appeals said the following:

> "[W]e can be absolutely certain that the warrantless entry in no way contributed in the slightest either to the issuance of a warrant or to the discovery of the evidence

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[3] JUSTICE MARSHALL argues that "the relevant question [is] whether, even if the initial entry uncovered no evidence, the officers would return immediately with a warrant to conduct a second search." *Post*, at 548, n. 2; see *post*, at 549–550, n. 4. We do not see how this is "relevant" at all. To determine whether the warrant was independent of the illegal entry, one must ask whether it would have been sought even if what actually happened had not occurred—not whether it would have been sought if something else had happened. That is to say, what counts is whether the actual illegal search had any effect in producing the warrant, not whether some hypothetical illegal search would have aborted the warrant. Only that much is needed to assure that what comes before the court is not the product of illegality; to go further than that would be to expand our existing exclusionary rule.

> during the lawful search that occurred pursuant to the warrant.
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> . . . . .
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> "This is as clear a case as can be imagined where the discovery of the contraband in plain view was totally irrelevant to the later securing of a warrant and the successful search that ensued. As there was no causal link whatever between the illegal entry and the discovery of the challenged evidence, we find no error in the court's refusal to suppress." *United States* v. *Moscatiello*, 771 F. 2d, at 603, 604.

Although these statements can be read to provide emphatic support for the Government's position, it is the function of the District Court rather than the Court of Appeals to determine the facts, and we do not think the Court of Appeals' conclusions are supported by adequate findings. The District Court found that the agents did not reveal their warrantless entry to the Magistrate, App. to Pet. for Cert. 43a, and that they did not include in their application for a warrant any recitation of their observations in the warehouse, *id.*, at 44a–45a. It did not, however, explicitly find that the agents would have sought a warrant if they had not earlier entered the warehouse. The Government concedes this in its brief. Brief for United States 17, n. 5. To be sure, the District Court did determine that the purpose of the warrantless entry was in part "to guard against the destruction of possibly critical evidence," App. to Pet. for Cert. 42a, and one could perhaps infer from this that the agents who made the entry already planned to obtain that "critical evidence" through a warrant-authorized search. That inference is not, however, clear enough to justify the conclusion that the District Court's findings amounted to a determination of independent source.

Accordingly, we vacate the judgment and remand these cases to the Court of Appeals with instructions that it remand to the District Court for determination whether the

warrant-authorized search of the warehouse was an independent source of the challenged evidence in the sense we have described.

It is so ordered.

JUSTICE BRENNAN and JUSTICE KENNEDY took no part in the consideration or decision of these cases.

JUSTICE MARSHALL, with whom JUSTICE STEVENS and JUSTICE O'CONNOR join, dissenting.

The Court today holds that the "independent source" exception to the exclusionary rule may justify admitting evidence discovered during an illegal warrantless search that is later "rediscovered" by the same team of investigators during a search pursuant to a warrant obtained immediately after the illegal search. I believe the Court's decision, by failing to provide sufficient guarantees that the subsequent search was, in fact, independent of the illegal search, emasculates the Warrant Clause and undermines the deterrence function of the exclusionary rule. I therefore dissent.

This Court has stated frequently that the exclusionary rule is principally designed to deter violations of the Fourth Amendment. See, *e. g.*, *United States* v. *Leon*, 468 U. S. 897, 906 (1984); *Elkins* v. *United States*, 364 U. S. 206, 217 (1960). By excluding evidence discovered in violation of the Fourth Amendment, the rule "compel[s] respect for the constitutional guaranty in the only effectively available way, by removing the incentive to disregard it." *Id.*, at 217. The Court has crafted exceptions to the exclusionary rule when the purposes of the rule are not furthered by the exclusion. As the Court today recognizes, the independent source exception to the exclusionary rule "allows admission of evidence that has been discovered by means wholly independent of any constitutional violation." *Nix* v. *Williams*, 467 U. S. 431, 443 (1984); see *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385, 392 (1920). The independent source exception, like the inevitable discovery exception, is primarily

based on a practical view that under certain circumstances the beneficial deterrent effect that exclusion will have on future constitutional violations is too slight to justify the social cost of excluding probative evidence from a criminal trial. See *Nix* v. *Williams*, *supra*, at 444–446; cf. *United States* v. *Leon*, *supra*, 906–909. When the seizure of the evidence at issue is "wholly independent of" the constitutional violation, then exclusion arguably will have no effect on a law enforcement officer's incentive to commit an unlawful search.[1]

Given the underlying justification for the independent source exception, any inquiry into the exception's application must keep sight of the practical effect admission will have on the incentives facing law enforcement officers to engage in unlawful conduct. The proper scope of the independent source exception, and guidelines for its application, cannot be divined in a factual vacuum; instead, they must be informed by the nature of the constitutional violation and the deterrent effect of exclusion in particular circumstances. In holding that the independent source exception may apply to the facts of these cases, I believe the Court loses sight of the practical moorings of the independent source exception and creates an affirmative incentive for unconstitutional searches. This holding can find no justification in the purposes underlying both the exclusionary rule and the independent source exception.

The factual setting of the instant case is straightforward. Federal Bureau of Investigation (FBI) and Drug Enforcement Agency (DEA) agents stopped two vehicles after they

[1] The clearest case for the application of the independent source exception is when a wholly separate line of investigation, shielded from information gathered in an illegal search, turns up the same evidence through a separate, lawful search. Under these circumstances, there is little doubt that the lawful search was not connected to the constitutional violation. The exclusion of such evidence would not significantly add to the deterrence facing the law enforcement officers conducting the illegal search, because they would have little reason to anticipate the separate investigation leading to the same evidence.

left a warehouse and discovered bales of marijuana. DEA Supervisor Garibotto and an assistant United States attorney then returned to the warehouse, which had been under surveillance for several hours. After demands that the warehouse door be opened went unanswered, Supervisor Garibotto forced open the door with a tire iron. A number of agents entered the warehouse. No persons were found inside, but the agents saw numerous bales of marijuana in plain view. Supervisor Garibotto then ordered everyone out of the warehouse. Agents did not reenter the warehouse until a warrant was obtained some eight hours later. The warehouse was kept under surveillance during the interim.

It is undisputed that the agents made no effort to obtain a warrant prior to the initial entry. The agents had not begun to prepare a warrant affidavit, and according to FBI Agent Cleary, who supervised the FBI's involvement, they had not even engaged in any discussions of obtaining a warrant. App. 52. The affidavit in support of the warrant obtained after the initial search was prepared by DEA Agent Keaney, who had tactical control over the DEA agents, and who had participated in the initial search of the warehouse. The affidavit did not mention the warrantless search of the warehouse, nor did it cite information obtained from that search. In determining that the challenged evidence was admissible, the Court of Appeals assumed that the initial warrantless entry was not justified by exigent circumstances and that the search therefore violated the Warrant Clause of the Fourth Amendment.

Under the circumstances of these cases, the admission of the evidence "reseized" during the second search severely undermines the deterrence function of the exclusionary rule. Indeed, admission in these cases affirmatively encourages illegal searches. The incentives for such illegal conduct are clear. Obtaining a warrant is inconvenient and time consuming. Even when officers have probable cause to support a warrant application, therefore, they have an incentive first

to determine whether it is worthwhile to obtain a warrant. Probable cause is much less than certainty, and many "confirmatory" searches will result in the discovery that no evidence is present, thus saving the police the time and trouble of getting a warrant. If contraband is discovered, however, the officers may later seek a warrant to shield the evidence from the taint of the illegal search. The police thus know in advance that they have little to lose and much to gain by forgoing the bother of obtaining a warrant and undertaking an illegal search.

The Court, however, "see[s] the incentives differently." *Ante*, at 540. Under the Court's view, today's decision does not provide an incentive for unlawful searches, because the officer undertaking the search would know that "his action would add to the normal burden of convincing a magistrate that there is probable cause the much more onerous burden of convincing a trial court that no information gained from the illegal entry affected either the law enforcement officers' decision to seek a warrant or the magistrate's decision to grant it." *Ibid.* The Court, however, provides no hint of why this risk would actually seem significant to the officers. Under the circumstances of these cases, the officers committing the illegal search have both knowledge and control of the factors central to the trial court's determination. First, it is a simple matter, as was done in these cases, to exclude from the warrant application any information gained from the initial entry so that the magistrate's determination of probable cause is not influenced by the prior illegal search. Second, today's decision makes the application of the independent source exception turn entirely on an evaluation of the officers' intent. It normally will be difficult for the trial court to verify, or the defendant to rebut, an assertion by officers that they always intended to obtain a warrant, regardless of the results of the illegal search.[2] The testimony of the officers

[2] Such an intent-based rule is of dubious value for other reasons as well. First, the intent of the officers prior to the illegal entry often will be of

conducting the illegal search is the only direct evidence of intent, and the defendant will be relegated simply to arguing that the officers should not be believed. Under these circumstances, the litigation risk described by the Court seems hardly a risk at all; it does not significantly dampen the incentive to conduct the initial illegal search.[3]

The strong Fourth Amendment interest in eliminating these incentives for illegal entry should cause this Court to scrutinize closely the application of the independent source exception to evidence obtained under the circumstances of the instant cases; respect for the constitutional guarantee requires a rule that does not undermine the deterrence function of the exclusionary rule. When, as here, the same team of investigators is involved in both the first and second search, there is a significant danger that the "independence" of the

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little significance to the relevant question: whether, even if the initial entry uncovered no evidence, the officers would return immediately with a warrant to conduct a second search. Officers who have probable cause to believe contraband is present genuinely might intend later to obtain a warrant, but after the illegal search uncovers no such contraband, those same officers might decide their time is better spent than to return with a warrant. In addition, such an intent rule will be difficult to apply. The Court fails to describe how a trial court will properly evaluate whether the law enforcement officers fully intended to obtain a warrant regardless of what they discovered during the illegal search. The obvious question is whose intent is relevant? Intentions clearly may differ both among supervisory officers and among officers who initiate the illegal search.

[3] The litigation risk facing these law enforcement officers may be contrasted with the risk faced by the officer in *Nix* v. *Williams*, 467 U. S. 431 (1984). *Nix* involved an application of the inevitable discovery exception to the exclusionary rule. In that case, the Court stressed that an officer "who is faced with the opportunity to obtain evidence illegally will rarely, if ever, be in a position to calculate whether the evidence sought would inevitably be discovered." *Id.*, at 445. Unlike the officer in *Nix*, who had no way of knowing about the progress of a wholly separate line of investigation that already had begun at the time of his unconstitutional conduct, the officers in the instant cases, at least under the Court's analysis, have complete knowledge and control over the factors relevant to the determination of "independence."

source will in fact be illusory, and that the initial search will have affected the decision to obtain a warrant notwithstanding the officers' subsequent assertions to the contrary. It is therefore crucial that the factual premise of the exception—complete independence—be clearly established before the exception can justify admission of the evidence. I believe the Court's reliance on the intent of the law enforcement officers who conducted the warrantless search provides insufficient guarantees that the subsequent legal search was unaffected by the prior illegal search.

To ensure that the source of the evidence is genuinely independent, the basis for a finding that a search was untainted by a prior illegal search must focus, as with the inevitable discovery doctrine, on "demonstrated historical facts capable of ready verification or impeachment." *Nix* v. *Williams*, 467 U. S., at 445, n. 5. In the instant cases, there are no "demonstrated historical facts" capable of supporting a finding that the subsequent warrant search was wholly unaffected by the prior illegal search. The same team of investigators was involved in both searches. The warrant was obtained immediately after the illegal search, and no effort was made to obtain a warrant prior to the discovery of the marijuana during the illegal search. The only evidence available that the warrant search was wholly independent is the testimony of the agents who conducted the illegal search. Under these circumstances, the threat that the subsequent search was tainted by the illegal search is too great to allow for the application of the independent source exception.[4] The Court's

[4] To conclude that the initial search had no effect on the decision to obtain a warrant, and thus that the warrant search was an "independent source" of the challenged evidence, one would have to assume that even if the officers entered the premises and discovered no contraband, they nonetheless would have gone to the Magistrate, sworn that they had probable cause to believe that contraband was in the building, and then returned to conduct another search. Although such a scenario is possible, I believe it is more plausible to believe that the officers would not have chosen to re-

contrary holding lends itself to easy abuse, and offers an incentive to bypass the constitutional requirement that probable cause be assessed by a neutral and detached magistrate before the police invade an individual's privacy.[5]

The decision in *Segura* v. *United States*, 468 U. S. 796 (1984), is not to the contrary. In *Segura*, the Court expressly distinguished between evidence discovered during an initial warrantless entry and evidence that was not discovered until a subsequent legal search. The Court held that under those circumstances, when no information from an illegal search was used in a subsequent warrant application, the warrant provided an independent source for the evidence first uncovered in the second, lawful search.

Segura is readily distinguished from the present cases. The admission of evidence first discovered during a legal search does not significantly lessen the deterrence facing the law enforcement officers contemplating an illegal entry *so long as* the evidence that is seen is excluded. This was clearly the view of Chief Justice Burger, joined by JUSTICE O'CONNOR, when he stated that the Court's ruling would not significantly detract from the deterrent effects of the exclusionary rule because "officers who enter illegally will recognize that whatever evidence they discover as a direct result of the entry may be suppressed, as it was by the Court of Appeals in this case." *Id.*, at 812. As I argue above, extending *Segura* to cover evidence discovered during an initial illegal search will eradicate this remaining deterrence to illegal entry. Moreover, there is less reason to believe that

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turn immediately to the premises with a warrant to search for evidence had they not discovered evidence during the initial search.

[5] Given that the law enforcement officers in these cases made no movement to obtain a warrant prior to the illegal search, these cases do not present the more difficult issue whether, in light of the strong interest in deterring illegal warrantless searches, the evidence discovered during an illegal search ever may be admitted under the independent source exception when the second legal search is conducted by the same investigative team pursuing the same line of investigation.

an initial illegal entry was prompted by a desire to determine whether to bother to get a warrant in the first place, and thus was not wholly independent of the second search, if officers understand that evidence they discover during the illegal search will be excluded even if they subsequently return with a warrant.

In sum, under circumstances as are presented in these cases, when the very law enforcement officers who participate in an illegal search immediately thereafter obtain a warrant to search the same premises, I believe the evidence discovered during the initial illegal entry must be suppressed. Any other result emasculates the Warrant Clause and provides an intolerable incentive for warrantless searches. I respectfully dissent.

JUSTICE STEVENS, dissenting.

While I join JUSTICE MARSHALL's opinion explaining why the majority's extension of the Court's holding in *Segura* v. *United States*, 468 U. S. 796 (1984), "emasculates the Warrant Clause and provides an intolerable incentive for warrantless searches," *ante* this page, I remain convinced that the *Segura* decision itself was unacceptable because, even then, it was obvious that it would "provide government agents with an affirmative incentive to engage in unconstitutional violations of the privacy of the home," 468 U. S., at 817 (dissenting opinion). I fear that the Court has taken another unfortunate step down the path to a system of "law enforcement unfettered by process concerns." *Patterson* v. *Illinois*, *ante*, at 305 (STEVENS, J., dissenting). In due course, I trust it will pause long enough to remember that "the efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land." *Weeks* v. *United States*, 232 U. S. 383, 393–394 (1914).

PIERCE, SECRETARY OF HOUSING AND URBAN DEVELOPMENT *v.* UNDERWOOD ET AL.

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

No. 86–1512. Argued December 1, 1987—Decided June 27, 1988

One of petitioner's predecessors as Secretary of Housing and Urban Development decided not to implement an "operating subsidy" program authorized by federal statute, which was intended to provide payments to owners of Government-subsidized apartment buildings to offset rising utility expenses and property taxes. Various plaintiffs, including respondent members of a nationwide class of Government-subsidized housing tenants, successfully challenged the decision in lawsuits in nine Federal District Courts. After two of the decisions were affirmed by Courts of Appeals, a newly appointed Secretary settled with most of the plaintiffs, including respondents. While the District Court was administering the settlement, Congress passed the Equal Access to Justice Act (EAJA), which authorizes an award of reasonable attorney's fees against the Government "unless the court finds that the position of the United States was substantially justified." Under the EAJA, the amount of fees awarded must "be based upon prevailing market rates for the kind and quality of the services furnished, except that . . . fees shall not be awarded in excess of $75 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee." The court awarded fees to respondents under the EAJA, concluding that the decision not to implement the operating-subsidy program had not been "substantially justified," and basing the amount of the award, which exceeded $1 million, on "special factors" justifying hourly rates in excess of the $75 cap. The Court of Appeals held that the District Court had not abused its discretion in concluding that the Secretary's position was not substantially justified, and that the special factors relied on by the District Court justified exceeding the $75 cap.

Held:

1. In reviewing the District Court's determination that the Secretary's position was not "substantially justified," the Court of Appeals correctly applied an abuse-of-discretion standard, rather than a *de novo* standard of review. Neither a clear statutory prescription nor a historical tradition requires this choice of standards. However, deferential, abuse-of-discretion review is suggested by the EAJA's language, which

requires a fees award "unless *the court finds* that" (rather than simply "unless") the United States' position was substantially justified, and by the statute's structure, which expressly provides an abuse-of-discretion standard for review of agency fee determinations. As a matter of sound judicial administration, the district courts are in a better position than the courts of appeals to decide the substantial justification question. Moreover, that question is multifarious, novel, and little susceptible of useful generalization at this time, and is therefore likely to profit from the experience that an abuse-of-discretion standard will permit to develop. Pp. 557–563.

2. The statutory phrase "substantially justified" means justified in substance or in the main—that is, justified to a degree that could satisfy a reasonable person. This interpretation of the phrase accords with related uses of the term "substantial," and is equivalent to the "reasonable basis both in law and fact" formulation adopted by the vast majority of Courts of Appeals. Respondents' reliance on a House Committee Report pertaining to the 1985 reenactment of the EAJA for the proposition that "substantial justification" means "more than mere reasonableness" is misplaced, since the 1985 Report is not an authoritative interpretation of what the 1980 statute meant or of language drafted by the 1985 Committee, which merely accepted the existing statutory phrase. Pp. 563–568.

3. The Court of Appeals correctly ruled that the District Court did not abuse its discretion in finding that the Government's position was not "substantially justified." Although "objective indicia" can be relevant to establishing "substantial justification," they are inconclusive in this case. The Government's willingness to settle the litigation and the stage in the proceedings at which the merits were decided are not reliable objective indicia here. Neither are views expressed by other courts on the merits, which provide some support on both sides. The Government's arguments on the merits of the underlying issue do not command the conclusion that its position was substantially justified. Pp. 568–571.

4. The District Court abused its discretion in fixing the amount of respondents' attorney's fees, since none of the reasons relied on by the court to increase the reimbursement rate above the statutory maximum was a "special factor" within the EAJA's meaning. Since the "special factor" formulation suggests that Congress thought that $75 an hour is generally sufficient regardless of the prevailing market rate, the "limited availability" factor must refer to attorneys "qualified for the proceedings" in some specialized sense, such as patent lawyers for patent proceedings, rather than just in their general legal competence. Similarly, in order to preserve the $75 cap's effectiveness, other "special factors"

must be such as are not of broad and general application. Thus, most of the factors relied on by the court—the "novelty and difficulty of issues," "the undesirability of the case," "the work and ability of counsel," "the results obtained," and "the contingent nature of the fee"—do not qualify since they are applicable to a broad spectrum of litigation and are little more than routine reasons why market rates are what they are. *Pennsylvania* v. *Delaware Valley Citizens' Council for Clean Air*, 483 U. S. 711, distinguished. Pp. 571–574.

761 F. 2d 1342 and 802 F. 2d 1107, affirmed in part, vacated in part, and remanded.

SCALIA, J., delivered the opinion of the Court, in Part I of which all participating Members joined, in Parts II and IV of which REHNQUIST, C. J., and BRENNAN, MARSHALL, BLACKMUN, and STEVENS, JJ., joined, in Part III of which REHNQUIST, C. J., and WHITE, STEVENS, and O'CONNOR, JJ., joined, and in Part V of which REHNQUIST, C. J., and STEVENS, J., joined, and WHITE and O'CONNOR, JJ., joined except as to the last three lines. BRENNAN, J., filed an opinion concurring in part and concurring in the judgment, in which MARSHALL and BLACKMUN, JJ., joined, *post*, p. 574. WHITE, J., filed an opinion concurring in part and dissenting in part, in which O'CONNOR, J., joined, *post*, p. 583. KENNEDY, J., took no part in the consideration or decision of the case.

Deputy Solicitor General Merrill argued the cause for petitioner. On the briefs were *Solicitor General Fried, Assistant Attorney General Willard, Deputy Solicitor General Lauber, Charles A. Rothfeld, William Kanter, John S. Koppel*, and *Gershon M. Ratner*.

Mary S. Burdick argued the cause for respondents. With her on the brief was *Richard A. Rothschild*.*

JUSTICE SCALIA delivered the opinion of the Court.

Respondents settled their lawsuit against one of petitioner's predecessors as Secretary of Housing and Urban Devel-

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*Briefs of *amici curiae* urging affirmance were filed for Battles Farm Co. et al. by *Gerald Goldman* and *Thomas D. Goldberg;* for the National Organization of Social Security Claimants' Representatives by *Robert E. Rains* and *Nancy G. Shor;* for the San Francisco Lawyers' Committee for Urban Affairs et al. by *Marilyn Kaplan;* for the Small Business Foundation of America, Inc., et al. by *David Overlock Stewart;* and for Vernice Dubose et al. by *Dennis J. O'Brien* and *William H. Clendenen, Jr.*

opment, and were awarded attorney's fees after the court found that the position taken by the Secretary was not "substantially justified" within the meaning of the Equal Access to Justice Act (EAJA), 28 U. S. C. § 2412(d). The court also determined that "special factors" justified calculating the attorney's fees at a rate in excess of the $75-per-hour cap imposed by the statute. We granted certiorari, 481 U. S. 1047 (1987), to resolve a conflict in the Courts of Appeals over important questions concerning the interpretation of the EAJA. Compare *Dubose* v. *Pierce*, 761 F. 2d 913 (CA2 1985), cert. pending, No. 85–516, with 761 F. 2d 1342 (CA9 1985) *(per curiam)*, as amended, 802 F. 2d 1107 (1986) (case below).

I

This dispute arose out of a decision by one of petitioner's predecessors as Secretary not to implement an "operating subsidy" program authorized by § 236 as amended by § 212 of the Housing and Community Development Act of 1974, Pub. L. 93–383, 88 Stat. 633, formerly codified at 12 U. S. C. §§ 1715z–1(f)(3) and (g) (1970 ed., Supp. IV). The program provided payments to owners of Government-subsidized apartment buildings to offset rising utility expenses and property taxes. Various plaintiffs successfully challenged the Secretary's decision in lawsuits filed in nine Federal District Courts. See *Underwood* v. *Pierce*, 547 F. Supp. 256, 257, n. 1 (CD Cal. 1982) (citing cases). While the Secretary was appealing these adverse decisions, respondents, members of a nationwide class of tenants residing in Government-subsidized housing, brought the present action challenging the Secretary's decision in the United States District Court for the District of Columbia. That court also decided the issue against the Secretary, granted summary judgment in favor of respondents, and entered a permanent injunction and writ of mandamus requiring the Secretary to disburse the accumulated operating-subsidy fund. See *Underwood* v. *Hills*, 414 F. Supp. 526, 532 (1976). We stayed the Dis-

trict Court's judgment pending appeal. *Sub nom. Hills* v. *Cooperative Services, Inc.*, 429 U. S. 892 (1976). The Court of Appeals for the Second Circuit similarly stayed, pending appeal, one of the eight other District Court judgments against the Secretary. See *Dubose* v. *Harris*, 82 F. R. D. 582, 584 (Conn. 1979). Two of those other judgments were affirmed by Courts of Appeals, see *Ross* v. *Community Services, Inc.*, 544 F. 2d 514 (CA4 1976), and *Abrams* v. *Hills*, 547 F. 2d 1062 (CA9 1976), vacated *sub nom. Pierce* v. *Ross*, 455 U. S. 1010 (1982), and we consolidated the cases and granted the Secretary's petitions for writs of certiorari to review those decisions, *Harris* v. *Ross*, 431 U. S. 928 (1977). Before any other Court of Appeals reached a decision on the issue, and before we could review the merits, a newly appointed Secretary settled with the plaintiffs in most of the cases. The Secretary agreed to pay into a settlement fund $60 million for distribution to owners of subsidized housing or to tenants whose rents had been increased because subsidies had not been paid. The present case was then transferred to the Central District of California for administration of the settlement.

In 1980, while the settlement was being administered, Congress passed the EAJA, 28 U. S. C. § 2412(d), which as relevant provides:

> "(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses . . . , incurred by that party in any civil action . . . brought by or against the United States . . . , unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.
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> . . . . . .
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> "(2) For the purposes of this subsection—
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> "(A) 'fees and other expense' includes . . . reasonable attorney fees (The amount of fees awarded under this

> subsection shall be based upon prevailing market rates for the kind and quality of the services furnished, except that . . . (ii) attorney fees shall not be awarded in excess of $75 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.)."

The District Court granted respondents' motion for an award of attorney's fees under this statute, concluding that the Secretary's decision not to implement the operating-subsidy program had not been "substantially justified." The court determined that respondents' attorneys had provided 3,304 hours of service and that "special factors" justified applying hourly rates ranging from $80 for work performed in 1976 to $120 for work performed in 1982. This produced a base or "lodestar" figure of $322,700 which the court multiplied by three-and-one-half (again because of the "special factors"), resulting in a total award of $1,129,450.

On appeal, the Court of Appeals for the Ninth Circuit held that the District Court had not abused its discretion in concluding that the Secretary's position was not substantially justified. 761 F. 2d, at 1346. The Court of Appeals also held that the special factors relied on by the District Court justified increasing the hourly rates of the attorneys, but did not justify applying a multiplier to the lodestar amount. It therefore reduced the award to $322,700. *Id.*, at 1347–1348; see 802 F. 2d, at 1107.

We granted the Secretary's petition for certiorari on the questions whether the Government's position was "substantially justified" and whether the courts below properly identified "special factors" justifying an award in excess of the statute's $75-per-hour cap on attorney's fees.

II

We first consider whether the Court of Appeals applied the correct standard when reviewing the District Court's deter-

mination that the Secretary's position was not substantially justified. For purposes of standard of review, decisions by judges are traditionally divided into three categories, denominated questions of law (reviewable *de novo*), questions of fact (reviewable for clear error), and matters of discretion (reviewable for "abuse of discretion"). The Ninth Circuit treated the issue of substantial justification as involving the last of these; other Courts of Appeals have treated it as involving the first. See *Battles Farm Co.* v. *Pierce*, 257 U. S. App. D. C. 6, 11–12, 806 F. 2d 1098, 1103–1104 (1986), cert. pending, No. 86–1661; *Dubose* v. *Pierce*, 761 F. 2d, at 917.

For some few trial court determinations, the question of what is the standard of appellate review is answered by relatively explicit statutory command. See, *e. g.*, 42 U. S. C. § 1988 ("[T]he court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee"). For most others, the answer is provided by a long history of appellate practice. But when, as here, the trial court determination is one for which neither a clear statutory prescription nor a historical tradition exists, it is uncommonly difficult to derive from the pattern of appellate review of other questions an analytical framework that will yield the correct answer.[1] See Rosen-

[1] JUSTICE WHITE suggests, *post*, at 583–585, that since the "substantial justification" question does not involve the establishment of "historical facts," Congress would have expected it to be reviewed *de novo*. We disagree. From the given that the issue is not one of fact, one can confidently conclude that Congress would *not* have expected, on the basis of the case law, that a clearly-erroneous standard of review would be applied, but not that it would have expected review *de novo* rather than review for abuse of discretion. See, *e. g.*, *Piper Aircraft Co.* v. *Reyno*, 454 U. S. 235, 257 (1981) (abuse-of-discretion standard applied to dismissal on *forum non conveniens* grounds); *Gulf Oil Co.* v. *Bernard*, 452 U. S. 89, 103 (1981) (order under Fed. Rule Civ. Proc. 23(d)); *Curtiss-Wright Corp.* v. *General Electric Co.*, 446 U. S. 1, 10–11 (1980) (certification under Fed. Rule Civ. Proc. 54(b)). It is especially common for issues involving what can broadly be labeled "supervision of litigation," which is the sort of issue presented here, to be given abuse-of-discretion review. See, *e. g.*, *Hensley* v. *Eckerhart*, 461 U. S. 424, 437 (1983) (attorney's fees); *National Hockey League* v. *Metropolitan Hockey Club, Inc.*, 427 U. S. 639, 642 (1976) (dis-

berg, Judicial Discretion of the Trial Court, Viewed from Above, 22 Syracuse L. Rev. 635, 638 (1971) (hereinafter Rosenberg). No more today than in the past shall we attempt to discern or to create a comprehensive test; but we are persuaded that significant relevant factors call for an "abuse of discretion" standard in the present case.

We turn first to the language and structure of the governing statute. It provides that attorney's fees shall be awarded "unless *the court finds* that the position of the United States was substantially justified." 28 U. S. C. § 2412(d)(1)(A) (emphasis added). This formulation, as opposed to simply "unless the position of the United States was substantially justified," emphasizes the fact that the determination is for the district court to make, and thus suggests some deference to the district court upon appeal. That inference is not compelled, but certainly available. Moreover, a related provision of the EAJA requires an administrative agency to award attorney's fees to a litigant prevailing in an agency adjudication if the Government's position is not "substantially justified," 5 U. S. C. § 504(a)(1), and specifies that the agency's decision may be reversed only if a reviewing court "finds that the failure to make an award . . . was unsupported by substantial evidence." § 504(c)(2). We doubt that it was the intent of this interlocking scheme that a court of appeals would accord more deference to an agency's determination that its own position was substantially justified than to such a determination by a federal district court. Again, however, the inference of deference is assuredly not compelled.

We recently observed, with regard to the problem of determining whether mixed questions of law and fact are to be treated as questions of law or of fact for purposes of appellate review, that sometimes the decision "has turned on a determination that, as a matter of the sound administration of jus-

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covery sanctions); see generally 1 S. Childress & M. Davis, Standards of Review §§ 4.1–4.20, pp. 228–286 (1986).

tice, one judicial actor is better positioned than another to decide the issue in question." *Miller* v. *Fenton*, 474 U. S. 104, 114 (1985). We think that consideration relevant in the present context as well, and it argues in favor of deferential, abuse-of-discretion review. To begin with, some of the elements that bear upon whether the Government's position "*was* substantially justified" may be known only to the district court. Not infrequently, the question will turn upon not merely what was the law, but what was the evidence regarding the facts. By reason of settlement conferences and other pretrial activities, the district court may have insights not conveyed by the record, into such matters as whether particular evidence was worthy of being relied upon, or whether critical facts could easily have been verified by the Government. Moreover, even where the district judge's full knowledge of the factual setting can be acquired by the appellate court, that acquisition will often come at unusual expense, requiring the court to undertake the unaccustomed task of reviewing the entire record, not just to determine whether there existed the usual minimum support for the merits determination made by the factfinder below, but to determine whether urging of the opposite merits determination was substantially justified.

In some cases, such as the present one, the attorney's fee determination will involve a judgment ultimately based upon evaluation of the purely legal issue governing the litigation. It cannot be assumed, however, that *de novo* review of this will not require the appellate court to invest substantial additional time, since it will in any case have to grapple with the same legal issue on the merits. To the contrary, one would expect that where the Government's case is so feeble as to provide grounds for an EAJA award, there will often be (as there was here) a settlement below, or a failure to appeal from the adverse judgment. Moreover, even if there is a merits appeal, and even if it occurs simultaneously with (or goes to the same panel that entertains) the appeal from the

attorney's fee award, the latter legal question will not be precisely the same as the merits: not what the law now is, but what the Government was substantially justified in believing it to have been. In all the separate-from-the-merits EAJA appeals, the investment of appellate energy will either fail to produce the normal law-clarifying benefits that come from an appellate decision on a question of law, or else will strangely distort the appellate process. The former result will obtain when (because of intervening legal decisions by this Court or by the relevant circuit itself) the law of the circuit is, at the time of the EAJA appeal, quite clear, so that the question of what the Government was substantially justified in believing it to have been is of entirely historical interest. Where, on the other hand, the law of the circuit remains unsettled at the time of the EAJA appeal, a ruling that the Government was not substantially justified in believing it to be thus-and-so would (unless there is some reason to think it has changed since) effectively establish the circuit law in a most peculiar, secondhanded fashion. Moreover, the possibility of the latter occurrence would encourage needless merits appeals by the Government, since it would know that if it does not appeal, but the victorious plaintiff appeals the denial of attorney's fees, its district-court loss on the merits can be converted into a circuit-court loss on the merits, without the opportunity for a circuit-court victory on the merits. All these untoward consequences can be substantially reduced or entirely avoided by adopting an abuse-of-discretion standard of review.

Another factor that we find significant has been described as follows by Professor Rosenberg:

> "One of the 'good' reasons for conferring discretion on the trial judge is the sheer impracticability of formulating a rule of decision for the matter in issue. Many questions that arise in litigation are not amenable to regulation by rule because they involve multifarious, fleet-

ing, special, narrow facts that utterly resist generalization—at least, for the time being.

. . . . .

"The non-amenability of the problem to rule, because of the diffuseness of circumstances, novelty, vagueness, or similar reasons that argue for allowing experience to develop, appears to be a sound reason for conferring discretion on the magistrate. . . . A useful analogue is the course of development under Rule 39(b) of the Federal Rules of Civil Procedure, providing that in spite of a litigant's tardiness (under Rule 38 which specifies a ten-day-from-last-pleading deadline) the trial court 'in its discretion' may order a trial by jury of any or all issues. Over the years, appellate courts have consistently upheld the trial judges in allowing or refusing late-demanded jury trials, but in doing so have laid down two guidelines for exercise of the discretionary power. The products of cumulative experience, these guidelines relate to the justifiability of the tardy litigant's delay and the absence of prejudice to his adversary. Time and experience have allowed the formless problem to take shape, and the contours of a guiding principle to emerge." Rosenberg 662–663.

We think that the question whether the Government's litigating position has been "substantially justified" is precisely such a multifarious and novel question, little susceptible, for the time being at least, of useful generalization, and likely to profit from the experience that an abuse-of-discretion rule will permit to develop. There applies here what we said in connection with our review of Rule 54(b) discretionary certification by district courts: "because the number of possible situations is large, we are reluctant either to fix or sanction narrow guidelines for the district courts to follow." *Curtiss-Wright Corp.* v. *General Electric Co.*, 446 U. S. 1, 10–11 (1980). Application of an abuse-of-discretion standard to the present question will permit that needed flexibility.

It must be acknowledged that militating against the use of that standard in the present case is the substantial amount of the liability produced by the District Judge's decision. If this were the sort of decision that ordinarily has such substantial consequences, one might expect it to be reviewed more intensively. In that regard, however, the present case is not characteristic of EAJA attorney's fee cases. The median award has been less than $3,000. See Annual Report of the Director of the Administrative Office of the U. S. Courts, Fees and Expenses Awarded Under the Equal Access to Justice Act, pp. 99–100, Table 29 (1987) (351 of 387 EAJA awards in fiscal year 1986–1987 were against the Department of Health and Human Services and averaged $2,379). We think the generality rather than the exception must form the basis for our rule.

In sum, although as we acknowledged at the outset our resolution of this issue is not rigorously scientific, we are satisfied that the text of the statute permits, and sound judicial administration counsels, deferential review of a district court's decision regarding attorney's fees under the EAJA. In addition to furthering the goals we have described, it will implement our view that a "request for attorney's fees should not result in a second major litigation." *Hensley* v. *Eckerhart*, 461 U. S. 424, 437 (1983).

III

Before proceeding to consider whether the trial court abused its discretion in this case, we have one more abstract legal issue to resolve: the meaning of the phrase "substantially justified" in 28 U. S. C. § 2412(d)(1)(A). The Court of Appeals, following Ninth Circuit precedent, held that the Government's position was "substantially justified" if it "had a reasonable basis both in law and in fact." 761 F. 2d, at 1346. The source of that formulation is a Committee Report prepared at the time of the original enactment of the EAJA, which commented that "[t]he test of whether the Govern-

ment position is substantially justified is essentially one of reasonableness in law and fact." H. R. Conf. Rep. No. 96–1434, p. 22 (1980). In this petition, the Government urges us to hold that "substantially justified" means that its litigating position must have had "some substance and a fair possibility of success." Brief for Petitioner 16. Respondents, on the other hand, contend that the phrase imports something more than "a simple reasonableness standard," Brief for Respondents 24—though they are somewhat vague as to precisely *what* more, other than "a high standard," and "a strong showing," *id.*, at 28.

In addressing this issue, we make clear at the outset that we do not think it appropriate to substitute for the formula that Congress has adopted any judicially crafted revision of it—whether that be "reasonable basis in both law and fact" or anything else. "Substantially justified" is the test the statute prescribes, and the issue should be framed in those terms. That being said, there is nevertheless an obvious need to elaborate upon the meaning of the phrase. The broad range of interpretations described above is attributable to the fact that the word "substantial" can have two quite different—indeed, almost contrary—connotations. On the one hand, it can mean "[c]onsiderable in amount, value, or the like; large," Webster's New International Dictionary 2514 (2d ed. 1945)—as, for example, in the statement, "He won the election by a substantial majority." On the other hand, it can mean "[t]hat is such in substance or in the main," *ibid.*—as, for example, in the statement, "What he said was substantially true." Depending upon which connotation one selects, "substantially justified" is susceptible of interpretations ranging from the Government's to the respondents'.

We are not, however, dealing with a field of law that provides no guidance in this matter. Judicial review of agency action, the field at issue here, regularly proceeds under the rubric of "substantial evidence" set forth in the Administrative Procedure Act, 5 U. S. C. § 706(2)(E). That phrase

does not mean a large or considerable amount of evidence, but rather "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co.* v. *NLRB*, 305 U. S. 197, 229 (1938). In an area related to the present case in another way, the test for avoiding the imposition of attorney's fees for resisting discovery in district court is whether the resistance was "substantially justified," Fed. Rules Civ. Proc. 37(a)(4) and (b)(2)(E). To our knowledge, that has never been described as meaning "justified to a high degree," but rather has been said to be satisfied if there is a "genuine dispute," Advisory Committee's Notes on 1970 Amendments to Fed. Rule Civ. Proc. 37(a)(4), 28 U. S. C. App., p. 601; see, *e. g.*, *Quaker Chair Corp.* v. *Litton Business Systems, Inc.*, 71 F. R. D. 527, 535 (SDNY 1976), or "if reasonable people could differ as to [the appropriateness of the contested action]," *Reygo Pacific Corp.* v. *Johnston Pump Co.*, 680 F. 2d 647, 649 (CA9 1982); see 8 C. Wright & A. Miller, Federal Practice and Procedure § 2288, p. 790 (1970); *SEC* v. *Musella*, [1984] CCH Fed. Sec. L. Rep. ¶ 91,647, p. 99,282 (SDNY 1984); *Smith* v. *Montgomery County*, 573 F. Supp. 604, 614 (Md. 1983).

We are of the view, therefore, that as between the two commonly used connotations of the word "substantially," the one most naturally conveyed by the phrase before us here is not "justified to a high degree," but rather "justified in substance or in the main"—that is, justified to a degree that could satisfy a reasonable person. That is no different from the "reasonable basis both in law and fact" formulation adopted by the Ninth Circuit and the vast majority of other Courts of Appeals that have addressed this issue. See *United States* v. *Yoffe*, 775 F. 2d 447, 449–450 (CA1 1985); *Dubose* v. *Pierce*, 761 F. 2d, at 917–918; *Citizens Council of Delaware County* v. *Brinegar*, 741 F. 2d 584, 593 (CA3 1984); *Anderson* v. *Heckler*, 756 F. 2d 1011, 1013 (CA4 1985); *Hanover Building Materials, Inc.* v. *Guiffrida*, 748 F. 2d 1011, 1015 (CA5 1984); *Trident Marine Construction, Inc.* v. *Dis-*

trict Engineer, 766 F. 2d 974, 980 (CA6 1985); *Ramos* v. *Haig*, 716 F. 2d 471, 473 (CA7 1983); *Foster* v. *Tourtellotte*, 704 F. 2d 1109, 1112 (CA9 1983) *(per curiam); United States* v. *2,116 Boxes of Boned Beef*, 726 F. 2d 1481, 1486–1487 (CA10), cert. denied *sub nom. Jarboe-Lackey Feedlots, Inc.* v. *United States*, 469 U. S. 825 (1984); *Ashburn* v. *United States*, 740 F. 2d 843, 850 (CA11 1984). To be "substantially justified" means, of course, more than merely undeserving of sanctions for frivolousness; that is assuredly not the standard for Government litigation of which a reasonable person would approve.[2]

Respondents press upon us an excerpt from the House Committee Report pertaining to the 1985 reenactment of the EAJA, which read as follows:

> "Several courts have held correctly that 'substantial justification' means more than merely reasonable. Because in 1980 Congress rejected a standard of 'reasonably justified' in favor of 'substantially justified,' the test must be more than mere reasonableness." H. R. Rep. No. 99–120, p. 9 (1985) (footnote omitted).

If this language is to be controlling upon us, it must be either (1) an authoritative interpretation of what the 1980 statute meant, or (2) an authoritative expression of what the 1985 Congress intended. It cannot, of course, be the former, since it is the function of the courts and not the Legislature, much less a Committee of one House of the Legislature, to say what an enacted statute means. Nor can it reasonably be thought to be the latter—because it is not an explanation

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[2] Contrary to JUSTICE BRENNAN's suggestion, *post*, at 576–577, our analysis does not convert the statutory term "substantially justified" into "reasonably justified." JUSTICE BRENNAN's arguments would have some force if the statutory criterion were "substantially *correct*" rather than "substantially *justified*." But a position can be justified even though it is not correct, and we believe it can be substantially (*i. e.*, for the most part) justified if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact.

of any language that the 1985 Committee drafted, because on its face it accepts the 1980 meaning of the terms as subsisting, and because there is no indication whatever in the text or even the legislative history of the 1985 reenactment that Congress thought it was doing anything insofar as the present issue is concerned except reenacting and making permanent the 1980 legislation. (Quite obviously, reenacting precisely the same language would be a strange way to make a change.) This is not, it should be noted, a situation in which Congress reenacted a statute that had in fact been given a consistent judicial interpretation along the lines that the quoted Committee Report suggested. Such a reenactment, of course, generally includes the settled judicial interpretation. *Lorillard* v. *Pons*, 434 U. S. 575, 580–581 (1978). Here, to the contrary, the almost uniform appellate interpretation (12 Circuits out of 13) *contradicted* the interpretation endorsed in the Committee Report. See *supra*, at 565–566 (citing cases); see also *Foley Construction Co.* v. *United States Army Corps of Engineers*, 716 F. 2d 1202, 1204 (CA8 1983), cert. denied, 466 U. S. 936 (1984); *Broad Avenue Laundry and Tailoring* v. *United States*, 693 F. 2d 1387, 1391 (CA Fed. 1982). Only the District of Columbia Circuit had adopted the position that the Government had to show something "slightly more" than reasonableness. *Spencer* v. *NLRB*, 229 U. S. App. D. C. 225, 244, 712 F. 2d 539, 558 (1983), cert. denied, 466 U. S. 936 (1984). We might add that in addition to being out of accord with the vast body of existing appellate precedent, the 1985 House Report also contradicted, without explanation, the 1980 House Report ("reasonableness in law and fact") from which, as we have noted, the Ninth Circuit drew its formulation in the present case.

Even in the ordinary situation, the 1985 House Report would not suffice to fix the meaning of language which that reporting Committee did not even draft. Much less are we willing to accord it such force in the present case, since only

the clearest indication of congressional command would persuade us to adopt a test so out of accord with prior usage, and so unadministerable, as "more than mere reasonableness." Between the test of reasonableness, and a test such as "clearly and convincingly justified"—which no one, not even respondents, suggests is applicable—there is simply no accepted stopping-place, no ledge that can hold the anchor for steady and consistent judicial behavior.

IV

We reach, at last, the merits of whether the District Court abused its discretion in finding that the Government's position was not "substantially justified." Both parties argue that for purposes of this inquiry courts should rely on "objective indicia" such as the terms of a settlement agreement, the stage in the proceedings at which the merits were decided, and the views of other courts on the merits. This, they suggest, can avoid the time-consuming and possibly inexact process of assessing the strength of the Government's position. While we do not disagree that objective indicia can be relevant, we do not think they provide a conclusive answer, in either direction, for the present case.

Respondents contend that the lack of substantial justification for the Government's position was demonstrated by its willingness to settle the litigation on unfavorable terms. Other factors, however, might explain the settlement equally well—for example, a change in substantive policy instituted by a new administration. The unfavorable terms of a settlement agreement, without inquiry into the reasons for settlement, cannot conclusively establish the weakness of the Government's position. To hold otherwise would not only distort the truth but penalize and thereby discourage useful settlements.

Respondents further contend that the weakness of the Government's position is established by the objective fact that the merits were decided at the pleadings stage. We disagree. At least where, as here, the dispute centers upon

questions of law rather than fact, summary disposition proves only that the district judge was efficient.

Both parties rely upon the objective indicia consisting of the views expressed by other courts on the merits of the Government's position. Obviously, the fact that one other court agreed or disagreed with the Government does not establish whether its position was substantially justified. Conceivably, the Government could take a position that is not substantially justified, yet win; even more likely, it could take a position that is substantially justified, yet lose. Nevertheless, a string of losses can be indicative; and even more so a string of successes. Once again, however, we cannot say that this category of objective indicia is enough to decide the present case. Respondents emphasize that every court to hear the merits (nine District Courts and two Courts of Appeals) rejected the Government's position. The Secretary responds that the stays issued by the Court of Appeals for the Second Circuit and by this Court reflect a view on the merits and objectively establish substantial justification; and that it is "unlikely that [this] Court would have granted the government's petitions [for certiorari in two cases to review this issue] had the Secretary's argument" not been substantial. Brief for Petitioner 25. Respondents reply that neither the stays nor the grants of certiorari are reliable indications of substantial merit. We will not parse these arguments further. Respondents' side of the case has at least sufficient force that we cannot possibly state, on the basis of these objective indications alone, that the District Court abused its discretion in finding no substantial justification.

We turn, then, to the actual merits of the Government's litigating position. The Government had argued that the operating-subsidy program was established in permissive rather than mandatory language: the Secretary is "*authorized* to make, and contract to make" operating-subsidy payments. 12 U. S. C. § 1715z–1(f)(3) (1970 ed., Supp. IV) (emphasis added). This contrasts with the mandatory language Congress used when creating a related housing sub-

sidy program: the Secretary "*shall* make, and contract to make." § 1715z–1(f)(2) (emphasis added). Moreover, the Government argued that its position was supported by the decision in *Pennsylvania* v. *Lynn*, 163 U. S. App. D. C. 288, 501 F. 2d 848 (1974), which held that a program authorized through permissive statutory language could be suspended by the Secretary when he concluded that its implementation would interfere with other housing goals. Finally, the Government contended that because Congress had not authorized sufficient funds to conduct the operating-subsidy program as well as two related subsidy programs, the Secretary had discretion to suspend the operating-subsidy program.

Respondents argued in rebuttal that other statutory language made clear that the operating-subsidy program was mandatory: "[T]here shall be established an initial operating expense level . . . [which] shall be established by the Secretary not later than 180 days after August 22, 1974." 12 U. S. C. §§ 1715z–1(f)(3), 1715z–1(g) (1970 ed., Supp. IV). The "project owner shall . . . pay to the Secretary all rental charges collected in excess of the basic rental charges [and] excess charges shall be credited to a reserve fund to be used by the Secretary to make additional assistance payments." § 1715z–1(g). Furthermore, respondents argued that *Lynn* did not support the Government's position because the Secretary did not contend here, as was the case there, that the operating-subsidy program was inconsistent with national housing policy. They also pointed out that the most direct precedents at the time the Government took its position in the present case were the nine adverse District Court decisions. Finally, respondents argued that the Secretary did not need an additional authorization because the reserve fund from excess rental charges had accumulated tens of millions of dollars which could be used only for operating-subsidy payments.

We cannot say that this description commands the conclusion that the Government's position was substantially justi-

fied. Accordingly, we affirm the Ninth Circuit's holding that the District Judge did not abuse his discretion when he found it was not.

V

The final issue before us is whether the amount of the attorney's fees award was proper. Here it is well established that the abuse-of-discretion standard applies. See *Hensley* v. *Eckerhart*, 461 U. S., at 437 (42 U. S. C. § 1988); *Pennsylvania* v. *Delaware Valley Citizens' Council for Clean Air*, 478 U. S. 546, 560–561 (1986) (42 U. S. C. § 7604(d)); *id.*, at 568 (BLACKMUN, J., concurring in part and dissenting in part).

The EAJA provides that attorney's fees "shall be based upon prevailing market rates for the kind and quality of the services furnished," but "shall not be awarded in excess of $75 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee." 28 U. S. C. § 2412(d)(2)(A)(ii). In allowing fees at a rate in excess of the $75 cap (adjusted for inflation), the District Court relied upon some circumstances that arguably come within the single example of a "special factor" described in the statute, "the limited availability of qualified attorneys for the proceedings involved." We turn first to the meaning of that provision.

If "the limited availability of qualified attorneys for the proceedings involved" meant merely that lawyers skilled and experienced enough to try the case are in short supply, it would effectively eliminate the $75 cap—since the "prevailing market rates for the kind and quality of the services furnished" are obviously *determined* by the relative supply of that kind and quality of services.[3] "Limited availability" so

[3] It is perhaps possible to argue that Congress intended to create a dichotomy between the phrase "the kind and quality of services *furnished*" in the first part of § 2412(d)(2)(A), and the later reference to attorneys "qualified . . . *for the proceedings involved*"—meaning the former to refer to the

interpreted would not be a "special factor," but a factor virtually always present when services with a market rate of more than $75 have been provided. We do not think Congress meant that if the rates for all lawyers in the relevant city—or even in the entire country—come to exceed $75 per hour (adjusted for inflation), then that market-minimum rate will govern instead of the statutory cap. To the contrary, the "special factor" formulation suggests Congress thought that $75 an hour was generally quite enough public reimbursement for lawyers' fees, whatever the local or national market might be. If that is to be so, the exception for "limited availability of qualified attorneys for the proceedings involved" must refer to attorneys "qualified for the proceedings" in some specialized sense, rather than just in their general legal competence. We think it refers to attorneys having some distinctive knowledge or specialized skill needful for the litigation in question—as opposed to an extraordinary level of the general lawyerly knowledge and ability useful in all litigation. Examples of the former would be an identifiable practice specialty such as patent law, or knowledge of foreign law or language. Where such qualifications are necessary and can be obtained only at rates in excess of the $75 cap, reimbursement above that limit is allowed.

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legal services provided (which may have been quite *de luxe*) and the latter to refer to the legal services really needed for the case (which may have been quite run-of-the-mine). Only those *de luxe* services really needed (the argument would run) could be reimbursed at a rate above the $75 cap. The problem with this is that both the provisions define and limit the statutory term "reasonable attorney's fees" in § 2412(d)(2)(A). See *supra*, at 556–557. Since that primary term assuredly embraces the notion that the fees must relate to services of a kind and quality needed for the case, the phrase "prevailing market rates for the kind and quality of services furnished" must in fact refer to the kind and quality of services both furnished and needed. The other reading, besides distorting the text, produces the peculiar result that attorney's fees for services of a needlessly high quality would be reimbursable up to $75 per hour, but not beyond.

For the same reason of the need to preserve the intended effectiveness of the $75 cap, we think the other "special factors" envisioned by the exception must be such as are not of broad and general application. We need not specify what they might be, but they include nothing relied upon by the District Court in this case. The "novelty and difficulty of issues," "the undesirability of the case," the "work and ability of counsel," and "the results obtained," App. to Pet. for Cert. 16a–17a, are factors applicable to a broad spectrum of litigation; they are little more than routine reasons why market rates are what they are. The factor of "customary fees and awards in other cases," *id.*, at 17a, is even worse; it is not even a routine reason for market rates, but rather a description of market rates. It was an abuse of discretion for the District Court to rely on these factors.

The final factor considered by the District Court, "the contingent nature of the fee," is also too generally applicable to be regarded as a "special" reason for exceeding the statutory cap. This issue is quite different from the question of contingent-fee enhancement that we faced last Term, in *Pennsylvania* v. *Delaware Valley Citizens' Council for Clean Air*, 483 U. S. 711 (1987) *(Delaware Valley II)*. The EAJA differs from the sort of statutory scheme at issue there, not only because it contains this "special factor" requirement, but more fundamentally because it is not designed to reimburse reasonable fees without limit. Once the $75 cap is exceeded, neither the client paying a reasonable hourly fee nor the client paying a reasonable contingent fee is fully compensated. Moreover, it is impossible to regard, or to use, the EAJA as a means of fostering contingent-fee practice for nonmonetary claims (or small-dollar claims) in a certain favored category of cases. Unlike the statutes discussed in *Delaware Valley II*, the EAJA subsidy is not directed to a category of litigation that can be identified in advance by the contingent-fee attorney. While it may be possible to base an economically viable contingent-fee practice

upon the acceptance of nonmonetary civil-rights cases (42 U. S. C. § 1988) or Clean Air Act cases (42 U. S. C. § 7604(d)) in which there is fair prospect of victory, it is quite impossible to base such a practice upon the acceptance of nonmonetary cases in which there is fair prospect that the Government's position will not be "substantially justified." Even if a lawyer can assess the strength of the Government's case at the time of initial discussions with the prospective client, the lawyer will rarely be able to assess with any degree of certainty the likelihood that the Government's position will be deemed *so* unreasonable as to produce an EAJA award. To be sure, allowing contingency as a "special factor" might cause the EAJA to foster contingent-fee practice in the broad category of all litigation against the Federal Government. But besides the fact that such an effect would be so diluted as to be insignificant, we do not think it was Congress' purpose, in providing for reimbursement in a very small category of cases, to subsidize all contingent-fee litigation with the United States.

We conclude, therefore, that none of the reasons relied upon by the District Court to increase the rate of reimbursement above the statutory was a "special factor."

* * *

We affirm the award of attorney's fees, but as to the amount of the award we vacate the judgment and remand for proceedings consistent with our 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 part and concurring in the judgment.

I agree that an award of attorney's fees under the Equal Access to Justice Act (EAJA) was appropriate in this case,

and I agree that the courts below did not adhere to the statutory hourly cap on fees. Therefore, I concur in the Court's judgment affirming the decision to award fees and remanding for a new determination as to the amount. I disagree, however, with some of the Court's reasoning. While I agree that appellate courts should review district court EAJA fee awards for abuse of discretion, in my view the Government may not prove that its position was "substantially justified" by showing that it was merely "reasonable." Therefore, although I join Parts I, II, and IV of the Court's opinion, I do not join Part III.[1] Further, because I believe that the Court's interpretation of the predicate showing for a party to obtain a fee award exceeding the statutory cap—that there existed "a special factor, such as the limited availability of qualified attorneys for the proceedings involved"—is stingier than Congress intended, I do not join Part V of the Court's opinion.

I

Concerned that the Government, with its vast resources, could force citizens into acquiescing to adverse Government action, rather than vindicating their rights, simply by threatening them with costly litigation, Congress enacted the EAJA, waiving the United States' sovereign and general statutory immunity to fee awards and creating a limited exception to the "American Rule" against awarding attorneys fees to prevailing parties. S. Rep. No. 96–253, pp. 1–6 (1979) (S. Rep.). Consequently, when a qualified party (as defined in the Act) prevails against the United States in an adversarial proceeding not sounding in tort, the EAJA prescribes that "a court shall award . . . fees and other expenses . . . unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U. S. C. § 2412(d)(1)(A).

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[1] Because I view the term "substantially justified" as imposing a higher burden on the Government than does the Court, the Court's reasoning in Part IV of its opinion applies perforce to my view of the case.

In this, our first EAJA case, we are called upon to consider the phrase "substantially justified."

The Court begins, as is proper, with the plain meaning of the statutory language. The Court points out that "substantially" is not a word of precise and singular definition. Indeed, the word bears two arguably different relevant definitions: "'considerable in amount, value, or the like; large'"; and "'in substance or in the main.'" *Ante*, at 564. See also Webster's Third New International Dictionary 2280 (1976) ("considerable in amount, value, or worth"; and "having a solid or firm foundation . . . being that specified to a large degree or in the main"). The Court concludes, and I agree, that, to the extent they are different, Congress intended the latter meaning.

Unfortunately, the Court feels duty bound to go beyond the words enacted by Congress and to fashion its own substitute phrase using what it perceives to be a more legally precise term. The test upon which the Court alights is initially the "'reasonable basis both in law and fact'" standard, adopted by the courts below. *Ante*, at 565. While this phrase is often mentioned in the legislative history as the explication of "substantially justified," this alternative phraseology is inherently no more precise than the statutory language. In fact, it may be less so, for the Court equates it with "the test of reasonableness," *ante*, at 568, a standard rejected by Congress and significantly more forgiving than the one actually adopted.

The Senate Judiciary Committee considered and rejected an amendment substituting the phrase "reasonably justified" for "substantially justified." S. Rep., at 8. Clearly, then, the Committee did not equate "reasonable" and "substantial"; on the contrary, it understood the two terms to embrace different burdens. "Reasonable" has a variety of connotations, but may be defined as "not absurd" or "not ridiculous." Webster's New Third International Dictionary 1892 (1976). Even at its strongest, the term implies a posi-

tion of some, but not necessarily much, merit. However, as we have seen, "substantial" has a very different definition: "in substance or in the main." Thus, the word connotes a solid position, or a position with a firm foundation. While it is true "reasonable" and "substantial" overlap somewhat (substantial at its weakest and reasonable at its strongest) an overlap is not an identity. Therefore, although Congress may well have intended to use "substantial" in its weaker sense, there is no reason to believe, and substantial reason to disbelieve (as I will discuss below), that Congress intended the word to mean "reasonable" in *its* weaker sense.

The underlying problem with the Court's methodology is that it uses words or terms with similar, but not identical, meanings as a substitute standard, rather than as an aid in choosing among the assertedly different meanings of the statutory language. Thus, instead of relying on the legislative history and other tools of interpretation to help resolve the ambiguity in the word "substantial," the Court uses those tools essentially to jettison the phrase crafted by Congress. This point is well illustrated by the Government's position in this case. Not content with the term "substantially justified," the Government asks us to hold that it may avoid fees if its position was "reasonable." Not satisfied even with that substitution, we are asked to hold that a position is "reasonable" if "it has some substance and a fair possibility of success." Brief for Petitioner 13. While each of the Government's successive definitions may not stray too far from the one before, the end product is significantly removed from "substantially justified." I believe that Congress intended the EAJA to do more than award fees where the Government's position was one having no substance, or only a slight possibility of success; I would hope that the Government rarely engages in litigation fitting that definition, and surely not often enough to warrant the $100 million in attorney's fees Congress expected to spend over the original EAJA's 5-year life.

My view that "substantially justified" means more than merely reasonable, aside from conforming to the words Congress actually chose, is bolstered by the EAJA's legislative history. The phrase "substantially justified" was a congressional attempt to fashion a "middle ground" between an earlier, unsuccessful proposal to award fees in all cases in which the Government did not prevail, and the Department of Justice's proposal to award fees only when the Government's position was "arbitrary, frivolous, unreasonable, or groundless." S. Rep., at 2–3. Far from occupying the middle ground, "the test of reasonableness" is firmly encamped near the position espoused by the Justice Department. Moreover, the 1985 House Committee Report pertaining to the EAJA's reenactment expressly states that "substantially justified" means more than "mere reasonableness." H. R. Rep. No. 99–120, p. 9 (1985). Although I agree with the Court that this Report is not dispositive, the Committee's unequivocal rejection of a pure "reasonableness" standard in the course of considering the bill reenacting the EAJA is deserving of some weight.

Finally, however lopsided the weight of authority in the lower courts over the meaning of "substantially justified" might once have been, lower court opinions are no longer nearly unanimous. The District of Columbia, Third, Eighth, and Federal Circuits have all adopted a standard higher than mere reasonableness, and the Sixth Circuit is considering the question en banc. See *Riddle* v. *Secretary of Health and Human Services*, 817 F. 2d 1238 (CA6) (adopting a higher standard), vacated for rehearing en banc, 823 F. 2d 164 (1987); *Lee* v. *Johnson*, 799 F. 2d 31 (CA3 1986); *United States* v. *1,378.65 Acres of Land*, 794 F. 2d 1313 (CA8 1986); *Gavette* v. *OPM*, 785 F. 2d 1568 (CA Fed. 1986) (en banc); *Spencer* v. *NLRB*, 229 U. S. App. D. C. 225, 712 F. 2d 539 (1983).

In sum, the Court's journey from "substantially justified" to "reasonable basis both in law and fact" to "the test of

reasonableness" does not crystallize the law, nor is it true to Congress' intent. Instead, it allows the Government to creep the standard towards "having some substance and a fair possibility of success," a position I believe Congress intentionally avoided. In my view, we should hold that the Government can avoid fees only where it makes a clear showing that its position had a solid basis (as opposed to a marginal basis or a not unreasonable basis) in both law and fact. That it may be less "anchored" than "the test of reasonableness," a debatable proposition, is no excuse to abandon the test Congress enacted.[2]

II

I also disagree with the Court's discussion of the circumstances supporting a fee enhancement beyond the $75-per-hour (adjusted for inflation) cap set by Congress, although I do agree that the lower courts' judgment in this regard cannot stand. The statute states that courts may not award fees in excess of this cap unless "a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies the higher fee." 28 U. S. C. § 2412(d)(2)(A)(ii). The District Court found that there was a limited availability of qualified attorneys here, and also that there were additional special factors warranting an increase. In so deciding, however, the District Court's and Court of Appeals' analyses erroneously mirrored the analysis under 42 U. S. C. § 1988, a fee-shifting statute without an hourly rate limitation. Congress clearly meant to contain the potential costs of the EAJA by limiting the hourly rate of attorneys where fees are awarded. Consequently, a consideration of factors like counsel's customary rate, while perfectly appropriate under § 1988, cannot justify exceeding the EAJA cap. To hold otherwise would render the cap nothing more than

[2] Because the purposes of the EAJA are different from those of Federal Rule of Civil Procedure 37 and from those served by the "substantial evidence" test used to review agency determinations, I believe the meanings given the term "substantial" in those contexts do not govern here.

advisory despite Congress' expressed intent to permit higher awards only in rare cases.

That said, our job is to decide the meaning of the term: "a special factor, such as the limited availability of qualified attorneys." The Court begins with the single expressed special factor, the "limited availability of qualified attorneys." It holds that this phrase refers to an attorney with a required, articulable specialization, and does not refer to the limited availability of attorneys experienced or skilled enough to handle the proceedings involved. The Court reasons that allowing an enhancement for extraordinary skill or experience, even if required, would render the cap nugatory, since those factors merely set the market rate. This tidy analysis is too simplistic.

The most striking aspect of the Court's holding in this regard is its willingness to ignore the plain meaning and language of the exception. After all, in the rare EAJA case where highly experienced attorneys are truly required, a neophyte lawyer is no more "qualified . . . for the proceedings involved" than a nonpatent lawyer is to handle a patent case. The Court's interpretation might nonetheless be appropriate if the cap would otherwise be actually rendered meaningless, but that is not the case here. First, we must keep in mind the nature of the cases Congress envisioned would result in a fee award: those in which the Government's position was not "substantially justified." This observation takes much of the force from the Court's reasoning, as it will be a rare case in which an attorney of exceptional skill is necessary *and* where the Government's position was weak enough to warrant an EAJA award.

Second, the phrase "limited availability of qualified attorneys," read in conjunction with "special factor," reflects a congressional judgment that if the price of lawyers generally exceeds the cap, that trend alone will not justify an increase. Therefore, awarding an enhancement in cases where extraor-

dinary experience or skill is required does not write the cap out of the statute.

Third, the Court's economic analysis assumes that the market price for services rendered will always be precisely known, an assumption I cannot share, and one that there is no reason to believe Congress shared. A "reasonable" hourly rate cannot be determined with exactitude according to some preset formulation accounting for the nature and complexity of every type of case. Therefore, courts often assume that an attorney's normal hourly rate is reasonable, or, in the case of public interest counsel, a reasonable rate is generally the rate charged by an attorney of like "skill, experience, and reputation." *Blum* v. *Stenson*, 465 U. S. 886, 895, n. 11 (1984). Certainly adjustments up or down are appropriate where the fee charged is out of line with the nature of the services rendered. However, such adjustments are often difficult to make given that the "prevailing market rate" is determined by reference to the particular attorney involved rather than to a minimally qualified hypothetical lawyer, *ibid.*, and that the fee determination should not become a "second major litigation." *Hensley* v. *Eckerhart*, 461 U. S. 424, 437 (1983). Moreover, to some extent, even in a simple case higher hourly rates may be offset by fewer hours billed due to counsel's greater efficiency. Absent the statutory cap, these factors would be used in an EAJA analysis as extensively as they are used in a § 1988 analysis. However, a showing that the particular attorney retained normally charges more than the statutory cap will, by itself, avail a fee applicant nothing under EAJA, although it may, by itself, be dispositive under § 1988.

Therefore, the Court is simply wrong when it asserts that if we allow a showing of extraordinary skill or experience (in the rare case where it is required) to justify an enhanced award, then the cap will be rendered meaningless. Far from it. The same logic supporting a "patent lawyer" exception—that when only a fraction of the bar is qualified to handle a

case, those attorneys may charge a premium for their services—supports an enhancement for skill or experience.

Equally troubling is the Court's requirement that a "special factor" must not be "of broad and general application." *Ante*, at 573. We are given no explanation of or for this limitation, beyond the declaration that it is necessary to preserve the efficacy of the cap. Further, while the Court is willing to say what is *not* a special factor—everything relied upon below—we are given no example of anything that *is* a special factor other than the subject-matter specialization already considered as falling within the "limited availability of qualified attorneys for the proceedings involved" example. Having rejected the lower courts' list of factors in its entirety, it seems as if the Court leaves nothing remaining.

Such a strained interpretation, apparently reading the words "such as" out of the Act, is unnecessary. See *Vibra-Tech Engineers, Inc.* v. *United States*, 787 F. 2d 1416 (CA10 1986); *Action on Smoking and Health* v. *CAB*, 233 U. S. App. D. C. 79, 724 F. 2d 211 (1984). Cf. *Kungys* v. *United States*, 485 U. S. 759, 778 (1988) ("[N]o provision [of a statute] should be construed to be entirely redundant"). A "special factor" may be readily analogized to the factors we identified in *Blum* to enhance the lodestar figure under § 1988. In *Blum*, we held that the lodestar amount (the reasonable hourly rate multiplied by the number of hours billed) is "presumably" the reasonable fee. However, we also held that an upward adjustment may be appropriate "in the rare case where the fee applicant offers specific evidence to show that the quality of service rendered was superior to that one reasonably should expect in light of the hourly rates charged and that the success was exceptional." 465 U. S., at 899 (internal quotations omitted).[3] Analogizing to the EAJA

[3] We left open whether the contingent nature of the fee could also justify an enhancement. However, much for the reasons stated by the Court, that question is not pertinent to an EAJA case. It is one thing to say that a contingent-fee enhancement is necessary to compensate an attorney

context, the lodestar would be calculated by multiplying the reasonable rate (as capped) by the number of hours billed. That amount would presumably be the proper award. However, where a factor exists that would justify an enhancement of the lodestar amount under § 1988, an enhancement of the EAJA award might also be appropriate. Unlike the lower courts' approach, this rule would not read the cap out of the statute, for as we predicted in *Blum*, a lodestar enhancement would be appropriate only in "the rare case."

Although the *Blum* enhancers constitute more than the situation where there is a limited availability of qualified counsel, the statute expressly allows more to be considered. The Court's miserly refusal to accede to this statutory command is unjustified and unwarranted. I therefore concur only in the judgment as to the fee calculation.

JUSTICE WHITE, with whom JUSTICE O'CONNOR joins, concurring in part and dissenting in part.

I agree with the majority's interpretation of the term "substantially justified" as used in the Equal Access to Justice Act (EAJA), 28 U. S. C. § 2412(d). However, because I believe that a district court's assessment of whether the Government's legal position was substantially justified should be reviewed *de novo* and that the attorney's fees award in this case could not be sustained under that standard of review, I dissent from Parts II and IV of the majority's opinion.

I

The majority acknowledges that neither the language nor the structure of the EAJA "compel[s]" deferential review of a district court's determination of whether the Government's position was substantially justified. *Ante*, at 559. In fact, the statute is wholly silent as to the standard under which

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when *victory* is uncertain, it is another thing entirely to say that such an enhancement is necessary to compensate an attorney when the lack of *substantial justification* is uncertain.

such determinations are to be reviewed.[1] This congressional silence in the face of both the general rule of *de novo* review of legal issues and the EAJA's special purpose of encouraging meritorious suits against the Government suggests a different result than that reached by the majority.

The Congress that adopted the EAJA certainly was aware of the general rule that issues of law are reviewed *de novo* while issues of fact are reviewed only for clear error. See Fed. Rule Civ. Proc. 52(a); *Pullman-Standard* v. *Swint*, 456 U. S. 273, 287 (1982). Congress would have known that whether or not a particular legal position was substantially justified is a question of law rather than of fact. The historical facts having been established, the question is to be resolved by the legal analysis of the relevant statutory and decisional authorities that appellate courts are expected to perform. As the District of Columbia Circuit has observed, "the special expertise and experience of appellate courts in assessing the relative force of competing interpretations and applications of legal norms makes the case for *de novo* review of judgments [of whether the Government's legal position was substantially justified] even stronger than the case for such review of paradigmatic conclusions of law." *Spencer* v. *NLRB*, 229 U. S. App. D. C. 225, 249, 712 F. 2d 539, 563 (1983), cert. denied, 466 U. S. 936 (1984). It is thus most likely that Congress expected that the courts of appeals would apply the same *de novo* standard of review to a district

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[1] That Congress remained silent as to the standard of review to be applied to district courts' determinations of whether an attorney's fee award is appropriate, yet explicitly directed that an "abuse of discretion" standard be applied to similar determinations by governmental agencies, see 5 U. S. C. § 504(c)(2), would seem to militate against rather than in favor of the rule adopted by the majority. See *ante*, at 559. The more reasonable inference to be drawn from this difference in the statutory provisions governing court-awarded and agency-awarded attorney's fees is that Congress knew how to specify an "abuse of discretion" standard when it chose to do so and that Congress did not choose to do so with regard to attorney's fee awards by the district courts.

court's assessment of whether the Government's interpretation of the law was substantially justified for purposes of the EAJA as they would apply to a district court's assessment of whether the Government's interpretation of the law was correct in the underlying litigation.

De novo appellate review of whether the Government's legal position was substantially justified would also foster consistency and predictability in EAJA litigation. A court of appeals may be required under the majority's "abuse of discretion" standard to affirm one district court's holding that the Government's legal position was substantially justified and another district court's holding that the same position was not substantially justified. As long as the district court's opinion about the substantiality of the Government case rests on some defensible construction and application of the statute, the Court's view would command the court of appeals to defer even though that court's own view on the legal issue is quite different. The availability of attorney's fees would not only be difficult to predict but would vary from circuit to circuit or even within a particular circuit. Such uncertainty over the potential availability of attorney's fees would, in my view, undermine the EAJA's purpose of encouraging challenges to unreasonable governmental action. See *Spencer*, *supra*, at 249–250, 712 F. 2d, at 563–564.[2]

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[2] The majority suggests that an "abuse of discretion" standard is desirable in order to limit the amount of "appellate energy" expended on cases that are unlikely to yield "law-clarifying benefits." *Ante*, at 561. I would have thought that decisions concerning the allocation of appellate resources are better left to Congress than to this Court. If the courts of appeals are to concentrate their efforts on clarifying the law, at the expense of correcting district court errors that may affect only the parties to a particular case, then Congress ought to make that policy choice. In any event, if the law of the circuit is indeed "quite clear" at the time of the EAJA appeal, *ibid.*, the appellate court may often have to expend relatively little energy in ascertaining whether the law was also reasonably clear at some earlier date. Of course, in those cases in which the law of the circuit remains unsettled at the time of the EAJA appeal, the appellate court may provide

Finally, the Federal Courts of Appeals have concluded with near unanimity that "close scrutiny," or *de novo* review, should be applied to district courts' assessments of whether the Government's legal position was substantially justified. See, *e. g.*, *Brinker* v. *Guiffrida*, 798 F. 2d 661, 664 (CA3 1986); *United States* v. *Estridge*, 797 F. 2d 1454, 1457 (CA8 1986); *Haitian Refugee Center* v. *Meese*, 791 F. 2d 1489, 1496 (CA11 1986); *United States* v. *Yoffe*, 775 F. 2d 447, 451 (CA1 1985); *Russell* v. *National Mediation Bd.*, 775 F. 2d 1284, 1289 (CA5 1985); *Essex Electro Engineers, Inc.* v. *United States*, 757 F. 2d 247, 252–253 (CA Fed. 1985); *Hicks* v. *Heckler*, 756 F. 2d 1022, 1024–1025 (CA4 1985); *Sigmon Fuel Co.* v. *TVA*, 754 F. 2d 162, 167 (CA6 1985); *Boudin* v. *Thomas*, 732 F. 2d 1107, 1117 (CA2 1984); *United States* v. *2,116 Boxes of Boned Beef*, 726 F. 2d 1481, 1486 (CA10), cert. denied *sub nom. Jarboe-Lackey Feedlots, Inc.* v. *United States*, 469 U. S. 825 (1984); *Spencer*, *supra*, at 251, 712 F. 2d, at 565. This weight of appellate authority reinforces my view that whether or not the Government's interpretation of the law was substantially justified is an appropriate question for *de novo* review.

II

I do not believe that the District Court's conclusion that the Government's position in this litigation was not substantially justified could withstand appellate scrutiny under a *de novo* standard of review.

The housing statute at issue in this case provided for three subsidy programs: a "deep-subsidy" program, an "interest-reduction" program, and an "operating-subsidy" program.

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needed guidance both to the Government and to any individuals with similar legal claims. The majority's concern that *de novo* review will force the Government to take "needless merits appeals," *ibid.*, does not appear to be shared by the Government itself, which has argued throughout this litigation that the question whether a legal position was substantially justified ought to be reviewed under a *de novo* standard rather than an "abuse of discretion" standard.

It was the Secretary's failure to implement the last of these programs that was challenged by respondents.

The statute provided that the Secretary was "*authorized* to make, and contract to make" operating-subsidy and interest-reduction payments. 12 U. S. C. §§ 1715z–1(f)(3), 1715z–1(a) (1970 ed., Supp. IV) (emphasis added). In contrast, the statute stated that the Secretary "*shall* make, and contract to make" deep-subsidy payments. § 1715z–1(f)(2) (emphasis added). In 1974, after concluding that Congress had not authorized her to commit funds sufficient to operate all three subsidy programs, Secretary Hills decided to devote the available funds to the more clearly mandatory deep-subsidy program (and to certain pre-existing commitments under the interest-reduction program) rather than to spread the funds among all three programs.

Whether or not the courts might differ with Secretary Hills on the scope of her discretion to decline to implement the operating-subsidy program, see *ante*, at 569, given the statutory language and the existing case law, her conclusion was not without substantial justification. The statutory provisions instructing the Secretary to make deep-subsidy payments, but merely "authorizing" her to make operating-subsidy payments, could reasonably be construed as vesting the Secretary with some discretion over the implementation of the operating-subsidy program. If Congress had intended to give the Secretary no choice in the matter, it is defensible to believe that Congress would have directed that the Secretary "*shall* make, and contract to make" operating-subsidy payments.

Moreover, the then-recent decision in *Pennsylvania* v. *Lynn*, 163 U. S. App. D. C. 288, 501 F. 2d 848 (1974), offered further support for the Secretary's position. The Court of Appeals held in that case that the Secretary had not abused his discretion in suspending the interest-reduction program—under which the Secretary was likewise "authorized to make, and contract to make" payments—after he had con-

cluded that the program was not serving national housing goals. The *Lynn* case is not, of course, on all fours with this one. However, because *Lynn* suggests that the Secretary has a degree of discretion over whether to implement housing programs that are not couched in clearly mandatory statutory language, that decision would have given Secretary Hills reason to believe that such discretion could properly be exercised with regard to the operating-subsidy program.[3]

Because I would conclude upon *de novo* review that the Secretary's refusal to implement the operating-subsidy program was substantially justified, I would reverse the award of attorney's fees under the EAJA.[4]

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[3] In *Dubose* v. *Pierce*, 761 F. 2d 913 (CA2 1985), cert. pending, No. 85–516, the Court of Appeals held that the Secretary's refusal to implement the operating-subsidy program was substantially justified for purposes of the EAJA. The court relied heavily on *Pennsylvania* v. *Lynn* in concluding that "[t]he governing law, to the extent that it existed, did not mandate HUD's surrender early in the litigation" and did not "bec[o]me so one-sided as to render HUD's position clearly unjustifiable" even after several lower courts had ruled against the Secretary on the operating-subsidy program. 761 F. 2d, at 918.

[4] The Court concludes that the amount of the award must be reconsidered. I agree in this respect and hence join Part V of the Court's opinion.

Syllabus

BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* KENDRICK ET AL.

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

No. 87–253. Argued March 30, 1988—Decided June 29, 1988*

A group of federal taxpayers, clergymen, and the American Jewish Congress (hereinafter appellees) filed this action in Federal District Court, seeking declaratory and injunctive relief, and challenging the constitutionality, under the Religion Clauses of the First Amendment, of the Adolescent Family Life Act (AFLA or Act), which authorizes federal grants to public or nonprofit private organizations or agencies for services and research in the area of premarital adolescent sexual relations and pregnancy. The Act provides, *inter alia*, that a grantee must furnish certain types of services, including various types of counseling and education relating to family life and problems associated with adolescent premarital sexual relations; that the complexity of the problem requires the involvement of religious and charitable organizations, voluntary associations, and other groups in the private sector, as well as governmental agencies; and that grantees may not use funds for certain purposes, including family planning services and the promotion of abortion. Federal funding under the Act has gone to a wide variety of recipients, including organizations with institutional ties to religious denominations. Granting summary judgment for appellees, the court declared that the Act, both on its face and as applied, violated the Establishment Clause insofar as it provided for the involvement of religious organizations in the federally funded programs.

Held:

1. The Act, on its face, does not violate the Establishment Clause. Pp. 600–618.

(a) With regard to the first factor of the applicable three-part test set forth in *Lemon* v. *Kurtzman*, 403 U. S. 602, the AFLA has a valid secular purpose. The face of the Act shows that it was motivated primarily, if not entirely, by the legitimate purpose of eliminating or reducing social and economic problems caused by teenage sexuality, preg-

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*Together with No. 87–431, *Bowen, Secretary of Health and Human Services* v. *Kendrick et al.*, No. 87–462, *Kendrick et al.* v. *Bowen, Secretary of Health and Human Services, et al.*, and No. 87–775, *United Families of America* v. *Kendrick et al.*, also on appeal from the same court.

nancy, and parenthood. Although the Act, in amending its predecessor, increased the role of religious organizations in programs sponsored by the Act, the challenged provisions were also motivated by other, entirely legitimate secular concerns, such as attempting to enlist the aid of other groups in the private sector to increase broad-based community involvement. Pp. 602–604.

(b) As to the second *Lemon* factor, the Act does not have the primary effect of advancing religion. It authorizes grants to institutions that are capable of providing certain services to adolescents, and requires that potential grantees describe how they will involve other organizations, including religious organizations, in the funded programs. However, there is no requirement that grantees be affiliated with any religious denomination, and the services to be provided under the Act are not religious in character. The Act's approach toward dealing with adolescent sexuality and pregnancy is not inherently religious, although it may coincide with the approach taken by certain religions. The provisions expressly mentioning the role of religious organizations reflect at most Congress' considered judgment that religious organizations can help solve the problems to which the Act is addressed. When, as Congress found, prevention of adolescent sexual activity and pregnancy depends primarily upon developing close family ties, it seems sensible for Congress to recognize that religious organizations can influence family life. To the extent that this congressional recognition has any effect of advancing religion, the effect is at most "incidental and remote." Moreover, to the extent that religious institutions, along with other types of organizations, are allowed to participate as recipients of federal funds, nothing on the Act's face suggests that it is anything but neutral with respect to the grantee's status as a sectarian or purely secular institution. The possibility that AFLA grants may go to religious institutions that can be considered "pervasively sectarian" is not sufficient to conclude that no grants whatsoever can be given to religious organizations. Nor does the Act necessarily have the effect of advancing religion because religiously affiliated AFLA grantees will be providing educational and counseling services to adolescents; because it authorizes "teaching" by religious grantees on matters that are fundamental elements of religious doctrine; because of any "crucial symbolic link" between government and religion; or because the statute lacks an express provision preventing the use of federal funds for religious purposes. Pp. 604–615.

(c) With regard to the third *Lemon* factor, the Act does not create an excessive entanglement of church and state. The monitoring of AFLA grants is necessary to ensure that public money is to be spent in the way that Congress intended and in a way that comports with the Establishment Clause. However, there is no reason to assume that the religious

organizations which may receive AFLA grants are "pervasively sectarian" in the same sense as parochial schools have been held to be in cases finding excessive "entanglement." There is accordingly no reason to fear that the less intensive monitoring involved here will cause the Government to intrude unduly in the day-to-day operations of the religiously affiliated grantees. Pp. 615–618.

2. The case is remanded for further consideration of whether the statute, as applied, violates the Establishment Clause. Pp. 618–624.

(a) Appellees have standing to raise the claim that the AFLA is unconstitutional as applied. Federal taxpayers have standing to raise Establishment Clause claims against exercises of congressional power under the taxing and spending power of Article I, § 8, of the Constitution. *Flast* v. *Cohen*, 392 U. S. 83. There is no merit to appellants' contention that a challenge to the AFLA "as applied" is really a challenge to executive action. The claim that AFLA funds are being used improperly by individual grantees is not any less a challenge to congressional taxing and spending power simply because the funding authorized by Congress has flowed through and been administered by the Secretary of Health and Human Services. *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U. S. 464; and *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U. S. 208, distinguished. Pp. 618–620.

(b) On the merits of the "as applied" challenge, the District Court did not follow the proper approach in assessing appellees' claim that the Secretary is making grants under the Act that violate the Establishment Clause. Although the record contains evidence of specific incidents of impermissible behavior by grantees, the case must be remanded for consideration of the evidence insofar as it sheds light on the manner in which the statute is presently being administered. If the Court concludes on the evidence presented that grants are being made by the Secretary in violation of the Establishment Clause, an appropriate remedy would be to require the Secretary to withdraw the approval of such grants. Pp. 620–622.

657 F. Supp. 1547, reversed and remanded.

REHNQUIST, C. J., delivered the opinion of the Court, in which WHITE, O'CONNOR, SCALIA, and KENNEDY, JJ., joined. O'CONNOR, J., filed a concurring opinion, *post*, p. 622. KENNEDY, J., filed a concurring opinion, in which SCALIA, J., joined, *post*, p. 624. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and STEVENS, JJ., joined, *post*, p. 625.

Solicitor General Fried argued the cause for appellant in Nos. 87–253 and 87–431, and for the federal appellee in No. 87–462. With him on the briefs were *Assistant Attorney General Willard, Acting Assistant Attorney General Spears, Deputy Solicitor General Ayer, Deputy Assistant Attorney General Cynkar, Lawrence S. Robbins, Michael Jay Singer, Jay S. Bybee,* and *Theodore C. Hirt. Michael W. McConnell* argued the cause for appellant in No. 87–775. With him on the briefs were *Edward R. Grant, Clarke D. Forsythe, Paul Arneson,* and *Michael J. Woodruff.*

Janet Benshoof argued the cause for appellees in Nos. 87–253, 87–431, and 87–775 and appellants in No. 87–462. With her on the briefs were *Lynn M. Paltrow, Nan D. Hunter, Rachael N. Pine,* and *Bruce J. Ennis, Jr.*†

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†Briefs of *amici curiae* urging reversal were filed for the Attorney General of Arizona et al. by *Gary B. Born* and *James S. Campbell;* for the Catholic League for Religious and Civil Rights et al. by *Steven Frederick McDowell;* for the Institute for Youth Advocacy by *Gregory A. Loken;* for the National Jewish Commission on Law and Public Affairs by *Nathan Lewin* and *Dennis Rapps;* for the National Right to Life Committee, Inc., by *James Bopp, Jr.;* for the Rutherford Institute et al. by *John W. Whitehead, David E. Morris, Alfred J. Lindh, Ira W. Still III, William B. Hollberg, Randall A. Pentiuk, Thomas W. Strahan, William Bonner, John F. Southworth, Jr.,* and *W. Charles Bundren;* and for the United States Catholic Conference by *Mark E. Chopko* and *Philip H. Harris.*

Briefs of *amici curiae* urging affirmance were filed for the American Public Health Association et al. by *John H. Hall, Nadine Taub,* and *Judith Levin;* for the Baptist Joint Committee on Public Affairs et al. by *Oliver S. Thomas;* for the Committee for Public Education and Religious Liberty by *Leo Pfeffer;* for the Council on Religious Freedom by *Lee Boothby, Robert W. Nixon,* and *Rolland Truman;* for the National Coalition for Public Education and Religious Liberty et al. by *David B. Isbell, David H. Remes,* and *Herman Schwartz;* and for the NOW Legal Defense and Education Fund et al. by *Sarah E. Burns* and *Marsha Levick.*

Briefs of *amici curiae* were filed for the Anti-Defamation League of B'nai B'rith et al. by *Ruti G. Teitel, Justin J. Finger, Jeffrey P. Sinensky, Meyer Eisenberg,* and *Steven M. Freeman;* for Catholic Charities,

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

This litigation involves a challenge to a federal grant program that provides funding for services relating to adolescent sexuality and pregnancy. Considering the federal statute both "on its face" and "as applied," the District Court ruled that the statute violated the Establishment Clause of the First Amendment insofar as it provided for the involvement of religious organizations in the federally funded programs. We conclude, however, that the statute is not unconstitutional on its face, and that a determination of whether any of the grants made pursuant to the statute violate the Establishment Clause requires further proceedings in the District Court.

I

The Adolescent Family Life Act (AFLA or Act), Pub. L. 97–35, 95 Stat. 578, 42 U. S. C. § 300z *et seq.* (1982 ed. and Supp. IV), was passed by Congress in 1981 in response to the "severe adverse health, social, and economic consequences" that often follow pregnancy and childbirth among unmarried adolescents. 42 U. S. C. § 300z(a)(5) (1982 ed., Supp. IV). Like its predecessor, the Adolescent Health Services and Pregnancy Prevention and Care Act of 1978, Pub. L. 95–626, Tit. VI, 92 Stat. 3595–3601 (Title VI), the AFLA is essentially a scheme for providing grants to public or nonprofit private organizations or agencies "for services and research in the area of premarital adolescent sexual relations and pregnancy." S. Rep. No. 97–161, p. 1 (1981) (hereinafter Senate Report). These grants are intended to serve several purposes, including the promotion of "self discipline and other prudent approaches to the problem of adolescent premarital sexual relations," § 300z(b)(1), the promotion of adoption as an alternative for adolescent parents, § 300z(b)(2), the

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U. S. A., et al. by *Patrick Francis Geary;* and for the Unitarian Universalist Association et al. by *Patricia Hennessey.*

establishment of new approaches to the delivery of care services for pregnant adolescents, § 300z(b)(3), and the support of research and demonstration projects "concerning the societal causes and consequences of adolescent premarital sexual relations, contraceptive use, pregnancy, and child rearing," § 300z(b)(4).

In pertinent part, grant recipients are to provide two types of services: "care services," for the provision of care to pregnant adolescents and adolescent parents, § 300z–1(a)(7), and "prevention services," for the prevention of adolescent sexual relations, § 300z–1(a)(8).[1] While the AFLA leaves it up to the Secretary of Health and Human Services (the Secretary) to define exactly what types of services a grantee must provide, see §§ 300z–1(a)(7), (8), 300z–1(b), the statute contains a listing of "necessary services" that may be funded. These services include pregnancy testing and maternity counseling, adoption counseling and referral services, prenatal and postnatal health care, nutritional information, counseling, child care, mental health services, and perhaps most importantly for present purposes, "educational services relating to family life and problems associated with adolescent premarital sexual relations," § 300z–1(a)(4).[2]

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[1] In addition to these services, the AFLA also provides funding for research projects. See §§ 300z(b)(4)–(6), 300z–7. This aspect of the statute is not involved in this case.

[2] Section 300z–1(a)(4) provides in full:

"(4) 'necessary services' means services which may be provided by grantees which are—

"(A) pregnancy testing and maternity counseling;

"(B) adoption counseling and referral services which present adoption as an option for pregnant adolescents, including referral to licensed adoption agencies in the community if the eligible grant recipient is not a licensed adoption agency;

"(C) primary and preventive health services including prenatal and postnatal care;

"(D) nutrition information and counseling;

"(E) referral for screening and treatment of venereal disease;

"(F) referral to appropriate pediatric care;

In drawing up the AFLA and determining what services to provide under the Act, Congress was well aware that "the problems of adolescent premarital sexual relations, pregnancy, and parenthood are multiple and complex." § 300z(a)(8)(A). Indeed, Congress expressly recognized that legislative or governmental action alone would be insufficient:

> "[S]uch problems are best approached through a variety of integrated and essential services provided to adolescents and their families by other family members, religious and charitable organizations, voluntary associations, and other groups in the private sector as well as services provided by publicly sponsored initiatives." § 300z(a)(8)(B).

"(G) educational services relating to family life and problems associated with adolescent premarital sexual relations, including—

"(i) information about adoption;

"(ii) education on the responsibilities of sexuality and parenting;

"(iii) the development of material to support the role of parents as the provider of sex education; and

"(iv) assistance to parents, schools, youth agencies, and health providers to educate adolescents and preadolescents concerning self-discipline and responsibility in human sexuality;

"(H) appropriate educational and vocational services and referral to such services;

"(I) referral to licensed residential care or maternity home services; and

"(J) mental health services and referral to mental health services and to other appropriate physical health services;

"(K) child care sufficient to enable the adolescent parent to continue education or to enter into employment;

"(L) consumer education and homemaking;

"(M) counseling for the immediate and extended family members of the eligible person;

"(N) transportation;

"(O) outreach services to families of adolescents to discourage sexual relations among unemancipated minors;

"(P) family planning services; and

"(Q) such other services consistent with the purposes of this subchapter as the Secretary may approve in accordance with regulations promulgated by the Secretary."

Accordingly, the AFLA expressly states that federally provided services in this area should promote the involvement of parents, and should "emphasize the provision of support by other family members, religious and charitable organizations, voluntary associations, and other groups." § 300z(a)(10)(C). The AFLA implements this goal by providing in § 300z–2 that demonstration projects funded by the government

> "shall use such methods as will strengthen the capacity of families to deal with the sexual behavior, pregnancy, or parenthood of adolescents and to make use of support systems such as other family members, friends, religious and charitable organizations, and voluntary associations."

In addition, AFLA requires grant applicants, among other things, to describe how they will, "as appropriate in the provision of services[,] involve families of adolescents[, and] involve religious and charitable organizations, voluntary associations, and other groups in the private sector as well as services provided by publicly sponsored initiatives." § 300z–5(a)(21). This broad-based involvement of groups outside of the government was intended by Congress to "establish better coordination, integration, and linkages" among existing programs in the community, § 300z(b)(3) (1982 ed., Supp. IV), to aid in the development of "strong family values and close family ties," § 300z(a)(10)(A), and to "help adolescents and their families deal with complex issues of adolescent premarital sexual relations and the consequences of such relations." § 300z(a)(10)(C).

In line with its purposes, the AFLA also imposes limitations on the use of funds by grantees. First, the AFLA expressly states that no funds provided for demonstration projects under the statute may be used for family planning services (other than counseling and referral services) unless appropriate family planning services are not otherwise available in the community. § 300z–3(b)(1). Second, the AFLA restricts the awarding of grants to "programs or projects

which do not provide abortions or abortion counseling or referral," except that the program may provide referral for abortion counseling if the adolescent and her parents request such referral. § 300z–10(a). Finally, the AFLA states that "grants may be made only to projects or programs which do not advocate, promote, or encourage abortion." § 300z–10(a).[3]

Since 1981, when the AFLA was adopted, the Secretary has received 1,088 grant applications and awarded 141 grants. Brief for Federal Appellant 8. Funding has gone to a wide variety of recipients, including state and local health agencies, private hospitals, community health associations, privately operated health care centers, and community and charitable organizations. It is undisputed that a number of grantees or subgrantees were organizations with institutional ties to religious denominations. See App. 748–756 (listing grantees).

In 1983, this lawsuit against the Secretary was filed in the United States District Court for the District of Columbia by appellees, a group of federal taxpayers, clergymen, and the American Jewish Congress. Seeking both declaratory and injunctive relief, appellees challenged the constitutionality of the AFLA on the grounds that on its face and as applied the statute violates the Religion Clauses of the First Amendment.[4] Following cross-motions for summary judgment, the

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[3] Section 300z–10(a) reads in full:

"Grants or payments may be made only to programs or projects which do not provide abortions or abortion counseling or referral, or which do not subcontract with or make any payment to any person who provides abortions or abortion counseling or referral, except that any such program or project may provide referral for abortion counseling to a pregnant adolescent if such adolescent and the parents or guardians of such adolescent request such referral; and grants may be made only to projects or programs which do not advocate, promote, or encourage abortion."

[4] On October 2, 1984, the District Court allowed United Families of America (UFA) to intervene and participate as a defendant-intervenor in support of the constitutionality of the AFLA.

District Court held for appellees and declared that the AFLA was invalid both on its face and as applied "insofar as religious organizations are involved in carrying out the programs and purposes of the Act." 657 F. Supp. 1547, 1570 (DC 1987).

The court first found that under *Flast* v. *Cohen*, 392 U. S. 83 (1968), appellees had standing to challenge the statute both on its face and as applied. Turning to the merits, the District Court applied the three-part test for Establishment Clause cases set forth in *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971).[5] The court concluded that the AFLA has a valid secular purpose: the prevention of social and economic injury caused by teenage pregnancy and premarital sexual relations. In the court's view, however, the AFLA does not survive the second prong of the *Lemon* test because it has the "direct and immediate" effect of advancing religion insofar as it expressly requires grant applicants to describe how they will involve religious organizations in the provision of services. § 300z–5(a)(21)(B). The statute also permits religious organizations to be grantees and "envisions a direct role for those organizations in the education and counseling components of AFLA grants." 657 F. Supp., at 1562. As written, the AFLA makes it possible for religiously affiliated grantees to teach adolescents on issues that can be considered "fundamental elements of religious doctrine." The

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[5] The court rejected appellees' claim that a strict-scrutiny standard should apply to the AFLA because the statute's restriction of funding to organizations that oppose abortion explicitly and deliberately discriminates among religious denominations. See *Larson* v. *Valente*, 456 U. S. 228 (1982). The court found that the AFLA does not precondition the award of a grant on a grantee's having a particular religious belief; it merely restricts the grantees from using federal tax dollars to advocate a certain course of action. See § 300z–10. While the AFLA's restriction on the advocacy of abortion does coincide with certain religious beliefs, that fact by itself did not, in the District Court's opinion, trigger the application of strict scrutiny under *Larson*. This aspect of the District Court's opinion has not been challenged on this appeal.

AFLA does all this without imposing any restriction whatsoever against the teaching of "religion *qua* religion" or the inculcation of religious beliefs in federally funded programs. As the District Court put it, "[t]o presume that AFLA counselors from religious organizations can put their beliefs aside when counseling an adolescent on matters that are part of religious doctrine is simply unrealistic." *Id.*, at 1563 (citing *Grand Rapids School District* v. *Ball*, 473 U. S. 373 (1985)).

The District Court then concluded that the statute as applied also runs afoul of the *Lemon* effects test.[6] The evidence presented by appellees revealed that AFLA grants had gone to various organizations that were affiliated with religious denominations and that had corporate requirements that the organizations abide by religious doctrines. Other AFLA grantees were not explicitly affiliated with organized religions, but were "religiously inspired and dedicated to teaching the dogma that inspired them." 657 F. Supp., at 1564. In the District Court's view, the record clearly established that the AFLA, as it has been administered by the Secretary, has in fact directly advanced religion, provided funding for institutions that were "pervasively sectarian," or allowed federal funds to be used for education and counseling that "amounts to the teaching of religion." *Ibid.* As to the entanglement prong of *Lemon*, the court ruled that because AFLA funds are used largely for counseling and teaching, it would require overly intrusive monitoring or oversight to ensure that religion is not advanced by religiously affiliated AFLA grantees. Indeed, the court felt that "it is impossible to comprehend entanglement more extensive and continuous

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[6] Prior to this, the court reviewed "the motions, the statements of material fact not in dispute, the allegations of disputed facts, the golconda of documents submitted to the Court, and the case law," and concluded that the material facts were not in dispute and that summary judgment would be proper. 657 F. Supp., at 1554.

than that necessitated by the AFLA." 657 F. Supp., at 1568.[7]

In a separate order, filed August 13, 1987, the District Court ruled that the "constitutionally infirm language of the AFLA, namely its references to 'religious organizations,'" App. to Juris. Statement in No. 431, p. 53a, is severable from the Act pursuant to *Alaska Airlines, Inc.* v. *Brock*, 480 U. S. 678 (1987). The court also denied the Secretary's Federal Rule of Civil Procedure 59(e) motion to clarify what the court meant by "religious organizations" for purposes of determining the scope of its injunction. On the same day that this order was entered, appellants docketed their appeal on the merits directly with this Court pursuant to 28 U. S. C. § 1252. A separate appeal from the District Court's August 13 order was also docketed, as was a cross-appeal by appellees on the severability issue. On November 9, 1987, we noted probable jurisdiction in all three appeals and consolidated the cases for argument. 484 U. S. 942 (1987).

II

The District Court in this lawsuit held the AFLA unconstitutional both on its face and as applied. Few of our cases in the Establishment Clause area have explicitly distinguished between facial challenges to a statute and attacks on the statute as applied. Several cases have clearly involved challenges to a statute "on its face." For example, in *Edwards* v. *Aguillard*, 482 U. S. 578 (1987), we considered the validity of the Louisiana "Creationism Act," finding the Act "facially invalid." Indeed, in that case it was clear that only a facial challenge could have been considered, as the Act had not been implemented. *Id.*, at 581, n. 1. Other cases, as well, have considered the validity of statutes without the benefit of a record as to how the statute had actually been applied.

[7] The court also found that the AFLA's funding of religious organizations is likely to incite political divisiveness. See *id.*, at 1569 (citing, *e. g.*, *Lynch* v. *Donnelly*, 465 U. S. 668, 689 (1984) (O'CONNOR, J., concurring)).

See *Wolman* v. *Walter*, 433 U. S. 229 (1977); *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U. S. 756 (1973).

In other cases we have, in the course of determining the constitutionality of a statute, referred not only to the language of the statute but also to the manner in which it had been administered in practice. *Levitt* v. *Committee for Public Education & Religious Liberty*, 413 U. S. 472, 479 (1973); *Meek* v. *Pittenger*, 421 U. S. 349 (1975). See also *Grand Rapids School District* v. *Ball*, *supra*, at 377–379; *Aguilar* v. *Felton*, 473 U. S. 402 (1985). In several cases we have expressly recognized that an otherwise valid statute authorizing grants might be challenged on the grounds that the award of a grant in a particular case would be impermissible. *Hunt* v. *McNair*, 413 U. S. 734 (1973), involved a challenge to a South Carolina statute that provided for the issuance of revenue bonds to assist "institutions of higher learning" in constructing new facilities. The plaintiffs in that case did not contest the validity of the statute as a whole, but contended only that a statutory grant to a religiously affiliated college would be invalid. *Id.*, at 736. In *Tilton* v. *Richardson*, 403 U. S. 672 (1971), the Court reviewed a federal statute authorizing construction grants to colleges exclusively for secular educational purposes. We rejected the contention that the statute was invalid "on its face" and "as applied" to the four church-related colleges that were named as defendants in the case. However, we did leave open the possibility that the statute might authorize grants which could be invalid, stating that "[i]ndividual projects can be properly evaluated if and when challenges arise with respect to particular recipients and some evidence is then presented to show that the institution does in fact possess" sectarian characteristics that might make a grant of aid to the institution constitutionally impermissible. *Id.*, at 682. See also *Roemer* v. *Maryland Bd. of Public Works*, 426 U. S. 736, 760–761 (1976) (upholding a similar statute authorizing grants to colleges against

a "facial" attack and pretermitting the question whether "particular applications may result in unconstitutional use of funds").

There is, then, precedent in this area of constitutional law for distinguishing between the validity of the statute on its face and its validity in particular applications. Although the Court's opinions have not even adverted to (to say nothing of explicitly delineated) the consequences of this distinction between "on its face" and "as applied" in this context, we think they do justify the District Court's approach in separating the two issues as it did here.

This said, we turn to consider whether the District Court was correct in concluding that the AFLA was unconstitutional on its face. As in previous cases involving facial challenges on Establishment Clause grounds, *e. g.*, *Edwards* v. *Aguillard*, *supra; Mueller* v. *Allen*, 463 U. S. 388 (1983), we assess the constitutionality of an enactment by reference to the three factors first articulated in *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971). Under the *Lemon* standard, which guides "[t]he general nature of our inquiry in this area," *Mueller* v. *Allen*, *supra*, at 394, a court may invalidate a statute only if it is motivated wholly by an impermissible purpose, *Lynch* v. *Donnelly*, 465 U. S. 668, 680 (1984); *Stone* v. *Graham*, 449 U. S. 39, 41 (1980), if its primary effect is the advancement of religion, *Estate of Thornton* v. *Caldor, Inc.*, 472 U. S. 703, 708 (1985), or if it requires excessive entanglement between church and state, *Lemon*, *supra*, at 613; *Walz* v. *Tax Comm'n*, 397 U. S. 664, 674 (1970). We consider each of these factors in turn.

As we see it, it is clear from the face of the statute that the AFLA was motivated primarily, if not entirely, by a legitimate secular purpose—the elimination or reduction of social and economic problems caused by teenage sexuality, pregnancy, and parenthood. See §§ 300z(a), (b) (1982 ed. and Supp. IV). Appellees cannot, and do not, dispute that, on the whole, religious concerns were not the sole motivation

behind the Act, see *Lynch*, *supra*, at 680, nor can it be said that the AFLA lacks a legitimate secular purpose, see *Edwards* v. *Aguillard*, 482 U. S., at 585. In the court below, however, appellees argued that the *real* purpose of the AFLA could only be understood in reference to the AFLA's predecessor, Title VI. Appellees contended that Congress had an impermissible purpose in adopting the AFLA because it specifically amended Title VI to increase the role of religious organizations in the programs sponsored by the Act. In particular, they pointed to the fact that the AFLA, unlike Title VI, requires grant applicants to describe how they will involve religious organizations in the programs funded by the AFLA. § 300z–5(a)(21)(B).

The District Court rejected this argument, however, reasoning that even if it is assumed that the AFLA was motivated in part by improper concerns, the parts of the statute to which appellees object were also motivated by other, entirely legitimate secular concerns. We agree with this conclusion. As the District Court correctly pointed out, Congress amended Title VI in a number of ways, most importantly for present purposes by attempting to enlist the aid of not only "religious organizations," but also "family members . . . , charitable organizations, voluntary associations, and other groups in the private sector," in addressing the problems associated with adolescent sexuality. § 300z(a)(8)(B); see also §§ 300z–5(a)(21)(A), (B). Cf. Title VI, § 601(a)(5) ("[T]he problems of adolescent [sexuality] . . . are best approached through a variety of integrated and essential services"). Congress' decision to amend the statute in this way reflects the entirely appropriate aim of increasing broad-based community involvement "in helping adolescent boys and girls understand the implications of premarital sexual relations, pregnancy, and parenthood." See Senate Report, at 2, 15–16. In adopting the AFLA, Congress expressly intended to expand the services already authorized by Title VI, to insure the increased participation of parents in education

and support services, to increase the flexibility of the programs, and to spark the development of new, innovative services. *Id.*, at 7–9. These are all legitimate secular goals that are furthered by the AFLA's additions to Title VI, including the challenged provisions that refer to religious organizations. There simply is no evidence that Congress' "actual purpose" in passing the AFLA was one of "endorsing religion." See *Edwards* v. *Aguillard*, 482 U. S., at 589–594. Nor are we in a position to doubt that Congress' expressed purposes are "sincere and not a sham." *Id.*, at 587.[8]

As usual in Establishment Clause cases, see, *e. g.*, *Grand Rapids School District* v. *Ball*, 473 U. S. 373 (1985); *Mueller*, *supra*, the more difficult question is whether the primary effect of the challenged statute is impermissible. Before we address this question, however, it is useful to review again just what the AFLA sets out to do. Simply stated, it authorizes grants to institutions that are capable of providing certain care and prevention services to adolescents. Because of the complexity of the problems that Congress sought to remedy, potential grantees are required to describe how they will involve other organizations, including religious organizations, in the programs funded by the federal grants. § 300z–5(a)(21)(B); see also § 300z–2(a). There is no requirement in the Act that grantees be affiliated with any religious denomination, although the Act clearly does not rule out grants to religious organizations.[9] The services to be pro-

[8] We also see no reason to conclude that the AFLA serves an impermissible religious purpose simply because some of the goals of the statute coincide with the beliefs of certain religious organizations. See *Harris* v. *McRae*, 448 U. S. 297, 319–320 (1980); *McGowan* v. *Maryland*, 366 U. S. 420, 442 (1961).

[9] Indeed, the legislative history shows that Congress was aware that religious organizations had been grantees under Title VI and that it did not disapprove of that practice. The Senate Report, at 16, states:

"It should be noted that under current law [Title VI], the Office of Adolescent Pregnancy Programs has made grants to two religious-affiliated organizations, two Christian organizations and several other groups that are

vided under the AFLA are not religious in character, see n. 2, *supra*, nor has there been any suggestion that religious institutions or organizations with religious ties are uniquely well qualified to carry out those services.[10] Certainly it is true that a substantial part of the services listed as "necessary services" under the Act involve some sort of education or counseling, see, *e. g.*, §§ 300z–1(a)(4)(D), (G), (H), (J), (L), (M), (O), but there is nothing inherently religious about these activities and appellees do not contend that, by themselves, the AFLA's "necessary services" somehow have the primary effect of advancing religion. Finally, it is clear that the AFLA takes a particular approach toward dealing with adolescent sexuality and pregnancy—for example, two of its stated purposes are to "promote self discipline and other prudent approaches to the problem of adolescent premarital sexual relations," § 300z(b)(1), and to "promote adoption as an alternative," 300z(b)(2)—but again, that approach is not inherently religious, although it may coincide with the approach taken by certain religions.

Given this statutory framework, there are two ways in which the statute, considered "on its face," might be said to have the impermissible primary effect of advancing religion. First, it can be argued that the AFLA advances religion by expressly recognizing that "religious organizations have a role to play" in addressing the problems associated with teen-

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indirectly affiliated with religious bodies. Religious affiliation is not a criterion for selection as a grantee under the adolescent family life program, but any such grants made by the Secretary would be a simple recognition that nonprofit religious organizations have a role to play in the provision of services to adolescents."

[10] One witness before the Senate Committee testified that "projects which target hispanic and other minority populations are more accepted by the population if they include sectarian, as well as non-sectarian, organizations in the delivery of those services." S. Rep. No. 98–496, p. 10 (1984). This indicates not that sectarian grantees are particularly well qualified to perform AFLA services, but that the inclusion of both secular and sectarian grantees can improve the effectiveness of the Act's programs.

age sexuality. Senate Report, at 16. In this view, even if no religious institution receives aid or funding pursuant to the AFLA, the statute is invalid under the Establishment Clause because, among other things, it expressly enlists the involvement of religiously affiliated organizations in the federally subsidized programs, it endorses religious solutions to the problems addressed by the Act, or it creates symbolic ties between church and state. Secondly, it can be argued that the AFLA is invalid on its face because it allows religiously affiliated organizations to participate as grantees or subgrantees in AFLA programs. From this standpoint, the Act is invalid because it authorizes direct federal funding of religious organizations which, given the AFLA's educational function and the fact that the AFLA's "viewpoint" may coincide with the grantee's "viewpoint" on sexual matters, will result unavoidably in the impermissible "inculcation" of religious beliefs in the context of a federally funded program.

We consider the former objection first. As noted previously, the AFLA expressly mentions the role of religious organizations in four places. It states (1) that the problems of teenage sexuality are "best approached through a variety of integrated and essential services provided to adolescents and their families by[, among others,] religious organizations," § 300z(a)(8)(B), (2) that federally subsidized services "should emphasize the provision of support by[, among others,] religious and charitable organizations," § 300z(a)(10)(C), (3) that AFLA programs "shall use such methods as will strengthen the capacity of families . . . to make use of support systems such as . . . religious . . . organizations," § 300z–2(a), and (4) that grant applicants shall describe how they will involve religious organizations, among other groups, in the provision of services under the Act. § 300z–5(a)(21)(B).

Putting aside for the moment the possible role of religious organizations as grantees, these provisions of the statute reflect at most Congress' considered judgment that religious organizations can help solve the problems to which the

AFLA is addressed. See Senate Report, at 15–16. Nothing in our previous cases prevents Congress from making such a judgment or from recognizing the important part that religion or religious organizations may play in resolving certain secular problems. Particularly when, as Congress found, "prevention of adolescent sexual activity and adolescent pregnancy depends primarily upon developing strong family values and close family ties," § 300z(a)(10)(A), it seems quite sensible for Congress to recognize that religious organizations can influence values and can have some influence on family life, including parents' relations with their adolescent children. To the extent that this congressional recognition has any effect of advancing religion, the effect is at most "incidental and remote." See *Lynch*, 465 U. S., at 683; *Estate of Thornton* v. *Caldor, Inc.*, 472 U. S., at 710; *Nyquist*, 413 U. S., at 771. In addition, although the AFLA does require potential grantees to describe how they will involve religious organizations in the provision of services under the Act, it also requires grantees to describe the involvement of "charitable organizations, voluntary associations, and other groups in the private sector," § 300z–5(a)(21)(B).[11] In our view, this reflects the statute's successful maintenance of "a course of neutrality among religions, and between religion and nonreligion," *Grand Rapids School District* v. *Ball*, 473 U. S., at 382.

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[11] This undercuts any argument that religion has been "advanced" simply because AFLA added to Title VI the various references to religious organizations. As we noted previously, the amendments to Title VI were motivated by the secular purpose of increasing community involvement in the problems associated with adolescent sexuality. Although the AFLA amendments may have the effect of increasing the role of religious organizations in services provided under the AFLA, at least relative to services provided under Title VI, this reflects merely the fact that the AFLA program as a whole was expanded, with the role of all community organizations being increased as a result. This expansion of programs available under the AFLA, as opposed to Title VI, has only the "incidental" effect, if that, of advancing religion.

This brings us to the second ground for objecting to the AFLA: the fact that it allows religious institutions to participate as recipients of federal funds. The AFLA defines an "eligible grant recipient" as a "public or nonprofit private organization or agency" which demonstrates the capability of providing the requisite services. § 300z–1(a)(3). As this provision would indicate, a fairly wide spectrum of organizations is eligible to apply for and receive funding under the Act, and nothing on the face of the Act suggests it is anything but neutral with respect to the grantee's status as a sectarian or purely secular institution. See Senate Report, at 16 ("Religious affiliation is not a criterion for selection as a grantee . . ."). In this regard, then, the AFLA is similar to other statutes that this Court has upheld against Establishment Clause challenges in the past. In *Roemer* v. *Maryland Bd. of Public Works*, 426 U. S. 736 (1976), for example, we upheld a Maryland statute that provided annual subsidies directly to qualifying colleges and universities in the State, including religiously affiliated institutions. As the plurality stated, "religious institutions need not be quarantined from public benefits that are neutrally available to all." *Id.*, at 746 (discussing *Everson* v. *Board of Education*, 330 U. S. 1 (1947) (approving busing services equally available to both public and private school children), and *Board of Education* v. *Allen*, 392 U. S. 236 (1968) (upholding state provision of secular textbooks for both public and private school students)). Similarly, in *Tilton* v. *Richardson*, 403 U. S. 672 (1971), we approved the federal Higher Educational Facilities Act, which was intended by Congress to provide construction grants to "all colleges and universities regardless of any affiliation with or sponsorship by a religious body." *Id.*, at 676. And in *Hunt* v. *McNair*, 413 U. S. 734 (1973), we rejected a challenge to a South Carolina statute that made certain benefits "available to all institutions of higher education in South Carolina, whether or not having a religious affiliation." *Id.*, at 741. In other cases involving indirect

grants of state aid to religious institutions, we have found it important that the aid is made available regardless of whether it will ultimately flow to a secular or sectarian institution. See, *e. g.*, *Witters* v. *Washington Dept. of Services for Blind*, 474 U. S. 481, 487 (1986); *Mueller* v. *Allen*, 463 U. S., at 398; *Everson* v. *Board of Education*, *supra*, at 17–18; *Walz* v. *Tax Comm'n*, 397 U. S., at 676.

We note in addition that this Court has never held that religious institutions are disabled by the First Amendment from participating in publicly sponsored social welfare programs. To the contrary, in *Bradfield* v. *Roberts*, 175 U. S. 291 (1899), the Court upheld an agreement between the Commissioners of the District of Columbia and a religiously affiliated hospital whereby the Federal Government would pay for the construction of a new building on the grounds of the hospital. In effect, the Court refused to hold that the mere fact that the hospital was "conducted under the auspices of the Roman Catholic Church" was sufficient to alter the purely secular legal character of the corporation, *id.*, at 298, particularly in the absence of any allegation that the hospital discriminated on the basis of religion or operated in any way inconsistent with its secular charter. In the Court's view, the giving of federal aid to the hospital was entirely consistent with the Establishment Clause, and the fact that the hospital was religiously affiliated was "wholly immaterial." *Ibid.* The propriety of this holding, and the long history of cooperation and interdependency between governments and charitable or religious organizations is reflected in the legislative history of the AFLA. See S. Rep. No. 98–496, p. 10 (1984) ("Charitable organizations with religious affiliations historically have provided social services with the support of their communities and without controversy").

Of course, even when the challenged statute appears to be neutral on its face, we have always been careful to ensure that direct government aid to religiously affiliated institutions does not have the primary effect of advancing religion.

One way in which direct government aid might have that effect is if the aid flows to institutions that are "pervasively sectarian." We stated in *Hunt* that

> "[a]id normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission . . . ." 413 U. S., at 743.

The reason for this is that there is a risk that direct government funding, even if it is designated for specific secular purposes, may nonetheless advance the pervasively sectarian institution's "religious mission." See *Grand Rapids School District* v. *Ball*, 473 U. S., at 385 (discussing how aid to religious schools may impermissibly advance religion). Accordingly, a relevant factor in deciding whether a particular statute on its face can be said to have the improper effect of advancing religion is the determination of whether, and to what extent, the statute directs government aid to pervasively sectarian institutions. In *Grand Rapids School District*, for example, the Court began its "effects" inquiry with "a consideration of the nature of the institutions in which the [challenged] programs operate." *Id.*, at 384.

In this lawsuit, nothing on the face of the AFLA indicates that a significant proportion of the federal funds will be disbursed to "pervasively sectarian" institutions. Indeed, the contention that there is a substantial risk of such institutions receiving direct aid is undercut by the AFLA's facially neutral grant requirements, the wide spectrum of public and private organizations which are capable of meeting the AFLA's requirements, and the fact that, of the eligible religious institutions, many will not deserve the label of "pervasively sectarian."[12] This is not a case like *Grand Rapids*, where the

[12] The validity of this observation is borne out by the statistics for the AFLA program in fiscal year 1986. According to the record of funding for that year, some $10.7 million in funding was awarded under the AFLA to a total of 86 organizations. Of this, about $3.3 million went to 23 religiously

challenged aid flowed almost entirely to parochial schools. In that case the State's "Shared Time" program was directed specifically at providing certain classes for nonpublic schools, and 40 of 41 of the schools that actually participated in the program were found to be "pervasively sectarian." *Id.*, at 385. See also *Nyquist*, 413 U. S., at 768 ("'all or practically all'" of the schools entitled to receive grants were religiously affiliated); *Meek* v. *Pittenger*, 421 U. S., at 371. Instead, this litigation more closely resembles *Tilton* and *Roemer*, where it was foreseeable that some proportion of the recipients of government aid would be religiously affiliated, but that only a small portion of these, if any, could be considered "pervasively sectarian." In those cases we upheld the challenged statutes on their face and as applied to the institutions named in the complaints, but left open the consequences which would ensue if they allowed federal aid to go to institutions that were in fact pervasively sectarian. *Tilton*, 403 U. S., at 682; *Roemer*, 426 U. S., at 760. As in *Tilton* and *Roemer*, we do not think the possibility that AFLA grants may go to religious institutions that can be considered "pervasively sectarian" is sufficient to conclude that no grants whatsoever can be given under the statute to religious organizations. We think that the District Court was wrong in concluding otherwise.

Nor do we agree with the District Court that the AFLA necessarily has the effect of advancing religion because the religiously affiliated AFLA grantees will be providing educational and counseling services to adolescents. Of course, we have said that the Establishment Clause does "prohibit government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith," *Grand*

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affiliated grantees, with only $1.3 million of this figure going to the 13 projects that were cited by the District Court for constitutional violations. App. 748–756. Of these 13 projects, 4 appear to be state or local government organizations, and at least 1 is a hospital. *Id.*, at 755. Of the 13 religiously affiliated organizations listed, 2 are universities. *Id.*, at 756.

Rapids, *supra*, at 385, and we have accordingly struck down programs that entail an unacceptable risk that government funding would be used to "advance the religious mission" of the religious institution receiving aid. See, *e. g.*, *Meek*, *supra*, at 370. But nothing in our prior cases warrants the presumption adopted by the District Court that religiously affiliated AFLA grantees are not capable of carrying out their functions under the AFLA in a lawful, secular manner. Only in the context of aid to "pervasively sectarian" institutions have we invalidated an aid program on the grounds that there was a "substantial" risk that aid to these religious institutions would, knowingly or unknowingly, result in religious indoctrination. *E. g.*, *Grand Rapids*, *supra*, at 387–398; *Meek*, *supra*, at 371. In contrast, when the aid is to flow to religiously affiliated institutions that were not pervasively sectarian, as in *Roemer*, we refused to presume that it would be used in a way that would have the primary effect of advancing religion. *Roemer*, 426 U. S., at 760 ("We must assume that the colleges . . . will exercise their delegated control over use of the funds in compliance with the statutory, and therefore the constitutional, mandate"). We think that the type of presumption that the District Court applied in this case is simply unwarranted. As we stated in *Roemer:* "It has not been the Court's practice, in considering facial challenges to statutes of this kind, to strike them down in anticipation that particular applications may result in unconstitutional use of funds." *Id.*, at 761; see also *Tilton*, *supra*, at 682.

We also disagree with the District Court's conclusion that the AFLA is invalid because it authorizes "teaching" by religious grant recipients on "matters [that] are fundamental elements of religious doctrine," such as the harm of premarital sex and the reasons for choosing adoption over abortion. 657 F. Supp., at 1562. On an issue as sensitive and important as teenage sexuality, it is not surprising that the Government's secular concerns would either coincide or conflict

with those of religious institutions. But the possibility or even the likelihood that some of the religious institutions who receive AFLA funding will agree with the message that Congress intended to deliver to adolescents through the AFLA is insufficient to warrant a finding that the statute on its face has the primary effect of advancing religion. See *Lynch*, 465 U. S., at 682; *id.*, at 715–716 (BRENNAN, J., dissenting); *Harris* v. *McRae*, 448 U. S. 297, 319–320 (1980). Nor does the alignment of the statute and the religious views of the grantees run afoul of our proscription against "fund[ing] a specifically religious activity in an otherwise substantially secular setting." *Hunt*, 413 U. S., at 743. The facially neutral projects authorized by the AFLA—including pregnancy testing, adoption counseling and referral services, prenatal and postnatal care, educational services, residential care, child care, consumer education, etc.—are not themselves "specifically religious activities," and they are not converted into such activities by the fact that they are carried out by organizations with religious affiliations.

As yet another reason for invalidating parts of the AFLA, the District Court found that the involvement of religious organizations in the Act has the impermissible effect of creating a "crucial symbolic link" between government and religion. 657 F. Supp., at 1564 (citing, *e. g.*, *Grand Rapids*, 473 U. S., at 390). If we were to adopt the District Court's reasoning, it could be argued that any time a government aid program provides funding to religious organizations in an area in which the organization also has an interest, an impermissible "symbolic link" could be created, no matter whether the aid was to be used solely for secular purposes. This would jeopardize government aid to religiously affiliated hospitals, for example, on the ground that patients would perceive a "symbolic link" between the hospital—part of whose "religious mission" might be to save lives—and whatever government entity is subsidizing the purely secular medical services provided to the patient. We decline to adopt the

District Court's reasoning and conclude that, in this litigation, whatever "symbolic link" might in fact be created by the AFLA's disbursement of funds to religious institutions is not sufficient to justify striking down the statute on its face.

A final argument that has been advanced for striking down the AFLA on "effects" grounds is the fact that the statute lacks an express provision preventing the use of federal funds for religious purposes.[13] Cf. *Tilton*, 403 U. S., at 675; *Roemer*, *supra*, at 740–741. Clearly, if there were such a provision in this statute, it would be easier to conclude that the statute on its face could not be said to have the primary effect of advancing religion, see, *e. g.*, *Roemer*, *supra*, at 760, but we have never stated that a *statutory* restriction is constitutionally required. The closest we came to such a holding was in *Tilton*, where we struck down a provision of the statute that would have eliminated Government sanctions for violating the statute's restrictions on religious uses of funds after 20 years. 403 U. S., at 683. The reason we did so, however, was because the 20-year limit on sanctions created a risk that the religious institution would, after the 20 years were up, act as if there were no longer any constitutional or statutory limitations on its use of the federally funded building. This aspect of the decision in *Tilton* was thus intended to indicate that the constitutional limitations on use of federal funds, as embodied in the statutory restriction, could not simply "expire" at some point during the economic life of the benefit that the grantee received from the Government. In this litigation, although there is no express statutory limitation on religious use of funds, there is also no intimation in the statute that at some point, or for some grantees, religious uses are permitted. To the contrary, the 1984 Senate Report on the AFLA states that "the use of Adolescent Family Life Act funds to

[13] Section 300z–3 does, however, expressly define the uses to which federal funds may be put, including providing care and prevention services to eligible individuals. Nowhere in this section is it suggested that use of funds for religious purposes would be permissible.

promote religion, or to teach the religious doctrines of a particular sect, is contrary to the intent of this legislation." S. Rep. No. 98–496, p. 10 (1984). We note in addition that the AFLA requires each grantee to undergo evaluations of the services it provides, § 300z–5(b)(1), and also requires grantees to "make such reports concerning its use of Federal funds as the Secretary may require," § 300z–5(c). The application requirements of the Act, as well, require potential grantees to disclose in detail exactly what services they intend to provide and how they will be provided. § 300z–5(a). These provisions, taken together, create a mechanism whereby the Secretary can police the grants that are given out under the Act to ensure that federal funds are not used for impermissible purposes. Unlike some other grant programs, in which aid might be given out in one-time grants without ongoing supervision by the Government, the programs established under the authority of the AFLA can be monitored to determine whether the funds are, in effect, being used by the grantees in such a way as to advance religion. Given this statutory scheme, we do not think that the absence of an express limitation on the use of federal funds for religious purposes means that the statute, on its face, has the primary effect of advancing religion.

This, of course, brings us to the third prong of the *Lemon* Establishment Clause "test"—the question whether the AFLA leads to "'an excessive government entanglement with religion.'" *Lemon*, 403 U. S., at 613 (quoting *Walz* v. *Tax Comm'n*, 397 U. S., at 674). There is no doubt that the monitoring of AFLA grants is necessary if the Secretary is to ensure that public money is to be spent in the way that Congress intended and in a way that comports with the Establishment Clause. Accordingly, this litigation presents us with yet another "Catch-22" argument: the very supervision of the aid to assure that it does not further religion renders the statute invalid. See *Aguilar* v. *Felton*, 473 U. S., at 421 (REHNQUIST, J., dissenting); *id.*, at 418 (Powell, J., concurring)

(interaction of entanglement and effects tests forces schools "to tread an extremely narrow line"); *Roemer*, 426 U. S., at 768–769 (WHITE, J., concurring in judgment). For this and other reasons, the "entanglement" prong of the *Lemon* test has been much criticized over the years. See, *e. g.*, *Aguilar* v. *Felton*, *supra*, at 429 (O'CONNOR, J., dissenting); *Wallace* v. *Jaffree*, 472 U. S. 38, 109–110 (1985) (REHNQUIST, J., dissenting); *Lynch* v. *Donnelly*, 465 U. S., at 689 (O'CONNOR, J., concurring); *Lemon*, *supra*, at 666–668 (WHITE, J., concurring and dissenting). Most of the cases in which the Court has divided over the "entanglement" part of the *Lemon* test have involved aid to parochial schools; in *Aguilar* v. *Felton*, for example, the Court's finding of excessive entanglement rested in large part on the undisputed fact that the elementary and secondary schools receiving aid were "pervasively sectarian" and had "'as a substantial purpose the inculcation of religious values.'" 473 U. S., at 411 (quoting *Nyquist*, 413 U. S., at 768); see also 473 U. S., at 411 (expressly distinguishing *Roemer*, *Hunt*, and *Tilton* as cases involving aid to institutions that were not pervasively sectarian). In *Aguilar*, the Court feared that an adequate level of supervision would require extensive and permanent on-site monitoring, 473 U. S., at 412–413, and would threaten both the "freedom of religious belief of those who [were] not adherents of that denomination" and the "freedom of . . . the adherents of the denomination." *Id.*, at 409–410.

Here, by contrast, there is no reason to assume that the religious organizations which may receive grants are "pervasively sectarian" in the same sense as the Court has held parochial schools to be. There is accordingly no reason to fear that the less intensive monitoring involved here will cause the Government to intrude unduly in the day-to-day operation of the religiously affiliated AFLA grantees. Unquestionably, the Secretary will review the programs set up and run by the AFLA grantees, and undoubtedly this will involve a review of, for example, the educational materials that a

grantee proposes to use. The Secretary may also wish to have Government employees visit the clinics or offices where AFLA programs are being carried out to see whether they are in fact being administered in accordance with statutory and constitutional requirements. But in our view, this type of grant monitoring does not amount to "excessive entanglement," at least in the context of a statute authorizing grants to religiously affiliated organizations that are not necessarily "pervasively sectarian."[14]

In sum, in this somewhat lengthy discussion of the validity of the AFLA on its face, we have concluded that the statute has a valid secular purpose, does not have the primary effect of advancing religion, and does not create an excessive entanglement of church and state. We note, as is proper given the traditional presumption in favor of the constitutionality of statutes enacted by Congress, that our conclusion that the statute does not violate the Establishment Clause is consistent with the conclusion Congress reached in the course of its deliberations on the AFLA. As the Senate Committee Report states:

> "In the committee's view, provisions for the involvement of religious organizations [in the AFLA] do not violate the constitutional separation between church and state. Recognizing the limitations of Government in dealing with a problem that has complex moral and social dimensions, the committee believes that promoting the involvement of religious organizations in the solution to

[14] We also disagree with the District Court's conclusion that the AFLA is invalid because it is likely to create political division along religious lines. See 657 F. Supp., at 1569. It may well be that because of the importance of the issues relating to adolescent sexuality there may be a division of opinion along religious lines as well as other lines. But the same may be said of a great number of other public issues of our day. In addition, as we said in *Mueller* v. *Allen*, 463 U. S. 388, 404, n. 11 (1983), the question of "political divisiveness" should be "regarded as confined to cases where direct financial subsidies are paid to parochial schools or to teachers in parochial schools."

these problems is neither inappropriate or illegal." Senate Report, at 15–16.

For the foregoing reasons we conclude that the AFLA does not violate the Establishment Clause "on its face."

III

We turn now to consider whether the District Court correctly ruled that the AFLA was unconstitutional as applied. Our first task in this regard is to consider whether appellees had standing to raise this claim. In *Flast* v. *Cohen*, 392 U. S. 83 (1968), we held that federal taxpayers have standing to raise Establishment Clause claims against exercises of congressional power under the taxing and spending power of Article I, § 8, of the Constitution. Although we have considered the problem of standing and Article III limitations on federal jurisdiction many times since then, we have consistently adhered to *Flast* and the narrow exception it created to the general rule against taxpayer standing established in *Frothingham* v. *Mellon*, 262 U. S. 447 (1923). Accordingly, in this case there is no dispute that appellees have standing to raise their challenge to the AFLA on its face. What is disputed, however, is whether appellees also have standing to challenge the statute as applied. The answer to this question turns on our decision in *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U. S. 464 (1982). In *Valley Forge*, we ruled that taxpayers did not have standing to challenge a decision by the Secretary of Health, Education, and Welfare (HEW) to dispose of certain property pursuant to the Federal Property and Administrative Services Act of 1949, 63 Stat. 377, as amended, 40 U. S. C. § 471 *et seq.* We rejected the taxpayers' claim of standing for two reasons: first, because "the source of their complaint is not a congressional action, but a decision by HEW to transfer a parcel of federal property," 454 U. S., at 479, and second, because "the property transfer about which [the taxpayers] complain was not an exercise of

authority conferred by the Taxing and Spending Clause of Art. I, § 8," *id.*, at 480. Appellants now contend that appellees' standing in this case is deficient for the former reason; they argue that a challenge to the AFLA "as applied" is really a challenge to executive action, not to an exercise of congressional authority under the Taxing and Spending Clause. We do not think, however, that appellees' claim that AFLA funds are being used improperly by individual grantees is any less a challenge to congressional taxing and spending power simply because the funding authorized by Congress has flowed through and been administered by the Secretary. Indeed, *Flast* itself was a suit against the Secretary of HEW, who had been given the authority under the challenged statute to administer the spending program that Congress had created. In subsequent cases, most notably *Tilton*, we have not questioned the standing of taxpayer plaintiffs to raise Establishment Clause challenges, even when their claims raised questions about the administratively made grants. See *Tilton*, 403 U. S., at 676; see also *Hunt*, 413 U. S., at 735–736 (not questioning standing of state taxpayer to file suit against state executive in an "as applied" challenge); *Roemer*, 426 U. S., at 744 (same). This is not a case like *Valley Forge*, where the challenge was to an exercise of executive authority pursuant to the Property Clause of Article IV, § 3, see 454 U. S., at 480, or *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U. S. 208, 228 (1974), where the plaintiffs challenged the executive decision to allow Members of Congress to maintain their status as officers of the Armed Forces Reserve. See also *United States* v. *Richardson*, 418 U. S. 166, 175 (1974) (rejecting standing in challenge to statutes regulating the Central Intelligence Agency's accounting and reporting requirements). Nor is this, as we stated in *Flast*, a challenge to "an incidental expenditure of tax funds in the administration of an essentially regulatory statute." 392 U. S., at 102. The AFLA is at heart a program of disbursement of funds pursuant to Con-

gress' taxing and spending powers, and appellees' claims call into question how the funds authorized by Congress are being disbursed pursuant to the AFLA's statutory mandate. In this litigation there is thus a sufficient nexus between the taxpayer's standing as a taxpayer and the congressional exercise of taxing and spending power, notwithstanding the role the Secretary plays in administering the statute.[15]

On the merits of the "as applied" challenge, it seems to us that the District Court did not follow the proper approach in assessing appellees' claim that the Secretary is making grants under the Act that violate the Establishment Clause of the First Amendment. Although the District Court stated several times that AFLA aid had been given to religious organizations that were "pervasively sectarian," see 657 F. Supp., at 1564, 1565, 1567, it did not identify which grantees it was referring to, nor did it discuss with any particularity the aspects of those organizations which in its view warranted classification as "pervasively sectarian."[16] The District Court did identify certain instances in which it felt AFLA funds were used for constitutionally improper purposes, but in our view the court did not adequately design its remedy to address the specific problems it found in the Secretary's administration of the statute. Accordingly, although there is no dispute that the record contains evidence of specific incidents of impermissible behavior by AFLA grantees, we feel that this lawsuit should be remanded to the District

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[15] Because we find that the taxpayer appellees have standing, we need not consider the standing of the clergy or the American Jewish Congress.

[16] The closest the court came was to identify "at least ten AFLA grantees or subgrantees [that] were themselves 'religious organizations,' in the sense that they have explicit corporate ties to a particular religious faith and by-laws or policies that prohibit any deviation from religious doctrine." 657 F. Supp., at 1565. While these factors are relevant to the determination of whether an institution is "pervasively sectarian," they are not conclusive, and we do not find the court's conclusion that these institutions are "religious organizations" to be equivalent to a finding that their secular purposes and religious mission are "inextricably intertwined."

Court for consideration of the evidence presented by appellees insofar as it sheds light on the manner in which the statute is presently being administered. It is the latter inquiry to which the court must direct itself on remand.

In particular, it will be open to appellees on remand to show that AFLA aid is flowing to grantees that can be considered "pervasively sectarian" religious institutions, such as we have held parochial schools to be. See *Hunt*, *supra*, at 743. As our previous discussion has indicated, and as *Tilton*, *Hunt*, and *Roemer* make clear, it is not enough to show that the recipient of a challenged grant is affiliated with a religious institution or that it is "religiously inspired."

The District Court should also consider on remand whether in particular cases AFLA aid has been used to fund "specifically religious activit[ies] in an otherwise substantially secular setting." *Hunt*, *supra*, at 743. In *Hunt*, for example, we deemed it important that the conditions on which the aid was granted were sufficient to preclude the possibility that funds would be used for the construction of a building used for religious purposes. Here it would be relevant to determine, for example, whether the Secretary has permitted AFLA grantees to use materials that have an explicitly religious content or are designed to inculcate the views of a particular religious faith. As we have pointed out in our previous discussion, evidence that the views espoused on questions such as premarital sex, abortion, and the like happen to coincide with the religious views of the AFLA grantee would not be sufficient to show that the grant funds are being used in such a way as to have a primary effect of advancing religion.

If the District Court concludes on the evidence presented that grants are being made by the Secretary in violation of the Establishment Clause, it should then turn to the question of the appropriate remedy. We deal here with a funding statute with respect to which Congress has expressed the view that the use of funds by grantees to promote religion,

or to teach religious doctrines of a particular sect, would be contrary to the intent of the statute. See S. Rep. No. 98–496, p. 10 (1984). The Secretary has promulgated a series of conditions to each grant, including a prohibition against teaching or promoting religion. See App. 757. While these strictures may not be coterminous with the requirements of the Establishment Clause, they make it very likely that any particular grant which would violate the Establishment Clause would also violate the statute and the grant conditions imposed by the Secretary. Should the court conclude that the Secretary has wrongfully approved certain AFLA grants, an appropriate remedy would require the Secretary to withdraw such approval.

IV

We conclude, first, that the District Court erred in holding that the AFLA is invalid on its face, and second, that the court should consider on remand whether particular AFLA grants have had the primary effect of advancing religion. Should the court conclude that the Secretary's current practice does allow such grants, it should devise a remedy to insure that grants awarded by the Secretary comply with the Constitution and the statute. The judgment of the District Court is accordingly

Reversed.

JUSTICE O'CONNOR, concurring.

This litigation raises somewhat unusual questions involving a facially valid statute that appears to have been administered in a way that led to violations of the Establishment Clause. I agree with the Court's resolution of those questions, and I join its opinion. I write separately, however, to explain why I do not believe that the Court's approach reflects any tolerance for the kind of improper administration that seems to have occurred in the Government program at issue here.

The dissent says, and I fully agree, that "[p]ublic funds may not be used to endorse the religious message." *Post*, at

642. As the Court notes, "there is no dispute that the record contains evidence of specific incidents of impermissible behavior by AFLA grantees." *Ante*, at 620. Because the District Court employed an analytical framework that did not require a detailed discussion of the voluminous record, the extent of this impermissible behavior and the degree to which it is attributable to poor administration by the Executive Branch is somewhat less clear. In this circumstance, two points deserve to be emphasized. First, *any* use of public funds to promote religious doctrines violates the Establishment Clause. Second, *extensive* violations—if they can be proved in this case—will be highly relevant in shaping an appropriate remedy that ends such abuses. For that reason, appellees may yet prevail on remand, and I do not believe that the Court's approach entails a relaxation of "the unwavering vigilance that the Constitution requires against any law 'respecting an establishment of religion.'" See *post*, at 648 (quoting U. S. Const., Amdt. 1); cf. *post*, at 630, n. 4.

The need for detailed factual findings by the District Court stems in part from the delicacy of the task given to the Executive Branch by the Adolescent Family Life Act (AFLA). Government has a strong and legitimate secular interest in encouraging sexual restraint among young people. At the same time, as the dissent rightly points out, "[t]here is a very real and important difference between running a soup kitchen or a hospital, and counseling pregnant teenagers on how to make the difficult decisions facing them." *Post*, at 641. Using religious organizations to advance the secular goals of the AFLA, without thereby permitting religious indoctrination, is inevitably more difficult than in other projects, such as ministering to the poor and the sick. I nonetheless agree with the Court that the partnership between governmental and religious institutions contemplated by the AFLA need not result in constitutional violations, despite an undeniably greater risk than is present in cooperative undertakings that involve less sensitive objectives. If the District Court finds

on remand that grants are being made in violation of the Establishment Clause, an appropriate remedy would take into account the history of the program's administration as well as the extent of any continuing constitutional violations.

JUSTICE KENNEDY, with whom JUSTICE SCALIA joins, concurring.

I join the Court's opinion, and write this separate concurrence to discuss one feature of the proceedings on remand. The Court states that "it will be open to appellees on remand to show that AFLA aid is flowing to grantees that can be considered 'pervasively sectarian' religious institutions, such as we have held parochial schools to be." *Ante*, at 621. In my view, such a showing will not alone be enough, in an as-applied challenge, to make out a violation of the Establishment Clause.

Though I am not confident that the term "pervasively sectarian" is a well-founded juridical category, I recognize the thrust of our previous decisions that a statute which provides for exclusive or disproportionate funding to pervasively sectarian institutions may impermissibly advance religion and as such be invalid on its face. We hold today, however, that the neutrality of the grant requirements and the diversity of the organizations described in the statute before us foreclose the argument that it is disproportionately tied to pervasively sectarian groups. *Ante*, at 610–611. Having held that the statute is not facially invalid, the only purpose of further inquiring whether any particular grantee institution is pervasively sectarian is as a preliminary step to demonstrating that the funds are in fact being used to further religion. In sum, where, as in this litigation, a statute provides that the benefits of a program are to be distributed in a neutral fashion to religious and nonreligious applicants alike, and the program withstands a facial challenge, it is not unconstitutional as applied solely by reason of the religious character of a specific recipient. The question in an as-applied challenge is not

whether the entity is of a religious character, but how it spends its grant.

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

In 1981, Congress enacted the Adolescent Family Life Act (AFLA), 95 Stat. 578, 42 U. S. C. § 300z *et seq.* (1982 ed. and Supp. IV), thereby "involv[ing] families[,] . . . religious and charitable organizations, voluntary associations, and other groups," § 300z–5(a)(21), in a broad-scale effort to alleviate some of the problems associated with teenage pregnancy. It is unclear whether Congress ever envisioned that public funds would pay for a program during a session of which parents and teenagers would be instructed:

> "You want to know the church teachings on sexuality. . . . You are the church. You people sitting here are the body of Christ. The teachings of you and the things you value are, in fact, the values of the Catholic Church." App. 226.

Or of curricula that taught:

> "The Church has always taught that the marriage act, or intercourse, seals the union of husband and wife, (and is a representation of their union on all levels.) Christ commits Himself to us when we come to ask for the sacrament of marriage. We ask Him to be active in our life. God is love. We ask Him to share His love in ours, and God procreates with us, He enters into our physical union with Him, and we begin new life." *Id.*, at 372.

Or the teaching of a method of family planning described on the grant application as "not only a method of birth regulation but also a philosophy of procreation," *id.*, at 143, and promoted as helping "spouses who are striving . . . to transform their married life into testimony[,] . . . to cultivate their matrimonial spirituality[, and] to make themselves better in-

struments in God's plan," and as "facilitat[ing] the evangelization of homes." *Id.*, at 385.

Whatever Congress had in mind, however, it enacted a statute that facilitated and, indeed, encouraged the use of public funds for such instruction, by giving religious groups a central pedagogical and counseling role without imposing any restraints on the sectarian quality of the participation. As the record developed thus far in this litigation makes all too clear, federal tax dollars appropriated for AFLA purposes have been used, with Government approval, to support religious teaching. Today the majority upholds the facial validity of this statute and remands the action to the District Court for further proceedings concerning appellees' challenge to the manner in which the statute has been applied. Because I am firmly convinced that our cases require invalidating this statutory scheme, I dissent.

I

The District Court, troubled by the lack of express guidance from this Court as to the appropriate manner in which to examine Establishment Clause challenges to an entire statute as well as to specific instances of its implementation, reluctantly proceeded to analyze the AFLA both "on its face" and "as applied." Thereafter, on cross-motions for summary judgment supported by an extensive record of undisputed facts, the District Court applied the three-pronged analysis of *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971), and declared the AFLA unconstitutional both facially and as applied. 657 F. Supp. 1547 (DC 1987). The majority acknowledges that this Court in some cases has passed on the facial validity of a legislative enactment and in others limited its analysis to the particular applications at issue; yet, while confirming that the District Court was justified in analyzing the AFLA both ways, the Court fails to elaborate on the consequences that flow from the analytical division.

While the distinction is sometimes useful in constitutional litigation, the majority misuses it here to divide and conquer appellees' challenge.[1] By designating appellees' broad attack on the statute as a "facial" challenge, the majority justifies divorcing its analysis from the extensive record developed in the District Court, and thereby strips the challenge of much of its force and renders the evaluation of the *Lemon* "effects" prong particularly sterile and meaningless. By characterizing appellees' objections to the real-world operation of the AFLA an "as-applied" challenge, the Court risks misdirecting the litigants and the lower courts toward piecemeal litigation continuing indefinitely throughout the life of the AFLA. In my view, a more effective way to review Establishment Clause challenges is to look to the type of re-

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[1] A related point on which I do agree with the majority is worth acknowledging explicitly. In his appeal to this Court, the Secretary of Health and Human Services vigorously criticized the District Court's analysis of the AFLA on its face, asserting that it "cannot be squared with this Court's explanation in *United States* v. *Salerno*, [481 U. S. 739, 745 (1987),] that in mounting a facial challenge to a legislative Act, 'the challenger must establish that no set of circumstances exists under which the Act would be valid.'" Brief for Federal Appellant 30. The Court, however, rejects the application of such rigid analysis in Establishment Clause cases, explaining: "As in previous cases involving facial challenges on Establishment Clause grounds, . . . we assess the constitutionality of an enactment by reference to the three factors first articulated in *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971)." *Ante*, at 602. Indeed, the Secretary's proposed test is wholly incongruous with analysis of an Establishment Clause challenge under *Lemon*, which requires our examination of the purpose of the legislative enactment, as well as its primary effect or potential for fostering excessive entanglement. Although I may differ with the majority in the application of the *Lemon* analysis to the AFLA, I join it in rejecting the Secretary's approach which would render review under the Establishment Clause a nullity. Even in a statute like the AFLA, with its solicitude for, and specific averment to, the participation of religious organizations, one could hypothesize some "set of circumstances . . . under which the Act would be valid," as, for example, might be the case if no religious organization ever actually applied for or participated under an AFLA grant. The Establishment Clause cannot be eviscerated by such artifice.

lief prayed for by the plaintiffs, and the force of the arguments and supporting evidence they marshal. Whether we denominate a challenge that focuses on the systematically unconstitutional operation of a statute a "facial" challenge—because it goes to the statute as a whole—or an "as-applied" challenge—because we rely on real-world events—the Court should not blind itself to the facts revealed by the undisputed record.[2]

As is evident from the parties' arguments, the record compiled below, and the decision of the District Court, this lawsuit has been litigated primarily as a broad challenge to the statutory scheme as a whole, not just to the awarding of grants to a few individual applicants. The thousands of pages of depositions, affidavits, and documentary evidence were not intended to demonstrate merely that particular grantees should not receive further funding. Indeed, because of the 5-year grant cycle, some of the original grantees are no longer AFLA participants. This record was designed to show that the AFLA had been interpreted and implemented by the Government in a manner that was clearly unconstitutional, and appellees sought declaratory and injunctive relief as to the entire statute.

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[2] Of course, the manner in which the challenge is characterized does not limit the relief available. Where justified by the nature of the controversy and the evidence in the record, a federal district court may invoke broad equitable powers to prevent continued unconstitutional activity. See *Hutto* v. *Finney*, 437 U. S. 678, 687, and n. 9 (1978); *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1, 15 (1971) ("[B]readth and flexibility are inherent in equitable remedies"). In *Milliken* v. *Bradley*, 433 U. S. 267 (1977), the Court reiterated that in exercising its broad equitable powers, a district court should focus on the "nature and scope of the constitutional violation," and ensure that decrees be "remedial in nature." *Id.*, at 280 (emphasis omitted). On remand, therefore, as instructed by the majority, the District Court must undertake the delicate task of fashioning relief appropriate to the scope of any particular violation it discovers.

In discussing appellees' as-applied challenge, the District Court recognized that their objections went further than the validity of the particular grants under review:

> "The undisputed record before the Court transforms the inherent conflicts between the AFLA and the Constitution into reality. . . . While the Court will not engage in an exhaustive recitation of the record, references to representative portions of the record reveal the extent to which the AFLA has in fact 'directly and immediately' advanced religion, funded 'pervasively sectarian' institutions, or permitted the use of federal tax dollars for education and counseling that amounts to the teaching of religion." 657 F. Supp., at 1564 (footnote omitted).

The majority declines to accept the District Court's characterization of the record, yet fails to review it independently, relying instead on its assumptions and casual observations about the character of the grantees and potential grantees.[3]

[3] The majority finds support for its "observation[s]" in the statistics for the AFLA program in fiscal 1986. See *ante*, at 610, n. 12. Because there are some organizations that were funded in 1982, but not in 1986, and vice versa, I find the cumulative funding figures for FY 1982–1986 more helpful. Looking at those figures, and the same group of recipients identified by the majority, I find that of approximately $53.5 million in AFLA funding, over $10 million went to the 13 organizations specifically cited in the District Court's opinion for constitutional violations. App. 748–756. The District Court, of course, did not "engage in an exhaustive recitation of the record," but made references only to "representative portions." 657 F. Supp. 1547, 1564 (DC 1987). Another 13 organizations characterized as "religiously affiliated" in a tabulation prepared by the Department of Health and Human Services in connection with this litigation, received an additional $6 million during this period. Looking at the figures from a different perspective, a third of the approximately 100,000 "clients served" by all AFLA grantees during the 1985–1986 period received their services from the "cited" grantees, and nearly 11,000 more from the other "religiously affiliated" institutions. App. 748–756. At a minimum, these figures already demonstrate substantial constitutionally suspect funding through the AFLA, rendering the majority's expectations unrealistic and

See *ante*, at 610, 611–612, 616–617. In doing so, the Court neglects its responsibilities under the Establishment Clause and gives uncharacteristically short shrift to the District Court's understanding of the facts.[4]

II

Before proceeding to apply *Lemon*'s three-part analysis to the AFLA, I pause to note a particular flaw in the majority's method. A central premise of the majority opinion seems to be that the primary means of ascertaining whether a statute that appears to be neutral on its face in fact has the effect of advancing religion is to determine whether aid flows to "pervasively sectarian" institutions. See *ante*, at 609–610, 616, 621. This misplaced focus leads the majority to ignore the substantial body of case law the Court has developed in analyzing programs providing direct aid to parochial schools,

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unwarranted. And, because of the Government's failure to require grantees to report on subgrant and subcontract arrangements, *id.*, at 745, we only can speculate as to what additional public funds subsidized the religious missions of groups that the secular grantees brought in to fulfill their statutory obligation to involve religious organizations in the provision of services. See § 300z–5(a)(21)(B).

[4] The Court leaves for the District Court on remand the "consideration of the evidence presented by appellees insofar as it sheds light on the manner in which the statute is presently being administered," *ante*, at 621, conceding, as it must, that the factual record could paint a troubling picture about the true effect of the AFLA as a whole. See *Witters* v. *Washington Dept. of Services for the Blind*, 474 U. S. 481, 488 (1986) (finding significant that "nothing in the record indicates that, if petitioner succeeds, any significant portion of the aid expended under the . . . program as a whole will end up flowing to religious education"); *Aguilar* v. *Felton*, 473 U. S. 402, 412, n. 8 (1985) ("'If any significant number of the . . . schools create the risks described in *Meek*, *Meek* applies'"), quoting *Felton* v. *Secretary, United States Dept. of Education*, 739 F. 2d 48, 70 (CA2 1984); *Widmar* v. *Vincent*, 454 U. S. 263, 275 (1981) (noting absence of empirical evidence that religious groups would dominate university's open forum).

I fully agree with the majority's determination that appellees have standing as taxpayers to challenge the operation of the AFLA, *ante*, at 618–620, and note that appellees may yet prevail on remand.

and to rely almost exclusively on the few cases in which the Court has upheld the supplying of aid to private colleges, including religiously affiliated institutions.

"Pervasively sectarian," a vaguely defined term of art, has its roots in this Court's recognition that government must not engage in detailed supervision of the inner workings of religious institutions, and the Court's sensible distaste for the "picture of state inspectors prowling the halls of parochial schools and auditing classroom instruction," *Lemon* v. *Kurtzman*, 403 U. S., at 650 (BRENNAN, J., concurring); see also *Aguilar* v. *Felton*, 473 U. S. 402, 411 (1985); *Roemer* v. *Maryland Public Works Board*, 426 U. S. 736, 762 (1976) (plurality opinion). Under the "effects" prong of the *Lemon* test, the Court has used one variant or another of the pervasively sectarian concept to explain why any but the most indirect forms of government aid to such institutions would necessarily have the effect of advancing religion. For example, in *Meek* v. *Pittenger*, 421 U. S. 349, 365 (1975), the Court explained:

> "[I]t would simply ignore reality to attempt to separate secular educational functions from the predominantly religious role performed by many of Pennsylvania's church-related elementary and secondary schools and to then characterize Act 195 as channeling aid to the secular without providing direct aid to the sectarian."

See also *Hunt* v. *McNair*, 413 U. S. 734, 743 (1973).

The majority first skews the Establishment Clause analysis by adopting a cramped view of what constitutes a pervasively sectarian institution. Perhaps because most of the Court's decisions in this area have come in the context of aid to parochial schools, which traditionally have been characterized as pervasively sectarian, the majority seems to equate the characterization with the institution.[5] In support of that

[5] In rejecting the claim that the AFLA leads to excessive government entanglement with religion, the Court declines "to assume that the reli-

illusion, the majority relies heavily on three cases in which the Court has upheld direct government funding to liberal arts colleges with some religious affiliation, noting that such colleges were not "pervasively sectarian." But the happenstance that the few cases in which direct-aid statutes have been upheld have concerned religiously affiliated liberal arts colleges no more suggests that only parochial schools should be considered "pervasively sectarian," than it suggests that the only religiously affiliated institutions that may ever receive direct government funding are private liberal arts colleges. In fact, the cases on which the majority relies have stressed that the institutions' "*predominant* higher education mission is to provide their students with a *secular* education." *Tilton* v. *Richardson*, 403 U. S. 672, 687 (1971) (emphasis added); see *Roemer* v. *Maryland Public Works Board*, 426 U. S., at 755 (noting "high degree of institutional autonomy" and that "the encouragement of spiritual development is only one secondary objective of each college") (internal quotations omitted); *Hunt* v. *McNair*, 413 U. S., at 744 (finding "no basis to conclude that the College's operations are oriented significantly towards sectarian rather than secular education"). In sharp contrast, the District Court here concluded that AFLA grantees and participants included "organizations with institutional ties to religious denominations *and corporate requirements that the organizations abide by and not contradict religious doctrines.* In addition, other recipients of AFLA funds, while not explicitly affiliated with a religious denomination, are religiously inspired *and dedicated to teaching the dogma that inspired them*" (emphasis

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gious organizations which may receive grants are 'pervasively sectarian' in the same sense as the Court has held parochial schools to be." *Ante*, at 616. With respect to the claim that the AFLA is unconstitutional at least as applied, if not on its face, the Court—apparently unsatisfied with findings the District Court already made to that very effect—instructs that on remand, appellees may show that "AFLA aid is flowing to grantees that can be considered 'pervasively sectarian' religious institutions, such as we have held parochial schools to be." *Ante*, at 621.

added). 657 F. Supp., at 1564. On a continuum of "sectarianism" running from parochial schools at one end to the colleges funded by the statutes upheld in *Tilton*, *Hunt*, and *Roemer* at the other, the AFLA grantees described by the District Court clearly are much closer to the former than to the latter.

More importantly, the majority also errs in suggesting that the inapplicability of the label is generally dispositive. While a plurality of the Court has framed the inquiry as "whether an institution is so 'pervasively sectarian' that it may receive no direct state aid of any kind," *Roemer* v. *Maryland Public Works Board*, 426 U. S., at 758, the Court never has treated the absence of such a finding as a license to disregard the potential for impermissible fostering of religion. The characterization of an institution as "pervasively sectarian" allows us to eschew further inquiry into the use that will be made of direct government aid. In that sense, it is a sufficient, but not a necessary, basis for a finding that a challenged program creates an unacceptable Establishment Clause risk. The label thus serves in some cases as a proxy for a more detailed analysis of the institution, the nature of the aid, and the manner in which the aid may be used.

The voluminous record compiled by the parties and reviewed by the District Court illustrates the manner in which the AFLA has been interpreted and implemented by the agency responsible for the aid program, and eliminates whatever need there might be to speculate about what kind of institutions *might* receive funds and how they *might* be selected; the record explains the nature of the activities funded with Government money, as well as the content of the educational programs and materials developed and disseminated. There is no basis for ignoring the volumes of depositions, pleadings, and undisputed facts reviewed by the District Court simply because the recipients of the Government funds may not in every sense resemble parochial schools.

III

As is often the case, it is the effect of the statute, rather than its purpose, that creates Establishment Clause problems. Because I have no meaningful disagreement with the majority's discussion of the AFLA's essentially secular purpose, and because I find the statute's effect of advancing religion dispositive, I turn to that issue directly.

A

The majority's holding that the AFLA is not unconstitutional on its face marks a sharp departure from our precedents. While aid programs providing nonmonetary, verifiably secular aid have been upheld notwithstanding the indirect effect they might have on the allocation of an institution's own funds for religious activities, see, *e. g.*, *Board of Education* v. *Allen*, 392 U. S. 236 (1968) (lending secular textbooks to parochial schools); *Everson* v. *Board of Education*, 330 U. S. 1 (1947) (providing bus services to parochial schools), direct cash subsidies have always required much closer scrutiny into the expected and potential uses of the funds, and much greater guarantees that the funds would not be used inconsistently with the Establishment Clause. Parts of the AFLA prescribing various forms of outreach, education, and counseling services[6] specifically authorize the expenditure of funds in ways previously held unconstitutional. For example, the Court has upheld the use of public funds to support a parochial school's purchase of secular textbooks already approved for use in public schools, see *Wolman* v. *Walter*, 433 U. S. 229, 236–238 (1977); *Meek* v. *Pittenger*, 421 U. S., at 359–362, or its grading and administering of state-prepared tests, *Committee for Public Education & Religious Liberty* v. *Regan*, 444 U. S. 646 (1980). When the books, teaching materials, or examinations were to

[6] The District Court observed that 9 of 17 "necessary services," see § 300z–1(a)(4), expressly involved some sort of education, counseling, or an intimately related service. 657 F. Supp., at 1562.

be selected or designed by the private schools themselves, however, the Court consistently has held that such government aid risked advancing religion impermissibly. See, *e. g.*, *Wolman* v. *Walter*, 433 U. S., at 248–251; *Levitt* v. *Committee for Public Education & Religious Liberty*, 413 U. S. 472 (1973); *Lemon* v. *Kurtzman*, 403 U. S., at 620–621. The teaching materials that may be purchased, developed, or disseminated with AFLA funding are in no way restricted to those already selected and approved for use in secular contexts.[7]

Notwithstanding the fact that Government funds are paying for religious organizations to teach and counsel impressionable adolescents on a highly sensitive subject of considerable religious significance, often on the premises of a church or parochial school and without any effort to remove religious symbols from the sites, 657 F. Supp., at 1565–1566, the majority concludes that the AFLA is not facially invalid. The majority acknowledges the constitutional proscription on

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[7] Thus, for example, until discovery began in this lawsuit, St. Ann's, a home for unmarried pregnant teenagers, operated by the Order of the Daughters of Charity and owned by the Archdiocese of Washington, D.C., purchased books containing Catholic doctrine on chastity, masturbation, homosexuality, and abortion, using AFLA funds, and distributed them to participants. See App. 336, 354–359, 362. Catholic Family Services of Amarillo, Tex., used a curriculum outline guide for AFLA-funded parent workshops with explicit theological references, as well as religious "reference" materials, including the film "Everyday Miracle," described as "depicting the miracle of the process of human reproduction as a gift from God." Record 155, Plaintiffs' Appendix, Vol. IV, p. 119. The District Court concluded:

"The record demonstrates that some grantees have included explicitly religious materials, or a curriculum that indicates an intent to teach theological and secular views on sexual conduct, in their HHS-approved grant proposals. . . . One such application, which was funded for one year, included a program designed, *inter alia*, 'to communicate the Catholic diocese, Mormon (Church of Jesus Christ of Latter Day Saints) and Young Buddhist Association's approaches to sex education.'" 657 F. Supp., at 1565–1566.

government-sponsored religious indoctrination but, on the basis of little more than an indefensible assumption that AFLA recipients are not pervasively sectarian and consequently are presumed likely to comply with statutory and constitutional mandates, dismisses as insubstantial the risk that indoctrination will enter counseling. *Ante*, at 611–612. Similarly, the majority rejects the District Court's conclusion that the subject matter renders the risk of indoctrination unacceptable, and does so, it says, because "the likelihood that some of the religious institutions who receive AFLA funding will agree with the message that Congress intended to deliver to adolescents through the AFLA" does not amount to the advancement of religion. *Ante*, at 613. I do not think the statute can be so easily and conveniently saved.

(1)

The District Court concluded that asking religious organizations to teach and counsel youngsters on matters of deep religious significance, yet expect them to refrain from making reference to religion is both foolhardy and unconstitutional. The majority's rejection of this view is illustrative of its doctrinal misstep in relying so heavily on the college-funding cases. The District Court reasoned:

> "To presume that AFLA counselors from religious organizations can put their beliefs aside when counseling an adolescent on matters that are part of religious doctrine is simply unrealistic. . . . Even if it were possible, government would tread impermissibly on religious liberty merely by suggesting that religious organizations instruct *on doctrinal matters* without any conscious or unconscious reference to that doctrine. Moreover, the statutory scheme is fraught with the possibility that religious beliefs might infuse instruction and never be detected by the impressionable and unlearned adolescent to whom the instruction is directed" (emphasis in original). 657 F. Supp., at 1563.

The majority rejects the District Court's assumptions as unwarranted outside the context of a pervasively sectarian institution. In doing so, the majority places inordinate weight on the nature of the institution receiving the funds, and ignores altogether the targets of the funded message and the nature of its content.

I find it nothing less than remarkable that the majority relies on statements expressing confidence that administrators of religiously affiliated liberal arts colleges would not breach statutory proscriptions and use government funds earmarked "for secular purposes only," to finance theological instruction or religious worship, see *ante*, at 612, citing *Roemer*, 426 U. S., at 760–761, and *Tilton*, 403 U. S., at 682, in order to reject a challenge based on the risk of indoctrination inherent in "educational services relating to family life and problems associated with adolescent premarital sexual relations," or "outreach services to families of adolescents to discourage sexual relations among unemancipated minors." §§ 300z–1(a)(4)(G), (O). The two situations are simply not comparable.[8]

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[8] In addition to funding activity of a wholly different character, the AFLA differs from the statutes reviewed in those cases in its expressed solicitude for the participation of religious organizations. In *Tilton* v. *Richardson*, 403 U. S. 672, 675 (1971), the statute "authorize[d] federal grants and loans to 'institutions of higher education' for the construction of a wide variety of 'academic facilities'"; in *Hunt* v. *McNair*, 413 U. S. 734, 736 (1973), South Carolina had established a state agency "the purpose of which [was] 'to assist institutions for higher education in the construction, financing and refinancing of projects' . . . primarily through the issuance of revenue bonds"; in *Roemer* v. *Maryland Public Works Board*, 426 U. S. 736, 740 (1976) (plurality opinion), the State provided funding to "'any [qualified] private institution of higher learning within the State of Maryland.'" The AFLA, in contrast, expressly requires applicants for grants to describe how they "will, as appropriate in the provision of services . . . (B) involve religious . . . organizations." § 300z–5(a)(21)(B), and the legislative history conclusively shows that Congress intended religious organizations to participate as grantees and as participants under grants awarded to other organizations. See S. Rep. No. 97–161, pp. 15–16 (1981).

The AFLA, unlike any statute this Court has upheld, pays for teachers and counselors, employed by and subject to the direction of religious authorities, to educate impressionable young minds on issues of religious moment. Time and again we have recognized the difficulties inherent in asking even the best-intentioned individuals in such positions to make "a total separation between secular teaching and religious doctrine." *Lemon* v. *Kurtzman*, 403 U. S., at 619. Accord, *Levitt* v. *Committee for Public Education & Religious Liberty*, 413 U. S., at 481; *Meek* v. *Pittenger*, 421 U. S., at 370–371; *Roemer* v. *Maryland Public Works Board*, 426 U. S., at 749 (plurality opinion); *Wolman* v. *Walter*, 433 U. S., at 254; *Grand Rapids School District* v. *Ball*, 473 U. S. 373, 388 (1985). Where the targeted audience is composed of children, of course, the Court's insistence on adequate safeguards has always been greatest. See, *e. g.*, *Grand Rapids School District* v. *Ball*, 473 U. S., at 383, 390; *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U. S. 756, 796–798 (1973), *Lemon* v. *Kurtzman*, 403 U. S., at 622–624. In those cases in which funding of colleges with religious affiliations has been upheld, the Court has relied on the assumption that "college students are less impressionable and less susceptible to religious indoctrination. . . . The skepticism of the college student is not an inconsiderable barrier to any attempt or tendency to subvert the congressional objectives and limitations" (footnote omitted). *Tilton* v. *Richardson*, 403 U. S., at 686 (plurality opinion). See also *Widmar* v. *Vincent*, 454 U. S. 263, 274, n. 14 (1981) ("University students are, of course, young adults. They are less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion").

(2)

By observing that the alignment of the statute and the religious views of the grantees do not render the AFLA a statute which funds "specifically religious activity," the majority

makes light of the religious significance in the counseling provided by some grantees. Yet this is a dimension that Congress specifically sought to capture by enlisting the aid of religious organizations in battling the problems associated with teenage pregnancy. See S. Rep. No. 97–161, pp. 15–16 (1981); S. Rep. No. 98–496, pp. 9–10 (1984). Whereas there may be secular values promoted by the AFLA, including the encouragement of adoption and premarital chastity and the discouragement of abortion, it can hardly be doubted that when promoted in theological terms by religious figures, those values take on a religious nature. Not surprisingly, the record is replete with observations to that effect.[9] It

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[9] The District Court's conclusion, which I find compelling, is that the AFLA requires teaching and counseling "on matters inseparable from religious dogma." 657 F. Supp., at 1565. This conclusion is borne out by statements of AFLA administrators and participants. For example, the Lyon County, Kan., Health Department's grant proposal acknowledges that "[s]uch sensitive and intimate material cannot be presented without touching on . . . religious beliefs." Record 155, Plaintiffs' Appendix, Vol. IV, p. 221. Patrick J. Sheeran, the Director of the Division of Program Development and Monitoring in the Office of Adolescent Pregnancy Programs explained:

"Broadly speaking, I find it hard to find any kind of educational or value type of program that doesn't have some kind of basic religious or ethical foundation, and while a sex education class may be completely separate from a religious class, it might relate back to it in terms of principles that are embedded philosophically or theologically or religiously in another discipline." App. 122.

Mr. Sheeran's views were echoed by Dr. Paul Simmons, a Baptist clergyman and professor of Christian Ethics:

"The very purpose of religion is to transmit certain values, and those values associated with sex, marriage, chastity and abortion involve religious values and theological or doctrinal issues. In encouraging premarital chastity, it would be extremely difficult for a religiously affiliated group not to impart its own religious values and doctrinal perspectives when teaching a subject that has always been central to its religious teachings." *Id.*, at 597.

In any event, regardless of the efforts AFLA teachers and counselors may have undertaken in attempting to separate their religious convictions from the advice they actually dispensed to participating teenagers, the Dis-

should be undeniable by now that religious dogma may not be employed by government even to accomplish laudable secular purposes such as "the promotion of moral values, the contradiction to the materialistic trends of our times, the perpetuation of our institutions and the teaching of literature." *Abington School District* v. *Schempp*, 374 U. S. 203, 223 (1963) (holding unconstitutional daily reading of Bible verses and recitation of the Lord's Prayer in public schools); *Stone* v. *Graham*, 449 U. S. 39 (1980) (holding unconstitutional posting of Ten Commandments despite notation explaining secular application thereof).[10]

It is true, of course, that the Court has recognized that the Constitution does not prohibit the government from supporting secular social-welfare services solely because they are provided by a religiously affiliated organization. See *ante*, at 609. But such recognition has been closely tied to the nature of the subsidized social service: "the State may send a

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trict Court found that "the overwhelming number of comments shows that program participants believed that these federally funded programs were also sponsored by the religious denomination." 657 F. Supp., at 1566.

[10] Religion plays an important role to many in our society. By enlisting its aid in combating certain social ills, while imposing the restrictions required by the First Amendment on the use of public funds to promote religion, we risk secularizing and demeaning the sacred enterprise. Whereas there is undoubtedly a role for churches of all denominations in helping prevent the problems often associated with early sexual activity and unplanned pregnancies, any attempt to confine that role within the strictures of a government-sponsored secular program can only taint the religious mission with a "corrosive secularism." *Grand Rapids School District* v. *Ball*, 473 U. S. 373, 385 (1985). The First Amendment protects not only the State from being captured by the Church, but also protects the Church from being corrupted by the State and adopted for its purposes. A government program that provides funds for religious organizations to carry out secular tasks inevitably risks promoting "the pernicious tendency of a state subsidy to tempt religious schools to compromise their religious mission without wholly abandoning it." *Roemer* v. *Maryland Public Works Board*, 426 U. S., at 775 (STEVENS, J., dissenting); see also *Lynch* v. *Donnelly*, 465 U. S. 668, 726–727 (1984) (BLACKMUN, J., dissenting).

cleric, indeed even a clerical order, to perform *a wholly secular task*" (emphasis added). *Roemer* v. *Maryland Public Works Board*, 426 U. S., at 746 (plurality opinion). There is a very real and important difference between running a soup kitchen or a hospital, and counseling pregnant teenagers on how to make the difficult decisions facing them. The risk of advancing religion at public expense, and of creating an appearance that the government is endorsing the medium and the message, is much greater when the religious organization is directly engaged in pedagogy, with the express intent of shaping belief and changing behavior, than where it is neutrally dispensing medication, food, or shelter.[11]

There is also, of course, a fundamental difference between government's employing religion *because* of its unique appeal to a higher authority and the transcendental nature of its message, and government's enlisting the aid of religiously committed individuals or organizations without regard to their sectarian motivation. In the latter circumstance, religion plays little or no role; it merely explains why the individual or organization has chosen to get involved in the publicly funded program. In the former, religion is at the core of the subsidized activity, and it affects the manner in which the "service" is dispensed. For some religious organizations,

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[11] In arguing that providing "social welfare services" is categorically different from educating schoolchildren for Establishment Clause purposes, appellants relied heavily on *Bradfield* v. *Roberts*, 175 U. S. 291 (1899), a case in which the Court upheld the appropriation of money for the construction of two buildings to be part of a religiously affiliated hospital. Unlike the AFLA, however, which seeks "to promote self discipline and other prudent approaches to the problem of adolescent premarital sexual relations," § 300z(b)(1), the Act of Congress by which the hospital at issue in *Bradfield* had been incorporated expressed that "'the specific and limited object of its creation' is the opening and keeping a hospital in the city of Washington for the care of such sick and invalid persons as may place themselves under the treatment and care of the corporation." 175 U. S., at 299–300.

the answer to a teenager's question "Why shouldn't I have an abortion?" or "Why shouldn't I use barrier contraceptives?" will undoubtedly be different from an answer based solely on secular considerations.[12] Public funds may not be used to endorse the religious message.

B

The problems inherent in a statutory scheme specifically designed to involve religious organizations in a government-funded pedagogical program are compounded by the lack of any statutory restrictions on the use of federal tax dollars to promote religion. Conscious of the remarkable omission from the AFLA of any restriction whatsoever on the use of public funds for sectarian purposes, the Court disingenuously argues that we have "never stated that a *statutory* restriction is constitutionally required." *Ante*, at 614. In *Tilton* v. *Richardson*, this Court upheld a statute providing grants and loans to colleges for the construction of academic facilities because it "expressly prohibit[ed] their use for religious instruction, training, or worship . . . and the record show[ed] that some church-related institutions ha[d] been required to disgorge benefits for failure to obey" the restriction, 403 U. S., at 679–680, but severed and struck a provision of the statute that permitted the restriction to lapse after 20 years. The *Tilton* Court noted that the statute required applicants to

[12] Employees of some grantees must follow the directives set forth in a booklet entitled "The Ethical and Religious Directives for Catholic Health Facilities," approved by the Committee on Doctrine of the National Conference of Catholic Bishops. App. 526, 540–544. Solely because of religious dictates, some AFLA grantees teach and refer teenagers for only "natural family planning," which "has never been used successfully with teenagers," *id.*, at 535, and may not refer couples to programs that offer artificial methods of birth control, because those programs conflict with the teachings of the Roman Catholic Church. *Id.*, at 407, 628. One nurse midwife working at an AFLA program was even reprimanded for contravening the hospital's religious views on sex when she answered "yes" to a teenager who asked, as a medical matter, whether she could have sex during pregnancy. *Id.*, at 552.

provide assurances only that use of the funded facility would be limited to secular purposes for the initial 20-year period, and that this limitation, "obviously opens the facility to use for any purpose at the end of that period." *Id.*, at 683. Because they expired after 20 years, "the statute's enforcement provisions [were] inadequate to ensure that the impact of the federal aid will not advance religion." *Id.*, at 682.

The majority interprets *Tilton* "to indicate that the constitutional limitations on use of federal funds, as embodied in the statutory restriction, could not simply 'expire'" after 20 years, but concludes that the absence of a statutory restriction in the AFLA is not troubling, because "there is also no intimation in the statute that at some point, or for some grantees, religious uses are permitted." *Ante*, at 614. Although there is something to the notion that the lifting of a pre-existing restriction may be more likely to be perceived as affirmative authorization than would the absence of any restriction at all, there was in *Tilton* no provision that stated that after 20 years facilities built under the aid program could be converted into chapels. What there was in *Tilton* was an express *statutory* provision, which lapsed, leaving no restrictions; it was that *vacuum* that the Court found constitutionally impermissible. In the AFLA, by way of contrast, there is a vacuum right from the start.[13]

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[13] This vacuum is particularly noticeable when we consider the pains to which Congress went to specify other restrictions on the use of AFLA funds. For example, the AFLA expressly provides:

"Grants or payments may be made only to programs or projects which do not provide abortions or abortion counseling or referral, or which do not subcontract with or make any payment to any person who provides abortions or abortion counseling or referral, except that any such program or project may provide referral for abortion counseling to a pregnant adolescent if such adolescent and the parents or guardians of such adolescent request such referral; and grants may be made only to projects or programs which do not advocate, promote, or encourage abortion." § 300z–10.

The AFLA also sets certain conditions on funding for family planning services, § 300z–3(b)(1), and requires of applicants some 18 separate "assur-

If *Tilton* were indeed the only indication that cash-grant programs must include prohibitions on the use of public funds to advance or endorse religion, one might argue more plausibly that ordinary reporting requirements, in conjunction with some presumption that Government agencies administer federal programs in a constitutional fashion,[14] might suffice to

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ances" covering everything from confidentiality of patient records, § 300z–5(a)(11), to a commitment that the applicant will "make every reasonable effort . . . to secure from eligible persons payment for services in accordance with [structured fee] schedules," § 300z–5(a)(16)(B). Yet nowhere in the statute is there a single restriction on the use of federal funds to promote or advance religion. See *ante*, at 614–615.

[14] Appellees have challenged that presumption here, calling into question the manner in which grantees were selected and supervised. Mr. Sheeran, the Director of the Division of Program Development and Monitoring in the Office of Adolescent Pregnancy Programs, testified that he was surprised at the lack of experience, yet high proportion of religious affiliation, among those selected to read and evaluate grant applications. App. 98. Some of the reader's comments strongly suggest *they* considered religious indoctrination indispensable to achieve the AFLA's stated purpose, see, *e. g.*, *id.*, at 509; Record 155, Plaintiffs' Appendix Vol. I, pp. 354–355, and that evidence of no involvement by religious organizations was a factor in rejecting applications, see, *e. g.*, Record 155, Plaintiffs' Appendix, Vol. I–A, pp. 505D, 505E, 505G; Record 155, Plaintiffs' Appendix, Vol. I, pp. 340, 346.

Despite the clear religious mission of many applicants, pre-award investigations or admonitions against the use of AFLA funds to promote religion were minimal. Mr. Sheeran was instructed to call Catholic grantees already selected for funding, and obtain assurances that the grant money would not be used for "teaching of morals, dogmas, [or] religious principles." App. 107. The calls lasted two or three minutes, and involved no detailed discussion of the use of church and parochial school facilities, or religious literature. *Id.*, at 112–113.

The District Court found that the problems that should have been noted at the application stage remained uncured in implementation:

"Nor do the facts suggest that the programs in operation cured the First Amendment problems evident from these approved grant applications. At least one grantee actually included 'spiritual counseling' in its AFLA program. Other AFLA programs used curricula with explicitly religious

protect a statute against facial challenge. That, however, is simply not the case. In *Committee for Public Education & Religious Liberty* v. *Regan*, 444 U. S. 646 (1980), for example, the Court upheld a state program whereby private schools were reimbursed for the actual cost of administering state-required tests. The statute specifically required that no payments be made for religious instruction and incorporated an extensive auditing system. The Court warned, however: "Of course, under the relevant cases the outcome would likely be different were there no effective means for insuring that the cash reimbursements would cover only secular services." *Id.*, at 659. In this regard, the *Regan* Court merely echoed and reaffirmed what was already well established. In *Committee for Public Education & Religious Liberty* v. *Nyquist*, the Court explained:

> "Nothing in the statute, for instance, bars a qualifying school from paying out of state funds the salaries of employees who maintain the school chapel, or the cost of renovating classrooms in which religion is taught, or the cost of heating and lighting those same facilities. *Absent appropriate restrictions* on expenditures for these and similar purposes, *it simply cannot be denied* that this section has a primary effect that advances religion in that it subsidizes directly the religious activities of sectarian elementary and secondary schools" (emphasis added). 413 U. S., at 774.

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materials. In addition, a very large number of AFLA programs took place on sites adorned with religious symbols . . . .

"Similarly, the record reveals that some grantees attempted to evade restrictions they perceived on AFLA-funded religious teaching by establishing programs in which an AFLA-funded staffer's presentations would be immediately followed, in the same room and in the staffer's presence, by a program presented by a member of a religious order and dedicated to presentation of religious views on the subject covered by the AFLA staffer" (citations omitted). 657 F. Supp., at 1566.

See *id.*, at 780 ("In the absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes, it is clear from our cases that direct aid in whatever form is invalid"); *Lemon* v. *Kurtzman*, 403 U. S., at 621 ("The history of government grants of a continuing cash subsidy indicates that such programs have almost always been accompanied by varying measures of control and surveillance"). See also *Roemer* v. *Maryland Public Works Board*, 426 U. S., at 760 (upholding grant program containing statutory restriction on using state funds for "sectarian purposes"); *Hunt* v. *McNair*, 413 U. S., at 744 (noting that the statute at issue "specifically states that a project 'shall not include' any buildings or facilities used for religious purposes").[15]

Despite the glaring omission of a restriction on the use of funds for religious purposes, the Court attempts to resurrect the AFLA by noting a legislative intent not to promote religion, and observing that various reporting provisions of the statute "create a mechanism whereby the Secretary can police the grants." *Ante*, at 615. However effective this "mechanism" might prove to be in enforcing clear statutory directives, it is of no help where, as here, no restrictions are found on the face of the statute, and the Secretary has not promulgated any by regulation. Indeed, the only restriction

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[15] Indeed, the AFLA stands out among similar grant programs, precisely because of the absence of such restrictions. Cf., *e. g.*, 20 U. S. C. § 27 (support for vocational education); 20 U. S. C. § 241–1(a)(4) (federal disaster relief for local education agencies); 20 U. S. C. § 1021(c) (assistance to college and research libraries); 20 U. S. C. § 1070e(c)(1)(B) (1982 ed., Supp. IV) (assistance to institutions of higher education); 20 U. S. C. § 1134e(g) (1982 ed., Supp. IV) (fellowships for graduate and professional study); 20 U. S. C. § 1210 (1982 ed. and Supp. IV) (grants to adult education programs); 42 U. S. C. § 2753(b)(1)(C) (college work-study grants); 42 U. S. C. § 5001(a)(2) (grants to retired senior-citizen volunteer service programs).

on the use of AFLA funds for religious purposes is found in the Secretary's "Notice of Grant Award" sent to grantees, which specifies that public funds may not be used to "teach or promote religion," 657 F. Supp., at 1563, n. 13, and apparently even that clause was not inserted until after this litigation was underway. Furthermore, the "enforcement" of the limitation on sectarian use of AFLA funds, such as it is, lacks any bite. There is no procedure pursuant to which funds used to promote religion must be refunded to the Government, as there was, for example, in *Tilton* v. *Richardson*, 403 U. S., at 682.

Indeed, nothing in the AFLA precludes the funding of even "pervasively sectarian" organizations, whose work by definition cannot be segregated into religious and secular categories. And, unlike a pre-enforcement challenge, where there is no record to review, or a limited challenge to a specific grant, where the Court is reluctant to invalidate a statute "in anticipation that particular applications may result in unconstitutional use of funds," *Roemer* v. *Maryland Public Works Board*, 426 U. S., at 761, in this litigation the District Court expressly found that funds have gone to pervasively sectarian institutions and tax dollars have been used for the teaching of religion. 657 F. Supp., at 1564. Moreover, appellees have specifically called into question the manner in which the grant program was administered and grantees were selected. See n. 14, *supra*. These objections cannot responsibly be answered by reliance on the Secretary's enforcement mechanism. See, *e. g.*, *Levitt* v. *Committee for Public Education & Religious Liberty*, 413 U. S., at 480 ("[T]he State is constitutionally compelled to assure that the state-supported activity is not being used for religious indoctrination"); *Lemon* v. *Kurtzman*, 403 U. S., at 619 ("The State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion").

C

By placing unsupportable weight on the "pervasively sectarian" label, and recharacterizing appellees' objections to the statute, the Court attempts to create an illusion of consistency between our prior cases and its present ruling that the AFLA is not facially invalid. But the Court ignores the unwavering vigilance that the Constitution requires against any law "respecting an establishment of religion," U. S. Const., Amdt. 1, which, as we have recognized time and again, calls for fundamentally conservative decisionmaking: our cases do not require a plaintiff to demonstrate that a government action *necessarily* promotes religion, but simply that it creates such a substantial risk. See, *e. g.*, *Grand Rapids School District* v. *Ball*, 473 U. S., at 387 (observing a "substantial risk that, overtly or subtly, the religious message . . . will infuse the supposedly secular classes"); *Committee for Public Education & Religious Liberty* v. *Regan*, 444 U. S., at 656 (describing as "minimal" the chance that religious bias would enter process of grading state-drafted tests in secular subjects, given "complete" state safeguards); *Wolman* v. *Walter*, 433 U. S., at 254 (noting "unacceptable risk of fostering of religion" as "an inevitable byproduct" of teacher-accompanied field trips); *Meek* v. *Pittenger*, 421 U. S., at 372 (finding "potential for impermissible fostering of religion"); *Levitt* v. *Committee for Public Education & Religious Liberty*, 413 U. S., at 480 (finding dispositive "the substantial risk that . . . examinations, prepared by teachers under the authority of religious institutions, will be drafted with an eye, unconsciously or otherwise, to inculcate students in the religious precepts of the sponsoring church"); *Lemon* v. *Kurtzman*, 403 U. S., at 619 (finding "potential for impermissible fostering of religion"). Given the nature of the subsidized activity, the lack of adequate safeguards, and the chronicle of past experience with this statute, there is no room for doubt that the AFLA creates a substantial risk of impermissible fostering of religion.

IV

While it is evident that the AFLA does not pass muster under *Lemon*'s "effects" prong, the unconstitutionality of the statute becomes even more apparent when we consider the unprecedented degree of entanglement between Church and State required to prevent subsidizing the advancement of religion with AFLA funds. The majority's brief discussion of *Lemon*'s "entanglement" prong is limited to (a) criticizing it as a "Catch-22," and (b) concluding that because there is "no reason to assume that the religious organizations which may receive grants are 'pervasively sectarian' in the same sense as the Court has held parochial schools to be," there is no need to be concerned about the degree of monitoring which will be necessary to ensure compliance with the AFLA and the Establishment Clause. *Ante*, at 615–616. As to the former, although the majority is certainly correct that the Court's entanglement analysis has been criticized in the separate writings of some Members of the Court, the question whether a government program leads to "'an excessive government entanglement with religion'" nevertheless is and remains a part of the applicable constitutional inquiry. *Lemon* v. *Kurtzman*, 403 U. S., at 613, quoting *Walz* v. *Tax Comm'n*, 397 U. S. 664, 674 (1970). I accept the majority's conclusion that "[t]here is no doubt that the monitoring of AFLA grants is necessary . . . to ensure that public money is to be spent . . . in a way that comports with the Establishment Clause," *ante*, at 615, but disagree with its easy characterization of entanglement analysis as a "Catch-22." To the extent any metaphor is helpful, I would be more inclined to characterize the Court's excessive entanglement decisions as concluding that to implement the required monitoring, we would have to kill the patient to cure what ailed him. See, *e. g.*, *Lemon* v. *Kurtzman*, 403 U. S., at 614–615; *Meek* v. *Pittenger*, 421 U. S., at 370; *Aguilar* v. *Felton*, 473 U. S., at 413–414.

As to the Court's conclusion that our precedents do not indicate that the Secretary's monitoring will have to be exceedingly intensive or entangling, because the grant recipients are not sufficiently like parochial schools, I must disagree. As discussed above, the majority's excessive reliance on the distinction between the Court's parochial-school-aid cases and college-funding cases is unwarranted. *Lemon*, *Meek*, and *Aguilar* cannot be so conveniently dismissed solely because the majority declines to assume that the "pervasively sectarian" label can be applied here.

To determine whether a statute fosters excessive entanglement, a court must look at three factors: (1) the character and purpose of the institutions benefited; (2) the nature of the aid; and (3) the nature of the relationship between the government and the religious organization. See *Lemon* v. *Kurtzman*, 403 U. S., at 614–615. Thus, in *Lemon*, it was not solely the fact that teachers performed their duties within the four walls of the parochial school that rendered monitoring difficult and, in the end, unconstitutional. It seems inherent in the pedagogical function that there will be disagreements about what is or is not "religious" and which will require an intolerable degree of government intrusion and censorship.

> "What would appear to some to be essential to good citizenship might well for others border on or constitute instruction in religion. . . .
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> . . . . . .
>
> ". . . Unlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment." *Id.*, at 619.

Accord, *Aguilar* v. *Felton*, 473 U. S., at 413. See also *New York* v. *Cathedral Academy*, 434 U. S. 125, 133 (1977) (noting that the State "would have to undertake a search

for religious meaning in every classroom examination . . . . The prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment").

In *Roemer*, *Tilton*, and *Hunt*, the Court relied on "the ability of the State to identify and subsidize separate secular functions carried out at the school, *without on-the-site inspections being necessary to prevent diversion of the funds to sectarian purposes*," *Roemer* v. *Maryland Public Works Board*, 426 U. S., at 765 (emphasis added), and on the fact that one-time grants require "no continuing financial relationships or dependencies, no annual audits, and no government analysis of an institution's expenditures on secular as distinguished from religious activities." *Tilton* v. *Richardson*, 403 U. S., at 688. AFLA grants, of course, are not simply one-time construction grants. As the majority readily acknowledges, the Secretary will have to "review the programs set up and run by the AFLA grantees[, including] a review of, for example, the educational materials that a grantee proposes to use." *Ante*, at 616–617. And, as the majority intimates, monitoring the use of AFLA funds will undoubtedly require more than the "minimal" inspection "necessary to ascertain that the facilities are devoted to secular education," *Tilton*, 403 U. S., at 687. Since teachers and counselors, unlike buildings, "are not necessarily religiously neutral, greater governmental surveillance would be required to guarantee that state salary aid would not in fact subsidize religious instruction." *Id.*, at 687–688.

V

The AFLA, without a doubt, endorses religion. Because of its expressed solicitude for the participation of religious organizations in all AFLA programs in one form or another, the statute creates a symbolic and real partnership between the clergy and the fisc in addressing a problem with substan-

tial religious overtones. Given the delicate subject matter and the impressionable audience, the risk that the AFLA will convey a message of Government endorsement of religion is overwhelming. The statutory language and the extensive record established in the District Court make clear that the problem lies in the statute and its systematically unconstitutional operation, and not merely in isolated instances of misapplication. I therefore would find the statute unconstitutional without remanding to the District Court. I trust, however, that after all its labors thus far, the District Court will not grow weary prematurely and read into the Court's decision a suggestion that the AFLA has been constitutionally implemented by the Government, for the majority deliberately eschews any review of the facts.[16] After such further

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[16] JUSTICE KENNEDY, joined by JUSTICE SCALIA, would further constrain the District Court's consideration of the evidence as to how grantees spent their money, regardless of whether the grantee could be labeled "pervasively sectarian," see *ante*, at 624–625, asserting that "[t]he question in an as-applied challenge is not whether the entity is of a religious character." This statement comes without citation to authority and is contrary to the clear import of our cases. As ill-defined as the concept behind the "pervasively sectarian" label may be, this Court consistently has held, and reaffirms today, that "'[a]id normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission.'" *Ante*, at 610, quoting *Hunt* v. *McNair*, 413 U. S., at 743.

See also *Roemer* v. *Maryland Public Works Board*, 426 U. S., at 758 ("[T]he question [is] whether an institution is so 'pervasively sectarian' that it may receive no direct state aid of any kind"). Indeed, to suggest that because a challenge is labeled "as-applied," the character of the institution receiving the aid loses its relevance is to misunderstand the very nature of the concept of a "pervasively sectarian" institution, which is based in part on the conclusion that the secular and sectarian activities of an institution are "inextricably intertwined," see *ante*, at 620, n. 16. Not surprisingly, the Court flatly rejects JUSTICE KENNEDY's suggestion, observing that "it will be open to appellees on remand to show that AFLA aid is flowing to grantees that can be considered 'pervasively sectarian' religious institutions." *Ante*, at 621.

proceedings as are now to be deemed appropriate, and after the District Court enters findings of fact on the basis of the testimony and documents entered into evidence, it may well decide, as I would today, that the AFLA as a whole indeed has been unconstitutionally applied.[17]

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[17] Appellees argued in the District Court, and here as cross-appellants, that the portions of the statute inviting the participation of religious organizations were not severable, and thus that the entire statute must be held unconstitutional. I take no position on this issue.

MORRISON, INDEPENDENT COUNSEL *v.* OLSON ET AL.

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

No. 87–1279. Argued April 26, 1988—Decided June 29, 1988

This case presents the question of the constitutionality of the independent counsel provisions of the Ethics in Government Act of 1978 (Act). It arose when the House Judiciary Committee began an investigation into the Justice Department's role in a controversy between the House and the Environmental Protection Agency (EPA) with regard to the Agency's limited production of certain documents that had been subpoenaed during an earlier House investigation. The Judiciary Committee's Report suggested that an official of the Attorney General's Office (appellee Olson) had given false testimony during the earlier EPA investigation, and that two other officials of that Office (appellees Schmults and Dinkins) had obstructed the EPA investigation by wrongfully withholding certain documents. A copy of the Report was forwarded to the Attorney General with a request, pursuant to the Act, that he seek appointment of an independent counsel to investigate the allegations against appellees. Ultimately, pursuant to the Act's provisions, the Special Division (a special court created by the Act) appointed appellant as independent counsel with respect to Olson only, and gave her jurisdiction to investigate whether Olson's testimony, or any other matter related thereto, violated federal law, and to prosecute any violations. When a dispute arose between independent counsel and the Attorney General, who refused to furnish as "related matters" the Judiciary Committee's allegations against Schmults and Dinkins, the Special Division ruled that its grant of jurisdiction to counsel was broad enough to permit inquiry into whether Olson had conspired with others, including Schmults and Dinkins, to obstruct the EPA investigation. Appellant then caused a grand jury to issue subpoenas on appellees, who moved in Federal District Court to quash the subpoenas, claiming that the Act's independent counsel provisions were unconstitutional and that appellant accordingly had no authority to proceed. The court upheld the Act's constitutionality, denied the motions, and later ordered that appellees be held in contempt for continuing to refuse to comply with the subpoenas. The Court of Appeals reversed, holding that the Act violated the Appointments Clause of the Constitution, Art. II, § 2, cl. 2; the limitations

of Article III; and the principle of separation of powers by interfering with the President's authority under Article II.

Held:

1. There is no merit to appellant's contention—based on *Blair* v. *United States*, 250 U. S. 273, which limited the issues that may be raised by a person who has been held in contempt for failure to comply with a grand jury subpoena—that the constitutional issues addressed by the Court of Appeals cannot be raised on this appeal from the District Court's contempt judgment. The Court of Appeals ruled that, because appellant had failed to object to the District Court's consideration of the merits of appellees' constitutional claims, she had waived her opportunity to contend on appeal that *Blair* barred review of those claims. Appellant's contention is not "jurisdictional" in the sense that it cannot be waived by failure to raise it at the proper time and place. Nor is it the sort of claim which would defeat jurisdiction in the District Court by showing that an Article III "Case or Controversy" is lacking. Pp. 669–670.

2. It does not violate the Appointments Clause for Congress to vest the appointment of independent counsel in the Special Division. Pp. 670–677.

(a) Appellant is an "inferior" officer for purposes of the Clause, which—after providing for the appointment of certain federal officials ("principal" officers) by the President with the Senate's advice and consent—states that "the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." Although appellant may not be "subordinate" to the Attorney General (and the President) insofar as, under the Act, she possesses a degree of independent discretion to exercise the powers delegated to her, the fact that the Act authorizes her removal by the Attorney General indicates that she is to some degree "inferior" in rank and authority. Moreover, appellant is empowered by the Act to perform only certain, limited duties, restricted primarily to investigation and, if appropriate, prosecution for certain federal crimes. In addition, appellant's office is limited in jurisdiction to that which has been granted by the Special Division pursuant to a request by the Attorney General. Also, appellant's office is "temporary" in the sense that an independent counsel is appointed essentially to accomplish a single task, and when that task is over the office is terminated, either by counsel herself or by action of the Special Division. Pp. 670–673.

(b) There is no merit to appellees' argument that, even if appellant is an "inferior" officer, the Clause does not empower Congress to place the power to appoint such an officer outside the Executive Branch—that

is, to make "interbranch appointments." The Clause's language as to "inferior" officers admits of no limitation on interbranch appointments, but instead seems clearly to give Congress significant discretion to determine whether it is "proper" to vest the appointment of, for example, executive officials in the "courts of Law." The Clause's history provides no support for appellees' position. Moreover, Congress was concerned when it created the office of independent counsel with the conflicts of interest that could arise in situations when the Executive Branch is called upon to investigate its own high-ranking officers, and the most logical place to put the appointing authority was in the Judicial Branch. In light of the Act's provision making the judges of the Special Division ineligible to participate in any matters relating to an independent counsel they have appointed, appointment of independent counsel by that court does not run afoul of the constitutional limitation on "incongruous" interbranch appointments. Pp. 673–677.

3. The powers vested in the Special Division do not violate Article III, under which executive or administrative duties of a nonjudicial nature may not be imposed on judges holding office under Article III. Pp. 677–685.

(a) There can be no Article III objection to the Special Division's exercise of the power, under the Act, to appoint independent counsel, since the power itself derives from the Appointments Clause, a source of authority for judicial action that is independent of Article III. Moreover, the Division's Appointments Clause powers encompass the power to define the independent counsel's jurisdiction. When, as here, Congress creates a temporary "office," the nature and duties of which will by necessity vary with the factual circumstances giving rise to the need for an appointment in the first place, it may vest the power to define the office's scope in the court as an incident to the appointment of the officer pursuant to the Appointments Clause. However, the jurisdiction that the court decides upon must be demonstrably related to the factual circumstances that gave rise to the Attorney General's request for the appointment of independent counsel in the particular case. Pp. 678–679.

(b) Article III does not absolutely prevent Congress from vesting certain miscellaneous powers in the Special Division under the Act. One purpose of the broad prohibition upon the courts' exercise of executive or administrative duties of a nonjudicial nature is to maintain the separation between the Judiciary and the other branches of the Federal Government by ensuring that judges do not encroach upon executive or legislative authority or undertake tasks that are more properly accomplished by those branches. Here, the Division's miscellaneous powers—such as the passive powers to "receive" (but not to act on or specifically approve) various reports from independent counsel or the Attorney General—do not encroach upon the Executive Branch's authority. The Act

simply does not give the Division power to "supervise" the independent counsel in the exercise of counsel's investigative or prosecutorial authority. And, the functions that the Division is empowered to perform are not inherently "Executive," but are directly analogous to functions that federal judges perform in other contexts. Pp. 680–681.

(c) The Special Division's power to terminate an independent counsel's office when counsel's task is completed—although "administrative" to the extent that it requires the Division to monitor the progress of counsel's proceedings and to decide whether counsel's job is "completed"—is not such a significant judicial encroachment upon executive power or upon independent counsel's prosecutorial discretion as to require that the Act be invalidated as inconsistent with Article III. The Act's termination provisions do not give the Division anything approaching the power to *remove* the counsel while an investigation or court proceeding is still underway—this power is vested solely in the Attorney General. Pp. 682–683.

(d) Nor does the Special Division's exercise of the various powers specifically granted to it pose any threat to the impartial and independent federal adjudication of claims within the judicial power of the United States. The Act gives the Division itself no power to review any of the independent counsel's actions or any of the Attorney General's actions with regard to the counsel. Accordingly, there is no risk of partisan or biased adjudication of claims regarding the independent counsel by that court. Moreover, the Act prevents the Division's members from participating in "any judicial proceeding concerning a matter which involves such independent counsel while such independent counsel is serving in that office or which involves the exercise of such independent counsel's official duties, regardless of whether such independent counsel is still serving in that office." Pp. 683–685.

4. The Act does not violate separation of powers principles by impermissibly interfering with the functions of the Executive Branch. Pp. 685–696.

(a) The Act's provision restricting the Attorney General's power to remove the independent counsel to only those instances in which he can show "good cause," taken by itself, does not impermissibly interfere with the President's exercise of his constitutionally appointed functions. Here, Congress has not attempted to gain a role in the removal of executive officials other than its established powers of impeachment and conviction. The Act instead puts the removal power squarely in the hands of the Executive Branch. *Bowsher* v. *Synar*, 478 U. S. 714, and *Myers* v. *United States*, 272 U. S. 52, distinguished. The determination of whether the Constitution allows Congress to impose a "good cause"-type restriction on the President's power to remove an official does not turn on whether or not that official is classified as "purely executive." The

analysis contained in this Court's removal cases is designed not to define rigid categories of those officials who may or may not be removed at will by the President, but to ensure that Congress does not interfere with the President's exercise of the "executive power" and his constitutionally appointed duty to "take care that the laws be faithfully executed" under Article II. Cf. *Humphrey's Executor* v. *United States*, 295 U. S. 602; *Wiener* v. *United States*, 357 U. S. 349. Here, the Act's imposition of a "good cause" standard for removal by itself does not unduly trammel on executive authority. The congressional determination to limit the Attorney General's removal power was essential, in Congress' view, to establish the necessary independence of the office of independent counsel. Pp. 685–693.

(b) The Act, taken as a whole, does not violate the principle of separation of powers by unduly interfering with the Executive Branch's role. This case does not involve an attempt by Congress to increase its own powers at the expense of the Executive Branch. The Act does empower certain Members of Congress to request the Attorney General to apply for the appointment of an independent counsel, but the Attorney General has no duty to comply with the request, although he must respond within a certain time limit. Other than that, Congress' role under the Act is limited to receiving reports or other information and to oversight of the independent counsel's activities, functions that have been recognized generally as being incidental to the legislative function of Congress. Similarly, the Act does not work any judicial usurpation of properly executive functions. Nor does the Act impermissibly undermine the powers of the Executive Branch, or disrupt the proper balance between the coordinate branches by preventing the Executive Branch from accomplishing its constitutionally assigned functions. Even though counsel is to some degree "independent" and free from Executive Branch supervision to a greater extent than other federal prosecutors, the Act gives the Executive Branch sufficient control over the independent counsel to ensure that the President is able to perform his constitutionally assigned duties. Pp. 693–696.

267 U. S. App. D. C. 178, 838 F. 2d 476, reversed.

REHNQUIST, C. J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, BLACKMUN, STEVENS, and O'CONNOR, JJ., joined. SCALIA, J., filed a dissenting opinion, *post*, p. 697. KENNEDY, J., took no part in the consideration or decision of the case.

Alexia Morrison, appellant, argued the cause *pro se*. With her on the briefs were *Earl C. Dudley, Jr.*, and *Louis*

F. Claiborne. *Michael Davidson* argued the cause for the United States Senate as *amicus curiae* in support of appellant. With him on the brief were *Ken U. Benjamin, Jr.*, and *Morgan J. Frankel*.

Thomas S. Martin argued the cause for appellees. With him on the brief for appellee Olson were *Anthony C. Epstein*, *David E. Zerhusen*, *David W. DeBruin*, and *Carl S. Nadler*. *Brendan V. Sullivan, Jr.*, *Barry S. Simon*, *Jacob A. Stein*, and *Robert F. Muse* filed a brief for appellees Schmults et al. *Solicitor General Fried* argued the cause for the United States as *amicus curiae* in support of appellees. With him on the brief were *Assistant Attorney General Bolton*, *Deputy Solicitors General Cohen* and *Bryson*, *Deputy Assistant Attorneys General Spears* and *Cynkar*, *Edwin S. Kneedler*, *Richard G. Taranto*, *Robert E. Kopp*, and *Douglas Letter*.*

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

This case presents us with a challenge to the independent counsel provisions of the Ethics in Government Act of 1978, 28 U. S. C. §§ 49, 591 *et seq.* (1982 ed., Supp. V). We hold

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*Briefs of *amici curiae* urging reversal were filed for the American Bar Association by *Robert MacCrate* and *Irvin B. Nathan;* for Common Cause by *Archibald Cox*, *Donald J. Simon*, *Paul A. Freund*, and *Philip B. Heymann;* for the Center for Constitutional Rights by *Morton Stavis*, *Michael Ratner*, *Frank Askin*, and *Daniel Pollitt;* for Public Citizen by *Eric R. Glitzenstein* and *Alan B. Morrison;* for Burton D. Linne et al. by *Edwin Vieira, Jr.;* and for Lawrence E. Walsh by *Laurence H. Tribe*, *Paul L. Friedman*, and *Guy Miller Struve*.

Briefs of *amici curiae* urging affirmance were filed for Michael K. Deaver by *Herbert J. Miller, Jr.*, and *Randall J. Turk;* and for Edward H. Levi et al. by *David A. Strauss*.

Briefs of *amici curiae* were filed for the Speaker and Leadership Group of the House of Representatives by *Steven R. Ross*, *Charles Tiefer*, and *Michael L. Murray;* for the American Federation of Labor and Congress of Industrial Organizations by *Robert M. Weinberg*, *Michael H. Gottesman*, and *Laurence Gold;* and for Whitney North Seymour, Jr., by *Mr. Seymour, pro se*, *George F. Hritz*, *Benjamin R. Civiletti*, and *Ramsey Clark*.

today that these provisions of the Act do not violate the Appointments Clause of the Constitution, Art. II, § 2, cl. 2, or the limitations of Article III, nor do they impermissibly interfere with the President's authority under Article II in violation of the constitutional principle of separation of powers.

I

Briefly stated, Title VI of the Ethics in Government Act (Title VI or the Act), 28 U. S. C. §§ 591–599 (1982 ed., Supp. V),[1] allows for the appointment of an "independent counsel" to investigate and, if appropriate, prosecute certain high-ranking Government officials for violations of federal criminal laws.[2] The Act requires the Attorney General, upon receipt of information that he determines is "sufficient to constitute grounds to investigate whether any person [covered by the Act] may have violated any Federal criminal law," to conduct a preliminary investigation of the matter. When the Attor-

[1] The Act was first enacted by Congress in 1978, Pub. L. 95–521, 92 Stat. 1867, and has been twice reenacted, with amendments. See Pub. L. 97–409, 96 Stat. 2039; Pub. L. 100–191, 101 Stat. 1293. The current version of the statute states that, with certain exceptions, it shall "cease to be effective five years after the date of the enactment of the Independent Counsel Reauthorization Act of 1987." 28 U. S. C. § 599 (1982 ed., Supp. V).

[2] Under 28 U. S. C. § 591(a) (1982 ed., Supp. V), the statute applies to violations of "any Federal criminal law other than a violation classified as a Class B or C misdemeanor or an infraction." See also § 591(c) ("any Federal criminal law other than a violation classified as a Class B or C misdemeanor or an infraction"). Section 591(b) sets forth the individuals who may be the target of an investigation by the Attorney General, including the President and Vice President, Cabinet level officials, certain high-ranking officials in the Executive Office of the President and the Justice Department, the Director and Deputy Director of Central Intelligence, the Commissioner of Internal Revenue, and certain officials involved in the President's national political campaign. Pursuant to § 591(c), the Attorney General may also conduct a preliminary investigation of persons not named in § 591(b) if an investigation by the Attorney General or other Department of Justice official "may result in a personal, financial, or political conflict of interest."

ney General has completed this investigation, or 90 days has elapsed, he is required to report to a special court (the Special Division) created by the Act "for the purpose of appointing independent counsels." 28 U. S. C. § 49 (1982 ed., Supp. V).[3] If the Attorney General determines that "there are no reasonable grounds to believe that further investigation is warranted," then he must notify the Special Division of this result. In such a case, "the division of the court shall have no power to appoint an independent counsel." § 592(b)(1). If, however, the Attorney General has determined that there are "reasonable grounds to believe that further investigation or prosecution is warranted," then he "shall apply to the division of the court for the appointment of an independent counsel."[4] The Attorney General's application to the court "shall contain sufficient information to assist the [court] in selecting an independent counsel and in defining that independent counsel's prosecutorial jurisdiction." § 592(d). Upon receiving this application, the Special Division "shall appoint an appropriate independent counsel and shall define that independent counsel's prosecutorial jurisdiction." § 593(b).[5]

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[3] The Special Division is a division of the United States Court of Appeals for the District of Columbia Circuit. 28 U. S. C. § 49 (1982 ed., Supp. V). The court consists of three circuit court judges or justices appointed by the Chief Justice of the United States. One of the judges must be a judge of the United States Court of Appeals for the District of Columbia Circuit, and no two of the judges may be named to the Special Division from a particular court. The judges are appointed for 2-year terms, with any vacancy being filled only for the remainder of the 2-year period. *Ibid.*

[4] The Act also requires the Attorney General to apply for the appointment of an independent counsel if 90 days elapse from the receipt of the information triggering the preliminary investigation without a determination by the Attorney General that there are no reasonable grounds to believe that further investigation or prosecution is warranted. § 592(c)(1). Pursuant to § 592(f), the Attorney General's decision to apply to the Special Division for the appointment of an independent counsel is not reviewable "in any court."

[5] Upon request of the Attorney General, in lieu of appointing an independent counsel the Special Division may "expand the prosecutorial juris-

With respect to all matters within the independent counsel's jurisdiction, the Act grants the counsel "full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice." § 594(a).[6] The functions of the independent counsel include conducting grand jury proceedings and other investigations, participating in civil and criminal court proceedings and litigation, and appealing any decision in any case in which the counsel participates in an official capacity. §§ 594(a)(1)–(3). Under § 594(a)(9), the counsel's powers include "initiating and conducting prosecutions in any court of competent jurisdiction, framing and signing indictments, filing informations, and handling all aspects of any case, in the name of the United States." The counsel may appoint employees, § 594(c), may request and obtain assistance from the Department of Justice, § 594(d), and may accept referral of matters from the Attorney General if the matter falls within the counsel's jurisdiction as defined by the Special Division, § 594(e). The Act also states that an independent counsel "shall, except where not possible, comply with the written or other established policies of the Department of Justice respecting enforcement of the criminal laws." § 594(f). In addition, whenever a matter has been referred to an independent counsel under the Act, the Attorney Gen-

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diction of an independent counsel." § 593(c). Section 593 also authorizes the Special Division to fill vacancies arising because of the death, resignation, or removal of an independent counsel. § 593(e). The court, in addition, is empowered to grant limited extensions of time for the Attorney General's preliminary investigation, § 592(a)(3), and to award attorney's fees to unindicted individuals who were the subject of an investigation by an independent counsel, § 593(f) (as amended by Pub. L. 101–191, 101 Stat. 1293).

[6] The Attorney General, however, retains "direction or control as to those matters that specifically require the Attorney General's personal action under section 2516 of title 18." § 594(a).

eral and the Justice Department are required to suspend all investigations and proceedings regarding the matter. § 597(a). An independent counsel has "full authority to dismiss matters within [his or her] prosecutorial jurisdiction without conducting an investigation or at any subsequent time before prosecution, if to do so would be consistent" with Department of Justice policy. § 594(g).[7]

Two statutory provisions govern the length of an independent counsel's tenure in office. The first defines the procedure for removing an independent counsel. Section 596(a)(1) provides:

> "An independent counsel appointed under this chapter may be removed from office, other than by impeachment and conviction, only by the personal action of the Attorney General and only for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel's duties."

If an independent counsel is removed pursuant to this section, the Attorney General is required to submit a report to both the Special Division and the Judiciary Committees of the Senate and the House "specifying the facts found and the ultimate grounds for such removal." § 596(a)(2). Under the current version of the Act, an independent counsel can obtain judicial review of the Attorney General's action by filing a civil action in the United States District Court for the District of Columbia. Members of the Special Division "may not hear or determine any such civil action or any appeal of a de-

[7] The 1987 amendments to the Act specify that the Department of Justice "shall pay all costs relating to the establishment and operation of any office of independent counsel." The Attorney General must report to Congress regarding the amount expended on investigations and prosecutions by independent counsel. § 594(d)(2). In addition, the independent counsel must also file a report of major expenses with the Special Division every six months. § 594(h)(1)(A).

cision in any such civil action." The reviewing court is authorized to grant reinstatement or "other appropriate relief." § 596(a)(3).[8]

The other provision governing the tenure of the independent counsel defines the procedures for "terminating" the counsel's office. Under § 596(b)(1), the office of an independent counsel terminates when he or she notifies the Attorney General that he or she has completed or substantially completed any investigations or prosecutions undertaken pursuant to the Act. In addition, the Special Division, acting either on its own or on the suggestion of the Attorney General, may terminate the office of an independent counsel at any time if it finds that "the investigation of all matters within the prosecutorial jurisdiction of such independent counsel . . . have been completed or so substantially completed that it would be appropriate for the Department of Justice to complete such investigations and prosecutions." § 596(b)(2).[9]

Finally, the Act provides for congressional oversight of the activities of independent counsel. An independent counsel may from time to time send Congress statements or reports on his or her activities. § 595(a)(2). The "appropriate committees of the Congress" are given oversight jurisdiction in regard to the official conduct of an independent counsel, and the counsel is required by the Act to cooperate with Congress in the exercise of this jurisdiction. § 595(a)(1). The counsel is required to inform the House of Representatives of

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[8] Under the Act as originally enacted, an independent counsel who was removed could obtain judicial review of the Attorney General's decision in a civil action commenced before the Special Division. If the removal was "based on error of law or fact," the court could order "reinstatement or other appropriate relief." 28 U. S. C. § 596(a)(3).

[9] Sections 596(b)(1)(B) and 596(b)(2) also require that the independent counsel have filed a final report with the Special Division in compliance with § 594(h)(1)(B).

"substantial and credible information which [the counsel] receives . . . that may constitute grounds for an impeachment." § 595(c). In addition, the Act gives certain congressional committee members the power to "request in writing that the Attorney General apply for the appointment of an independent counsel." § 592(g)(1). The Attorney General is required to respond to this request within a specified time but is not required to accede to the request. § 592(g)(2).

The proceedings in this case provide an example of how the Act works in practice. In 1982, two Subcommittees of the House of Representatives issued subpoenas directing the Environmental Protection Agency (EPA) to produce certain documents relating to the efforts of the EPA and the Land and Natural Resources Division of the Justice Department to enforce the "Superfund Law."[10] At that time, appellee Olson was the Assistant Attorney General for the Office of Legal Counsel (OLC), appellee Schmults was Deputy Attorney General, and appellee Dinkins was the Assistant Attorney General for the Land and Natural Resources Division. Acting on the advice of the Justice Department, the President ordered the Administrator of EPA to invoke executive privilege to withhold certain of the documents on the ground that they contained "enforcement sensitive information." The Administrator obeyed this order and withheld the documents. In response, the House voted to hold the Administrator in contempt, after which the Administrator and the United States together filed a lawsuit against the House. The conflict abated in March 1983, when the administration agreed to give the House Subcommittees limited access to the documents.

The following year, the House Judiciary Committee began an investigation into the Justice Department's role in the controversy over the EPA documents. During this investigation, appellee Olson testified before a House Subcommittee

[10] Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. 96–510, 94 Stat. 2767, 42 U. S. C. § 9601 *et seq.*

on March 10, 1983. Both before and after that testimony, the Department complied with several Committee requests to produce certain documents. Other documents were at first withheld, although these documents were eventually disclosed by the Department after the Committee learned of their existence. In 1985, the majority members of the Judiciary Committee published a lengthy report on the Committee's investigation. Report on Investigation of the Role of the Department of Justice in the Withholding of Environmental Protection Agency Documents from Congress in 1982–83, H. R. Rep. No. 99–435 (1985). The report not only criticized various officials in the Department of Justice for their role in the EPA executive privilege dispute, but it also suggested that appellee Olson had given false and misleading testimony to the Subcommittee on March 10, 1983, and that appellees Schmults and Dinkins had wrongfully withheld certain documents from the Committee, thus obstructing the Committee's investigation. The Chairman of the Judiciary Committee forwarded a copy of the report to the Attorney General with a request, pursuant to 28 U. S. C. § 592(c), that he seek the appointment of an independent counsel to investigate the allegations against Olson, Schmults, and Dinkins.

The Attorney General directed the Public Integrity Section of the Criminal Division to conduct a preliminary investigation. The Section's report concluded that the appointment of an independent counsel was warranted to investigate the Committee's allegations with respect to all three appellees. After consulting with other Department officials, however, the Attorney General chose to apply to the Special Division for the appointment of an independent counsel solely with respect to appellee Olson.[11] The Attorney General accordingly

[11] The Attorney General concluded that appellees Schmults and Dinkins lacked the requisite "criminal intent" to obstruct the Committee's investigation. See Report of Attorney General Pursuant to 28 U. S. C. § 592(c)(1) Regarding Allegations Against Department of Justice Officials

requested appointment of an independent counsel to investigate whether Olson's March 10, 1983, testimony "regarding the completeness of [OLC's] response to the Judiciary Committee's request for OLC documents, and regarding his knowledge of EPA's willingness to turn over certain disputed documents to Congress, violated 18 U. S. C. § 1505, § 1001, or any other provision of federal criminal law." Attorney General Report, at 2–3. The Attorney General also requested that the independent counsel have authority to investigate "any other matter related to that allegation." *Id.*, at 11.

On April 23, 1986, the Special Division appointed James C. McKay as independent counsel to investigate "whether the testimony of . . . Olson and his revision of such testimony on March 10, 1983, violated either 18 U. S. C. § 1505 or § 1001, or any other provision of federal law." The court also ordered that the independent counsel

> "shall have jurisdiction to investigate any other allegation of evidence of violation of any Federal criminal law by Theodore Olson developed during investigations, by the Independent Counsel, referred to above, and connected with or arising out of that investigation, and Independent Counsel shall have jurisdiction to prosecute for any such violation." Order, Div. No. 86–1 (CADC Special Division, April 23, 1986).

McKay later resigned as independent counsel, and on May 29, 1986, the Division appointed appellant Morrison as his replacement, with the same jurisdiction.

In January 1987, appellant asked the Attorney General pursuant to § 594(e) to refer to her as "related matters" the Committee's allegations against appellees Schmults and Dinkins. The Attorney General refused to refer the matters, concluding that his decision not to request the appointment of

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in United States House Judiciary Committee Report 22, 45 (Apr. 10, 1986), filed in No. 86–1 (CADC) (Attorney General Report).

an independent counsel in regard to those matters was final under § 592(b)(1). Appellant then asked the Special Division to order that the matters be referred to her under § 594(e). On April 2, 1987, the Division ruled that the Attorney General's decision not to seek appointment of an independent counsel with respect to Schmults and Dinkins was final and unreviewable under § 592(b)(1), and that therefore the court had no authority to make the requested referral. *In re Olson*, 260 U. S. App. D. C. 168, 818 F. 2d 34. The court ruled, however, that its original grant of jurisdiction to appellant was broad enough to permit inquiry into whether Olson may have conspired with others, including Schmults and Dinkins, to obstruct the Committee's investigation. *Id.*, at 181–182, 818 F. 2d, at 47–48.

Following this ruling, in May and June 1987, appellant caused a grand jury to issue and serve subpoenas *ad testificandum* and *duces tecum* on appellees. All three appellees moved to quash the subpoenas, claiming, among other things, that the independent counsel provisions of the Act were unconstitutional and that appellant accordingly had no authority to proceed. On July 20, 1987, the District Court upheld the constitutionality of the Act and denied the motions to quash. *In re Sealed Case*, 665 F. Supp. 56 (DC). The court subsequently ordered that appellees be held in contempt pursuant to 28 U. S. C. § 1826(a) for continuing to refuse to comply with the subpoenas. See App. to Juris. Statement 140a, 143a, 146a. The court stayed the effect of its contempt orders pending expedited appeal.

A divided Court of Appeals reversed. *In re Sealed Case*, 267 U. S. App. D. C. 178, 838 F. 2d 476 (1988). The majority ruled first that an independent counsel is not an "inferior Officer" of the United States for purposes of the Appointments Clause. Accordingly, the court found the Act invalid because it does not provide for the independent counsel to be nominated by the President and confirmed by the Senate, as the Clause requires for "principal" officers. The court then

went on to consider several alternative grounds for its conclusion that the statute was unconstitutional. In the majority's view, the Act also violates the Appointments Clause insofar as it empowers a court of law to appoint an "inferior" officer who performs core executive functions; the Act's delegation of various powers to the Special Division violates the limitations of Article III; the Act's restrictions on the Attorney General's power to remove an independent counsel violate the separation of powers; and finally, the Act interferes with the Executive Branch's prerogative to "take care that the Laws be faithfully executed," Art. II, § 3. The dissenting judge was of the view that the Act was constitutional. 267 U. S. App. D. C., at 238, 838 F. 2d, at 536. Appellant then sought review by this Court, and we noted probable jurisdiction. 484 U. S. 1058 (1988). We now reverse.

II

Before we get to the merits, we first must deal with appellant's contention that the constitutional issues addressed by the Court of Appeals cannot be reviewed on this appeal from the District Court's contempt judgment. Appellant relies on *Blair* v. *United States*, 250 U. S. 273 (1919), in which this Court limited rather sharply the issues that may be raised by an individual who has been subpoenaed as a grand jury witness and has been held in contempt for failure to comply with the subpoena. On the facts of this case, however, we find it unnecessary to consider whether *Blair* has since been narrowed by our more recent decisions, as appellees contend and the Court of Appeals found in another related case, *In re Sealed Case*, 264 U. S. App. D. C. 125, 827 F. 2d 776 (1987). Appellant herself admits that she failed to object to the District Court's consideration of the merits of appellees' constitutional claims, and as a result, the Court of Appeals ruled that she had waived her opportunity to contend on appeal that review of those claims was barred by *Blair*. We see no reason why the Court of Appeals was not entitled to conclude

that the failure of appellant to object on this ground in the District Court was a sufficient reason for refusing to consider it, and we likewise decline to consider it. Appellant's contention is not "jurisdictional" in the sense that it cannot be waived by failure to raise it at the proper time and place. It is not the sort of claim which would defeat jurisdiction in the District Court by showing that an Article III "Case" or "Controversy" is lacking. Appellees are subject to the burden of complying with the grand jury subpoena as a result of the District Court's contempt order, there is a legitimate adversarial relationship between the parties, and the courts possess the power to redress or resolve the current controversy. See *Bender* v. *Williamsport Area School District*, 475 U. S. 534, 541–543 (1986). We therefore turn to consider the merits of appellees' constitutional claims.

III

The Appointments Clause of Article II reads as follows:

> "[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." U. S. Const., Art. II, § 2, cl. 2.

The parties do not dispute that "[t]he Constitution for purposes of appointment . . . divides all its officers into two classes." *United States* v. *Germaine*, 99 U. S. 508, 509 (1879). As we stated in *Buckley* v. *Valeo*, 424 U. S. 1, 132 (1976): "Principal officers are selected by the President with the advice and consent of the Senate. Inferior officers Congress may allow to be appointed by the President alone, by the heads of departments, or by the Judiciary." The initial

question is, accordingly, whether appellant is an "inferior" or a "principal" officer.[12] If she is the latter, as the Court of Appeals concluded, then the Act is in violation of the Appointments Clause.

The line between "inferior" and "principal" officers is one that is far from clear, and the Framers provided little guidance into where it should be drawn. See, *e. g.*, 2 J. Story, Commentaries on the Constitution § 1536, pp. 397–398 (3d ed. 1858) ("In the practical course of the government there does not seem to have been any exact line drawn, who are and who are not to be deemed *inferior* officers, in the sense of the constitution, whose appointment does not necessarily require the concurrence of the senate"). We need not attempt here to decide exactly where the line falls between the two types of officers, because in our view appellant clearly falls on the "inferior officer" side of that line. Several factors lead to this conclusion.

First, appellant is subject to removal by a higher Executive Branch official. Although appellant may not be "subordinate" to the Attorney General (and the President) insofar as she possesses a degree of independent discretion to exercise the powers delegated to her under the Act, the fact that she can be removed by the Attorney General indicates that she is to some degree "inferior" in rank and authority. Second, appellant is empowered by the Act to perform only certain, limited duties. An independent counsel's role is restricted primarily to investigation and, if appropriate, prosecution for certain federal crimes. Admittedly, the Act delegates to appellant "full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice," § 594(a), but this grant of authority does not include any authority to formulate policy for the Government or the Executive Branch, nor does it give appellant any administrative duties outside of those nec-

[12] It is clear that appellant is an "officer" of the United States, not an "employee." See *Buckley*, 424 U. S., at 126, and n. 162.

essary to operate her office. The Act specifically provides that in policy matters appellant is to comply to the extent possible with the policies of the Department. § 594(f).

Third, appellant's office is limited in jurisdiction. Not only is the Act itself restricted in applicability to certain federal officials suspected of certain serious federal crimes, but an independent counsel can only act within the scope of the jurisdiction that has been granted by the Special Division pursuant to a request by the Attorney General. Finally, appellant's office is limited in tenure. There is concededly no time limit on the appointment of a particular counsel. Nonetheless, the office of independent counsel is "temporary" in the sense that an independent counsel is appointed essentially to accomplish a single task, and when that task is over the office is terminated, either by the counsel herself or by action of the Special Division. Unlike other prosecutors, appellant has no ongoing responsibilities that extend beyond the accomplishment of the mission that she was appointed for and authorized by the Special Division to undertake. In our view, these factors relating to the "ideas of tenure, duration . . . and duties" of the independent counsel, *Germaine*, *supra*, at 511, are sufficient to establish that appellant is an "inferior" officer in the constitutional sense.

This conclusion is consistent with our few previous decisions that considered the question whether a particular Government official is a "principal" or an "inferior" officer. In *United States* v. *Eaton*, 169 U. S. 331 (1898), for example, we approved Department of State regulations that allowed executive officials to appoint a "vice-consul" during the temporary absence of the consul, terming the "vice-consul" a "subordinate officer" notwithstanding the Appointment Clause's specific reference to "Consuls" as principal officers. As we stated: "Because the subordinate officer is charged with the performance of the duty of the superior for a limited time and under special and temporary conditions he is not thereby transformed into the superior and permanent offi-

cial." *Id.*, at 343. In *Ex parte Siebold*, 100 U. S. 371 (1880), the Court found that federal "supervisor[s] of elections," who were charged with various duties involving oversight of local congressional elections, see *id.*, at 379–380, were inferior officers for purposes of the Clause. In *Go-Bart Importing Co.* v. *United States*, 282 U. S. 344, 352–353 (1931), we held that "United States commissioners are inferior officers." *Id.*, at 352. These commissioners had various judicial and prosecutorial powers, including the power to arrest and imprison for trial, to issue warrants, and to institute prosecutions under "laws relating to the elective franchise and civil rights." *Id.*, at 353, n. 2. All of this is consistent with our reference in *United States* v. *Nixon*, 418 U. S. 683, 694, 696 (1974), to the office of Watergate Special Prosecutor—whose authority was similar to that of appellant, see *id.*, at 694, n. 8—as a "subordinate officer."

This does not, however, end our inquiry under the Appointments Clause. Appellees argue that even if appellant is an "inferior" officer, the Clause does not empower Congress to place the power to appoint such an officer outside the Executive Branch. They contend that the Clause does not contemplate congressional authorization of "interbranch appointments," in which an officer of one branch is appointed by officers of another branch. The relevant language of the Appointments Clause is worth repeating. It reads: " . . . but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the courts of Law, or in the Heads of Departments." On its face, the language of this "excepting clause" admits of no limitation on interbranch appointments. Indeed, the inclusion of "as they think proper" seems clearly to give Congress significant discretion to determine whether it is "proper" to vest the appointment of, for example, executive officials in the "courts of Law." We recognized as much in one of our few decisions in this area, *Ex parte Siebold*, *supra*, where we stated:

> "It is no doubt usual and proper to vest the appointment of inferior officers in that department of the government, executive or judicial, or in that particular executive department to which the duties of such officers appertain. But there is no absolute requirement to this effect in the Constitution; and, if there were, it would be difficult in many cases to determine to which department an office properly belonged. . . .
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> "But as the Constitution stands, the selection of the appointing power, as between the functionaries named, is a matter resting in the discretion of Congress. And, looking at the subject in a practical light, it is perhaps better that it should rest there, than that the country should be harassed by the endless controversies to which a more specific direction on this subject might have given rise." *Id.*, at 397–398.

Our only decision to suggest otherwise, *Ex parte Hennen*, 13 Pet. 230 (1839), from which the first sentence in the above quotation from *Siebold* was derived, was discussed in *Siebold* and distinguished as "not intended to define the constitutional power of Congress in this regard, but rather to express the law or rule by which it should be governed." 100 U. S., at 398. Outside of these two cases, there is very little, if any, express discussion of the propriety of interbranch appointments in our decisions, and we see no reason now to depart from the holding of *Siebold* that such appointments are not proscribed by the excepting clause.

We also note that the history of the Clause provides no support for appellees' position. Throughout most of the process of drafting the Constitution, the Convention concentrated on the problem of who should have the authority to appoint judges. At the suggestion of James Madison, the Convention adopted a proposal that the Senate should have this authority, 1 Records of the Federal Convention of 1787, pp. 232–233 (M. Farrand ed. 1966), and several attempts to transfer the appointment power to the President were re-

jected. See 2 *id.*, at 42–44, 80–83. The August 6, 1787, draft of the Constitution reported by the Committee of Detail retained Senate appointment of Supreme Court Judges, provided also for Senate appointment of ambassadors, and vested in the President the authority to "appoint officers in all cases not otherwise provided for by this Constitution." *Id.*, at 183, 185. This scheme was maintained until September 4, when the Committee of Eleven reported its suggestions to the Convention. This Committee suggested that the Constitution be amended to state that the President "shall nominate and by and with the advice and consent of the Senate shall appoint ambassadors, and other public Ministers, Judges of the Supreme Court, and all other Officers of the [United States], whose appointments are not otherwise herein provided for." *Id.*, at 498–499. After the addition of "Consuls" to the list, the Committee's proposal was adopted, *id.*, at 539, and was subsequently reported to the Convention by the Committee of Style. See *id.*, at 599. It was at this point, on September 15, that Gouverneur Morris moved to add the Excepting Clause to Art. II, § 2. *Id.*, at 627. The one comment made on this motion was by Madison, who felt that the Clause did not go far enough in that it did not allow Congress to vest appointment powers in "Superior Officers below Heads of Departments." The first vote on Morris' motion ended in a tie. It was then put forward a second time, with the urging that "some such provision [was] too necessary, to be omitted." This time the proposal was adopted. *Id.*, at 627–628. As this discussion shows, there was little or no debate on the question whether the Clause empowers Congress to provide for interbranch appointments, and there is nothing to suggest that the Framers intended to prevent Congress from having that power.

We do not mean to say that Congress' power to provide for interbranch appointments of "inferior officers" is unlimited. In addition to separation-of-powers concerns, which would arise if such provisions for appointment had the potential to

impair the constitutional functions assigned to one of the branches, *Siebold* itself suggested that Congress' decision to vest the appointment power in the courts would be improper if there was some "incongruity" between the functions normally performed by the courts and the performance of their duty to appoint. 100 U. S., at 398 ("[T]he duty to appoint inferior officers, when required thereto by law, is a constitutional duty of the courts; and in the present case there is no such incongruity in the duty required as to excuse the courts from its performance, or to render their acts void"). In this case, however, we do not think it impermissible for Congress to vest the power to appoint independent counsel in a specially created federal court. We thus disagree with the Court of Appeals' conclusion that there is an inherent incongruity about a court having the power to appoint prosecutorial officers.[13] We have recognized that courts may appoint private attorneys to act as prosecutor for judicial contempt judgments. See *Young* v. *United States ex rel. Vuitton et Fils S. A.*, 481 U. S. 787 (1987). In *Go-Bart Importing Co.* v. *United States*, 282 U. S. 344 (1931), we approved court appointment of United States commissioners, who exercised certain limited prosecutorial powers. *Id.*, at 353, n. 2. In *Siebold*, as well, we indicated that judicial appointment of federal marshals, who are "executive officer[s]," would not be inappropriate. Lower courts have also upheld interim judicial appointments of United States Attorneys, see *United States* v. *Solomon*, 216 F. Supp. 835 (SDNY 1963), and Congress itself has vested the power to make these interim appointments in the district courts, see 28

[13] Indeed, in light of judicial experience with prosecutors in criminal cases, it could be said that courts are especially well qualified to appoint prosecutors. This is not a case in which judges are given power to appoint an officer in an area in which they have no special knowledge or expertise, as in, for example, a statute authorizing the courts to appoint officials in the Department of Agriculture or the Federal Energy Regulatory Commission.

U. S. C. § 546(d) (1982 ed., Supp. V).[14] Congress, of course, was concerned when it created the office of independent counsel with the conflicts of interest that could arise in situations when the Executive Branch is called upon to investigate its own high-ranking officers. If it were to remove the appointing authority from the Executive Branch, the most logical place to put it was in the Judicial Branch. In the light of the Act's provision making the judges of the Special Division ineligible to participate in any matters relating to an independent counsel they have appointed, 28 U. S. C. § 49(f) (1982 ed., Supp. V), we do not think that appointment of the independent counsel by the court runs afoul of the constitutional limitation on "incongruous" interbranch appointments.

IV

Appellees next contend that the powers vested in the Special Division by the Act conflict with Article III of the Constitution. We have long recognized that by the express provision of Article III, the judicial power of the United States is limited to "Cases" and "Controversies." See *Muskrat* v. *United States*, 219 U. S. 346, 356 (1911). As a general rule, we have broadly stated that "executive or administrative duties of a nonjudicial nature may not be imposed on judges holding office under Art. III of the Constitution." *Buckley*, 424 U. S., at 123 (citing *United States* v. *Ferreira*, 13 How. 40 (1852); *Hayburn's Case*, 2 Dall. 409 (1792)).[15] The pur-

[14] We note also the longstanding judicial practice of appointing defense attorneys for individuals who are unable to afford representation, see 18 U. S. C. § 3006A(b) (1982 ed., Supp. V), notwithstanding the possibility that the appointed attorney may appear in court before the judge who appointed him.

[15] In several cases, the Court has indicated that Article III "judicial Power" does not extend to duties that are more properly performed by the Executive Branch. *Hayburn's Case*, for example, involved a statute empowering federal and state courts to set pensions for disabled veterans of the Revolutionary War. See Act of Mar. 23, 1792, ch. 11, 1 Stat. 243. The Act "undertook to devolve upon the Circuit Court of the United States the duty of examining proofs, of determining what amount of the monthly

pose of this limitation is to help ensure the independence of the Judicial Branch and to prevent the Judiciary from encroaching into areas reserved for the other branches. See *United States Parole Comm'n* v. *Geraghty*, 445 U. S. 388, 396 (1980). With this in mind, we address in turn the various duties given to the Special Division by the Act.

Most importantly, the Act vests in the Special Division the power to choose who will serve as independent counsel and the power to define his or her jurisdiction. § 593(b). Clearly, once it is accepted that the Appointments Clause gives Congress the power to vest the appointment of officials such as the independent counsel in the "courts of Law," there can be no Article III objection to the Special Division's exercise of that power, as the power itself derives from the Appointments Clause, a source of authority for judicial action

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pay would be equivalent to the disability ascertained, and to certify the same to the Secretary of War." *Muskrat*, 219 U. S., at 352. The court's decision was to be reported to the Secretary of War, who had the discretion to either adopt or reject the court's findings. *Ibid.* This Court did not reach the constitutional issue in *Hayburn's Case*, but the opinions of several Circuit Courts were reported in the margins of the Court's decision in that case, and have since been taken to reflect a proper understanding of the role of the Judiciary under the Constitution. See, *e. g.*, *Ferreira*, 13 How., at 50–51.

In *Ferreira*, Congress passed a statute authorizing a federal court in Florida to hear and adjudicate claims for losses for which the United States was to be held responsible under the 1819 treaty with Spain that ceded Florida to the United States. *Id.*, at 45. As in *Hayburn's Case*, the results of the court proceeding were to be reported to an executive official, the Secretary of the Treasury, who would make the final determination whether to pay the claims. 13 How., at 47. The Court recognized that the powers conferred on the judge by the statute were "judicial in their nature," in that they involved "judgment and discretion." *Id.*, at 48. Nonetheless, they were not "judicial . . . in the sense in which judicial power is granted by the Constitution to the courts of the United States." *Ibid.* Because the District Court's decision in *Ferreira* was not an exercise of Article III judicial power, the Court ruled that it had no jurisdiction to hear the appeal. *Id.*, at 51–52.

that is independent of Article III.[16] Appellees contend, however, that the Division's Appointments Clause powers do not encompass the power to define the independent counsel's jurisdiction. We disagree. In our view, Congress' power under the Clause to vest the "Appointment" of inferior officers in the courts may, in certain circumstances, allow Congress to give the courts some discretion in defining the nature and scope of the appointed official's authority. Particularly when, as here, Congress creates a temporary "office" the nature and duties of which will by necessity vary with the factual circumstances giving rise to the need for an appointment in the first place, it may vest the power to define the scope of the office in the court as an incident to the appointment of the officer pursuant to the Appointments Clause. This said, we do not think that Congress may give the Division *unlimited* discretion to determine the independent counsel's jurisdiction. In order for the Division's definition of the counsel's jurisdiction to be truly "incidental" to its power to appoint, the jurisdiction that the court decides upon must be demonstrably related to the factual circumstances that gave rise to the Attorney General's investigation and request for the appointment of the independent counsel in the particular case.[17]

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[16] We do not think that judicial exercise of the power to appoint, *per se*, is in any way inconsistent as a functional matter with the courts' exercise of their Article III powers. We note that courts have long participated in the appointment of court officials such as United States commissioners or magistrates, see *Go-Bart Importing Co.* v. *United States*, 282 U. S. 344 (1931); 28 U. S. C. § 631(a), without disruption of normal judicial functions. And certainly the Court in *Ex parte Hennen*, 13 Pet. 230 (1839), deemed it entirely appropriate that a court should have the authority to appoint its own clerk.

[17] Our conclusion that the power to define the counsel's jurisdiction is incidental to the power to appoint also applies to the Division's authority to expand the jurisdiction of the counsel upon request of the Attorney General under § 593(c)(2).

The Act also vests in the Special Division various powers and duties in relation to the independent counsel that, because they do not involve appointing the counsel or defining his or her jurisdiction, cannot be said to derive from the Division's Appointments Clause authority. These duties include granting extensions for the Attorney General's preliminary investigation, § 592(a)(3); receiving the report of the Attorney General at the conclusion of his preliminary investigation, §§ 592(b)(1), 593(c)(2)(B); referring matters to the counsel upon request, § 594(e)[18]; receiving reports from the counsel regarding expenses incurred, § 594(h)(1)(A); receiving a report from the Attorney General following the removal of an independent counsel, § 596(a)(2); granting attorney's fees upon request to individuals who were investigated but not indicted by an independent counsel, § 593(f); receiving a final report from the counsel, § 594(h)(1)(B); deciding whether to release the counsel's final report to Congress or the public and determining whether any protective orders should be issued, § 594(h)(2); and terminating an independent counsel when his or her task is completed, § 596(b)(2).

Leaving aside for the moment the Division's power to terminate an independent counsel, we do not think that Article III absolutely prevents Congress from vesting these other miscellaneous powers in the Special Division pursuant to the Act. As we observed above, one purpose of the broad prohibition upon the courts' exercise of "executive or administrative duties of a nonjudicial nature," *Buckley*, 424 U. S., at 123, is to maintain the separation between the Judiciary and the other branches of the Federal Government by ensuring that judges do not encroach upon executive or legislative authority or undertake tasks that are more properly accom-

[18] In our view, this provision does not empower the court to expand the original scope of the counsel's jurisdiction; that may be done only upon request of the Attorney General pursuant to § 593(c)(2). At most, § 594(e) authorizes the court simply to refer matters that are "relate[d] to the independent counsel's prosecutorial jurisdiction" as already defined.

plished by those branches. In this case, the miscellaneous powers described above do not impermissibly trespass upon the authority of the Executive Branch. Some of these allegedly "supervisory" powers conferred on the court are passive: the Division merely "receives" reports from the counsel or the Attorney General, it is not entitled to act on them or to specifically approve or disapprove of their contents. Other provisions of the Act do require the court to exercise some judgment and discretion,[19] but the powers granted by these provisions are themselves essentially ministerial. The Act simply does not give the Division the power to "supervise" the independent counsel in the exercise of his or her investigative or prosecutorial authority. And, the functions that the Special Division is empowered to perform are not inherently "Executive"; indeed, they are directly analogous to functions that federal judges perform in other contexts, such as deciding whether to allow disclosure of matters occurring before a grand jury, see Fed. Rule Crim. Proc. 6(e), deciding to extend a grand jury investigation, Rule 6(g), or awarding attorney's fees, see, *e. g.*, 42 U. S. C. § 1988.[20]

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[19] The Special Division must determine whether the Attorney General has shown "good cause" for his or her request for an extension of the time limit on his or her preliminary investigation, § 592(a)(3); the court must decide whether and to what extent it should release to the public the counsel's final report or the Attorney General's removal report, §§ 596(a)(2), (b)(2); and the court may consider the propriety of a request for attorney's fees, § 593(f).

[20] By way of comparison, we also note that federal courts and judges have long performed a variety of functions that, like the functions involved here, do not necessarily or directly involve adversarial proceedings within a trial or appellate court. For example, federal courts have traditionally supervised grand juries and assisted in their "investigative function" by, if necessary, compelling the testimony of witnesses. See *Brown* v. *United States*, 359 U. S. 41, 49 (1959). Federal courts also participate in the issuance of search warrants, see Fed. Rule Crim. Proc. 41, and review applications for wiretaps, see 18 U. S. C. §§ 2516, 2518 (1982 ed. and Supp. IV), both of which may require a court to consider the nature and scope of criminal investigations on the basis of evidence or affidavits submitted in an *ex*

We are more doubtful about the Special Division's power to terminate the office of the independent counsel pursuant to § 596(b)(2). As appellees suggest, the power to terminate, especially when exercised by the Division on its own motion, is "administrative" to the extent that it requires the Special Division to monitor the progress of proceedings of the independent counsel and come to a decision as to whether the counsel's job is "completed." § 596(b)(2). It also is not a power that could be considered typically "judicial," as it has few analogues among the court's more traditional powers. Nonetheless, we do not, as did the Court of Appeals, view this provision as a significant judicial encroachment upon executive power or upon the prosecutorial discretion of the independent counsel.

We think that the Court of Appeals overstated the matter when it described the power to terminate as a "broadsword and . . . rapier" that enables the court to "control the pace and depth of the independent counsel's activities." 267 U. S. App. D. C., at 217, 838 F. 2d, at 515. The provision has not been tested in practice, and we do not mean to say that an adventurous special court could not reasonably construe the provision as did the Court of Appeals; but it is the duty of federal courts to construe a statute in order to save it from constitutional infirmities, see, *e. g.*, *Commodity Futures Trading Comm'n* v. *Schor*, 478 U. S. 833, 841 (1986), and to that end we think a narrow construction is appropriate here. The termination provisions of the Act do not give the Special Division anything approaching the power to *remove* the counsel while an investigation or court proceeding is still underway—this power is vested solely in the Attorney General. As we see it, "termination" may occur only when the duties of

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parte proceeding. In *Young* v. *United States ex rel. Vuitton et Fils S. A.*, 481 U. S. 787, 793–802 (1987), we recognized that federal courts possess inherent authority to initiate contempt proceedings for disobedience to their orders, and this authority necessarily includes the ability to appoint a private attorney to prosecute the contempt.

the counsel are truly "completed" or "so substantially completed" that there remains no need for any continuing action by the independent counsel.[21] It is basically a device for removing from the public payroll an independent counsel who has served his or her purpose, but is unwilling to acknowledge the fact. So construed, the Special Division's power to terminate does not pose a sufficient threat of judicial intrusion into matters that are more properly within the Executive's authority to require that the Act be invalidated as inconsistent with Article III.

Nor do we believe, as appellees contend, that the Special Division's exercise of the various powers specifically granted to it under the Act poses any threat to the "impartial and independent federal adjudication of claims within the judicial power of the United States." *Commodity Futures Trading Comm'n* v. *Schor*, *supra*, at 850. We reach this conclusion for two reasons. First, the Act as it currently stands gives the Special Division itself no power to review any of the actions of the independent counsel or any of the actions of the Attorney General with regard to the counsel. Accordingly, there is no risk of partisan or biased adjudication of claims regarding the independent counsel by that court. Second, the Act prevents members of the Special Division from participating in "*any* judicial proceeding concerning a matter which involves such independent counsel while such independent counsel is serving in that office or which involves the exercise of such independent counsel's official duties, regard-

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[21] As the dissenting opinion noted below, the termination provision was "intended to serve only as a measure of last resort." See *In re Sealed Case*, 267 U. S. App. D. C. 178, 224, n. 13, 838 F. 2d 476, 522, n. 13 (1988). The Senate Report on the provision states:

"This paragraph provides for the unlikely situation where a special prosecutor may try to remain as special prosecutor after his responsibilities under this chapter are completed. . . . The drastic remedy of terminating the office of special prosecutor without the consent of the special prosecutor should obviously be executed with caution." S. Rep. No. 95–170, p. 75 (1977).

less of whether such independent counsel is still serving in that office." 28 U. S. C. § 49(f) (1982 ed., Supp. V) (emphasis added); see also § 596(a)(3) (preventing members of the Special Division from participating in review of the Attorney General's decision to remove an independent counsel). We think both the special court and its judges are sufficiently isolated by these statutory provisions from the review of the activities of the independent counsel so as to avoid any taint of the independence of the Judiciary such as would render the Act invalid under Article III.

We emphasize, nevertheless, that the Special Division has *no* authority to take any action or undertake any duties that are not specifically authorized by the Act. The gradual expansion of the authority of the Special Division might in another context be a bureaucratic success story, but it would be one that would have serious constitutional ramifications. The record in other cases involving independent counsel indicate that the Special Division has at times given advisory opinions or issued orders that are not directly authorized by the Act. Two examples of this were cited by the Court of Appeals, which noted that the Special Division issued "orders" that ostensibly exempted the independent counsel from conflict-of-interest laws. See 267 U. S. App. D. C., at 216, and n. 60, 838 F. 2d, at 514, and n. 60 (citing *In re Deaver*, No. 86–2 (CADC Special Division, July 2, 1986), and *In re Olson*, No. 86–1 (CADC Special Division, June 18, 1986)). In another case, the Division reportedly ordered that a counsel postpone an investigation into certain allegations until the completion of related state criminal proceedings. See H. R. Rep. Conf. Rep. No. 100–452, p. 26 (1987). The propriety of the Special Division's actions in these instances is not before us as such, but we nonetheless think it appropriate to point out not only that there is no authorization for such actions in the Act itself, but that the Division's exercise of unauthorized

powers risks the transgression of the constitutional limitations of Article III that we have just discussed.[22]

V

We now turn to consider whether the Act is invalid under the constitutional principle of separation of powers. Two related issues must be addressed: The first is whether the provision of the Act restricting the Attorney General's power to remove the independent counsel to only those instances in which he can show "good cause," taken by itself, impermissibly interferes with the President's exercise of his constitutionally appointed functions. The second is whether, taken as a whole, the Act violates the separation of powers by reducing the President's ability to control the prosecutorial powers wielded by the independent counsel.

A

Two Terms ago we had occasion to consider whether it was consistent with the separation of powers for Congress to pass a statute that authorized a Government official who is removable only by Congress to participate in what we found to be "executive powers." *Bowsher* v. *Synar*, 478 U. S. 714, 730 (1986). We held in *Bowsher* that "Congress cannot reserve

[22] We see no impropriety in the Special Division's actions with regard to its response to appellant's request for referral of additional matters in this case. See *In re Olson*, 260 U. S. App. D. C. 168, 818 F. 2d 34 (Special Division 1987). The Division has statutory authority to respond to appellant's request pursuant to § 594(e), and it was only proper that it first consider whether it could exercise its statutory authority without running afoul of the Constitution. As to the Division's alleged "reinterpretation" of its original grant of jurisdiction, the power to "reinterpret" or clarify the original grant may be seen as incidental to the court's referral power. After all, in order to decide whether to refer a matter to the counsel, the court must be able to determine whether the matter falls within the scope of the original grant. See n. 18, *supra*. We express no view on the merits of the Division's interpretation of the original grant or of its ruling in regard its power to refer matters that the Attorney General has previously refused to refer.

for itself the power of removal of an officer charged with the execution of the laws except by impeachment." *Id.*, at 726. A primary antecedent for this ruling was our 1926 decision in *Myers* v. *United States*, 272 U. S. 52. *Myers* had considered the propriety of a federal statute by which certain postmasters of the United States could be removed by the President only "by and with the advice and consent of the Senate." There too, Congress' attempt to involve itself in the removal of an executive official was found to be sufficient grounds to render the statute invalid. As we observed in *Bowsher*, the essence of the decision in *Myers* was the judgment that the Constitution prevents Congress from "draw[ing] to itself . . . the power to remove or the right to participate in the exercise of that power. To do this would be to go beyond the words and implications of the [Appointments Clause] and to infringe the constitutional principle of the separation of governmental powers." *Myers*, *supra*, at 161.

Unlike both *Bowsher* and *Myers*, this case does not involve an attempt by Congress itself to gain a role in the removal of executive officials other than its established powers of impeachment and conviction. The Act instead puts the removal power squarely in the hands of the Executive Branch; an independent counsel may be removed from office, "only by the personal action of the Attorney General, and only for good cause." § 596(a)(1).[23] There is no requirement of congressional approval of the Attorney General's removal decision, though the decision is subject to judicial review. § 596(a)(3). In our view, the removal provisions of the Act make this case more analogous to *Humphrey's Executor* v. *United States*, 295 U. S. 602 (1935), and *Wiener* v. *United States*, 357 U. S. 349 (1958), than to *Myers* or *Bowsher*.

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[23] As noted, an independent counsel may also be removed through impeachment and conviction. In addition, the Attorney General may remove a counsel for "physical disability, mental incapacity, or any other condition that substantially impairs the performance" of his or her duties. § 596(a)(1).

In *Humphrey's Executor*, the issue was whether a statute restricting the President's power to remove the Commissioners of the Federal Trade Commission (FTC) only for "inefficiency, neglect of duty, or malfeasance in office" was consistent with the Constitution. 295 U. S., at 619. We stated that whether Congress can "condition the [President's power of removal] by fixing a definite term and precluding a removal except for cause, will depend upon the character of the office." *Id.*, at 631. Contrary to the implication of some dicta in *Myers*,[24] the President's power to remove Government officials simply was not "all-inclusive in respect of civil officers with the exception of the judiciary provided for by the Constitution." 295 U. S., at 629. At least in regard to "quasi-legislative" and "quasi-judicial" agencies such as the FTC,[25] "[t]he authority of Congress, in creating [such] agencies, to require them to act in discharge of their duties independently of executive control . . . includes, as an appropriate incident, power to fix the period during which they shall continue in office, and to forbid their removal except for cause in the meantime." *Ibid.* In *Humphrey's Executor*, we found it "plain" that the Constitution did not give the President "illimitable power of removal" over the officers of independent agencies. *Ibid.* Were the President to have

[24] The Court expressly disapproved of any statements in *Myers* that "are out of harmony" with the views expressed in *Humphrey's Executor*. 295 U. S., at 626. We recognized that the only issue actually decided in *Myers* was that "the President had power to remove a postmaster of the first class, without the advice and consent of the Senate as required by act of Congress." 295 U. S., at 626.

[25] See *id.*, at 627–628. We described the FTC as "an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed, and to perform other specified duties as a legislative or as a judicial aid." Such an agency was not "an arm or an eye of the executive," and the commissioners were intended to perform their duties "without executive leave and . . . free from executive control." *Id.*, at 628. As we put it at the time, the powers of the FTC were not "purely" executive, but were "quasi-legislative or quasi-judicial." *Ibid.*

the power to remove FTC Commissioners at will, the "coercive influence" of the removal power would "threate[n] the independence of [the] commission." *Id.*, at 630.

Similarly, in *Wiener* we considered whether the President had unfettered discretion to remove a member of the War Claims Commission, which had been established by Congress in the War Claims Act of 1948, 62 Stat. 1240. The Commission's function was to receive and adjudicate certain claims for compensation from those who had suffered personal injury or property damage at the hands of the enemy during World War II. Commissioners were appointed by the President, with the advice and consent of the Senate, but the statute made no provision for the removal of officers, perhaps because the Commission itself was to have a limited existence. As in *Humphrey's Executor*, however, the Commissioners were entrusted by Congress with adjudicatory powers that were to be exercised free from executive control. In this context, "Congress did not wish to have hang over the Commission the Damocles' sword of removal by the President for no reason other than that he preferred to have on that Commission men of his own choosing." 357 U. S., at 356. Accordingly, we rejected the President's attempt to remove a Commissioner "merely because he wanted his own appointees on [the] Commission," stating that "no such power is given to the President directly by the Constitution, and none is impliedly conferred upon him by statute." *Ibid.*

Appellees contend that *Humphrey's Executor* and *Wiener* are distinguishable from this case because they did not involve officials who performed a "core executive function." They argue that our decision in *Humphrey's Executor* rests on a distinction between "purely executive" officials and officials who exercise "quasi-legislative" and "quasi-judicial" powers. In their view, when a "purely executive" official is involved, the governing precedent is *Myers*, not *Humphrey's Executor*. See *Humphrey's Executor*, *supra*, at 628. And, under *Myers*, the President must have absolute discretion to

discharge "purely" executive officials at will. See *Myers*, 272 U. S., at 132–134.[26]

We undoubtedly did rely on the terms "quasi-legislative" and "quasi-judicial" to distinguish the officials involved in *Humphrey's Executor* and *Wiener* from those in *Myers*, but our present considered view is that the determination of whether the Constitution allows Congress to impose a "good cause"-type restriction on the President's power to remove an official cannot be made to turn on whether or not that official is classified as "purely executive."[27] The analysis contained in our removal cases is designed not to define rigid categories of those officials who may or may not be removed at will by the President,[28] but to ensure that Congress does

[26] This same argument was raised by the Solicitor General in *Bowsher* v. *Synar*, 478 U. S. 714 (1986), although as JUSTICE WHITE noted in dissent in that case, the argument was clearly not accepted by the Court at that time. *Id.*, at 738–739, and nn. 1–3.

[27] Indeed, this Court has never held that the Constitution prevents Congress from imposing limitations on the President's power to remove *all* executive officials simply because they wield "executive" power. *Myers* itself expressly distinguished cases in which Congress had chosen to vest the appointment of "inferior" executive officials in the head of a department. See 272 U. S., at 161–163, 164. In such a situation, we saw no specific constitutional impediment to congressionally imposed restrictions on the President's removal powers. See also *United States* v. *Perkins*, 116 U. S. 483, 485 (1886) ("'The constitutional authority in Congress to thus vest the appointment [of inferior officers in the heads of departments] implies authority to limit, restrict, and regulate the removal by such laws as Congress may enact in relation to the officers so appointed'") (quoting the Court of Claims' decision in the case).

[28] The difficulty of defining such categories of "executive" or "quasi-legislative" officials is illustrated by a comparison of our decisions in cases such as *Humphrey's Executor*, *Buckley* v. *Valeo*, 424 U. S. 1, 140–141 (1976), and *Bowsher*, *supra*, at 732–734. In *Buckley*, we indicated that the functions of the Federal Election Commission are "administrative," and "more legislative and judicial in nature," and are "of kinds usually performed by independent regulatory agencies or by some department in the Executive Branch under the direction of an Act of Congress." 424 U. S., at 140–141. In *Bowsher*, we found that the functions of the Comptroller General were "executive" in nature, in that he was required to "exercise judgment concerning facts that affect the application of the Act," and he

not interfere with the President's exercise of the "executive power" and his constitutionally appointed duty to "take care that the laws be faithfully executed" under Article II. *Myers* was undoubtedly correct in its holding, and in its broader suggestion that there are some "purely executive" officials who must be removable by the President at will if he is to be able to accomplish his constitutional role.[29] See 272 U. S., at 132–134. But as the Court noted in *Wiener:*

> "The assumption was short-lived that the *Myers* case recognized the President's inherent constitutional power to remove officials no matter what the relation of the executive to the discharge of their duties and no matter what restrictions Congress may have imposed regarding the nature of their tenure." 357 U. S., at 352.

At the other end of the spectrum from *Myers*, the characterization of the agencies in *Humphrey's Executor* and *Wie-*

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must "interpret the provisions of the Act to determine precisely what budgetary calculations are required." 478 U. S., at 733. Compare this with the description of the FTC's powers in *Humphrey's Executor*, which we stated "occupie[d] no place in the executive department": "The [FTC] is an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed, and to perform other specified duties as a legislative or as a judicial aid." 295 U. S., at 628. As JUSTICE WHITE noted in his dissent in *Bowsher*, it is hard to dispute that the powers of the FTC at the time of *Humphrey's Executor* would at the present time be considered "executive," at least to some degree. See 478 U. S., at 761, n. 3.

[29] The dissent says that the language of Article II vesting the executive power of the United States in the President requires that every officer of the United States exercising any part of that power must serve at the pleasure of the President and be removable by him at will. *Post*, at 705. This rigid demarcation—a demarcation incapable of being altered by law in the slightest degree, and applicable to tens of thousands of holders of offices neither known nor foreseen by the Framers—depends upon an extrapolation from general constitutional language which we think is more than the text will bear. It is also contrary to our holding in *United States* v. *Perkins*, *supra*, decided more than a century ago.

ner as "quasi-legislative" or "quasi-judicial" in large part reflected our judgment that it was not essential to the President's proper execution of his Article II powers that these agencies be headed up by individuals who were removable at will.[30] We do not mean to suggest that an analysis of the functions served by the officials at issue is irrelevant. But the real question is whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty, and the functions of the officials in question must be analyzed in that light.

Considering for the moment the "good cause" removal provision in isolation from the other parts of the Act at issue in this case, we cannot say that the imposition of a "good cause" standard for removal by itself unduly trammels on executive authority. There is no real dispute that the functions performed by the independent counsel are "executive" in the sense that they are law enforcement functions that typically have been undertaken by officials within the Executive Branch. As we noted above, however, the independent counsel is an inferior officer under the Appointments Clause, with limited jurisdiction and tenure and lacking policymaking or significant administrative authority. Although the counsel exercises no small amount of discretion and judgment in deciding how to carry out his or her duties under the Act, we simply do not see how the President's need to control the exercise of that discretion is so central to the functioning of the Executive Branch as to require as a matter of consti-

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[30] The terms also may be used to describe the circumstances in which Congress might be more inclined to find that a degree of independence from the Executive, such as that afforded by a "good cause" removal standard, is necessary to the proper functioning of the agency or official. It is not difficult to imagine situations in which Congress might desire that an official performing "quasi-judicial" functions, for example, would be free of executive or political control.

tutional law that the counsel be terminable at will by the President.[31]

Nor do we think that the "good cause" removal provision at issue here impermissibly burdens the President's power to control or supervise the independent counsel, as an executive official, in the execution of his or her duties under the Act. This is not a case in which the power to remove an executive official has been completely stripped from the President, thus providing no means for the President to ensure the "faithful execution" of the laws. Rather, because the independent counsel may be terminated for "good cause," the Executive, through the Attorney General, retains ample authority to assure that the counsel is competently performing his or her statutory responsibilities in a manner that comports with the provisions of the Act.[32] Although we need not decide in this case exactly what is encompassed within the term "good cause" under the Act, the legislative history of the removal provision also makes clear that the Attorney General may remove an independent counsel for "misconduct." See H. R. Conf. Rep. No. 100–452, p. 37 (1987). Here, as with the provision of the Act conferring the appointment authority of

[31] We note by way of comparison that various federal agencies whose officers are covered by "good cause" removal restrictions exercise civil enforcement powers that are analogous to the prosecutorial powers wielded by an independent counsel. See, *e. g.*, 15 U. S. C. § 45(m) (giving the FTC the authority to bring civil actions to recover civil penalties for the violations of rules respecting unfair competition); 15 U. S. C. §§ 2061, 2071, 2076(b)(7)(A) (giving the Consumer Product Safety Commission the authority to obtain injunctions and apply for seizure of hazardous products).

[32] Indeed, during the hearings on the 1982 amendments to the Act, a Justice Department official testified that the "good cause" standard contained in the amendments "would make the special prosecutor no more independent than officers of the many so-called independent agencies in the executive branch." Ethics in Government Act Amendments of 1982, Hearing before the Subcommittee on Oversight of Government Management of the Senate Committee on Governmental Affairs, 97th Cong., 2d Sess., 7 (1981) (Associate Attorney General Giuliani).

the independent counsel on the special court, the congressional determination to limit the removal power of the Attorney General was essential, in the view of Congress, to establish the necessary independence of the office. We do not think that this limitation as it presently stands sufficiently deprives the President of control over the independent counsel to interfere impermissibly with his constitutional obligation to ensure the faithful execution of the laws.[33]

B

The final question to be addressed is whether the Act, taken as a whole, violates the principle of separation of powers by unduly interfering with the role of the Executive Branch. Time and again we have reaffirmed the importance in our constitutional scheme of the separation of governmental powers into the three coordinate branches. See, *e. g.*, *Bowsher* v. *Synar*, 478 U. S., at 725 (citing *Humphrey's Executor*, 295 U. S., at 629–630). As we stated in *Buckley* v. *Valeo*, 424 U. S. 1 (1976), the system of separated powers and checks and balances established in the Constitution was regarded by the Framers as "a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." *Id.*, at 122. We have not hesitated to invalidate provisions of law which violate this principle. See *id.*, at 123. On the other hand, we have never held that the Constitution requires that the three

[33] We see no constitutional problem in the fact that the Act provides for judicial review of the removal decision. § 596(a)(3). The purpose of such review is to ensure that an independent counsel is removed only in accordance with the will of Congress as expressed in the Act. The possibility of judicial review does not inject the Judicial Branch into the removal decision, nor does it, by itself, put any additional burden on the President's exercise of executive authority. Indeed, we note that the legislative history of the most recent amendment to the Act indicates that the scope of review to be exercised by the courts under § 596(a)(3) is to be "the standards established by existing case law on the removal of [other] officials" who are subject to "good cause" removal. H. R. Conf. Rep. No. 100–452, p. 37 (1987).

branches of Government "operate with absolute independence." *United States* v. *Nixon*, 418 U. S., at 707; see also *Nixon* v. *Administrator of General Services*, 433 U. S. 425, 442 (1977) (citing James Madison in The Federalist No. 47, and Joseph Story in 1 Commentaries on the Constitution § 525 (M. Bigelow, 5th ed. 1905)). In the often-quoted words of Justice Jackson:

> "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 635 (1952) (concurring opinion).

We observe first that this case does not involve an attempt by Congress to increase its own powers at the expense of the Executive Branch. Cf. *Commodity Futures Trading Comm'n* v. *Schor*, 478 U. S., at 856. Unlike some of our previous cases, most recently *Bowsher* v. *Synar*, this case simply does not pose a "dange[r] of congressional usurpation of Executive Branch functions." 478 U. S., at 727; see also *INS* v. *Chadha*, 462 U. S. 919, 958 (1983). Indeed, with the exception of the power of impeachment—which applies to all officers of the United States—Congress retained for itself no powers of control or supervision over an independent counsel. The Act does empower certain Members of Congress to request the Attorney General to apply for the appointment of an independent counsel, but the Attorney General has no duty to comply with the request, although he must respond within a certain time limit. § 592(g). Other than that, Congress' role under the Act is limited to receiving reports or other information and oversight of the independent counsel's activities, § 595(a), functions that we have recognized generally as being incidental to the legislative function of Congress. See *McGrain* v. *Daugherty*, 273 U. S. 135, 174 (1927).

Similarly, we do not think that the Act works any *judicial* usurpation of properly executive functions. As should be apparent from our discussion of the Appointments Clause above, the power to appoint inferior officers such as independent counsel is not in itself an "executive" function in the constitutional sense, at least when Congress has exercised its power to vest the appointment of an inferior office in the "courts of Law." We note nonetheless that under the Act the Special Division has no power to appoint an independent counsel *sua sponte;* it may only do so upon the specific request of the Attorney General, and the courts are specifically prevented from reviewing the Attorney General's decision not to seek appointment, § 592(f). In addition, once the court has appointed a counsel and defined his or her jurisdiction, it has no power to supervise or control the activities of the counsel. As we pointed out in our discussion of the Special Division in relation to Article III, the various powers delegated by the statute to the Division are not supervisory or administrative, nor are they functions that the Constitution requires be performed by officials within the Executive Branch. The Act does give a federal court the power to review the Attorney General's decision to remove an independent counsel, but in our view this is a function that is well within the traditional power of the Judiciary.

Finally, we do not think that the Act "impermissibly undermine[s]" the powers of the Executive Branch, *Schor, supra,* at 856, or "disrupts the proper balance between the coordinate branches [by] prevent[ing] the Executive Branch from accomplishing its constitutionally assigned functions," *Nixon* v. *Administrator of General Services, supra,* at 443. It is undeniable that the Act reduces the amount of control or supervision that the Attorney General and, through him, the President exercises over the investigation and prosecution of a certain class of alleged criminal activity. The Attorney General is not allowed to appoint the individual of his choice; he does not determine the counsel's jurisdiction; and his

power to remove a counsel is limited.[34] Nonetheless, the Act does give the Attorney General several means of supervising or controlling the prosecutorial powers that may be wielded by an independent counsel. Most importantly, the Attorney General retains the power to remove the counsel for "good cause," a power that we have already concluded provides the Executive with substantial ability to ensure that the laws are "faithfully executed" by an independent counsel. No independent counsel may be appointed without a specific request by the Attorney General, and the Attorney General's decision not to request appointment if he finds "no reasonable grounds to believe that further investigation is warranted" is committed to his unreviewable discretion. The Act thus gives the Executive a degree of control over the power to initiate an investigation by the independent counsel. In addition, the jurisdiction of the independent counsel is defined with reference to the facts submitted by the Attorney General, and once a counsel is appointed, the Act requires that the counsel abide by Justice Department policy unless it is not "possible" to do so. Notwithstanding the fact that the counsel is to some degree "independent" and free from executive supervision to a greater extent than other federal prosecutors, in our view these features of the Act give the Executive Branch sufficient control over the independent counsel to ensure that the President is able to perform his constitutionally assigned duties.

VI

In sum, we conclude today that it does not violate the Appointments Clause for Congress to vest the appointment of independent counsel in the Special Division; that the powers exercised by the Special Division under the Act do not violate

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[34] With these provisions, the degree of control exercised by the Executive Branch over an independent counsel is clearly diminished in relation to that exercised over other prosecutors, such as the United States Attorneys, who are appointed by the President and subject to termination at will.

Article III; and that the Act does not violate the separation-of-powers principle by impermissibly interfering with the functions of the Executive Branch. The decision of the Court of Appeals is therefore

Reversed.

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

JUSTICE SCALIA, dissenting.

It is the proud boast of our democracy that we have "a government of laws and not of men." Many Americans are familiar with that phrase; not many know its derivation. It comes from Part the First, Article XXX, of the Massachusetts Constitution of 1780, which reads in full as follows:

> "In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: The executive shall never exercise the legislative and judicial powers, or either of them: The judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men."

The Framers of the Federal Constitution similarly viewed the principle of separation of powers as the absolutely central guarantee of a just Government. In No. 47 of The Federalist, Madison wrote that "[n]o political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty." The Federalist No. 47, p. 301 (C. Rossiter ed. 1961) (hereinafter Federalist). Without a secure structure of separated powers, our Bill of Rights would be worthless, as are the bills of rights of many nations of the world that have adopted, or even improved upon, the mere words of ours.

The principle of separation of powers is expressed in our Constitution in the first section of each of the first three Articles. Article I, § 1, provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United

States, which shall consist of a Senate and House of Representatives." Article III, § 1, provides that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." And the provision at issue here, Art. II, § 1, cl. 1, provides that "[t]he executive Power shall be vested in a President of the United States of America."

But just as the mere words of a Bill of Rights are not self-effectuating, the Framers recognized "[t]he insufficiency of a mere parchment delineation of the boundaries" to achieve the separation of powers. Federalist No. 73, p. 442 (A. Hamilton). "[T]he great security," wrote Madison, "against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack." Federalist No. 51, pp. 321–322. Madison continued:

> "But it is not possible to give to each department an equal power of self-defense. In republican government, the legislative authority necessarily predominates. The remedy for this inconveniency is to divide the legislature into different branches; and to render them, by different modes of election and different principles of action, as little connected with each other as the nature of their common functions and their common dependence on the society will admit. . . . As the weight of the legislative authority requires that it should be thus divided, the weakness of the executive may require, on the other hand, that it should be fortified." *Id.*, at 322–323.

The major "fortification" provided, of course, was the veto power. But in addition to providing fortification, the Founders conspicuously and very consciously declined to sap the Executive's strength in the same way they had weakened

the Legislature: by dividing the executive power. Proposals to have multiple executives, or a council of advisers with separate authority were rejected. See 1 M. Farrand, Records of the Federal Convention of 1787, pp. 66, 71–74, 88, 91–92 (rev. ed. 1966); 2 *id.*, at 335–337, 533, 537, 542. Thus, while "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate *and* House of Representatives," U. S. Const., Art. I, § 1 (emphasis added), "[t]he executive Power shall be vested in *a President of the United States*," Art. II, § 1, cl. 1 (emphasis added).

That is what this suit is about. Power. The allocation of power among Congress, the President, and the courts in such fashion as to preserve the equilibrium the Constitution sought to establish—so that "a gradual concentration of the several powers in the same department," Federalist No. 51, p. 321 (J. Madison), can effectively be resisted. Frequently an issue of this sort will come before the Court clad, so to speak, in sheep's clothing: the potential of the asserted principle to effect important change in the equilibrium of power is not immediately evident, and must be discerned by a careful and perceptive analysis. But this wolf comes as a wolf.

I

The present case began when the Legislative and Executive Branches became "embroiled in a dispute concerning the scope of the congressional investigatory power," *United States* v. *House of Representatives of United States*, 556 F. Supp. 150, 152 (DC 1983), which—as is often the case with such interbranch conflicts—became quite acrimonious. In the course of oversight hearings into the administration of the Superfund by the Environmental Protection Agency (EPA), two Subcommittees of the House of Representatives requested and then subpoenaed numerous internal EPA documents. The President responded by personally directing the EPA Administrator not to turn over certain of the docu-

ments, see Memorandum of November 30, 1982, from President Reagan for the Administrator, Environmental Protection Agency, reprinted in H. R. Rep. No. 99–435, pp. 1166–1167 (1985), and by having the Attorney General notify the congressional Subcommittees of this assertion of executive privilege, see Letters of November 30, 1982, from Attorney General William French Smith to Hon. John D. Dingell and Hon. Elliott H. Levitas, reprinted, *id.*, at 1168–1177. In his decision to assert executive privilege, the President was counseled by appellee Olson, who was then Assistant Attorney General of the Department of Justice for the Office of Legal Counsel, a post that has traditionally had responsibility for providing legal advice to the President (subject to approval of the Attorney General). The House's response was to pass a resolution citing the EPA Administrator, who had possession of the documents, for contempt. Contempt of Congress is a criminal offense. See 2 U. S. C. § 192. The United States Attorney, however, a member of the Executive Branch, initially took no steps to prosecute the contempt citation. Instead, the Executive Branch sought the immediate assistance of the Third Branch by filing a civil action asking the District Court to declare that the EPA Administrator had acted lawfully in withholding the documents under a claim of executive privilege. See *ibid.* The District Court declined (in my view correctly) to get involved in the controversy, and urged the other two branches to try "[c]ompromise and cooperation, rather than confrontation." 556 F. Supp., at 153. After further haggling, the two branches eventually reached an agreement giving the House Subcommittees limited access to the contested documents.

Congress did not, however, leave things there. Certain Members of the House remained angered by the confrontation, particularly by the role played by the Department of Justice. Specifically, the Judiciary Committee remained disturbed by the possibility that the Department had persuaded the President to assert executive privilege despite reservations by the

EPA; that the Department had "deliberately and unnecessarily precipitated a constitutional confrontation with Congress"; that the Department had not properly reviewed and selected the documents as to which executive privilege was asserted; that the Department had directed the United States Attorney not to present the contempt certification involving the EPA Administrator to a grand jury for prosecution; that the Department had made the decision to sue the House of Representatives; and that the Department had not adequately advised and represented the President, the EPA, and the EPA Administrator. H. R. Rep. No. 99–435, p. 3 (1985) (describing unresolved "questions" that were the basis of the Judiciary Committee's investigation). Accordingly, staff counsel of the House Judiciary Committee were commissioned (apparently without the knowledge of many of the Committee's members, see *id.*, at 731) to investigate the Justice Department's role in the controversy. That investigation lasted 2½ years, and produced a 3,000-page report issued by the Committee over the vigorous dissent of all but one of its minority-party members. That report, which among other charges questioned the truthfulness of certain statements made by Assistant Attorney General Olson during testimony in front of the Committee during the early stages of its investigation, was sent to the Attorney General along with a formal request that he appoint an independent counsel to investigate Mr. Olson and others.

As a general matter, the Act before us here requires the Attorney General to apply for the appointment of an independent counsel within 90 days after receiving a request to do so, unless he determines within that period that "there are no reasonable grounds to believe that further investigation or prosecution is warranted." 28 U. S. C. § 592(b)(1). As a practical matter, it would be surprising if the Attorney General had any choice (assuming this statute is constitutional) but to seek appointment of an independent counsel to pursue the charges against the principal object of the congressional

request, Mr. Olson. Merely the political consequences (to him and the President) of seeming to break the law by refusing to do so would have been substantial. How could it not be, the public would ask, that a 3,000-page indictment drawn by our representatives over 2½ years does not even establish "reasonable grounds to believe" that further investigation or prosecution is warranted with respect to at least the principal alleged culprit? But the Act establishes more than just practical compulsion. Although the Court's opinion asserts that the Attorney General had "no duty to comply with the [congressional] request," *ante*, at 694, that is not entirely accurate. He *had* a duty to comply unless he could conclude that there were "*no reasonable grounds to believe*," not that prosecution was warranted, but merely that "*further investigation*" was warranted, 28 U. S. C. § 592(b)(1) (1982 ed., Supp. V) (emphasis added), after a 90-day investigation in which he was prohibited from using such routine investigative techniques as grand juries, plea bargaining, grants of immunity, or even subpoenas, see § 592(a)(2). The Court also makes much of the fact that "the courts are specifically prevented from reviewing the Attorney General's decision not to seek appointment, § 592(f)." *Ante*, at 695. Yes,[1] but *Congress* is not prevented from reviewing it. The context of this statute is acrid with the smell of threatened impeachment. Where, as here, a request for appointment of an inde-

[1] I agree with the Court on this point, but not because of the section of the statute that it cites, § 592(f). What that provides is that "[t]he Attorney General's determination . . . *to apply to the division of the court for the appointment of an independent counsel shall not be reviewable in any court.*" Quite obviously, the determination to apply is not the same as the determination not to apply. In other contexts, we have sternly avoided "construing" a statute to mean what it plainly does not say, merely in order to avoid constitutional problems. See *Commodity Futures Trading Comm'n* v. *Schor*, 478 U. S. 833, 841 (1986). In my view, however, the Attorney General's decision not to refer would in any event be nonreviewable as the exercise of prosecutorial discretion. See *Heckler* v. *Chaney*, 470 U. S. 821 (1985).

pendent counsel has come from the Judiciary Committee of either House of Congress, the Attorney General must, if he decides not to seek appointment, explain to that Committee why. See also 28 U. S. C. § 595(c) (1982 ed., Supp. V) (independent counsel must report to the House of Representatives information "that may constitute grounds for an impeachment").

Thus, by the application of this statute in the present case, Congress has effectively compelled a criminal investigation of a high-level appointee of the President in connection with his actions arising out of a bitter power dispute between the President and the Legislative Branch. Mr. Olson may or may not be guilty of a crime; we do not know. But we do know that the investigation of him has been commenced, not necessarily because the President or his authorized subordinates believe it is in the interest of the United States, in the sense that it warrants the diversion of resources from other efforts, and is worth the cost in money and in possible damage to other governmental interests; and not even, leaving aside those normally considered factors, because the President or his authorized subordinates necessarily believe that an investigation is likely to unearth a violation worth prosecuting; but only because the Attorney General cannot affirm, as Congress demands, that there are *no reasonable grounds to believe* that further investigation is warranted. The decisions regarding the scope of that further investigation, its duration, and, finally, whether or not prosecution should ensue, are likewise beyond the control of the President and his subordinates.

II

If to describe this case is not to decide it, the concept of a government of separate and coordinate powers no longer has meaning. The Court devotes most of its attention to such relatively technical details as the Appointments Clause and the removal power, addressing briefly and only at the end of its opinion the separation of powers. As my prologue sug-

gests, I think that has it backwards. Our opinions are full of the recognition that it is the principle of separation of powers, and the inseparable corollary that each department's "defense must . . . be made commensurate to the danger of attack," Federalist No. 51, p. 322 (J. Madison), which gives comprehensible content to the Appointments Clause, and determines the appropriate scope of the removal power. Thus, while I will subsequently discuss why our appointments and removal jurisprudence does not support today's holding, I begin with a consideration of the fountainhead of that jurisprudence, the separation and equilibration of powers.

First, however, I think it well to call to mind an important and unusual premise that underlies our deliberations, a premise not expressly contradicted by the Court's opinion, but in my view not faithfully observed. It is rare in a case dealing, as this one does, with the constitutionality of a statute passed by the Congress of the United States, not to find anywhere in the Court's opinion the usual, almost formulary caution that we owe great deference to Congress' view that what it has done is constitutional, see, *e. g.*, *Rostker* v. *Goldberg*, 453 U. S. 57, 64 (1981); *Fullilove* v. *Klutznick*, 448 U. S. 448, 472 (1980) (opinion of Burger, C. J.); *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U. S. 94, 102 (1973); *United States* v. *National Dairy Products Corp.*, 372 U. S. 29, 32 (1963), and that we will decline to apply the statute only if the presumption of constitutionality can be overcome, see *Fullilove*, *supra*, at 473; *Columbia Broadcasting*, *supra*, at 103. That caution is not recited by the Court in the present case *because it does not apply*. Where a private citizen challenges action of the Government on grounds unrelated to separation of powers, harmonious functioning of the system demands that we ordinarily give some deference, or a presumption of validity, to the actions of the political branches in what is agreed, between themselves at least, to be within their respective spheres. But where the issue pertains to separation of pow-

ers, and the political branches are (as here) in disagreement, neither can be presumed correct. The reason is stated concisely by Madison: "The several departments being perfectly co-ordinate by the terms of their common commission, neither of them, it is evident, can pretend to an exclusive or superior right of settling the boundaries between their respective powers . . . ." Federalist No. 49, p. 314. The playing field for the present case, in other words, is a level one. As one of the interested and coordinate parties to the underlying constitutional dispute, Congress, no more than the President, is entitled to the benefit of the doubt.

To repeat, Article II, § 1, cl. 1, of the Constitution provides:

> "The executive Power shall be vested in a President of the United States."

As I described at the outset of this opinion, this does not mean *some of* the executive power, but *all of* the executive power. It seems to me, therefore, that the decision of the Court of Appeals invalidating the present statute must be upheld on fundamental separation-of-powers principles if the following two questions are answered affirmatively: (1) Is the conduct of a criminal prosecution (and of an investigation to decide whether to prosecute) the exercise of purely executive power? (2) Does the statute deprive the President of the United States of exclusive control over the exercise of that power? Surprising to say, the Court appears to concede an affirmative answer to both questions, but seeks to avoid the inevitable conclusion that since the statute vests some purely executive power in a person who is not the President of the United States it is void.

The Court concedes that "[t]here is no real dispute that the functions performed by the independent counsel are 'executive'," though it qualifies that concession by adding "in the sense that they are law enforcement functions that typically have been undertaken by officials within the Executive Branch." *Ante*, at 691. The qualifier adds nothing but at-

mosphere. In what *other* sense can one identify "the executive Power" that is supposed to be vested in the President (unless it includes everything the Executive Branch is given to do) *except* by reference to what has always and everywhere—if conducted by government at all—been conducted never by the legislature, never by the courts, and always by the executive. There is no possible doubt that the independent counsel's functions fit this description. She is vested with the "full power and independent authority to exercise all *investigative and prosecutorial* functions and powers of the Department of Justice [and] the Attorney General." 28 U. S. C. §594(a) (1982 ed., Supp. V) (emphasis added). Governmental investigation and prosecution of crimes is a quintessentially executive function. See *Heckler* v. *Chaney*, 470 U. S. 821, 832 (1985); *Buckley* v. *Valeo*, 424 U. S. 1, 138 (1976); *United States* v. *Nixon*, 418 U. S. 683, 693 (1974).

As for the second question, whether the statute before us deprives the President of exclusive control over that quintessentially executive activity: The Court does not, and could not possibly, assert that it does not. That is indeed the whole object of the statute. Instead, the Court points out that the President, through his Attorney General, has at least *some* control. That concession is alone enough to invalidate the statute, but I cannot refrain from pointing out that the Court greatly exaggerates the extent of that "some" Presidential control. "Most importan[t]" among these controls, the Court asserts, is the Attorney General's "power to remove the counsel for 'good cause.'" *Ante*, at 696. This is somewhat like referring to shackles as an effective means of locomotion. As we recognized in *Humphrey's Executor* v. *United States*, 295 U. S. 602 (1935)—indeed, what *Humphrey's Executor* was all about—limiting removal power to "good cause" is an impediment to, not an effective grant of, Presidential control. We said that limitation was necessary with respect to members of the Federal Trade Commission, which we found to be "an agency of the legislative and judicial

departments," and "wholly disconnected from the executive department," *id.*, at 630, because "it is quite evident that one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will." *Id.*, at 629. What we in *Humphrey's Executor* found to be a means of eliminating Presidential control, the Court today considers the "most importan[t]" means of assuring Presidential control. Congress, of course, operated under no such illusion when it enacted this statute, describing the "good cause" limitation as "protecting the independent counsel's ability to act independently of the President's direct control" since it permits removal only for "misconduct." H. R. Conf. Rep. 100–452, p. 37 (1987).

Moving on to the presumably "less important" controls that the President retains, the Court notes that no independent counsel may be appointed without a specific request from the Attorney General. As I have discussed above, the condition that renders such a request mandatory (inability to find "no reasonable grounds to believe" that further investigation is warranted) is so insubstantial that the Attorney General's discretion is severely confined. And once the referral is made, it is for the Special Division to determine the scope and duration of the investigation. See 28 U. S. C. § 593(b) (1982 ed., Supp. V). And in any event, the limited power over referral is irrelevant to the question whether, *once appointed*, the independent counsel exercises executive power free from the President's control. Finally, the Court points out that the Act directs the independent counsel to abide by general Justice Department policy, except when not "possible." See 28 U. S. C. § 594(f) (1982 ed., Supp. V). The exception alone shows this to be an empty promise. Even without that, however, one would be hard put to come up with many investigative or prosecutorial "policies" (other than those imposed by the Constitution or by Congress through law) that are absolute. Almost all investigative and prosecutorial deci-

sions—including the ultimate decision whether, after a technical violation of the law has been found, prosecution is warranted—involve the balancing of innumerable legal and practical considerations. Indeed, even political considerations (in the nonpartisan sense) must be considered, as exemplified by the recent decision of an independent counsel to subpoena the former Ambassador of Canada, producing considerable tension in our relations with that country. See N. Y. Times, May 29, 1987, p. A12, col. 1. Another preeminently political decision is whether getting a conviction in a particular case is worth the disclosure of national security information that would be necessary. The Justice Department and our intelligence agencies are often in disagreement on this point, and the Justice Department does not always win. The present Act even goes so far as specifically to take the resolution of that dispute away from the President and give it to the independent counsel. 28 U. S. C. § 594(a)(6) (1982 ed., Supp. V). In sum, the balancing of various legal, practical, and political considerations, none of which is absolute, is the very essence of prosecutorial discretion. To take this away is to remove the core of the prosecutorial function, and not merely "some" Presidential control.

As I have said, however, it is ultimately irrelevant *how much* the statute reduces Presidential control. The case is over when the Court acknowledges, as it must, that "[i]t is undeniable that the Act reduces the amount of control or supervision that the Attorney General and, through him, the President exercises over the investigation and prosecution of a certain class of alleged criminal activity." *Ante*, at 695. It effects a revolution in our constitutional jurisprudence for the Court, once it has determined that (1) purely executive functions are at issue here, and (2) those functions have been given to a person whose actions are not fully within the supervision and control of the President, nonetheless to proceed further to sit in judgment of whether "the President's need to control the exercise of [the independent counsel's]

discretion is *so central* to the functioning of the Executive Branch" as to require complete control, *ante*, at 691 (emphasis added), whether the conferral of his powers upon someone else "*sufficiently* deprives the President of control over the independent counsel to interfere impermissibly with [his] constitutional obligation to ensure the faithful execution of the laws," *ante*, at 693 (emphasis added), and whether "the Act give[s] the Executive Branch *sufficient* control over the independent counsel to ensure that the President is able to perform his constitutionally assigned duties," *ante*, at 696 (emphasis added). It is not for us to determine, and we have never presumed to determine, how much of the purely executive powers of government must be within the full control of the President. The Constitution prescribes that they *all* are.

The utter incompatibility of the Court's approach with our constitutional traditions can be made more clear, perhaps, by applying it to the powers of the other two branches. Is it conceivable that if Congress passed a statute depriving itself of less than full and entire control over some insignificant area of legislation, we would inquire whether the matter was "*so central* to the functioning of the Legislative Branch" as really to require complete control, or whether the statute gives Congress "*sufficient* control over the surrogate legislator to ensure that Congress is able to perform its constitutionally assigned duties"? Of course we would have none of that. Once we determined that a purely legislative power was at issue we would require it to be exercised, wholly and entirely, by Congress. Or to bring the point closer to home, consider a statute giving to non-Article III judges just a tiny bit of purely judicial power in a relatively insignificant field, with substantial control, though not total control, in the courts—perhaps "clear error" review, which would be a fair judicial equivalent of the Attorney General's "for cause" removal power here. Is there any doubt that we would not pause to inquire whether the matter was "*so central* to the

functioning of the Judicial Branch" as really to require complete control, or whether we retained "*sufficient* control over the matters to be decided that we are able to perform our constitutionally assigned duties"? We would say that our "constitutionally assigned duties" include *complete* control over all exercises of the judicial power—or, as the plurality opinion said in *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U. S. 50, 58–59 (1982): "The inexorable command of [Article III] is clear and definite: The judicial power of the United States must be exercised by courts having the attributes prescribed in Art. III." We should say here that the President's constitutionally assigned duties include *complete* control over investigation and prosecution of violations of the law, and that the inexorable command of Article II is clear and definite: the executive power must be vested in the President of the United States.

Is it unthinkable that the President should have such exclusive power, even when alleged crimes by him or his close associates are at issue? No more so than that Congress should have the exclusive power of legislation, even when what is at issue is its own exemption from the burdens of certain laws. See Civil Rights Act of 1964, Title VII, 42 U. S. C. § 2000e *et seq.* (prohibiting "employers," not defined to include the United States, from discriminating on the basis of race, color, religion, sex, or national origin). No more so than that this Court should have the exclusive power to pronounce the final decision on justiciable cases and controversies, even those pertaining to the constitutionality of a statute reducing the salaries of the Justices. See *United States* v. *Will*, 449 U. S. 200, 211–217 (1980). A system of separate and coordinate powers necessarily involves an acceptance of exclusive power that can theoretically be abused. As we reiterate this very day, "[i]t is a truism that constitutional protections have costs." *Coy* v. *Iowa*, *post*, at 1020. While the separation of powers may prevent us from righting every wrong, it does so in order to ensure that we do not lose lib-

erty. The checks against any branch's abuse of its exclusive powers are twofold: First, retaliation by one of the other branch's use of *its* exclusive powers: Congress, for example, can impeach the executive who willfully fails to enforce the laws; the executive can decline to prosecute under unconstitutional statutes, cf. *United States* v. *Lovett*, 328 U. S. 303 (1946); and the courts can dismiss malicious prosecutions. Second, and ultimately, there is the political check that the people will replace those in the political branches (the branches more "dangerous to the political rights of the Constitution," Federalist No. 78, p. 465) who are guilty of abuse. Political pressures produced special prosecutors—for Teapot Dome and for Watergate, for example—long before this statute created the independent counsel. See Act of Feb. 8, 1924, ch. 16, 43 Stat. 5–6; 38 Fed. Reg. 30738 (1973).

The Court has, nonetheless, replaced the clear constitutional prescription that the executive power belongs to the President with a "balancing test." What are the standards to determine how the balance is to be struck, that is, how much removal of Presidential power is too much? Many countries of the world get along with an executive that is much weaker than ours—in fact, entirely dependent upon the continued support of the legislature. Once we depart from the text of the Constitution, just where short of that do we stop? The most amazing feature of the Court's opinion is that it does not even purport to give an answer. It simply *announces*, with no analysis, that the ability to control the decision whether to investigate and prosecute the President's closest advisers, and indeed the President himself, is not "so central to the functioning of the Executive Branch" as to be constitutionally required to be within the President's control. Apparently that is so because we say it is so. Having abandoned as the basis for our decisionmaking the text of Article II that "the executive Power" must be vested in the President, the Court does not even attempt to craft a *substitute* criterion—a "justiciable standard," see, *e. g.*, *Baker* v. *Carr*,

369 U. S. 186, 210 (1962); *Coleman* v. *Miller*, 307 U. S. 433, 454–455 (1939), however remote from the Constitution—that today governs, and in the future will govern, the decision of such questions. Evidently, the governing standard is to be what might be called the unfettered wisdom of a majority of this Court, revealed to an obedient people on a case-by-case basis. This is not only not the government of laws that the Constitution established; it is not a government of laws at all.

In my view, moreover, even as an ad hoc, standardless judgment the Court's conclusion must be wrong. Before this statute was passed, the President, in taking action disagreeable to the Congress, or an executive officer giving advice to the President or testifying before Congress concerning one of those many matters on which the two branches are from time to time at odds, could be assured that his acts and motives would be adjudged—insofar as the decision whether to conduct a criminal investigation and to prosecute is concerned—in the Executive Branch, that is, in a forum attuned to the interests and the policies of the Presidency. That was one of the natural advantages the Constitution gave to the Presidency, just as it gave Members of Congress (and their staffs) the advantage of not being prosecutable for anything said or done in their legislative capacities. See U. S. Const., Art. I, § 6, cl. 1; *Gravel* v. *United States*, 408 U. S. 606 (1972). It is the very object of this legislation to eliminate that assurance of a sympathetic forum. Unless it can honestly be said that there are "no reasonable grounds to believe" that further investigation is warranted, further investigation must ensue; and the conduct of the investigation, and determination of whether to prosecute, will be given to a person neither selected by nor subject to the control of the President—who will in turn assemble a staff by finding out, presumably, who is willing to put aside whatever else they are doing, for an indeterminate period of time, in order to investigate and prosecute the President or a particular named individual in his administration. The prospect is frightening (as I will dis-

cuss at some greater length at the conclusion of this opinion) even outside the context of a bitter, interbranch political dispute. Perhaps the boldness of the President himself will not be affected—though I am not even sure of that. (How much easier it is for Congress, instead of accepting the political damage attendant to the commencement of impeachment proceedings against the President on trivial grounds—or, for that matter, how easy it is for one of the President's political foes outside of Congress—simply to trigger a debilitating criminal investigation of the Chief Executive under this law.) But as for the President's high-level assistants, who typically have no political base of support, it is as utterly unrealistic to think that they will not be intimidated by this prospect, and that their advice to him and their advocacy of his interests before a hostile Congress will not be affected, as it would be to think that the Members of Congress and their staffs would be unaffected by replacing the Speech or Debate Clause with a similar provision. It deeply wounds the President, by substantially reducing the President's ability to protect himself and his staff. That is the whole object of the law, of course, and I cannot imagine why the Court believes it does not succeed.

Besides weakening the Presidency by reducing the zeal of his staff, it must also be obvious that the institution of the independent counsel enfeebles him more directly in his constant confrontations with Congress, by eroding his public support. Nothing is so politically effective as the ability to charge that one's opponent and his associates are not merely wrongheaded, naive, ineffective, but, in all probability, "crooks." And nothing so effectively gives an appearance of validity to such charges as a Justice Department investigation and, even better, prosecution. The present statute provides ample means for that sort of attack, assuring that massive and lengthy investigations will occur, not merely when the Justice Department in the application of its usual standards believes they are called for, but whenever it

cannot be said that there are "no reasonable grounds to believe" they are called for. The statute's highly visible procedures assure, moreover, that unlike most investigations these will be widely known and prominently displayed. Thus, in the 10 years since the institution of the independent counsel was established by law, there have been nine highly publicized investigations, a source of constant political damage to two administrations. That they could not remotely be described as merely the application of "normal" investigatory and prosecutory standards is demonstrated by, in addition to the language of the statute ("no reasonable grounds to believe"), the following facts: Congress appropriates approximately $50 million annually for general legal activities, salaries, and expenses of the Criminal Division of the Department of Justice. See 1989 Budget Request of the Department of Justice, Hearings before a Subcommittee of the House Committee on Appropriations, 100th Cong., 2d Sess., pt. 6, pp. 284–285 (1988) (DOJ Budget Request). This money is used to support "[f]ederal appellate activity," "[o]rganized crime prosecution," "[p]ublic integrity" and "[f]raud" matters, "[n]arcotic & dangerous drug prosecution," "[i]nternal security," "[g]eneral litigation and legal advice," "special investigations," "[p]rosecution support," "[o]rganized crime drug enforcement," and "[m]anagement & administration." *Id.*, at 284. By comparison, between May 1986 and August 1987, four independent counsel (not all of whom were operating for that entire period of time) spent almost $5 million (one-tenth of the amount annually appropriated to the entire Criminal Division), spending almost $1 million in the month of August 1987 alone. See Washington Post, Oct. 21, 1987, p. A21, col. 5. For fiscal year 1989, the Department of Justice has requested $52 million for the entire Criminal Division, DOJ Budget Request 285, and $7 million to support the activities of independent counsel, *id.*, at 25.

In sum, this statute does deprive the President of substantial control over the prosecutory functions performed by the

independent counsel, and it does substantially affect the balance of powers. That the Court could possibly conclude otherwise demonstrates both the wisdom of our former constitutional system, in which the degree of reduced control and political impairment were irrelevant, since *all* purely executive power had to be in the President; and the folly of the new system of standardless judicial allocation of powers we adopt today.

III

As I indicated earlier, the basic separation-of-powers principles I have discussed are what give life and content to our jurisprudence concerning the President's power to appoint and remove officers. The same result of unconstitutionality is therefore plainly indicated by our case law in these areas.

Article II, § 2, cl. 2, of the Constitution provides as follows:

> "[The President] shall nominate, and by and with the Advice and Consent of the the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

Because appellant (who all parties and the Court agree is an officer of the United States, *ante*, at 671, n. 12) was not appointed by the President with the advice and consent of the Senate, but rather by the Special Division of the United States Court of Appeals, her appointment is constitutional only if (1) she is an "inferior" officer within the meaning of the above Clause, and (2) Congress may vest her appointment in a court of law.

As to the first of these inquiries, the Court does not attempt to "decide exactly" what establishes the line between

principal and "inferior" officers, but is confident that, whatever the line may be, appellant "clearly falls on the 'inferior officer' side" of it. *Ante*, at 671. The Court gives three reasons: *First*, she "is subject to removal by a higher Executive Branch official," namely, the Attorney General. *Ibid.* *Second*, she is "empowered by the Act to perform only certain, limited duties." *Ibid.* *Third*, her office is "limited in jurisdiction" and "limited in tenure." *Ante*, at 672.

The first of these lends no support to the view that appellant is an inferior officer. Appellant is removable only for "good cause" or physical or mental incapacity. 28 U. S. C. § 596(a)(1) (1982 ed., Supp. V). By contrast, most (if not all) *principal* officers in the Executive Branch may be removed by the President *at will*. I fail to see how the fact that appellant is more difficult to remove than most principal officers helps to establish that she is an inferior officer. And I do not see how it could possibly make any difference to her superior or inferior status that the President's limited power to remove her must be exercised through the Attorney General. If she were removable at will by the Attorney General, then she would be subordinate to him and thus properly designated as inferior; but the Court essentially admits that she is not subordinate. See *ante*, at 671. If it were common usage to refer to someone as "inferior" who is subject to removal for cause by another, then one would say that the President is "inferior" to Congress.

The second reason offered by the Court—that appellant performs only certain, limited duties—may be relevant to whether she is an inferior officer, but it mischaracterizes the extent of her powers. As the Court states: "Admittedly, the Act delegates to appellant [the] *'full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice.'*" *Ibid.*, quoting 28 U. S. C. § 594(a) (1982 ed., Supp. V) (emphasis

added).[2] Moreover, in addition to this general grant of power she is given a broad range of specifically enumerated powers, including a power not even the Attorney General possesses: to "contes[t] in court . . . any claim of privilege or attempt to withhold evidence on grounds of national security." § 594(a)(6).[3] Once all of this is "admitted," it seems

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[2] The Court omits the further provision that the independent counsel exercises within her sphere the "full power" of "*the Attorney General*, [with one minor exception relating to wiretap authorizations] and any other officer or employee of the Department of Justice[.]" § 594(a). This is, of course, quite difficult to square with the Court's assertion that appellant is "'inferior' in rank and authority" to the Attorney General. *Ante*, at 671.

[3] The independent counsel's specifically enumerated powers include the following:

"(1) conducting proceedings before grand juries and other investigations;

"(2) participating in court proceedings and engaging in any litigation, including civil and criminal matters, that [the] independent counsel deems necessary;

"(3) appealing any decision of a court in any case or proceeding in which [the] independent counsel participates in an official capacity;

"(4) reviewing all documentary evidence available from any source;

"(5) determining whether to contest the assertion of any testimonial privilege;

"(6) receiving appropriate national security clearances and, if necessary contesting in court . . . any claim of privilege or attempt to withhold evidence on grounds of national security;

"(7) making applications to any Federal court for a grant of immunity to any witness . . . or for warrants, subpoenas, or other court orders, and for purposes of sections 6003, 6004, and 6005 of title 18, exercising the authority vested in a United States attorney or the Attorney General;

"(8) inspecting, obtaining, or using the original or a copy of any tax return . . . ;

"(9) initiating and conducting prosecutions in any court of competent jurisdiction, framing and signing indictments, filing informations, and handling all aspects of any case filed in the name of the United States; and

"(10) consulting with the United States Attorney for the district in which the violation was alleged to have occurred." §§ 594(a)(1)–(10).

In addition, the statute empowers the independent counsel to hire a staff of a size as large as she "deems necessary," § 594(c), and to enlist and re-

to me impossible to maintain that appellant's authority is so "limited" as to render her an inferior officer. The Court seeks to brush this away by asserting that the independent counsel's power does not include any authority to "formulate policy for the Government or the Executive Branch." *Ante*, at 671. But the same could be said for all officers of the Government, with the single exception of the President. All of them only formulate policy within their respective spheres of responsibility—as does the independent counsel, who must comply with the policies of the Department of Justice only to the extent possible. § 594(f).

The final set of reasons given by the Court for why the independent counsel clearly is an inferior officer emphasizes the limited nature of her jurisdiction and tenure. Taking the latter first, I find nothing unusually limited about the independent counsel's tenure. To the contrary, unlike most high ranking Executive Branch officials, she continues to serve until she (or the Special Division) decides that her work is substantially completed. See §§ 596(b)(1), (b)(2). This particular independent prosecutor has already served more than two years, which is at least as long as many Cabinet officials. As to the scope of her jurisdiction, there can be no doubt that is small (though far from unimportant). But within it she exercises more than the full power of the Attorney General. The Ambassador to Luxembourg is not anything less than a principal officer, simply because Luxembourg is small. And the federal judge who sits in a small district is not for that reason "inferior in rank and authority." If the mere fragmentation of executive responsibilities into small compartments suffices to render the heads of each of those compartments inferior officers, then Congress could deprive the President of the right to appoint his chief law enforcement officer by dividing up the Attorney General's responsibilities among a number of "lesser" functionaries.

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ceive "where necessary to perform [her] duties" the assistance, personnel and resources of the Department of Justice, § 594(d).

More fundamentally, however, it is not clear from the Court's opinion why the factors it discusses—even if applied correctly to the facts of this case—are determinative of the question of inferior officer status. The apparent source of these factors is a statement in *United States* v. *Germaine*, 99 U. S. 508, 511 (1879) (discussing *United States* v. *Hartwell*, 6 Wall. 385, 393 (1868)), that "the term [officer] embraces the ideas of tenure, duration, emolument, and duties." See *ante*, at 672. Besides the fact that this was dictum, it was dictum in a case where the distinguishing characteristics of inferior officers versus superior officers were in no way relevant, but rather only the distinguishing characteristics of an "officer of the United States" (to which the criminal statute at issue applied) as opposed to a mere *employee*. Rather than erect a theory of who is an inferior officer on the foundation of such an irrelevancy, I think it preferable to look to the text of the Constitution and the division of power that it establishes. These demonstrate, I think, that the independent counsel is not an inferior officer because she is not *subordinate* to any officer in the Executive Branch (indeed, not even to the President). Dictionaries in use at the time of the Constitutional Convention gave the word "inferiour" two meanings which it still bears today: (1) "[l]ower in place, . . . station, . . . rank of life, . . . value or excellency," and (2) "[s]ubordinate." S. Johnson, Dictionary of the English Language (6th ed. 1785). In a document dealing with the structure (the constitution) of a government, one would naturally expect the word to bear the latter meaning—indeed, in such a context it would be unpardonably careless to use the word *unless* a relationship of subordination was intended. If what was meant was merely "lower in station or rank," one would use instead a term such as "lesser officers." At the only other point in the Constitution at which the word "inferior" appears, it plainly connotes a relationship of subordination. Article III vests the judicial power of the United States in "one supreme Court, and in such *inferior* Courts as

the Congress may from time to time ordain and establish." U. S. Const., Art. III, § 1 (emphasis added). In Federalist No. 81, Hamilton pauses to describe the "inferior" courts authorized by Article III as inferior in the sense that they are "subordinate" to the Supreme Court. See *id.*, at 485, n., 490, n.

That "inferior" means "subordinate" is also consistent with what little we know about the evolution of the Appointments Clause. As originally reported to the Committee on Style, the Appointments Clause provided no "exception" from the standard manner of appointment (President with the advice and consent of the Senate) for inferior officers. 2 M. Farrand, Records of the Federal Convention of 1787, pp. 498–499, 599 (rev. ed. 1966). On September 15, 1787, the last day of the Convention before the proposed Constitution was signed, in the midst of a host of minor changes that were being considered, Gouverneur Morris moved to add the exceptions clause. *Id.*, at 627. No great debate ensued; the only disagreement was over whether it was necessary at all. *Id.*, at 627–628. Nobody thought that it was a fundamental change, excluding from the President's appointment power and the Senate's confirmation power a category of officers who might function on their own, outside the supervision of those appointed in the more cumbersome fashion. And it is significant that in the very brief discussion Madison mentions (as in apparent contrast to the "inferior officers" covered by the provision) "Superior Officers." *Id.*, at 637. Of course one is not a "superior officer" without some supervisory responsibility, just as, I suggest, one is not an "inferior officer" within the meaning of the provision under discussion unless one is subject to supervision by a "superior officer." It is perfectly obvious, therefore, both from the relative brevity of the discussion this addition received, and from the content of that discussion, that it was intended merely to make clear (what Madison thought already was clear, see *id.*, at 627) that those officers appointed by the President with Senate

approval could on their own appoint their subordinates, who would, of course, by chain of command still be under the direct control of the President.

This interpretation is, moreover, consistent with our admittedly sketchy precedent in this area. For example, in *United States* v. *Eaton*, 169 U. S. 331 (1898), we held that the appointment by an Executive Branch official other than the President of a "vice-consul," charged with the duty of temporarily performing the function of the consul, did not violate the Appointments Clause. In doing so, we repeatedly referred to the "vice-consul" as a "subordinate" officer. *Id.*, at 343. See also *United States* v. *Germaine*, *supra*, at 511 (comparing "inferior" commissioners and bureau officers to heads of department, describing the former as "mere . . . subordinates") (dicta); *United States* v. *Hartwell*, *supra*, at 394 (describing clerk appointed by Assistant Treasurer with approval of Secretary of the Treasury as a "subordinate office[r]") (dicta). More recently, in *United States* v. *Nixon*, 418 U. S. 683 (1974), we noted that the Attorney General's appointment of the Watergate Special Prosecutor was made pursuant to the Attorney General's "power to appoint *subordinate officers* to assist him in the discharge of his duties." *Id.*, at 694 (emphasis added). The Court's citation of *Nixon* as support for its view that the independent counsel is an inferior officer is simply not supported by a reading of the case. We explicitly stated that the Special Prosecutor was a "subordinate office[r]," *ibid.*, because, in the end, the President or the Attorney General could have removed him at any time, if by no other means than amending or revoking the regulation defining his authority. *Id.*, at 696. Nor are any of the other cases cited by the Court in support of its view inconsistent with the natural reading that an inferior officer must at least be subordinate to another officer of the United States. In *Ex parte Siebold*, 100 U. S. 371 (1880), we upheld the appointment by a court of federal "Judges of Election," who were charged with various duties involving the oversee-

ing of local congressional elections. Contrary to the Court's assertion, see *ante*, at 673, we did not specifically find that these officials were inferior officers for purposes of the Appointments Clause, probably because no one had contended that they were principal officers. Nor can the case be said to represent even an assumption on our part that they were inferior without being subordinate. The power of assisting in the judging of elections that they were exercising was assuredly not a purely executive power, and if we entertained any assumption it was probably that they, like the marshals who assisted them, see *Siebold*, 100 U. S., at 380, were subordinate to the courts, see *id.*, at 397. Similarly, in *Go-Bart Importing Co.* v. *United States*, 282 U. S. 344 (1931), where we held that United States commissioners were inferior officers, we made plain that they were subordinate to the district courts which appointed them: "The commissioner acted not as a court, or as a judge of any court, but as a mere officer of the district court in proceedings of which that court had authority to take control at any time." *Id.*, at 354.

To be sure, it is not a *sufficient* condition for "inferior" officer status that one be subordinate to a principal officer. Even an officer who is subordinate to a department head can be a principal officer. That is clear from the brief exchange following Gouverneur Morris' suggestion of the addition of the exceptions clause for inferior officers. Madison responded:

> "It does not go far enough if it be necessary at all—*Superior Officers below Heads of Departments* ought in some cases to have the appointment of the lesser offices." 2 M. Farrand, Records of the Federal Convention, of 1787, p. 627 (rev. ed. 1966) (emphasis added).

But it is surely a *necessary* condition for inferior officer status that the officer be subordinate to another officer.

The independent counsel is not even subordinate to the President. The Court essentially admits as much, noting that "appellant may not be 'subordinate' to the Attorney Gen-

eral (and the President) insofar as she possesses a degree of independent discretion to exercise the powers delegated to her under the Act." *Ante*, at 671. In fact, there is no doubt about it. As noted earlier, the Act specifically grants her the "*full* power and *independent* authority to exercise *all* investigative and prosecutorial functions of the Department of Justice," 28 U. S. C. § 594(a) (1982 ed., Supp. V), and makes her removable only for "good cause," a limitation specifically intended to ensure that she be *independent* of, not *subordinate* to, the President and the Attorney General. See H. R. Conf. Rep. No. 100–452, p. 37 (1987).

Because appellant is not subordinate to another officer, she is not an "inferior" officer and her appointment other than by the President with the advice and consent of the Senate is unconstitutional.

IV

I will not discuss at any length why the restrictions upon the removal of the independent counsel also violate our established precedent dealing with that specific subject. For most of it, I simply refer the reader to the scholarly opinion of Judge Silberman for the Court of Appeals below. See *In re Sealed Case*, 267 U. S. App. D. C. 178, 838 F. 2d 476 (1988). I cannot avoid commenting, however, about the essence of what the Court has done to our removal jurisprudence today.

There is, of course, no provision in the Constitution stating who may remove executive officers, except the provisions for removal by impeachment. Before the present decision it was established, however, (1) that the President's power to remove principal officers who exercise purely executive powers could not be restricted, see *Myers* v. *United States*, 272 U. S. 52, 127 (1926), and (2) that his power to remove inferior officers who exercise purely executive powers, and whose appointment Congress had removed from the usual procedure of Presidential appointment with Senate consent, could be restricted, at least where the appointment had been made by

an officer of the Executive Branch, see *ibid.*; *United States* v. *Perkins*, 116 U. S. 483, 485 (1886).[4]

The Court could have resolved the removal power issue in this case by simply relying upon its erroneous conclusion that the independent counsel was an inferior officer, and then extending our holding that the removal of inferior officers appointed by the Executive can be restricted, to a new holding that even the removal of inferior officers appointed by the courts can be restricted. That would in my view be a considerable and unjustified extension, giving the Executive full discretion in *neither* the selection *nor* the removal of a purely executive officer. The course the Court has chosen, however, is even worse.

Since our 1935 decision in *Humphrey's Executor* v. *United States*, 295 U. S. 602—which was considered by many at the time the product of an activist, anti-New Deal Court bent on reducing the power of President Franklin Roosevelt—it has been established that the line of permissible restriction upon removal of principal officers lies at the point at which the powers exercised by those officers are no longer purely executive. Thus, removal restrictions have been generally regarded as lawful for so-called "independent regulatory

[4] The Court misunderstands my opinion to say that "every officer of the United States exercising any part of [the executive] power must serve at the pleasure of the President and be removable by him at will." *Ante*, at 690, n. 29. Of course, as my discussion here demonstrates, that has never been the law and I do not assert otherwise. What I *do* assert—and what the Constitution seems plainly to prescribe—is that the President must have control over all exercises of the executive power. See *supra*, at 705. That requires that he have plenary power to remove principal officers such as the independent counsel, but it does not require that he have plenary power to remove inferior officers. Since the latter are, as I have described, subordinate to, *i. e.*, subject to the supervision of, principal officers who (being removable at will) have the President's complete confidence, it is enough—at least if they have been appointed by the President or by a principal officer—that they be removable *for cause*, which would include, of course, the failure to accept supervision. Thus, *Perkins* is in no way inconsistent with my views.

agencies," such as the Federal Trade Commission, see *ibid.*; 15 U. S. C. § 41, the Interstate Commerce Commission, see 49 U. S. C. § 10301(c) (1982 ed., Supp. IV), and the Consumer Product Safety Commission, see 15 U. S. C. § 2053(a), which engage substantially in what has been called the "quasi-legislative activity" of rulemaking, and for members of Article I courts, such as the Court of Military Appeals, see 10 U. S. C. § 867(a)(2), who engage in the "quasi-judicial" function of adjudication. It has often been observed, correctly in my view, that the line between "purely executive" functions and "quasi-legislative" or "quasi-judicial" functions is not a clear one or even a rational one. See *ante*, at 689–691; *Bowsher* v. *Synar*, 478 U. S. 714, 761, n. 3 (1986) (WHITE, J., dissenting); *FTC* v. *Ruberoid Co.*, 343 U. S. 470, 487–488 (1952) (Jackson, J., dissenting). But at least it permitted the identification of certain officers, and certain agencies, whose functions were entirely within the control of the President. Congress had to be aware of that restriction in its legislation. Today, however, *Humphrey's Executor* is swept into the dustbin of repudiated constitutional principles. "[O]ur present considered view," the Court says, "is that the determination of whether the Constitution allows Congress to impose a 'good cause'-type restriction on the President's power to remove an official cannot be made to turn on whether or not that official is classified as 'purely executive.'" *Ante*, at 689. What *Humphrey's Executor* (and presumably *Myers*) really means, we are now told, is not that there are any "rigid categories of those officials who may or may not be removed at will by the President," but simply that Congress cannot "interefere with the President's exercise of the 'executive power' and his constitutionally appointed duty to 'take care that the laws be faithfully executed,'" *ante*, at 689–690.

One can hardly grieve for the shoddy treatment given today to *Humphrey's Executor*, which, after all, accorded the same indignity (with much less justification) to Chief Justice

Taft's opinion 10 years earlier in *Myers* v. *United States*, 272 U. S. 52 (1926)—gutting, in six quick pages devoid of textual or historical precedent for the novel principle it set forth, a carefully researched and reasoned 70-page opinion. It is in fact comforting to witness the reality that he who lives by the *ipse dixit* dies by the *ipse dixit*. But one must grieve for the Constitution. *Humphrey's Executor* at least had the decency formally to observe the constitutional principle that the President had to be the repository of *all* executive power, see 295 U. S., at 627–628, which, as *Myers* carefully explained, necessarily means that he must be able to discharge those who do not perform executive functions according to his liking. As we noted in *Bowsher*, once an officer is appointed "'it is only the authority that can remove him, and not the authority that appointed him, that he must fear and, in the performance of his functions, obey.'" 478 U. S., at 726, quoting *Synar* v. *United States*, 626 F. Supp. 1374, 1401 (DC 1986) (Scalia, Johnson, and Gasch, JJ.). By contrast, "our present considered view" is simply that *any* executive officer's removal can be restricted, so long as the President remains "able to accomplish his constitutional role." *Ante*, at 690. There are now no lines. If the removal of a prosecutor, the virtual embodiment of the power to "take care that the laws be faithfully executed," can be restricted, what officer's removal cannot? This is an open invitation for Congress to experiment. What about a special Assistant Secretary of State, with responsibility for one very narrow area of foreign policy, who would not only have to be confirmed by the Senate but could also be removed only pursuant to certain carefully designed restrictions? Could this possibly render the President "[un]able to accomplish his constitutional role"? Or a special Assistant Secretary of Defense for Procurement? The possibilities are endless, and the Court does not understand what the separation of powers, what "[a]mbition . . . counteract[ing] ambition," Federalist No. 51, p. 322 (Madison), is all about, if it does not expect Congress to try them. As far as I can discern from the Court's opinion, it is now

open season upon the President's removal power for all executive officers, with not even the superficially principled restriction of *Humphrey's Executor* as cover. The Court essentially says to the President: "Trust us. We will make sure that you are able to accomplish your constitutional role." I think the Constitution gives the President—and the people—more protection than that.

V

The purpose of the separation and equilibration of powers in general, and of the unitary Executive in particular, was not merely to assure effective government but to preserve individual freedom. Those who hold or have held offices covered by the Ethics in Government Act are entitled to that protection as much as the rest of us, and I conclude my discussion by considering the effect of the Act upon the fairness of the process they receive.

Only someone who has worked in the field of law enforcement can fully appreciate the vast power and the immense discretion that are placed in the hands of a prosecutor with respect to the objects of his investigation. Justice Robert Jackson, when he was Attorney General under President Franklin Roosevelt, described it in a memorable speech to United States Attorneys, as follows:

> "There is a most important reason why the prosecutor should have, as nearly as possible, a detached and impartial view of all groups in his community. Law enforcement is not automatic. It isn't blind. One of the greatest difficulties of the position of prosecutor is that he must pick his cases, because no prosecutor can even investigate all of the cases in which he receives complaints. If the Department of Justice were to make even a pretense of reaching every probable violation of federal law, ten times its present staff will be inadequate. We know that no local police force can strictly enforce the traffic laws, or it would arrest half the driving population on

any given morning. What every prosecutor is practically required to do is to select the cases for prosecution and to select those in which the offense is the most flagrant, the public harm the greatest, and the proof the most certain.

"If the prosecutor is obliged to choose his case, it follows that he can choose his defendants. Therein is the most dangerous power of the prosecutor: that he will pick people that he thinks he should get, rather than cases that need to be prosecuted. With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone. In such a case, it is not a question of discovering the commission of a crime and then looking for the man who has committed it, it is a question of picking the man and then searching the law books, or putting investigators to work, to pin some offense on him. It is in this realm—in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies. It is here that law enforcement becomes personal, and the real crime becomes that of being unpopular with the predominant or governing group, being attached to the wrong political views, or being personally obnoxious to or in the way of the prosecutor himself." R. Jackson, The Federal Prosecutor, Address Delivered at the Second Annual Conference of United States Attorneys, April 1, 1940.

Under our system of government, the primary check against prosecutorial abuse is a political one. The prosecutors who exercise this awesome discretion are selected and can be removed by a President, whom the people have trusted enough to elect. Moreover, when crimes are not investigated and prosecuted fairly, nonselectively, with a rea-

sonable sense of proportion, the President pays the cost in political damage to his administration. If federal prosecutors "pick people that [they] thin[k] [they] should get, rather than cases that need to be prosecuted," if they amass many more resources against a particular prominent individual, or against a particular class of political protesters, or against members of a particular political party, than the gravity of the alleged offenses or the record of successful prosecutions seems to warrant, the unfairness will come home to roost in the Oval Office. I leave it to the reader to recall the examples of this in recent years. That result, of course, was precisely what the Founders had in mind when they provided that all executive powers would be exercised by a *single* Chief Executive. As Hamilton put it, "[t]he ingredients which constitute safety in the republican sense are a due dependence on the people, and a due responsibility." Federalist No. 70, p. 424. The President is directly dependent on the people, and since there is only *one* President, *he* is responsible. The people know whom to blame, whereas "one of the weightiest objections to a plurality in the executive . . . is that it tends to conceal faults and destroy responsibility." *Id.*, at 427.

That is the system of justice the rest of us are entitled to, but what of that select class consisting of present or former high-level Executive Branch officials? If an allegation is made against them of any violation of any federal criminal law (except Class B or C misdemeanors or infractions) the Attorney General must give it his attention. That in itself is not objectionable. But if, after a 90-day investigation without the benefit of normal investigatory tools, the Attorney General is unable to say that there are "no reasonable grounds to believe" that further investigation is warranted, a process is set in motion that is *not* in the full control of persons "dependent on the people," and whose flaws cannot be blamed on the President. An independent counsel is selected, and the scope of his or her authority prescribed, by a

panel of judges. What if they are politically partisan, as judges have been known to be, and select a prosecutor antagonistic to the administration, or even to the particular individual who has been selected for this special treatment? There is no remedy for that, not even a political one. Judges, after all, have life tenure, and appointing a surefire enthusiastic prosecutor could hardly be considered an impeachable offense. So if there is anything wrong with the selection, there is effectively no one to blame. The independent counsel thus selected proceeds to assemble a staff. As I observed earlier, in the nature of things this has to be done by finding lawyers who are willing to lay aside their current careers for an indeterminate amount of time, to take on a job that has no prospect of permanence and little prospect for promotion. One thing is certain, however: it involves investigating and perhaps prosecuting a particular individual. Can one imagine a less equitable manner of fulfilling the executive responsibility to investigate and prosecute? What would be the reaction if, in an area not covered by this statute, the Justice Department posted a public notice inviting applicants to assist in an investigation and possible prosecution of a certain prominent person? Does this not invite what Justice Jackson described as "picking the man and then searching the law books, or putting investigators to work, to pin some offense on him"? To be sure, the investigation must relate to the area of criminal offense specified by the life-tenured judges. But that has often been (and nothing prevents it from being) very broad—and should the independent counsel or his or her staff come up with something beyond that scope, nothing prevents him or her from asking the judges to expand his or her authority or, if that does not work, referring it to the Attorney General, whereupon the whole process would recommence and, if there was "reasonable basis to believe" that further investigation was warranted, that new offense would be referred to the Special Division, which would in all likelihood assign it to the same

independent counsel. It seems to me not conducive to fairness. But even if it were entirely evident that unfairness was in fact the result—the judges hostile to the administration, the independent counsel an old foe of the President, the staff refugees from the recently defeated administration—*there would be no one accountable to the public to whom the blame could be assigned.*

I do not mean to suggest that anything of this sort (other than the inevitable self-selection of the prosecutory staff) occurred in the present case. I know and have the highest regard for the judges on the Special Division, and the independent counsel herself is a woman of accomplishment, impartiality, and integrity. But the fairness of a process must be adjudged on the basis of what it permits to happen, not what it produced in a particular case. It is true, of course, that a similar list of horribles could be attributed to an ordinary Justice Department prosecution—a vindictive prosecutor, an antagonistic staff, etc. But the difference is the difference that the Founders envisioned when they established a single Chief Executive accountable to the people: the blame can be assigned to someone who can be punished.

The above described possibilities of irresponsible conduct must, as I say, be considered in judging the constitutional acceptability of this process. But they will rarely occur, and in the average case the threat to fairness is quite different. As described in the brief filed on behalf of three ex-Attorneys General from each of the last three administrations:

> "The problem is less spectacular but much more worrisome. It is that the institutional environment of the Independent Counsel—specifically, her isolation from the Executive Branch and the internal checks and balances it supplies—is designed to heighten, not to check, all of the occupational hazards of the dedicated prosecutor; the danger of too narrow a focus, of the loss of perspective, of preoccupation with the pursuit of one alleged suspect to the exclusion of other interests." Brief for Edward

H. Levi, Griffin B. Bell, and William French Smith as *Amici Curiae* 11.

It is, in other words, an additional advantage of the unitary Executive that it can achieve a more uniform application of the law. Perhaps that is not always achieved, but the mechanism to achieve it is there. The mini-Executive that is the independent counsel, however, operating in an area where so little is law and so much is discretion, is intentionally cut off from the unifying influence of the Justice Department, and from the perspective that multiple responsibilities provide. What would normally be regarded as a technical violation (there are no rules defining such things), may in his or her small world assume the proportions of an indictable offense. What would normally be regarded as an investigation that has reached the level of pursuing such picayune matters that it should be concluded, may to him or her be an investigation that ought to go on for another year. How frightening it must be to have your own independent counsel and staff appointed, with nothing else to do but to investigate you until investigation is no longer worthwhile—with whether it is worthwhile not depending upon what such judgments usually hinge on, competing responsibilities. And to have that counsel and staff decide, with no basis for comparison, whether what you have done is bad enough, willful enough, and provable enough, to warrant an indictment. How admirable the constitutional system that provides the means to avoid such a distortion. And how unfortunate the judicial decision that has permitted it.

* * *

The notion that every violation of law should be prosecuted, including—indeed, *especially*—every violation by those in high places, is an attractive one, and it would be risky to argue in an election campaign that that is not an absolutely overriding value. *Fiat justitia, ruat coelum.* Let justice be done, though the heavens may fall. The reality is, however, that it is not an absolutely overriding value, and it

was with the hope that we would be able to acknowledge and apply such realities that the Constitution spared us, by life tenure, the necessity of election campaigns. I cannot imagine that there are not many thoughtful men and women in Congress who realize that the benefits of this legislation are far outweighed by its harmful effect upon our system of government, and even upon the nature of justice received by those men and women who agree to serve in the Executive Branch. But it is difficult to vote not to enact, and even more difficult to vote to repeal, a statute called, appropriately enough, the Ethics in Government Act. If Congress is controlled by the party other than the one to which the President belongs, it has little incentive to repeal it; if it is controlled by the same party, it dare not. By its shortsighted action today, I fear the Court has permanently encumbered the Republic with an institution that will do it great harm.

Worse than what it has done, however, is the manner in which it has done it. A government of laws means a government of rules. Today's decision on the basic issue of fragmentation of executive power is ungoverned by rule, and hence ungoverned by law. It extends into the very heart of our most significant constitutional function the "totality of the circumstances" mode of analysis that this Court has in recent years become fond of. Taking all things into account, we conclude that the power taken away from the President here is not really *too* much. The next time executive power is assigned to someone other than the President we may conclude, taking all things into account, that it *is* too much. That opinion, like this one, will not be confined by any rule. We will describe, as we have today (though I hope more accurately) the effects of the provision in question, and will authoritatively announce: "The President's need to control the exercise of the [subject officer's] discretion *is* so central to the functioning of the Executive Branch as to require complete control." This is not analysis; it is ad hoc judgment. And it fails to explain why it is not true that—as the text of

the Constitution seems to require, as the Founders seemed to expect, and as our past cases have uniformly assumed—all purely executive power must be under the control of the President.

The ad hoc approach to constitutional adjudication has real attraction, even apart from its work-saving potential. It is guaranteed to produce a result, in every case, that will make a majority of the Court happy with the law. The law is, by definition, precisely what the majority thinks, taking all things into account, it *ought* to be. I prefer to rely upon the judgment of the wise men who constructed our system, and of the people who approved it, and of two centuries of history that have shown it to be sound. Like it or not, that judgment says, quite plainly, that "[t]he executive Power shall be vested in a President of the United States."

Syllabus

COMMUNICATIONS WORKERS OF AMERICA ET AL. *v.* BECK ET AL.

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

No. 86–637. Argued January 11, 1988—Decided June 29, 1988

Section 8(a)(3) of the National Labor Relations Act (NLRA) permits an employer and a union to enter into an agreement requiring all employees in the bargaining unit to pay union dues as a condition of continued employment, whether or not the employees become union members. Petitioner Communications Workers of America (CWA) entered into a collective-bargaining agreement that contains a union-security clause under which all represented employees who do not become union members must pay the union "agency fees" in amounts equal to the dues paid by union members. Respondents, bargaining-unit employees who chose not to become union members, filed this suit in Federal District Court, challenging CWA's use of their agency fees for purposes other than collective bargaining, contract administration, or grievance adjustment (hereinafter "collective-bargaining" activities). They alleged that expenditure of their fees on activities such as organizing the employees of other employers, lobbying for labor legislation, and participating in social, charitable, and political events violated CWA's duty of fair representation, § 8(a)(3), and the First Amendment. The court concluded that CWA's collection and disbursement of agency fees for purposes other than collective-bargaining activities violated the associational and free speech rights of objecting nonmembers, and granted injunctive relief and an order for reimbursement of excess fees. The Court of Appeals, preferring to rest its judgment on a ground other than the Constitution, ultimately concluded, *inter alia*, that the collection of nonmembers' fees for purposes unrelated to collective bargaining violated CWA's duty of fair representation.

Held:

1. The courts below properly exercised jurisdiction over respondents' claims that exactions of agency fees beyond those necessary to finance collective-bargaining activities violated the judicially created duty of fair representation and respondents' First Amendment rights. Although the National Labor Relations Board (Board) had primary jurisdiction over respondents' § 8(a)(3) claim, cf. *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, the courts below were not precluded from deciding the merits of that claim insofar as such a decision was necessary

to the disposition of respondents' duty-of-fair-representation challenge. Federal courts may resolve unfair labor practice questions that emerge as collateral issues in suits brought under independent federal remedies. Respondents did not attempt to circumvent the Board's primary jurisdiction by casting their statutory claim as a violation of CWA's duty of fair representation. Instead, the necessity of deciding the scope of § 8(a)(3) arose because CWA and its copetitioner local unions sought to defend themselves on the ground that the statute authorizes the type of union-security agreement in issue. Pp. 742–744.

2. Section 8(a)(3) does not permit a union, over the objections of dues-paying nonmember employees, to expend funds collected from them on activities unrelated to collective-bargaining activities. Pp. 744–762.

(a) The decision in *Machinists* v. *Street*, 367 U. S. 740—holding that § 2, Eleventh of the Railway Labor Act (RLA) does not permit a union, over the objections of nonmembers, to expend agency fees on political causes—is controlling, for § 8(a)(3) and § 2, Eleventh are in all material respects identical. Their nearly identical language reflects the fact that in both Congress authorized compulsory unionism only to the extent necessary to ensure that those who enjoy union-negotiated benefits contribute to their cost. Indeed, Congress, in 1951, expressly modeled § 2, Eleventh on § 8(a)(3), which it had added to the NLRA by the Taft-Hartley Act only four years earlier, and emphasized that it was extending to railroad labor the same rights and privileges of the union shop that were contained in the Taft-Hartley Act. Pp. 744–747.

(b) Section 8(a)(3) was intended to correct abuses of compulsory unionism that had developed under "closed shop" agreements and, at the same time, to require, through union-security clauses, that nonmember employees pay their share of the cost of benefits secured by the union through collective bargaining. These same concerns prompted Congress' later amendment of the RLA. Given the parallel purpose, structure, and language of § 8(a)(3) and § 2, Eleventh, both provisions must be interpreted in the same manner. Only the most compelling evidence would support a contrary conclusion, and petitioners have not proffered such evidence here. Pp. 747–754.

(c) Petitioners claim that the union-security provisions of the RLA and NLRA should be read differently in light of the different history of unionism in the regulated industries—that is, the tradition of voluntary unionism in the railway industry prior to the 1951 amendment of the RLA and the history of compulsory unionism in NLRA-regulated industries prior to 1947. Petitioners contend that because agreements requiring the payment of uniform dues were not among the specific abuses Congress sought to remedy in the Taft-Hartley Act, § 8(a)(3) cannot plausibly be read to prohibit the collection of fees in excess of those

necessary to cover the costs of collective bargaining. This argument is unpersuasive because the legislative history of § 8(a)(3) shows that Congress was concerned with numerous and systemic abuses of the closed shop and therefore resolved to ban the closed shop altogether; to the extent it permitted union-security agreements at all, Congress was guided—as it was in its later amendment of the RLA—by the principle that those enjoying the benefits of union representation should contribute their fair share to the expense of securing those benefits. Moreover, it is clear that Congress understood its actions in 1947 and 1951 to have placed the respective regulated industries on an equal footing insofar as compulsory unionism was concerned. Pp. 754–756.

(d) The fact that in the Taft-Hartley Act Congress expressly considered proposals regulating union finances but ultimately placed only a few limitations on the collection and use of dues and fees, and otherwise left unions free to arrange their financial affairs as they saw fit, is not sufficient to compel a broader construction of § 8(a)(3) than that accorded § 2, Eleventh in *Street*. The legislative history of § 8(a)(3) shows that Congress was concerned with the dues and rights of union members, not the agency fees and rights of nonmembers. The absence, in such legislative history, of congressional concern for the rights of nonmembers is consistent with the view that Congress understood § 8(a)(3) to afford nonmembers adequate protection by authorizing the collection of only those fees necessary to finance collective-bargaining activities. Nor is there any merit to the contention that, because unions had previously used members' dues for a variety of purposes in addition to collective-bargaining agreements, Congress' silence in 1947 as to the uses to which unions could put nonmembers' fees should be understood as an acquiescence in such union practices. Pp. 756–761.

(e) *Street* cannot be distinguished on the theory that the construction of § 2, Eleventh was merely expedient to avoid the constitutional question—as to the use of fees for political causes that nonmembers find objectionable—that otherwise would have been raised because the RLA (unlike the NLRA) pre-empts state laws banning union-security agreements and thus nonmember fees were compelled by "governmental action." Even assuming that the exercise of rights permitted, though not compelled, by § 8(a)(3) does not involve state action, and that the NLRA and RLA therefore differ in such respect, nevertheless the absence of any constitutional concerns in this case would not warrant reading the nearly identical language of § 8(a)(3) and § 2, Eleventh differently. Pp. 761–762.

800 F. 2d 1280, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, MARSHALL, and STEVENS, JJ., joined, and in Parts I and II of which BLACKMUN, O'CONNOR, and SCALIA, JJ., joined. BLACKMUN, J., filed an opinion concurring in part and dissenting in part, in which O'CONNOR and SCALIA, JJ., joined, *post*, p. 763. KENNEDY, J., took no part in the consideration or decision of the case.

Laurence Gold argued the cause for petitioners. With him on the briefs were *Thomas S. Adair*, *James Coppess*, and *George Kaufmann*.

Edwin Vieira, Jr., argued the cause for respondents. With him on the brief was *Hugh L. Reilly*.*

JUSTICE BRENNAN delivered the opinion of the Court.

Section 8(a)(3) of the National Labor Relations Act of 1935 (NLRA), 49 Stat. 452, as amended, 29 U. S. C. § 158(a)(3), permits an employer and an exclusive bargaining representative to enter into an agreement requiring all employees in the bargaining unit to pay periodic union dues and initiation fees as a condition of continued employment, whether or not the employees otherwise wish to become union members. Today we must decide whether this provision also permits a union, over the objections of dues-paying nonmember employees, to expend funds so collected on activities unrelated to collective bargaining, contract administration, or grievance adjustment, and, if so, whether such expenditures violate the union's duty of fair representation or the objecting employees' First Amendment rights.

**David M. Silberman* filed a brief for the American Federation of Labor and Congress of Industrial Organizations as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the Landmark Legal Foundation by *Jerald L. Hill* and *Mark J. Bredemeier;* for the Pacific Legal Foundation et al. by *Ronald A. Zumbrun* and *Anthony T. Caso;* and for Senator Jesse Helms et al. by *Thomas A. Farr, W. W. Taylor, Jr.*, and *Robert A. Valois*.

Solicitor General Fried, Deputy Solicitor General Cohen, Norton J. Come, and *Linda Sher* filed a brief for the United States as *amicus curiae*.

I

In accordance with § 9 of the NLRA, 49 Stat. 453, as amended, 29 U. S. C. § 159, a majority of the employees of American Telephone and Telegraph Company and several of its subsidiaries selected petitioner Communications Workers of America (CWA) as their exclusive bargaining representative. As such, the union is empowered to bargain collectively with the employer on behalf of all employees in the bargaining unit over wages, hours, and other terms and conditions of employment, § 9(a), 29 U. S. C. § 159(a), and it accordingly enjoys "broad authority . . . in the negotiation and administration of [the] collective bargaining contract." *Humphrey* v. *Moore*, 375 U. S. 335, 342 (1964). This broad authority, however, is tempered by the union's "statutory obligation to serve the interests of all members without hostility or discrimination toward any," *Vaca* v. *Sipes*, 386 U. S. 171, 177 (1967), a duty that extends not only to the negotiation of the collective-bargaining agreement itself but also to the subsequent enforcement of that agreement, including the administration of any grievance procedure the agreement may establish. *Ibid.* CWA chartered several local unions, copetitioners in this case, to assist it in discharging these statutory duties. In addition, at least in part to help defray the considerable costs it incurs in performing these tasks, CWA negotiated a union-security clause in the collective-bargaining agreement under which all represented employees, including those who do not wish to become union members, must pay the union "agency fees" in "amounts equal to the periodic dues" paid by union members. Plaintiffs' Complaint ¶ 11 and Plaintiffs' Exhibit A–1, 1 Record. Under the clause, failure to tender the required fee may be grounds for discharge.

In June 1976, respondents, 20 employees who chose not to become union members, initiated this suit challenging CWA's use of their agency fees for purposes other than collective bargaining, contract administration, or grievance adjustment

(hereinafter "collective-bargaining" or "representational" activities). Specifically, respondents alleged that the union's expenditure of their fees on activities such as organizing the employees of other employers, lobbying for labor legislation, and participating in social, charitable, and political events violated petitioners' duty of fair representation, § 8(a)(3) of the NLRA, the First Amendment, and various common-law fiduciary duties. In addition to declaratory relief, respondents sought an injunction barring petitioners from exacting fees above those necessary to finance collective-bargaining activities, as well as damages for the past collection of such excess fees.

The District Court concluded that the union's collection and disbursement of agency fees for purposes other than bargaining unit representation violated the associational and free speech rights of objecting nonmembers, and therefore enjoined their future collection. 468 F. Supp. 93 (Md. 1979). Applying a "clear and convincing" evidentiary standard, the District Court concluded that the union had failed to show that more than 21% of its funds were expended on collective-bargaining matters. App. to Pet. for Cert. 119a. The court ordered reimbursement of all excess fees respondents had paid since January 1976, and directed the union to institute a recordkeeping system to segregate accounts for representational and noncollective-bargaining activities. *Id.*, at 125a, 108a–109a.

A divided panel of the United States Court of Appeals for the Fourth Circuit agreed that respondents stated a valid claim for relief under the First Amendment, but, preferring to rest its judgment on a ground other than the Constitution, concluded that the collection of nonmembers' fees for purposes unrelated to collective bargaining violated § 8(a)(3). 776 F. 2d 1187 (1985). Turning to the specific activities challenged, the majority noted that the District Court's adoption of a "clear and convincing" standard of proof was improper, but found that for certain categories of expenditures, such

as lobbying, organizing employees in other companies, and funding various community services, the error was harmless inasmuch as the activities were indisputably unrelated to bargaining unit representation. The majority remanded the case for reconsideration of the remaining expenditures, which the union claimed were made in connection with valid collective-bargaining activities. Chief Judge Winter dissented. *Id.*, at 1214. He concluded that § 8(a)(3) authorized exaction of fees in amounts equivalent to full union dues, including fees expended on nonrepresentational activities, and that the negotiation and enforcement of agreements permitting such exactions was private conduct incapable of violating the constitutional rights of objecting nonmembers.

On rehearing, the en banc court vacated the panel opinion and by a 6-to-4 vote again affirmed in part, reversed in part, and remanded for further proceedings. 800 F. 2d 1280 (1986). The court explained in a brief *per curiam* opinion that five of the six majority judges believed there was federal jurisdiction over both the § 8(a)(3) and the duty-of-fair-representation claims, and that respondents were entitled to judgment on both. Judge Murnaghan, casting the deciding vote, concluded that the court had jurisdiction over only the duty-of-fair-representation claim; although he believed that § 8(a)(3) permits union-security clauses requiring payment of full union dues, he concluded that the collection of such fees from nonmembers to finance activities unrelated to collective bargaining violates the union's duty of fair representation. All six of these judges agreed with the panel's resolution of the specific allocations issue and accordingly remanded the action. Chief Judge Winter, joined by three others, again dissented for the reasons set out in his earlier panel dissent.

The decision below directly conflicts with that of the United States Court of Appeals for the Second Circuit. See *Price* v. *Auto Workers*, 795 F. 2d 1128 (1986). We granted certiorari to resolve the important question concerning the

validity of such agreements, 482 U. S. 904 (1987), and now affirm.

II

At the outset, we address briefly the jurisdictional question that divided the Court of Appeals. Respondents sought relief on three separate federal claims: that the exaction of fees beyond those necessary to finance collective-bargaining activities violates § 8(a)(3); that such exactions violate the judicially created duty of fair representation; and that such exactions violate respondents' First Amendment rights. We think it clear that the courts below properly exercised jurisdiction over the latter two claims, but that the National Labor Relations Board (NLRB or Board) had primary jurisdiction over respondents' § 8(a)(3) claim.

In *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236 (1959), we held that "[w]hen an activity is arguably subject to § 7 or § 8 of the [NLRA], the States *as well as the federal courts* must defer to the exclusive competence of the [Board] if the danger of state interference with national policy is to be averted." *Id.*, at 245 (emphasis added). A simple recitation of respondents' § 8(a)(3) claim reveals that it falls squarely within the primary jurisdiction of the Board: respondents contend that, by collecting and using agency fees for nonrepresentational purposes, the union has contravened the express terms of § 8(a)(3), which, respondents argue, provides a limited authorization for the collection of only those fees necessary to finance collective-bargaining activities. There can be no doubt, therefore, that the challenged fee-collecting activity is "subject to" § 8.

While the five-judge plurality of the en banc court did not explain the basis of its jurisdictional holding, the panel majority concluded that because courts have jurisdiction over challenges to union-security clauses negotiated under § 2, Eleventh of the Railway Labor Act (RLA), 64 Stat. 1238, 45 U. S. C. § 152, Eleventh, which is in all material respects identical to § 8(a)(3), there must be a parity of federal juris-

diction over § 8(a)(3) claims. Unlike the NLRA, however, the RLA establishes no agency charged with administering its provisions, and instead leaves it to the courts to determine the validity of activities challenged under the Act. The primary jurisdiction of the NLRB, therefore, cannot be diminished by analogies to the RLA, for in this regard the two labor statutes do not parallel one another. The Court of Appeals erred, then, to the extent that it concluded it possessed jurisdiction to pass directly on respondents' § 8(a)(3) claim.

The court was not precluded, however, from deciding the merits of this claim insofar as such a decision was necessary to the disposition of respondents' duty-of-fair-representation challenge. Federal courts may resolve unfair labor practice questions that "emerge as collateral issues in suits brought under independent federal remedies," *Connell Construction Co.* v. *Plumbers*, 421 U. S. 616, 626 (1975), and one such remedy over which federal jurisdiction is well settled is the judicially implied duty of fair representation. *Vaca* v. *Sipes*, 386 U. S. 171 (1967). This jurisdiction to adjudicate fair-representation claims encompasses challenges leveled not only at a union's contract administration and enforcement efforts, *id.*, at 176–188, but at its negotiation activities as well. *Ford Motor Co.* v. *Huffman*, 345 U. S. 330 (1953). Employees, of course, may not circumvent the primary jurisdiction of the NLRB simply by casting statutory claims as violations of the union's duty of fair representation. Respondents, however, have done no such thing here; rather, they claim that the union failed to represent their interests fairly and without hostility by negotiating and enforcing an agreement that allows the exaction of funds for purposes that do not serve their interests and in some cases are contrary to their personal beliefs. The necessity of deciding the scope of § 8(a)(3) arises because *petitioners* seek to defend themselves on the ground that the statute authorizes precisely this type of agreement. Under these circumstances, the Court of Ap-

peals had jurisdiction to decide the § 8(a)(3) question raised by respondents' duty-of-fair-representation claim.[1]

III

Added as part of the Labor Management Relations Act, 1947, or Taft-Hartley Act, § 8(a)(3) makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment . . . to encourage or discourage membership in any labor organization." 29 U. S. C. § 158 (a)(3). The section contains two provisos without which all union-security clauses would fall within this otherwise broad condemnation: the first states that nothing in the Act "preclude[s] an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein" 30 days after the employee attains employment, *ibid.*; the second, limiting the first, provides:

> "[N]o employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure . . . to tender the periodic

[1] The courts below, of course, possessed jurisdiction over respondents' constitutional challenges. Whether or not the NLRB entertains constitutional claims, see *Florida Gulf Coast Building & Construction Trades Council (Edward J. DeBartolo Corp.)*, 273 N. L. R. B. 1431, 1432 (1985) (Board "will presume the constitutionality of the Act [it] administer[s]"); *Handy Andy, Inc.*, 228 N. L. R. B. 447, 452 (1977) (Board lacks the authority "to determine the constitutionality of mandatory language in the Act"); see also *Johnson* v. *Robison*, 415 U. S. 361, 368 (1974) ("Adjudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies"); cf. *NLRB* v. *Catholic Bishop of Chicago*, 440 U. S. 490, 495–499 (1979) (reviewing Board's history of determining its jurisdiction over religious schools in light of Free Exercise Clause concerns), such claims would not fall within the Board's primary jurisdiction.

dues and the initiation fees uniformly required as a condition of acquiring or retaining membership." *Ibid.*

Taken as a whole, § 8(a)(3) permits an employer and a union[2] to enter into an agreement requiring all employees to become union members as a condition of continued employment, but the "membership" that may be so required has been "whittled down to its financial core." *NLRB* v. *General Motors Corp.*, 373 U. S. 734, 742 (1963). The statutory question presented in this case, then, is whether this "financial core" includes the obligation to support union activities beyond those germane to collective bargaining, contract administration, and grievance adjustment. We think it does not.

Although we have never before delineated the precise limits § 8(a)(3) places on the negotiation and enforcement of union-security agreements, the question the parties proffer is not an entirely new one. Over a quarter century ago we held that § 2, Eleventh of the RLA does not permit a union, over the objections of nonmembers, to expend compelled agency fees on political causes. *Machinists* v. *Street*, 367 U. S. 740 (1961). Because the NLRA and RLA differ in certain crucial respects, we have frequently warned that decisions construing the latter often provide only the roughest of guidance when interpreting the former. See, *e. g.*, *Street*, *supra*, at 743; *First National Maintenance Corp.* v. *NLRB*, 452 U. S. 666, 686, n. 23 (1984). Our decision in *Street*, however, is far more than merely instructive here: we believe it is controlling, for § 8(a)(3) and § 2, Eleventh are in all material respects identical.[3] Indeed, we have previously described

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[2] Section 8(b)(2) makes it unlawful for unions "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3)," 29 U. S. C. § 158(b)(2); accordingly, the provisos to § 8(a)(3) also allow unions to seek and enter into union-security agreements.

[3] Section 2, Eleventh provides, in pertinent part:

"Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or

the two provisions as "statutory equivalent[s]," *Ellis* v. *Railway Clerks*, 466 U. S. 435, 452, n. 13 (1984), and with good reason, because their nearly identical language reflects the fact that in both Congress authorized compulsory unionism only to the extent necessary to ensure that those who enjoy union-negotiated benefits contribute to their cost. Thus, in amending the RLA in 1951, Congress expressly modeled § 2, Eleventh on § 8(a)(3), which it had added to the NLRA only four years earlier, and repeatedly emphasized that it was extending "to railroad labor the same rights and privileges of the union shop that are contained in the Taft-Hartley Act." 96 Cong. Rec. 17055 (1951) (remarks of Rep. Brown).[4] In

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labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—

"(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is later, all employees shall become members of the labor organization representing their craft or class: *Provided*, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership." 45 U. S. C. § 152, Eleventh.

Although § 2, Eleventh allows termination of an employee for failure to pay "periodic dues, initiation fees, *and assessments (not including fines and penalties)*," the italicized language was added to the RLA only because some railway unions required only nominal dues, and financed their bargaining activities through monthly assessments; having added "assessments" as a proper element of agency fees, Congress simply clarified that the term did not refer, as it often did in the parlance of other industries, to fines or penalties. See *Machinists* v. *Street*, 367 U. S., at 766. In addition, § 2, Eleventh pre-empts state laws that would otherwise ban union shops. This difference, however, has no bearing on the types of union-security agreements that the statute permits, and thus does not distinguish the union shop authorization of § 2, Eleventh from that of § 8(a)(3).

[4] See also S. Rep. No. 2262, 81st Cong., 2d Sess., 3 (1950) ("[T]he terms of [the bill] are substantially the same as those of the Labor-Management

these circumstances, we think it clear that Congress intended the same language to have the same meaning in both statutes.

A

Both the structure and purpose of § 8(a)(3) are best understood in light of the statute's historical origins. Prior to the enactment of the Taft-Hartley Act of 1947, 61 Stat. 140, § 8(3) of the Wagner Act of 1935 (NLRA) permitted majority unions to negotiate "closed shop" agreements requiring employers to hire only persons who were already union members.

Relations Act"); H. R. Rep. No. 2811, 81st Cong., 2d Sess., 4 (1950) (the bill allows unions "to negotiate agreements with railroads and airlines of a character permitted in the case of labor organizations in the other large industries of the country"); 96 Cong. Rec. 15737 (1950) (remarks of Sen. Hill) ("The bill . . . is designed merely to extend to employees and employers subject to the [RLA] rights now possessed by employees and employers under the Taft-Hartley Act"); *id.*, at 15740 (remarks of Sen. Lehman) ("The railroad brotherhoods should have the same right that any other union has to negotiate for the union shop"); *id.*, at 16267 (remarks of Sen. Taft) ("[T]he bill inserts in the railway mediation law almost the exact provisions . . . of the Taft-Hartley law"); *id.*, at 17049 (remarks of Rep. Beckworth) (the bill permits railway unions "to bring about agreements with carriers providing for union shops, a principle enacted into law in the Taft-Hartley bill"); *id.*, at 17055 (remarks of Rep. Biemiller) ("[The] provision . . . gives to railway labor the right to bargain for the union shop just as any other labor group in the country may do"); *id.*, at 17056 (remarks of Rep. Bennett) ("The purpose of the bill is to amend the [RLA] to give railroad workers . . . the same right to enjoy the benefits and privileges of a union-shop arrangement that is now accorded to all workmen in most other types of employment"); *ibid.* (remarks of Rep. Heselton) ("[T]his bill primarily provides for the same kind of treatment of railroad and airline employees as is now accorded employees in all other industries under existing law"); *id.*, at 17059 (remarks of Rep. Harris) ("The fundamental proposition involved in the bill [is to extend] the national policy expressed in the Taft-Hartley Act regarding the lawfulness of . . . the union shop . . . to . . . railroad and airline labor organizations"); *id.*, at 17061 (remarks of Rep. Vursell) ("This bill simply extends to the railroad workers and employers the benefit of this provision now enjoyed by all other laboring men under the Taft-Hartley Act").

See *Algoma Plywood Co.* v. *Wisconsin Employment Relations Board*, 336 U. S. 301, 307–311 (1949). By 1947, such agreements had come under increasing attack, and after extensive hearings Congress determined that the closed shop and the abuses associated with it "create[d] too great a barrier to free employment to be longer tolerated." S. Rep. No. 105, 80th Cong., 1st Sess., 6 (1947) (S. Rep.), Legislative History of Labor Management Relations Act, 1947 (Committee Print compiled for the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare), p. 412 (1974) (Leg. Hist.). The 1947 Congress was equally concerned, however, that without such agreements, many employees would reap the benefits that unions negotiated on their behalf without in any way contributing financial support to those efforts. As Senator Taft, one of the authors of the 1947 legislation, explained, "the argument . . . against abolishing the closed shop . . . is that if there is not a closed shop those not in the union will get a free ride, that the union does the work, gets the wages raised, then the man who does not pay dues rides along freely without any expense to himself." 93 Cong. Rec. 4887 (1947), Leg. Hist. 1422.[5] Thus, the Taft-Hartley Act was

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[5] This sentiment was repeated throughout the hearings and lengthy debate that preceded passage of the bill. See, *e. g.*, 93 Cong. Rec. 3557 (1947), Leg. Hist. 740 (remarks of Rep. Jennings) (because members of the minority "would get the benefit of that contract made between the majority of their fellow workmen and the management . . . it is not unreasonable that they should go along and contribute dues like the others"); 93 Cong Rec. 3558, Leg. Hist. 741 (remarks of Rep. Robison) ("If [union-negotiated] benefits come to the workers all alike, is it not only fair that the beneficiaries, whether the majority or the minority, contribute their equal share in securing these benefits?"); 93 Cong. Rec. 3837, Leg. Hist. 1010 (remarks of Sen. Taft) ([T]he legislation, "in effect, . . . say[s], that no one can get a free ride in such a shop. That meets one of the arguments for a union shop. The employee has to pay the union dues"); S. Rep., at 6, Leg. Hist. 412 ("In testifying before this Committee, . . . leaders of organized labor have stressed the fact that in the absence of [union-security] provisions many employees sharing the benefits of what unions are able to ac-

> "intended to accomplish twin purposes. On the one hand, the most serious abuses of compulsory unionism were eliminated by abolishing the closed shop. On the other hand, Congress recognized that in the absence of a union-security provision 'many employees sharing the benefits of what unions are able to accomplish by collective bargaining will refuse to pay their share of the cost.'" *NLRB* v. *General Motors Corp.*, 373 U. S., at 740–741 (quoting S. Rep., at 6, Leg. Hist. 412).

The legislative solution embodied in § 8(a)(3) allows employers to enter into agreements requiring all the employees in a given bargaining unit to become members 30 days after being hired as long as such membership is available to all workers on a nondiscriminatory basis, but it prohibits the mandatory discharge of an employee who is expelled from the union for any reason other than his or her failure to pay initiation fees or dues. As we have previously observed, Congress carefully tailored this solution to the evils at which it was aimed:

> "Th[e] legislative history clearly indicates that Congress intended to prevent utilization of union security agreements for any purpose other than to compel payment of union dues and fees. Thus Congress recognized the validity of unions' concerns about 'free riders,' *i. e.*, employees who receive the benefits of union representation but are unwilling to contribute their *fair share* of financial support to such union, and gave unions the power to contract to meet *that problem* while withholding from unions the power to cause the discharge of employees for any other reason." *Radio Officers* v. *NLRB*, 347 U. S. 17, 41 (1954) (emphasis added).

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complish by collective bargaining will refuse to pay their share of the cost"). See also H. R. Rep. No. 245, 80th Cong., 1st Sess., 80 (1947) (H. R. Rep.), Leg. Hist. 371 ("[Closed shop] agreements prevent nonunion workers from sharing in the benefits resulting from union activities without also sharing in the obligations").

Indeed, "Congress' decision to allow union-security agreements *at all* reflects its concern that . . . the parties to a collective bargaining agreement be allowed to provide that there be no employees who are getting the benefits of union representation without paying for them." *Oil Workers* v. *Mobil Oil Corp.*, 426 U. S. 407, 416 (1976) (emphasis added).

This same concern over the resentment spawned by "free riders" in the railroad industry prompted Congress, four years after the passage of the Taft-Hartley Act, to amend the RLA. As the House Report explained, 75 to 80% of the 1.2 million railroad industry workers belonged to one or another of the railway unions. H. R. Rep. No. 2811, 81st Cong., 2d Sess., 4 (1950). These unions, of course, were legally obligated to represent the interests of all workers, including those who did not become members; thus nonunion workers were able, at no expense to themselves, to share in all the benefits the unions obtained through collective bargaining. *Ibid.* Noting that the "principle of authorizing agreements for the union shop and the deduction of union dues has now become firmly established as a national policy for all industry subject to the Labor Management Relations Act of 1947," the House Report concluded that "[n]o sound reason exists for continuing to deny to labor organizations subject to the Railway Labor Act the right to negotiate agreements with railroads and airlines of a character permitted in the case of labor organizations in the other large industries of the country." *Ibid.*

In drafting what was to become § 2, Eleventh, Congress did not look to § 8(a)(3) merely for guidance. Rather, as Senator Taft argued in support of the legislation, the amendment "inserts in the railway mediation law almost the exact provisions, so far as they fit, of the Taft-Hartley law, so that the conditions regarding the union shop and the check-off are carried into the relations between railroad unions and the rail-

roads." 96 Cong. Rec. 16267 (1950).[6] This was the universal understanding, among both supporters and opponents, of the purpose and effect of the amendment. See n. 4, *supra*. Indeed, railroad union representatives themselves proposed the amendment that incorporated in § 2, Eleventh, § 8(a)(3)'s prohibition against the discharge of employees who fail to obtain or maintain union membership for any reason other than nonpayment of periodic dues; in offering this proposal the unions argued, in terms echoing the language of the Senate Report accompanying the Taft-Hartley Act, that such a prohibition "remedies the alleged abuses of compulsory union membership . . . , yet makes possible the elimination of the 'free rider' and the sharing of the burden of maintenance by all of the beneficiaries of union activity." Hearings on H. R. 7789 before the House Committee on Interstate and Foreign Commerce, 81st Cong., 2d Sess., 253 (1950).

In *Street* we concluded "that § 2, Eleventh contemplated compulsory unionism to force employees to share the costs of negotiating and administering collective agreements, and the costs of the adjustment and settlement of disputes," but that Congress did not intend "to provide the unions with a means for forcing employees, over their objection, to support political causes which they oppose." 367 U. S., at 764. Constru-

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[6] Although Senator Taft qualified his comparison by explaining that the provisions of the Taft-Hartley law were incorporated into the RLA "so far as they fit," this qualification merely reflected the fact that the laws were not identical in all respects, their chief difference inhering in their preemptive effect, or lack thereof, on all state regulation of union-security agreements. See n. 3, *supra*. This difference, of course, does not detract from the near identity of the provisions insofar as they confer on unions and employers authority to enter into union-security agreements, nor does it in any way undermine the force of Senator Taft's comparison with respect to this authority. Indeed, Taft himself explained that he initially "objected to some of the original terms of the bill, but when the [bill's] proponents agreed to accept amendments which made the provisions *identical* with the Taft-Hartley law," he decided to support the law. 96 Cong. Rec. 16267 (1950) (emphasis added).

ing the statute in light of this legislative history and purpose, we held that although § 2, Eleventh on its face authorizes the collection from nonmembers of "periodic dues, initiation fees, and assessments . . . *uniformly required* as a condition of acquiring or retaining membership" in a union, 45 U. S. C. § 152, Eleventh (b) (emphasis added), this authorization did not "ves[t] the unions with unlimited power to spend exacted money." 367 U. S., at 768. We have since reaffirmed that "Congress' essential justification for authorizing the union shop" limits the expenditures that may properly be charged to nonmembers under § 2, Eleventh to those "necessarily or reasonably incurred for the purpose of performing the duties of an exclusive [bargaining] representative." *Ellis* v. *Railway Clerks*, 466 U. S., at 447–448. Given the parallel purpose, structure, and language of § 8(a)(3), we must interpret that provision in the same manner.[7] Like § 2, Eleventh,

[7] We note that the NLRB, at least for a time, also took the position that the uniform "periodic dues and initiation fees" required by § 8(a)(3) were limited by the congressional concern with free riders to those fees necessary to finance collective-bargaining activities. In *Teamsters Local No. 959*, 167 N. L. R. B. 1042, 1045 (1967), the Board explained:

"[T]he right to charge 'periodic dues' granted unions by the proviso to Section 8(a)(3) is concerned exclusively with the concept that those enjoying the benefits of collective bargaining should bear their fair share of the costs incurred by the collective-bargaining agent in representing them. But it is manifest that dues that do not contribute, and are not intended to contribute, to the cost of operation of a union in its capacity as collective-bargaining agent cannot be justified as necessary for the elimination of 'free riders.'"

The Board, however, subsequently repudiated that view. See *Detroit Mailers Union No. 40*, 192 N. L. R. B. 951, 952 (1971).

Notwithstanding this unequivocal language, the dissent advises us, *post*, at 767, n. 5, that we have misread *Teamsters Local*. Choosing to ignore the above-quoted passage, the dissent asserts that the Board never "embraced . . . the view," *post*, at 767, n. 5, that "periodic dues and initiation fees" are limited to those that finance the union in its capacity as collective-bargaining agent, because in *Teamsters Local* itself the Board concluded that the dues in question "were actually 'special purpose funds,'" and were thus "'assessments' not contemplated by the proviso to § 8(a)(3)." *Post*, at 767, n. 5

§ 8(a)(3) permits the collection of "periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership" in the union,[8] and like its counterpart in the RLA, § 8(a)(3) was designed to remedy the inequities posed by "free riders" who would otherwise unfairly profit from the

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(quoting *Teamsters Local*, *supra*, at 1044). This observation, however, avails the dissent nothing; obviously, once the Board determined that the dues were not used for collective-bargaining purposes, the conclusion that they were not dues within the meaning of § 8(a)(3) followed automatically. Under the dissent's reading, had the union simply built the increase into its dues base, rather than initially denominating it as a "special assessment," it would have been entitled to exact the fees as "periodic dues" and spend them for precisely the same purposes without running afoul of § 8(a)(3). The Board made entirely clear, however, that it was the *purpose* of the fee, not the manner in which it was collected, that controlled, and thus explained that "[m]onies collected for a credit union or building fund even if regularly recurring, as here, are obviously not 'for the maintenance of the' [union] as an organization, but are for a 'special purpose' and could be terminated without affecting *the continued existence of [the union] as the bargaining representative.*" *Teamsters Local*, *supra*, at 1045 (emphasis added). Finally, the dissent's portrayal of *Teamsters Local* as part of an unbroken string of consistent Board decisions on the issue is belied by the dissenting statement in *Detroit Mailers*, in which member Jenkins, who joined the decision in *Teamsters Local*, charged that the Board had ignored the clear holding of that earlier case. 192 N. L. R. B., at 952–953.

[8] Construing both § 8(a)(3) and § 2, Eleventh as permitting the collection and use of only those fees germane to collective bargaining does not, as petitioners seem to believe, read the term "uniform" out of the statutes. The uniformity requirement makes clear that the costs of representational activities must be borne equally by all those who benefit; without this language, unions could conceivably establish different dues rates both among members and between members and nonmembers, and thereby apportion the costs of collective bargaining unevenly. Indeed, the uniformity requirement inures to the benefit of dissident union members as well, by ensuring that if the union discriminates against them by charging higher dues, their failure to pay such dues cannot be grounds for discharge. See § 8(b)(2), 29 U. S. C. § 158(b)(2) (making it an unfair labor practice for a union "to cause or attempt to cause an *employer* to discriminate against an employee . . . with respect to whom membership in [the union] has been denied or terminated on some ground other than [the] failure to tender the periodic dues and initiation fees uniformly required") (emphasis added).

Taft-Hartley Act's abolition of the closed shop. In the face of such statutory congruity, only the most compelling evidence could persuade us that Congress intended the nearly identical language of these two provisions to have different meanings. Petitioners have not proffered such evidence here.

B

(1)

Petitioners claim that the union-security provisions of the RLA and NLRA can and should be read differently in light of the vastly different history of unionism in the industries the two statutes regulate. Thus they note that in *Street* we emphasized the "long-standing tradition of voluntary unionism" in the railway industry prior to the 1951 amendment, and the fact that in 1934 Congress had expressly endorsed an "open shop" policy in the RLA. 367 U. S., at 750. It was this historical background, petitioners contend, that led us to conclude that in amending the RLA in 1951, Congress "did not completely abandon the policy of full freedom of choice embodied in the 1934 Act, but rather made inroads on it for the limited purpose of eliminating the problems created by the 'free rider.'" *Id.*, at 767. The history of union security in industries governed by the NLRA was precisely the opposite: under the Wagner Act of 1935, all forms of compulsory unionism, including the closed shop, were permitted. Petitioners accordingly argue that the inroads Congress made in 1947 on the policy of compulsory unionism were likewise limited, and were designed to remedy only those "carefully-defined" abuses of the union shop system that Congress had expressly identified. Brief for Petitioners 42. Because agreements requiring the payment of uniform dues were not among these specified abuses, petitioners contend that § 8(a)(3) cannot plausibly be read to prohibit the collection of fees in excess of those necessary to cover the costs of collective bargaining.

We find this argument unpersuasive for several reasons. To begin with, the fact that Congress sought to remedy "the most serious abuses of compulsory union membership," S. Rep., at 7, Leg. Hist. 413, hardly suggests that the Taft-Hartley Act effected only limited changes in union-security practices. Quite to the contrary, in *Street* we concluded that Congress' purpose in amending the RLA was "limited" precisely because Congress did not perceive voluntary unionism as the source of widespread and flagrant abuses, and thus modified the railroad industry's open shop system only to the extent necessary to eliminate the problems associated with "free riders." That Congress viewed the Wagner Act's regime of compulsory unionism as seriously flawed, on the other hand, indicates that its purposes in overhauling that system were, if anything, far less limited, and not, as petitioners and the dissent contend, equally circumspect. Not surprisingly, therefore—and in stark contrast to petitioners' "limited inroads" theory—congressional opponents of the Taft-Hartley Act's union-security provisions understood the Act to provide only the most grudging authorization of such agreements, permitting "union-shop agreement[s] only under limited and administratively burdensome conditions." S. Rep., pt. 2, p. 8, Leg. Hist. 470 (Minority Report). That understanding comports with our own recognition that "Congress' decision to allow union-security agreements *at all* reflects its concern that . . . the parties to a collective bargaining agreement be allowed to provide that there be no employees who are getting the benefits of union representation without paying for them." *Oil Workers* v. *Mobil Oil Corp.*, 426 U. S., at 416 (emphasis added). Congress thus did not set out in 1947 simply to tinker in some limited fashion with the NLRA's authorization of union-security agreements. Rather, to the extent Congress preserved the status quo, it did so because of the considerable evidence adduced at congressional hearings indicating that "such agreements promoted stability by eliminating 'free riders,'" S. Rep., at 7,

Leg. Hist. 413, and Congress accordingly "gave unions the power to contract to meet *that problem* while withholding from unions the power to cause the discharge of employees for any other reason." *Radio Officers* v. *NLRB*, 347 U. S., at 41 (emphasis added). We therefore think it not only permissible but altogether proper to read § 8(a)(3), as we read § 2, Eleventh, in light of this animating principle.

Finally, however much union-security practices may have differed between the railway and NLRA-governed industries prior to 1951, it is abundantly clear that Congress itself understood its actions in 1947 and 1951 to have placed these respective industries on an equal footing insofar as compulsory unionism was concerned. Not only did the 1951 proponents of the union shop propose adding to the RLA language nearly identical to that of § 8(a)(3), they repeatedly insisted that the purpose of the amendment was to confer on railway unions precisely the same right to negotiate and enter into union-security agreements that all unions subject to the NLRA enjoyed. See n. 4, *supra*. Indeed, a subtheme running throughout the comments of these supporters was that the inequity of permitting "free riders" in the railroad industry was especially egregious in view of the fact that the Taft-Hartley Act gave exclusive bargaining representatives in all other industries adequate means to redress such problems. It would surely come as a surprise to these legislators to learn that their efforts to provide these same means of redress to railway unions were frustrated by the very historical disparity they sought to eliminate.

(2)

Petitioners also rely on certain aspects of the Taft-Hartley Act's legislative history as evidence that Congress intended to permit the collection and use of full union dues, including those allocable to activities other than collective bargaining. Again, however, we find this history insufficient to compel a

broader construction of § 8(a)(3) than that accorded § 2, Eleventh in *Street*.

First and foremost, petitioners point to the fact that Congress expressly considered proposals regulating union finances but ultimately placed only a few limitations on the collection and use of dues and fees, and otherwise left unions free to arrange their financial affairs as they saw fit. In light of this history and the specific prohibitions Congress did enact, petitioners argue that there is no warrant for implying any further limitations on the amount of dues equivalents that unions may collect or the manner in which they may use them. As originally passed, § 7(b) of the House bill guaranteed union members the "right to be free from unreasonable or discriminatory financial demands of" unions. Leg. Hist. 176. Similarly, § 8(c) of the bill, the so-called "bill of rights for union members," H. R. Rep., at 31, Leg. Hist. 322, set out 10 protections against arbitrary action by union officers, one of which made it an unfair labor practice for a union to impose initiation fees in excess of $25 without NLRB approval, or to fix dues in amounts that were unreasonable, nonuniform, or not approved by majority vote of the members. *Id.*, at 53. In addition, § 304 of the bill prohibited unions from making contributions to or expenditures on behalf of candidates for federal office. *Id.*, at 97–98. The conferees adopted the latter provision, see *Pipefitters* v. *United States*, 407 U. S. 385, 405 (1972), and agreed to a prohibition on "excessive" initiation fees, see § 8(b)(5), 29 U. S. C. § 158(b)(5), but the Senate steadfastly resisted any further attempts to regulate internal union affairs. Referring to the House provisions, Senator Taft explained:

> "[T]he Senate conferees refused to agree to the inclusion of this subsection in the conference agreement since they felt that it was unwise to authorize an agency of the Government to undertake such elaborate policing of the internal affairs of unions as this section contemplated . . . . In the opinion of the Senate conferees the language

which protected an employee from losing his job if a union expelled him for some reason other than nonpayment of dues and initiation fees, uniformly required of all members, was considered sufficient protection." 93 Cong. Rec. 6443 (1947), Leg. Hist. 1540.

Petitioners would have us infer from the demise of this "bill of rights" that Congress "'rejected . . . general federal restrictions on either the dues equivalents that employees may be required to pay or the uses to which unions may put such dues-equivalents,'" and that aside from the prohibition on political expenditures Congress placed no limitations on union exactions other than the requirement that they be equal to uniform dues. Brief for Petitioners 39–40 (quoting Brief for United States as *Amicus Curiae* 19). We believe petitioners' reliance on this legislative compromise is misplaced. The House bill did not purport to set out the rights of *nonmembers* who are compelled to pay union dues, but rather sought to establish a "bill of rights for union *members*" vis-à-vis their union leaders. H. R. Rep., at 31, Leg. Hist. 322 (emphasis added). Thus, § 8(c) of the House bill sought to regulate, among other things, the ability of unions to fine, discipline, suspend, or expel members; the manner in which unions conduct certain elections or maintain financial records; and the extent to which they can compel contributions to insurance or other benefit plans, or encumber the rights of members to resign. Leg. Hist. 52–56. The debate over these provisions focused on the desirability of Government oversight of internal union affairs, and a myriad of reasons having nothing whatever to do with the rights of nonmembers accounted for Congress' decision to forgo such detailed regulation. In rejecting any limitation on dues, therefore, Congress was not concerned with restrictions on "dues-equivalents," but rather with the administrative burdens and

potential threat to individual liberties posed by Government regulation of purely internal union matters.[9]

It simply does not follow from this that Congress left unions free to exact dues equivalents from nonmembers in any amount they please, no matter how unrelated those fees may be to collective-bargaining activities. On the contrary, the complete lack of congressional concern for the rights of nonmembers in the debate surrounding the House "bill of rights" is perfectly consistent with the view that Congress understood § 8(a)(3) to afford nonmembers adequate protection by authorizing the collection of only those fees necessary to finance collective-bargaining activities: because the amount of such fees would be fixed by their underlying purpose—defraying the costs of collective bargaining—Congress would have every reason to believe that the lack of any limitations on union dues was entirely irrelevant so far as the rights of nonmembers were concerned. In short, we think it far safer and far more appropriate to construe § 8(a)(3) in light of its legislative justification, *i. e.*, ensuring that nonmembers who obtain the benefits of union representation can be made to pay for them, than by drawing inferences from Congress' rejection of a proposal that did not address the rights of nonmembers at all.

Petitioners also deem it highly significant that prior to 1947 unions "'rather typically'" used their members' dues for a "'variety of purposes . . . in addition to meeting the . . . costs of collective bargaining,'" *Retail Clerks* v. *Schermerhorn*, 373 U. S. 746, 754 (1963), and yet Congress, which was presumably well aware of the practice, in no way limited the

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[9] See, *e. g.*, H. R. Rep., at 76–77, Leg. Hist. 367–368 (Minority Views) (charging that Government regulation was essentially impossible; that the encroachment on the rights of voluntary organizations such as unions was "without parallel"; and that such regulation invited harassment by rival unions and employers, and ultimately complete governmental control over union affairs).

uses to which unions could put fees collected from nonmembers. This silence, petitioners suggest, should be understood as congressional acquiescence in these practices. The short answer to this argument is that Congress was equally well aware of the same practices by railway unions, see *Street*, 367 U. S., at 767 ("We may assume that Congress was . . . fully conversant with the long history of intensive involvement of the railroad unions in political activities"); *Ellis*, 466 U. S., at 446 ("Congress was adequately informed about the broad scope of union activities"), yet neither in *Street* nor in any of the cases that followed it have we deemed Congress' failure in § 2, Eleventh to prohibit or otherwise regulate such expenditures as an endorsement of fee collections unrelated to collective-bargaining expenses. We see no reason to give greater weight to Congress' silence in the NLRA than we did in the RLA, particularly where such silence is again perfectly consistent with the rationale underlying § 8(a)(3): prohibiting the collection of fees that are not germane to representational activities would have been redundant if Congress understood § 8(a)(3) simply to enable unions to charge nonmembers only for those activities that actually benefit them.

Finally, petitioners rely on a statement Senator Taft made during floor debate in which he explained how the provisos of § 8(a)(3) remedied the abuses of the closed shop. "The great difference [between the closed shop and the union shop]," the Senator stated, "is that [under the union shop] a man can get a job without joining the union or asking favors of the union. . . . The fact that the employee has to pay dues to the union seems to me to be much less important." 93 Cong. Rec. 4886 (1947), Leg. Hist. 1422. On its face, the statement—made during a lengthy legislative debate—is somewhat ambiguous, for the reference to "union dues" could connote "full union dues" or could as easily be a shorthand method of referring to "collective-bargaining-related dues." In any event, as noted above, Senator Taft later described § 2, Eleventh as "almost the exact provisions . . . of the Taft-Hartley law," 96 Cong.

Rec. 16267 (1950), and we have construed the latter statute as permitting the exaction of only those dues related to representational activities. In view of Senator Taft's own comparison of the two statutory provisions, his comment in 1947 fails to persuade us that Congress intended virtually identical language in two statutes to have different meanings.

(3)

We come then to petitioners' final reason for distinguishing *Street*. Five years prior to our decision in that case, we ruled in *Railway Employees* v. *Hanson*, 351 U. S. 225 (1956), that because the RLA pre-empts all state laws banning union-security agreements, the negotiation and enforcement of such provisions in railroad industry contracts involves "governmental action" and is therefore subject to constitutional limitations. Accordingly, in *Street* we interpreted § 2, Eleventh to avoid the serious constitutional question that would otherwise be raised by a construction permitting unions to expend governmentally compelled fees on political causes that nonmembers find objectionable. See 367 U. S., at 749. No such constitutional questions lurk here, petitioners contend, for § 14(b) of the NLRA expressly preserves the authority of States to outlaw union-security agreements. Thus, petitioners' argument runs, the federal pre-emption essential to *Hanson*'s finding of governmental action is missing in the NLRA context, and we therefore need not strain to avoid the plain meaning of § 8(a)(3) as we did with § 2, Eleventh.

We need not decide whether the exercise of rights permitted, though not compelled, by § 8(a)(3) involves state action. Cf. *Steelworkers* v. *Sadlowski*, 457 U. S. 102, 121, n. 16 (1982) (union's decision to adopt an internal rule governing its elections does not involve state action); *Steelworkers* v. *Weber*, 443 U. S. 193, 200 (1979) (negotiation of collective-bargaining agreement's affirmative-action plan does not involve state action). Even assuming that it does not, and

that the NLRA and RLA therefore differ in this respect, we do not believe that the absence of any constitutional concerns in this case would warrant reading the nearly identical language of § 8(a)(3) and § 2, Eleventh differently. It is, of course, true that federal statutes are to be construed so as to avoid serious doubts as to their constitutionality, and that when faced with such doubts the Court will first determine whether it is fairly possible to interpret the statute in a manner that renders it constitutionally valid. *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Construction Trades Council*, 485 U. S. 568 (1988); *Crowell* v. *Benson*, 285 U. S. 22, 62 (1932). But statutory construction may not be pressed "'to the point of disingenuous evasion,'" *United States* v. *Locke*, 471 U. S. 84, 96 (1985) (quoting *George Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373, 379 (1933)), and in avoiding constitutional questions the Court may not embrace a construction that "is plainly contrary to the intent of Congress." *DeBartolo*, *supra*, at 575. In *Street*, we concluded that our interpretation of § 2, Eleventh was "not only 'fairly possible' but entirely reasonable," 367 U. S., at 750, and we have adhered to that interpretation since. We therefore decline to construe the language of § 8(a)(3) differently from that of § 2, Eleventh on the theory that our construction of the latter provision was merely constitutionally expedient. Congress enacted the two provisions for the same purpose, eliminating "free riders," and that purpose dictates our construction of § 8(a)(3) no less than it did that of § 2, Eleventh, regardless of whether the negotiation of union-security agreements under the NLRA partakes of governmental action.

IV

We conclude that § 8(a)(3), like its statutory equivalent, § 2, Eleventh of the RLA, authorizes the exaction of only those fees and dues necessary to "performing the duties of an exclusive representative of the employees in dealing with the

employer on labor-management issues." *Ellis*, 466 U. S., at 448. Accordingly, the judgment of the Court of Appeals is

Affirmed.

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

JUSTICE BLACKMUN, with whom JUSTICE O'CONNOR and JUSTICE SCALIA join, concurring in part and dissenting in part.

I agree that the District Court and the Court of Appeals properly exercised jurisdiction over respondents' duty-of-fair-representation and First Amendment claims, and that the National Labor Relations Board had primary jurisdiction over respondents' claim brought under § 8(a)(3) of the National Labor Relations Act of 1935, 49 Stat. 452, as amended, 29 U. S. C. § 158(a)(3). I also agree that the Court of Appeals had jurisdiction to decide the § 8(a)(3) question raised by respondents' duty-of-fair-representation claim.[1] I therefore join Parts I and II of the Court's opinion.

My agreement with the majority ends there, however, for I cannot agree with its resolution of the § 8(a)(3) issue. Without the decision in *Machinists* v. *Street*, 367 U. S. 740 (1961), involving the Railway Labor Act (RLA), the Court could not reach the result it does today. Our accepted mode of resolving statutory questions would not lead to a construction of § 8(a)(3) so foreign to that section's express language and legislative history, which show that Congress did not intend to limit either the amount of "agency fees" (or what the majority labels "dues-equivalents") a union may collect under a union-security agreement, or the union's expenditure of such funds. The Court's excessive reliance on *Street* to reach a

[1] Like the majority, I do not reach the First Amendment issue raised below by respondents, and therefore similarly do not address whether a union's exercise of rights pursuant to § 8(a)(3) involves state action. See *ante*, at 761.

contrary conclusion is manifested by its unique line of reasoning. No sooner is the language of § 8(a)(3) intoned, than the Court abandons all attempt at construction of *this* statute and leaps to its interpretation over a quarter century ago of another statute enacted by a different Congress, a statute with a distinct history and purpose. See *ante*, at 744–745. I am unwilling to offend our established doctrines of statutory construction and strain the meaning of the language used by Congress in § 8(a)(3), simply to conform § 8(a)(3)'s construction to the Court's interpretation of similar language in a different later-enacted statute, an interpretation which is itself "not without its difficulties." *Abood* v. *Detroit Board of Education*, 431 U. S. 209, 232 (1977) (characterizing the Court's decision in *Street*). I therefore dissent from Parts III and IV of the Court's opinion.

I

As the Court observes, "we have never before delineated the precise limits § 8(a)(3) places on the negotiation and enforcement of union-security agreements." *Ante*, at 745. Unlike the majority, however, I think the issue is an entirely new one. I shall endeavor, therefore, to resolve it in accordance with our well-settled principles of statutory construction.

A

As with any question of statutory interpretation, the starting point is the language of the statute itself. Section 8(a)(3) makes it unlawful for an employer to "discriminat[e] in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 29 U. S. C. § 158(a)(3). Standing alone, this proscription, and thus § 8(b)(2)'s corollary proscription,[2] effectively would outlaw union-security agreements. The proscription, however, is qualified by two provisos. The first, which appeared initially in § 8(a)(3) of the

[2] Section 8(b)(2) makes it unlawful for a union "to cause or attempt to cause an employer" to violate § 8(a)(3). 29 U. S. C. § 158(b)(2).

NLRA as originally enacted in 1935, 49 Stat. 452, generally excludes union-security agreements from statutory condemnation by explaining that

> "nothing in [the NLRA] or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein . . . if such labor organization is the representative of the employees as provided in section 159(a) of this title . . . ." § 8(a)(3), 29 U. S. C. § 158(a)(3).

The second proviso, incorporated in § 8(a)(3) by the Taft-Hartley Amendments of 1947, 61 Stat. 141,[3] circumscribes the first proviso's general exemption by the following limitations:

> "[N]o employer shall justify any discrimination against an employee for nonmembership in a labor organization . . . if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."

The plain language of these statutory provisions, read together, permits an employer and union to enter into an agreement requiring *all* employees, as a condition of continued employment, to pay uniform periodic dues and initiation fees.[4] The second proviso expressly allows an employer to terminate any "employee," pursuant to a union-security agreement permitted by the first proviso, if the employee

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[3] The Taft-Hartley Act also amended the first proviso to prohibit the application of a union-security agreement to an individual until he has been employed for 30 days. See 29 U. S. C. § 158(a)(3).

[4] This reading, of course, flows from the fact that "membership" as used in the first proviso, means not *actual* membership in the union, but rather "the payment of initiation fees and monthly dues." *NLRB* v. *General Motors Corp.*, 373 U. S. 734, 742 (1963).

fails "to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership" in the union. 29 U. S. C. § 158(a)(3). The term "employee," as statutorily defined, includes any employee, without regard to union membership. See 29 U. S. C. § 152 (3). Union-member employees and nonunion-member employees are treated alike under § 8(a)(3).

"[W]e assume 'that the legislative purpose is expressed by the ordinary meaning of the words used.'" *American Tobacco Co.* v. *Patterson*, 456 U. S. 63, 68 (1982), quoting *Richards* v. *United States*, 369 U. S. 1, 9 (1962). The terms "dues" and "fees," as used in the proviso, can refer to nothing other than the regular, periodic dues and initiation fees paid by "voluntary" union members. This was the apparent understanding of the Court in those decisions in which it held that § 8(a)(3) permits union-security agreements. See *NLRB* v. *General Motors Corp.*, 373 U. S. 734, 736 (1963) (approving a union-security proposal that would have conditioned employment "upon the payment of sums equal to the initiation fee and regular monthly dues paid by the union members"); *Retail Clerks* v. *Schermerhorn*, 373 U. S. 746, 753 (1963) (upholding agreement requiring nonmembers to pay a "service fee [which] is admittedly the exact equal of membership initiation fees and monthly dues"). It also has been the consistent view of the NLRB,[5] "the agency en-

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[5] See, *e. g.*, *In re Union Starch & Refining Co.*, 87 N. L. R. B. 779, (1949), enf'd, 186 F. 2d 1008 (CA7), cert. denied, 342 U. S. 815 (1951); *Detroit Mailers Union No. 40*, 192 N. L. R. B. 951, 951–952 (1971). In *Detroit Mailers*, the Board explained:

"Neither on its face nor in the congressional purpose behind [§ 8(a)(3)] can any warrant be found for making any distinction here between dues which may be allocated for collective-bargaining purposes and those earmarked for institutional expenses of the union. . . . '[D]ues collected from members may be used for a variety of purposes, in addition to meeting the union's costs of collective bargaining.' Unions 'rather typically' use their membership dues 'to do those things which the members authorized the union to do in their interest and on their behalf.' By virtue of Sec-

trusted by Congress with the authority to administer the NLRA." *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Construction Trades Council*, 485 U. S. 568, 574 (1988). The provisos do not give any employee, union member or not, the right to pay less than the full amount of regular dues and initiation fees charged to all other bargaining-unit employees.

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tion 8(a)(3), such dues may be required from an employee under a union-security contract so long as they are periodic and uniformly required and are not devoted to a purpose which would make their mandatory extraction otherwise inimical to public policy." *Id.*, at 952, quoting *Retail Clerks* v. *Schermerhorn*, 373 U. S., at 753–754 (internal quotations omitted).

The United States, appearing here as *amicus curiae*, maintains that position in this case.

Contrary to the Court's suggestion, the NLRB has not embraced and then "repudiated" the view that, for purposes of § 8(a)(3), "periodic dues and initiation fees" mean only "those fees necessary to finance collective-bargaining activities." *Ante*, at 752, n. 7. *Teamsters Local No. 959*, 167 N. L. R. B. 1042 (1967), does not demonstrate otherwise. In *Teamsters Local*, the NLRB held that "working dues" designated to fund a union building program and a credit union were actually "assessments" not contemplated by the proviso to § 8(a)(3). *Id.*, at 1044. The Board found that the union itself regarded the levy as a "temporary assessment," clearly distinct from its "regular dues." *Ibid.* Moreover, because the financing for the programs was constructed in such a way that the union treasury might never have received 90% of the moneys, the Board concluded that the "working dues" were actually "special purposes funds," and that "the support of such funds cannot come from 'periodic dues' as that term is used in § 8(a)(3)." *Ibid.* In *Detroit Mailers*, the NLRB distinguished such assessments from "periodic and uniformly required" dues, which, in its view, a union is not precluded from demanding of nonmembers pursuant to § 8(a)(3). 192 N. L. R. B., at 952.

While the majority credits an interpretation of *Teamsters Local* propounded by a dissenting member of the Board in *Detroit Mailers*, *ante*, at 752–753, n. 7, I prefer to take the Board's word at face value: *Teamsters Local* did not create "controlling precedent" endorsing the view of § 8(a)(3) enunciated by the Court today. 192 N. L. R. B., at 952. Significantly, the majority cannot cite one case in which the Board has held that uniformly required, periodic dues used for purposes other than "collective bargaining" are not dues within the meaning of § 8(a)(3).

The Court's conclusion that § 8(a)(3) prohibits petitioners from requiring respondents to pay fees for purposes other than those "germane" to collective bargaining, contract administration, and grievance adjustment simply cannot be derived from the plain language of the statute. In effect, the Court accepts respondents' contention that the words "dues" and "fees," as used in § 8(a)(3), refer not to the periodic amount a union charges its members but to the portion of that amount that the union expends on statutory collective bargaining.[6] See Brief for Respondents 17–20. Not only is this reading implausible as a matter of simple English usage, but it is also contradicted by the decisions of this Court and of the NLRB interpreting the section. Section 8(a)(3) does not speak of "dues" and "fees" that employees covered by a

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[6] The Court's insistence that it has not changed the meaning of the term "uniform," see *ante*, at 753, n. 8, misses the point. The uniformity requirement obviously requires that the union can collect from nonmembers under a union-security agreement only those "periodic dues and initiation fees" collected equally from its members. But this begs the question: what "periodic dues and initiation fees"? It is the meaning of those terms which the Court misconceives.

Under our settled doctrines of statutory construction, were there any ambiguity in the meaning of § 8(a)(3)—which there is not—the Court would be constrained to defer to the interpretation of the NLRB, unless the agency's construction were contrary to the clear intent of Congress. *Chevron U. S. A. Inc.* v. *National Resources Defense Council, Inc.*, 467 U. S. 837, 842–843, and n. 9 (1984). Although the Court apparently finds such ambiguity, it fails to apply this doctrine. By reference to a narrow view of congressional "purpose" gleaned from isolated statements in the legislative history, and in reliance upon this Court's interpretation of another statute, the Court constructs an interpretation that not only finds no support in the statutory language or legislative history of § 8(a)(3), but also contradicts the Board's settled interpretation of the statutory provision. The Court previously has directed: "Where the Board's construction of the Act is reasonable, it should not be rejected 'merely because the courts might prefer another view of the statute.'" *Pattern Makers* v. *NLRB*, 473 U. S. 95, 114 (1985), quoting *Ford Motor Co.* v. *NLRB*, 441 U. S. 488, 497 (1979). Here, the only apparent motivation for holding that the Board's interpretation of § 8(a)(3) is impermissible, is the Court's view of *another* statute.

union-security agreement may be required to tender to their union representative; rather, the section speaks only of "the periodic dues and the initiation fees *uniformly required as a condition of acquiring or retaining membership*" (emphasis added). Thus, the section, by its terms, defines "periodic dues" and "initiation fees" as those dues and fees "uniformly required" of all members, not as a portion of full dues. As recognized by this Court, "dues collected from members may be used for a variety of purposes, in addition to meeting the union's costs of collective bargaining. Unions rather typically use their membership dues to do those things which the members authorize the union to do in their interest and on their behalf." *Retail Clerks* v. *Schermerhorn*, 373 U. S., at 753–754 (internal quotations omitted). By virtue of § 8(a)(3), such dues may be required from *any* employee under a union-security agreement. Nothing in § 8(a)(3) limits, or even addresses, the purposes to which a union may devote the moneys collected pursuant to such an agreement.[7]

B

The Court's attempt to squeeze support from the legislative history for its reading of congressional intent contrary to the plain language of § 8(a)(3) is unavailing. As its own discussion of the relevant legislative materials reveals, *ante*, at 747–750, there is no indication that the 1947 Congress intended to limit the union's authority to collect from nonmembers the same periodic dues and initiation fees it collects from members. Indeed, on balance, the legislative history rein-

[7] The Court's answer to the absolute lack of evidence that Congress intended to regulate such expenditures is no answer at all: the Court simply reiterates that in *Machinists* v. *Street*, 367 U. S. 740 (1961), it did not give weight to congressional silence in the RLA on this issue. See *ante*, at 760. The point, however, is *not* that the Court should give weight to Congress' silence in the NLRA; the point is that the Court must find *some* support in the NLRA for its proposition. Congress' silence simply highlights that there is no support for the Court's interpretation of the 1947 Congress' intent.

forces what the statutory language suggests: the provisos neither limit the uses to which agency fees may be put nor require nonmembers to be charged less than the "uniform" dues and initiation fees.

In *Machinists* v. *NLRB*, 362 U. S. 411 (1960), the Court stated:

> "It is well known, and the legislative history of the 1947 Taft-Hartley amendments plainly shows, that § 8(a)(3)—including its proviso—represented the Congressional response to the competing demands of employee freedom of choice and union security. Had Congress thought one or the other overriding, it would doubtless have found words adequate to express that judgment. It did not do so; it accommodated both interests, doubtless in a manner unsatisfactory to the extreme partisans of each, by drawing a line it thought reasonable. It is not for the administrators of the Congressional mandate to approach either side of that line grudgingly." *Id.*, at 418, n. 7.

The legislative debates surrounding the adoption of § 8 (a)(3) in 1947, show that in crafting the proviso to § 8(a)(3), Congress was attempting "only to 'remedy the most serious abuses of compulsory union membership . . . .'" *NLRB* v. *General Motors Corp.*, 373 U. S., at 741, quoting from the legislative history. The particular "abuses" Congress identified and attempted to correct were two: the closed shop, which "deprives management of any real choice of the men it hires" and gives union leaders "a method of depriving employees of their jobs, and in some cases [of] a means of securing a livelihood in their trade or calling, for purely capricious reasons," S. Rep. No. 105, 80th Cong., 1st Sess., 6 (1947) (S. Rep.), Legislative History of the Labor Management Relations Act, 1947 (Committee Print compiled for the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare), p. 412 (1974) (Leg. Hist.); and those union shops in which the union sought to obtain indirectly the same

result as that obtained through a closed shop by negotiating a union-shop agreement and maintaining a "closed" union where it was free to deny membership to an individual arbitrarily or discriminatorily and then compel the discharge of that person because of his nonmembership, 93 Cong. Rec. 3836–3837, 4193, 4885–4886 (1947), Leg. Hist. 1010, 1096–1097, 1420–1421 (remarks of Sen. Taft); 93 Cong. Rec. 4135, Leg. Hist. 1061–1062 (remarks of Sen. Ellender). Senator Taft, the chief sponsor of the Senate bill, in arguing against an amendment to proscribe all forms of union-security agreements, stated that it was unwise to outlaw union-security agreements altogether "since there had been for such a long time so many union shops in the United States, [and] since in many trades it was entirely customary and had worked satisfactorily," and that therefore the appropriate approach was to "meet the problem of dealing with the abuses which had appeared." 93 Cong. Rec. 4885, Leg. Hist. 1420.[8] "Con-

[8] See also, *e. g.*, 93 Cong. Rec. 3837 (1947), Leg. Hist. 1010 (remarks of Sen. Taft) ("[B]ecause the union shop has been in force in many industries for so many years . . . to upset it today probably would destroy relationships of long standing and probably would bring on more strikes than it would cure").

Despite a legislative history rife with unequivocal statements to the contrary, the Court concludes that the 1947 Congress did not set out to restrict union-security agreements in a "limited fashion." *Ante*, at 755. Quite apart from the Court's unorthodox reliance on representations of those *opposed* to the Taft-Hartley amendments, the majority's observation that "Congress viewed the Wagner Act's regime of compulsory unionism as seriously flawed," *ibid.*, begs the question. The perceived flaws were embedded in the *closed*-shop system, not the *union*-shop system. Thus, as is characteristic of the majority's opinion, its comparison to the RLA, under which there was no closed-shop system, is beside the point. See *ibid.* Congress was aware that under the NLRA, "the one system [the closed shop] ha[d] led to very serious abuses and the other system [the union shop] ha[d] not led to such serious abuses." 93 Cong. Rec. 4886 (1947), Leg. Hist. 1421 (remarks of Sen. Taft). Accordingly, Congress banned closed shops altogether, but it made only limited inroads on the union-shop system that had been in effect prior to 1947, carefully describing its limitations on such agreements. H. R. Rep. No. 245, 80th Cong.,

gress [also] recognized that in the absence of a union-security provision 'many employees sharing the benefits of what unions are able to accomplish by collective bargaining will refuse to pay their share of the cost.'" *NLRB* v. *General Motors Corp.*, 373 U. S., at 740–741, quoting S. Rep., at 6, Leg. Hist. 412.

Congress' solution was to ban the closed shop and to permit the enforcement of union-shop agreements as long as union membership is available "on the same terms and conditions" to all employees, and mandatory discharge is required only for "nonpayment of regular dues and initiation fees." S. Rep., at 7, 20, Leg. Hist. 413, 426. Congress was of the view, that, as Senator Taft stated, "[t]he fact that the employee will have to pay dues to the union seems . . . to be much less important. The important thing is that the man will have the job." 93 Cong. Rec. 4886 (1947), Leg. Hist. 1422. "[A] man can get a job with an employer and can continue in that job if, in effect, he joins the union and pays the union dues.

. . . . .

"If he pays the dues without joining the union, he has the right to be employed." 93 Cong. Rec. 4886 (1947), Leg. Hist.

1st Sess., 9 (1947), Leg. Hist. 300; S. Rep., at 6–7, Leg. Hist. 412–413. It could not be clearer from the legislative history that in enacting the provisos to § 8(a)(3), Congress attempted to deal only with specific abuses in the union-shop system, only the "actual problems that ha[d] arisen." 93 Cong. Rec. 4886 (1947), Leg. Hist. 1421 (remarks of Sen. Taft); accord, 93 Cong. Rec. 3836–3837 (1947), Leg. Hist. 1010–1011 (remarks of Sen. Taft). Congress' philosophy was that it had "to decree either an open shop or an open union. [It] decreed an open union . . . [which would] permit the continuation of existing relationships, and [would] not violently tear apart a great many long-existing relationships and make trouble in the labor movement; and yet at the same time it [would] meet the abuses which exist." 93 Cong. Rec. 4886 (1947), Leg. Hist. 1420 (remarks of Sen. Taft). Union-security agreements requiring the payment of uniform periodic dues and standard initiation fees were not among the specified abuses. There was no testimony regarding problems arising from such arrangements. Indeed, the subtext of the entire debate was that such arrangements were acceptable. The Court's suggestion to the contrary is simply untenable.

1421–1422. There is no serious doubt that what Congress had in mind was a situation in which the nonmember employee would "pay the same dues as other members of the union." 93 Cong. Rec. 4272 (1947), Leg. Hist. 1142 (remarks of Sen. Taft); accord, 93 Cong. Rec. 3557 (1947), Leg. Hist. 740 (remarks of Sen. Jennings) (members of the minority "should go along and contribute dues like the others"). In their financial obligations, therefore, these employees were "in effect," union members, and could not be discharged pursuant to a union-security agreement as long as they maintained this aspect of union "membership."[9] This solution was viewed as "tak[ing] care" of the free-rider issue. 93 Cong. Rec. 4887 (1947), Leg. Hist. 1422 (remarks of Sen. Taft).

Throughout the hearings and lengthy debate on one of the most hotly contested issues that confronted the 1947 Congress, not once did any Member of Congress suggest that § 8(a)(3) did not leave employers and unions free to adopt and enforce union-security agreements requiring all employees in the bargaining unit to pay an amount equal to full union dues and standard initiation fees. Nor did anyone suggest that § 8(a)(3) affected a union's expenditure of such funds.

Indeed, the legislative history indicates that Congress affirmatively declined to place limitations on either the amount of dues a union could charge or the uses to which it could put these dues. The Court dismisses as irrelevant the fact that Congress expressly rejected the House proposal that would have empowered the NLRB to regulate the "reasonableness" of union dues and expenditures. The Court finds meaningful the fact that "[t]he House bill did not purport to set out the

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[9] The Senate Report explained: Congress "did not desire to limit the labor organization with respect to either its selection of membership or expulsion therefrom. But [it] did wish to protect the employee in his job if unreasonably expelled or denied membership. The tests provided by the amendment are based upon facts readily ascertainable and do not require the employer to inquire into the internal affairs of the union." S. Rep., at 20, Leg. Hist. 426.

rights of *nonmembers* who are compelled to pay union dues, but rather sought to establish a 'bill of rights for union *members*' vis-à-vis their union leaders. H. R. Rep., at 31, Leg. Hist. 322 (emphasis added)." *Ante*, at 758. But this is a distinction without a difference. Contrary to the Court's view, Congress viewed this proposal as directly related to § 8(a)(3); Congress clearly saw the nonmembers' interests in this context as being represented by union members.[10] Thus, Senator Taft explained the Senate conferees' reasons for refusing to accept the provisions in the House bill:

> "In the opinion of the Senate conferees[,] the language which protected an employee from losing his job if a union expelled him for some reason other than nonpayment of dues and initiation fees, uniformly required of all members, was considered sufficient protection." 93 Cong. Rec. 6443 (1947), Leg. Hist. 1540.

Congress' decision, in the course of the well-documented Senate-House compromise, not to place any general federal restrictions on the levels or uses of union dues,[11] indicates

[10] The Court appears to believe that Congress intended § 8(a)(3) to protect the interests of individual nonmembers in the uses to which the union puts their moneys. See *ante*, at 759. It could not be clearer, however, that Congress did not have this in mind at all. As Senator Taft explained to his colleague who complained that requiring a man to join a union he does not wish to join (pursuant to § 8(a)(3)) was no less restrictive than a closed shop: in enacting § 8(a)(3), Congress was not trying "to go into the broader fields of the rights of particular persons." 93 Cong. Rec. 4886 (1947), Leg. Hist. 1421.

The only "rights" protected by the § 8(a)(3) provisos are workers' employment rights. As the legislative debates reflect, Congress was principally concerned with insulating workers' jobs from capricious actions by union leaders. "The purpose of the union unfair labor practice provisions added to § 8(a)(3) was to 'preven[t] the union from inducing the employer to use the emoluments of the job to enforce the union's rules.'" *Pattern Makers* v. *NLRB*, 473 U. S., at 126 (dissenting opinion), quoting *Scofield* v. *NLRB*, 394 U. S. 423, 429 (1969).

[11] Congress placed only one limitation on the uses which can be made of union dues. "[W]ith little apparent discussion or opposition," the Senate

that it did not intend the provisos to limit the uses to which agency fees may be put.

The Court invokes what it apparently sees as a single-minded legislative purpose, namely, the eradication of a "free-rider" problem, and then views the legislative history through this narrow prism. The legislative materials demonstrate, however, that, contrary to the impression left by the Court, Congress was not guided solely by a desire to eliminate "free riders." The 1947 Congress that carefully crafted § 8(a)(3) was focusing on a quite different problem—the most serious abuses of compulsory unionism. As the majority observes, "Congress carefully tailored [its] solution to the evils at which it was aimed." *Ante*, at 749. In serving its purpose, Congress went only so far in foreclosing compulsory unionism. It outlawed closed shops altogether, but banned unions from using union-security provisions only where those provisions exact more than the initiation fees and "periodic dues" uniformly required as conditions of union

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conferees adopted the House bill's prohibition limiting what unions may spend from dues money on federal elections. *Pipefitters* v. *United States*, 407 U. S. 385, 405 (1972). In § 304 of the Labor Management Relations (Taft-Hartley) Act, 61 Stat. 159–160, which is now incorporated in the Federal Election Campaign Act of 1976, 90 Stat. 490, 2 U. S. C. § 441b(a), Congress made it unlawful for a union "to make a contribution or expenditure in connection with" certain political elections, primaries, or political conventions.

The Senate conferees also agreed with the House that some safeguard was needed to prevent unions from charging new members exorbitant initiation fees that effectively "close" the union, thereby "frustrat[ing] the intent of [§ 8(a)(3)]." 93 Cong. Rec. 6443 (1947), Leg. Hist. 1540 (remarks of Sen. Taft). Hence, § 8(b)(5) was added to the final bill, which makes it an unfair labor practice for a union which has negotiated a union-security agreement to require initiation fees that the NLRB "finds excessive or discriminatory under all the circumstances." 29 U. S. C. § 158(b)(5). The Senate passed § 8(b)(5) only after receiving assurances from Senator Taft that it would not allow the NLRB to regulate union expenditures. See 93 Cong. Rec. 6859 (1947), Leg. Hist. 1623 (stressing that the provision "is limited to initiation fees and does not cover dues").

membership. Otherwise, it determined that the regulation of union-security agreements should be left to specific federal legislation and to the legislatures and courts of the several States.[12] Congress explicitly declined to mandate the kind of particularized regulation of union dues and fees which the Court attributes to it today.

II

By suggesting that the 1947 Congress was driven principally by a desire to eradicate a "free-rider" problem, the Court finds the means not only to distort the legislative justification for § 8(a)(3) and to ignore the provision's plain language, but also to draw a controlling parallelism to § 2, Eleventh of the RLA, 64 Stat. 1238, 45 U. S. C. § 152. As mistaken as the Court is in its view of Congress' purpose in enacting § 8(a)(3), the Court is even more mistaken in its reliance on this Court's interpretation of § 2, Eleventh in *Machinists* v. *Street*, 367 U. S. 740 (1961).

The text of § 8(a)(3) of the NLRA is, of course, very much like the text of the later enacted § 2, Eleventh of the RLA. This similarity, however, does not dictate the conclusion that the 1947 Congress intended § 8(a)(3) to have a meaning identical to that which the 1951 Congress intended § 2, Eleventh to have. The Court previously has held that the scope of the RLA is not identical to that of the NLRA and that courts should be wary of drawing parallels between the two stat-

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[12] "It was never the intention of the [NLRA] . . . to preempt the field in this regard so as to deprive the States of their powers to prevent compulsory unionism." H. R. Conf. Rep. 510, 80th Cong., 1st Sess., 60 (1947), Leg. Hist. 564. Accordingly, Congress added § 14(b) to the final bill, which, as enacted, expressly preserves the authority of the States to regulate union-security agreements, including the use of funds collected from employees pursuant to such an agreement. See *Retail Clerks* v. *Schermerhorn*, 373 U. S., at 751–752. Many States in fact have imposed limitations on the union-security agreements that are permitted in their jurisdictions. See 2 C. Morris, The Developing Labor Law 1391–1392 (2d ed. 1983).

utes. See, *e. g.*, *First National Maintenance Corp.* v. *NLRB*, 452 U. S. 666, 686, n. 23 (1981); *Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U. S. 369, 383 (1969). Thus, parallels between § 8(a)(3) and § 2, Eleventh, "like all parallels between the NLRA and the Railway Labor Act, should be drawn with the utmost care and with full awareness of the differences between the statutory schemes." *Chicago & N. W. R. Co.* v. *Transportation Union*, 402 U. S. 570, 579, n. 11 (1971). Contrary to the majority's conclusion, *ante*, at 750, the two provisions were not born of the "same concern[s]"; indeed, they were born of competing concerns. This Court's interpretation of § 2, Eleventh, therefore, provides no support for construing § 8(a)(3) in a fashion inconsistent with its plain language and legislative history.[13]

The considerations that enabled the Court to conclude in *Street*, 367 U. S., at 750, that it is "'fairly possible'" and "entirely reasonable" to read § 2, Eleventh to proscribe union-security agreements requiring uniform payments from all bargaining-unit employees are wholly absent with respect to § 8(a)(3). In *Street*, the Court stressed the fact that from 1926, when the RLA was first enacted, until 1951 when § 2, Eleventh assumed its present form, that Act prohibited all forms of union security and declared a "policy of complete freedom of choice of employees to join or not to join a union." *Ibid.* By 1951, however, Congress recognized "the expenses and burdens incurred by the unions in the administration of the complex scheme of the [RLA]." 367 U. S., at 751. The purpose advanced for amending the RLA in 1951 to authorize union-security agreements for the first time was "the elimi-

[13] The dissent in the original panel decision in this case appropriately observed: "If the legislative purposes behind § 8(a)(3) and § 2, Eleventh were identical, one would expect that [this] Court in *Street* would have looked to the NLRA for guidance in interpreting § 2, Eleventh. The *Street* opinion, however, does not significantly rely on or discuss either the NLRA or § 8(a)(3). Instead, it focuses on the distinctive features of the railroad industry and the Railway Labor Act in construing § 2, Eleventh." 776 F. 2d 1187, 1220 (CA4 1985).

nation of the 'free riders.'" 367 U. S., at 761. Given that background, the Court was persuaded that it was possible to conclude that "Congress did not completely abandon the policy of full freedom of choice embodied in the . . . Act, but rather made inroads on it for the limited purpose of eliminating the problems created by the 'free rider.'" *Id.*, at 767.

The NLRA does not share the RLA's underlying policy, which propelled the Court's interpretation of § 2, Eleventh in *Street*. Indeed, the history of the NLRA points in the opposite direction: the original policy of the Wagner Act was to permit all forms of union-security agreements, and such agreements were commonplace in 1947. Thus, in enacting § 8(a)(3), the 1947 Congress, unlike the 1951 Congress, was not making inroads on a policy of full freedom of choice in order to provide "a specific response," *id.*, at 751, to a particular problem facing unions. Rather, the 1947 amendments to § 8(a)(3) were designed to make an inroad into a preexisting policy of the absolute freedom of private parties under federal law to negotiate union-security agreements. It was a "limited" inroad, responding to carefully defined abuses that Congress concluded had arisen in the union-security agreements permitted by the Wagner Act. The 1947 Congress did not enact § 8(a)(3) for the "same purpose" as did the 1951 Congress in enacting § 2, Eleventh. Therefore, contrary to the Court's conclusion, *ante*, at 762, the latter purpose, "eliminating 'free riders,'" does *not* dictate our construction of § 8(a)(3), regardless of its impact on our construction of § 2, Eleventh.

In order to overcome this inevitable conclusion, the Court relies on remarks made by a few Members of the Congress in enacting the 1951 amendments to § 2, Eleventh of the RLA, which the Court contends show that the 1951 Congress viewed those amendments as identical to the amendments that had been made to § 8(a)(3) of the NLRA in 1947. See *ante*, at 756; see also *ante*, at 746, and n. 4. But even assuming the Court's view of the legislative history of § 2, Elev-

enth is correct (and the legislative materials do not obviously impart the message the Court receives [14]), it does not provide support for the Court's strained reading of § 8(a)(3). Its only possible relevance in this case is to evidence the 1951 Congress' understanding of a statute that particular Congress did not enact. The relevant question here, however, is what the 1947 Congress intended by the statute that *it* enacted. "[I]t is well settled that '"the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one."'" *Russello* v. *United States*, 464 U. S. 16, 26 (1983), quoting *Jefferson County Pharmaceutical Assn.* v. *Abbott Laboratories*, 460 U. S. 150, 165, n. 27 (1983), in turn quoting *United States* v. *Price*, 361 U. S. 304, 313 (1960). See also *United States* v. *Clark*, 445 U. S. 23, 33, n. 9 (1980). It

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[14] The Court overstates the clarity of what was said about § 8(a)(3) when § 2, Eleventh was amended in 1951. As the Court's recitation of various statements reflects, the extent to which the 1951 Congress saw itself engrafting onto the RLA terms *identical*, in all respects, to the terms of § 8(a)(3) is uncertain. See *ante*, at 746–747, n. 4. The remarks are only general comments about the similarity of the NLRA union-security provisions, rather than explicit comparisions of § 8(a)(3) with the provisions of the RLA. For example, Senator Taft explained: "In effect, the bill inserts in the railway mediation law *almost the exact provisions, so far as they fit*, of the Taft-Hartley law, so that the conditions regarding the union shop and the check-off are carried into the relations between railroad unions and the railroads." 96 Cong. Rec. 16267 (1950) (emphasis added). See also, *e. g.*, H. R. Rep. No. 2811, 81st Cong., 2d Sess., 4 (1950) (§ 2, Eleventh allows agreements "of a character" permitted in § 8(a)(3)); 96 Cong. Rec. 17049 (1951) (remarks of Rep. Beckworth) (§ 2, Eleventh extends to railroads "a principle" embodied in § 8(a)(3)). Especially when it is remembered that Congress was *extending* to unions in the railroad industry the authority to enter into agreements for which they previously had *no* authority, whereas the 1947 Congress had rescinded authorization for certain kinds of union-security agreements, the import of these statements is ambiguous. To borrow a phrase from the majority, I "think it far safer and far more appropriate to construe § 8(a)(3) in light of its" language and legislative history, "than by drawing inferences from" ambiguous statements made by Members of a later Congress in enacting a different statute. *Ante*, at 759.

would "surely come as a surprise" to the legislators who enacted § 8(a)(3) to learn that, in discerning their intent, the Court listens not to their voices, but to those of a later Congress. *Ante*, at 756. Unlike the majority, I am unwilling to put the 1951 legislators' words into the 1947 legislators' mouths.

The relevant sources for gleaning the 1947 Congress' intent are the plain language of § 8(a)(3), and, at least to the extent that it might reflect a clear intention contrary to the plain meaning of the statute, the legislative history of § 8(a)(3). Those sources show that the 1947 Congress did not intend § 8(a)(3) to have the same meaning the Court has attributed to § 2, Eleventh of the RLA. I therefore must disagree with the majority's assertion that the Court's decision in *Street* is "controlling" here. See *ante*, at 745.

III

In sum, I conclude that, in enacting § 8(a)(3) of the NLRA, Congress did not intend to prohibit union-security agreements that require the tender of full union dues and standard union initiation fees from nonmember employees, without regard to how the union expends the funds so collected. In finding controlling weight in this Court's interpretation of § 2, Eleventh of the RLA to reach a contrary conclusion, the Court has not only eschewed our well-established methods of statutory construction, but also interpreted the terms of § 8(a)(3) in a manner inconsistent with the congressional purpose clearly expressed in the statutory language and amply documented in the legislative history. I dissent.

Syllabus

RILEY, DISTRICT ATTORNEY OF THE TENTH PROSECUTORIAL DISTRICT OF NORTH CAROLINA, ET AL. *v.* NATIONAL FEDERATION OF THE BLIND OF NORTH CAROLINA, INC., ET AL.

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

No. 87–328. Argued March 23, 1988—Decided June 29, 1988

The North Carolina Charitable Solicitations Act defines the prima facie "reasonable fee" that a professional fundraiser may charge according to a three-tiered schedule. A fee up to 20% of receipts collected is deemed reasonable. A fee between 20% and 35% is deemed unreasonable upon a showing that the solicitation at issue did not involve the "dissemination of information, discussion, or advocacy relating to public issues as directed by the [charitable organization] which is to benefit from the solicitation." A fee exceeding 35% is presumed unreasonable, but the fundraiser may rebut the presumption by showing that the fee was necessary either because the solicitation involved the dissemination of information or advocacy on public issues directed by the charity, or because otherwise the charity's ability to raise money or communicate would be significantly diminished. The Act also provides that a professional fundraiser must disclose to potential donors the average percentage of gross receipts actually turned over to charities by the fundraiser for all charitable solicitations conducted in the State within the previous 12 months. Finally, the Act provides that professional fundraisers may not solicit without an approved license, whereas volunteer fundraisers may solicit immediately upon submitting a license application. Appellees, a coalition of professional fundraisers, charitable organizations, and potential donors, brought suit against appellant government officials charged with the enforcement of the Act (hereinafter collectively referred to as North Carolina or the State), seeking injunctive and declaratory relief. The District Court ruled that the challenged provisions on their face unconstitutionally infringed upon freedom of speech and enjoined their enforcement. The Court of Appeals affirmed.

Held:

1. North Carolina's three-tiered definition of "reasonable fees" unconstitutionally infringes upon freedom of speech. The solicitation of charitable contributions is protected speech, and using percentages to decide the legality of the fundraiser's fee is not narrowly tailored to the State's

interest in preventing fraud. *Schaumburg* v. *Citizens for a Better Environment*, 444 U. S. 620; *Secretary of State of Maryland* v. *Joseph H. Munson Co.*, 467 U. S. 947. North Carolina cannot meaningfully distinguish its statute from those previously held invalid on the ground that it has a motivating interest, not present in the prior cases, to ensure that the maximum amount of funds reach the charity, or to guarantee that the fee charged charities is not unreasonable. This provision is not merely an economic regulation, with no First Amendment implication, to be tested only for rationality; instead, the regulation must be considered as one burdening speech. The State's asserted justification that charities' speech must be regulated for their own benefit is unsound. The First Amendment mandates the presumption that speakers, not the government, know best both what they want to say and how to say it. Also unavailing is the State's contention that the Act's flexibility more narrowly tailors it to the State's asserted interests than the laws invalidated in the prior cases. The State's asserted additional interests are both constitutionally invalid and insufficiently related to a percentage-based test. And while a State's interest in protecting charities and the public from fraud is a sufficiently substantial interest to justify a narrowly tailored regulation, the North Carolina statute, even with its flexibility, is not sufficiently tailored to such interest. Pp. 787–795.

2. North Carolina's requirement that professional fundraisers disclose to potential donors, before an appeal for funds, the percentage of charitable contributions collected during the previous 12 months that were actually turned over to charity is unconstitutional. This provision of the Act is a content-based regulation because mandating speech that a speaker would not otherwise make necessarily alters the speech's content. Even assuming that the mandated speech, in the abstract, is merely "commercial," it does not retain its commercial character when it is inextricably intertwined with the otherwise fully protected speech involved in charitable solicitations, and thus the mandated speech is subject to the test for fully protected expression, not the more deferential commercial speech principles. Nor is a deferential test to be applied on the theory that the First Amendment interest in compelled speech is different than the interest in compelled silence. The difference is without constitutional significance, for the First Amendment guarantees "freedom of speech," a term necessarily comprising the decision of both what to say and what not to say. Moreover, for First Amendment purposes, a distinction cannot be drawn between compelled statements of opinion and, as here, compelled statements of "fact," since either form of compulsion burdens protected speech. Thus, North Carolina's content-based regulation is subject to exacting First Amendment scrutiny. The State's interest in informing donors how the money they contribute is spent to

dispel the alleged misperception that the money they give to professional fundraisers goes in greater-than-actual proportion to benefit charity, is not sufficiently weighty, and the means chosen to accomplish it are unduly burdensome and not narrowly tailored. Pp. 795–801.

3. North Carolina's licensing requirement for professional fundraisers is unconstitutional. A speaker's rights are not lost merely because compensation is received, and the State's asserted power to license professional fundraisers carries with it (unless properly constrained) the power directly and substantially to affect the speech they utter. Consequently, the statute is subject to First Amendment scrutiny. Generally, speakers need not obtain a license to speak. Even assuming that the State's interest in regulating those who solicit money justifies requiring fundraisers to obtain a license before soliciting, such a regulation must provide that the licensor will, within a specified brief period, either issue a license or go to court. That requirement is not met here, for the North Carolina Act permits a delay without limit. Nor can the State assert that its history of issuing licenses quickly constitutes a practice effectively constraining the licensor's discretion, since such history relates to a time (prior to amendment of the Act) when professional fundraisers were permitted to solicit as soon as their applications were filed. Pp. 801–804.

817 F. 2d 102, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, and KENNEDY, JJ., joined, in Parts I, II, and III, of which STEVENS, J., joined, and in all but n. 11 of which SCALIA, J., joined. SCALIA, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 803. STEVENS, J., filed an opinion concurring in part and dissenting in part, *post*, p. 804. REHNQUIST, C. J., filed a dissenting opinion, in which O'CONNOR, J., joined, *post*, p. 804.

Lacy H. Thornburg, Attorney General of North Carolina, argued the cause for appellants. With him on the briefs were *Jean A. Benoy*, Senior Deputy Attorney General, and *Charles M. Hensey*, Special Deputy Attorney General.

Errol Copilevitz argued the cause for appellees. With him on the brief was *John P. Jennings, Jr.**

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*Briefs of *amici curiae* urging reversal were filed for the State of Indiana et al. by *Linley E. Pearson*, Attorney General of Indiana, *David A. Miller*, *Christine M. Page*, and *David M. Sommers*, Deputy Attorneys General, and *Charlie Brown*, Attorney General of West Virginia; and for the State of Maine et al. by *James E. Tierney*, Attorney General of Maine,

JUSTICE BRENNAN delivered the opinion of the Court.

The North Carolina Charitable Solicitations Act governs the solicitation of charitable contributions by professional fundraisers. As relevant here, it defines the prima facie "reasonable fee" that a professional fundraiser may charge as a percentage of the gross revenues solicited; requires professional fundraisers to disclose to potential donors the gross percentage of revenues retained in prior charitable solicitations; and requires professional fundraisers to obtain a license before engaging in solicitation. The United States Court of Appeals for the Fourth Circuit held that these aspects of the Act unconstitutionally infringed upon freedom of speech. We affirm.

I

Responding to a study showing that in the previous five years the State's largest professional fundraisers had retained as fees and costs well over 50% of the gross revenues collected in charitable solicitation drives, North Carolina amended its Charitable Solicitations Act in 1985. As amended, the Act prohibits professional fundraisers from retaining an "unreasonable" or "excessive" fee,[1] a term defined by a three-tiered schedule.[2] A fee up to 20% of the gross

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and *Stephen L. Wessler*, Assistant Attorney General, *Joseph J. Lieberman*, Attorney General of Connecticut, and *David E. Ormstedt*, Assistant Attorney General.

Briefs of *amici curiae* urging affirmance were filed for the Alabama Sheriffs' Association et al. by *Eric J. Magnuson;* for the California Council of the Blind by *Barry A. Fisher* and *David Grosz;* and for Independent Sector et al. by *Thomas R. Asher* and *Adam Yarmolinsky*.

[1] "Fee" for purposes of the statute includes the costs and expenses of solicitation. N. C. Gen. Stat. § 131C–3(5a) (1986).

[2] North Carolina Gen. Stat. § 131C–17.2 (1986) provides:

"(a) No professional fund-raising counsel or professional solicitor who contracts to raise funds for a person established for a charitable purpose may charge such person established for a charitable purpose an excessive and unreasonable fund-raising fee for raising such funds.

"(b) For purposes of this section a fund-raising fee of twenty percent (20%) or less of the gross receipts of all solicitations on behalf of a particu-

receipts collected is deemed reasonable. If the fee retained is between 20% and 35%, the Act deems it unreasonable upon a showing that the solicitation at issue did not involve the "dissemination of information, discussion, or advocacy relating to public issues as directed by the [charitable organization] which is to benefit from the solicitation." Finally, a fee exceeding 35% is presumed unreasonable, but the fundraiser may rebut the presumption by showing that the amount of the fee was necessary either (1) because the solicitation involved the dissemination of information or advocacy on public issues directed by the charity, or (2) because otherwise the charity's ability to raise money or communicate would be sig-

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lar person established for a particular charitable purpose is deemed to be reasonable and nonexcessive.

"(c) For purposes of this section a fund-raising fee greater than twenty percent (20%) but less than thirty-five percent (35%) of the gross receipts of all solicitations on behalf of a particular person established for a charitable purpose is excessive and unreasonable if the party challenging the fund-raising fee also proves that the solicitation does not involve the dissemination of information, discussion, or advocacy relating to public issues as directed by the person established for a charitable purpose which is to benefit from the solicitation.

"(d) For purposes of this section only, a fund-raising fee of thirty-five percent (35%) or more of the gross receipts of all solicitations on behalf of a particular person established for a charitable purpose may be excessive and unreasonable without further evidence of any fact by the party challenging the fund-raising fee. The professional fund-raising counsel or professional solicitor may successfully defend the fund-raising fee by proving that the level of the fee charged was necessary:

"(1) Because of the dissemination of information, discussion, or advocacy relating to public issues as directed by the person established for a charitable purpose which is to benefit from the solicitation, or

"(2) Because otherwise ability of the person established for a charitable purpose which is to benefit from the solicitations to raise money or communicate its ideas, opinions, and positions to the public would be significantly diminished.

"(e) Where the fund-raising fee charged by a professional fund-raising counsel or a professional solicitor is determined to be excessive and unreasonable, the fact finder making that determination shall then determine a reasonable fee under the circumstances. . . ."

nificantly diminished. As the State describes the Act, even where a prima facie showing of unreasonableness has been rebutted, the factfinder must still make an ultimate determination, on a case-by-case basis, as to whether the fee was reasonable—a showing that the solicitation involved the advocacy or dissemination of information does not alone establish that the total fee was reasonable. See Brief for Appellants 10–11; Reply Brief for Appellants 2–3.

The Act also provides that, prior to any appeal for funds, a professional fundraiser must disclose to potential donors: (1) his or her name; (2) the name of the professional solicitor or professional fundraising counsel by whom he or she is employed and the name and address of his or her employer; and (3) the average percentage of gross receipts actually turned over to charities by the fundraiser for all charitable solicitations conducted in North Carolina within the previous 12 months.[3] Only the third disclosure requirement is challenged here.

Finally, professional fundraisers may not solicit without an approved license.[4] In contrast, volunteer fundraisers

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[3] North Carolina Gen. Stat. § 131C–16.1 (1986) states:

"During any solicitation and before requesting or appealing either directly or indirectly for any charitable contribution a professional solicitor shall disclose to the person solicited:

"(1) His name; and,

"(2) The name of the professional solicitor or professional fund-raising counsel by whom he is employed and the address of his employer; and

"(3) The average of the percentage of gross receipts actually paid to the persons established for a charitable purpose by the professional fundraising counsel or professional solicitor conducting the solicitation for all charitable sales promotions conducted in this State by that professional fund-raising counsel or professional solicitor for the past 12 months, or for all completed charitable sales promotions where the professional fundraising counsel or professional solicitor has been soliciting funds for less than 12 months."

[4] North Carolina Gen. Stat. § 131C–6 (1986) provides:

"Any person who acts as a professional fund-raising counsel or professional solicitor shall apply for and obtain an annual license from the Depart-

may solicit immediately upon submitting a license application. N. C. Gen. Stat. § 131C–4 (1986). A licensing provision had been in effect prior to the 1985 amendments, but the prior law allowed both professional and volunteer fundraisers to solicit as soon as a license application was submitted.

A coalition of professional fundraisers, charitable organizations, and potential charitable donors brought suit against various government officials charged with the enforcement of the Act (hereinafter collectively referred to as North Carolina or the State), seeking injunctive and declaratory relief. The District Court for the Eastern District of North Carolina ruled on summary judgment that the foregoing aspects of the Act on their face unconstitutionally infringed upon freedom of speech (it also found the Act constitutional in other respects not before us now), and enjoined enforcement of the unconstitutional provisions. 635 F. Supp. 256 (1986). The Court of Appeals for the Fourth Circuit affirmed in a *per curiam* opinion. 817 F. 2d 102 (judgment order), and we noted probable jurisdiction, 484 U. S. 911 (1987).

II

We turn first to the "reasonable fee" provision. In deciding this issue, we do not write on a blank slate; the Court has heretofore twice considered laws regulating the financial aspects of charitable solicitations. We first examined such a law in *Schaumburg* v. *Citizens for a Better Environment*, 444 U. S. 620 (1980). There we invalidated a local ordinance requiring charitable solicitors to use, for charitable purposes (defined to exclude funds used toward administrative expenses and the costs of conducting the solicitation), 75% of the funds solicited. We began our analysis by categorizing the type of speech at issue. The village argued that charitable solicitation is akin to a business proposition, and therefore constitutes merely commercial speech. We rejected

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ment [of Human Resources], and shall not act as a professional fund-raising counsel or professional solicitor until after obtaining such license."

that approach and squarely held, on the basis of considerable precedent, that charitable solicitations "involve a variety of speech interests . . . that are within the protection of the First Amendment," and therefore have not been dealt with as "purely commercial speech." *Id.*, at 632. Applying standard First Amendment analysis, we determined that the ordinance was not narrowly tailored to achieve the village's principal asserted interest: the prevention of fraud. We concluded that some charities, especially those formed primarily to advocate, collect, or disseminate information, would of necessity need to expend more than 25% of the funds collected on administration or fundraising expenses. *Id.*, at 635–637. Yet such an eventuality would not render a solicitation by these charities fraudulent. In short, the prevention of fraud was only "peripherally promoted by the 75-percent requirement and could be sufficiently served by measures less destructive of First Amendment interests." *Id.*, at 636–637. We also observed that the village was free to enforce its already existing fraud laws and to require charities to file financial disclosure reports. *Id.*, at 637–638, and nn. 11–12.

We revisited the charitable solicitation field four years later in *Secretary of State of Maryland* v. *Joseph H. Munson Co.*, 467 U. S. 947 (1984), a case closer to the present one in that the statute directly regulated contracts between charities and professional fundraisers. Specifically, the statute in question forbade such contracts if, after allowing for a deduction of many of the costs associated with the solicitation, the fundraiser retained more than 25% of the money collected. Although the Secretary was empowered to waive this limitation where it would effectively prevent the charitable organization from raising contributions, we held the law unconstitutional under the force of *Schaumburg*. We rejected the State's argument that restraints on the relationship between the charity and the fundraiser were mere "economic regulations" free of First Amendment implication. Rather, we viewed the law as "a direct restriction on the amount of

money a charity can spend on fundraising activity," and therefore "a direct restriction on protected First Amendment activity." 467 U. S., at 967, and n. 16. Consequently, we subjected the State's statute to exacting First Amendment scrutiny. Again, the State asserted the prevention of fraud as its principal interest, and again we held that the use of a percentage-based test was not narrowly tailored to achieve that goal. In fact, we found that if the statute actually prevented fraud in some cases it would be "little more than fortuitous." An "equally likely" result would be that the law would "restrict First Amendment activity that results in high costs but is itself a part of the charity's goal or that is simply attributable to the fact that the charity's cause proves to be unpopular." *Id.*, at 966–967.

As in *Schaumburg* and *Munson*, we are unpersuaded by the State's argument here that its three-tiered, percentage-based definition of "unreasonable" passes constitutional muster. Our prior cases teach that the solicitation of charitable contributions is protected speech, and that using percentages to decide the legality of the fundraiser's fee is not narrowly tailored to the State's interest in preventing fraud.[5] That much established, unless the State can meaningfully distinguish its statute from those discussed in our precedents, its statute must fall. The State offers two distinctions. First, it asserts a motivating interest not expressed in *Schaumburg* or *Munson:* ensuring that the maximum amount of funds reach the charity or, somewhat relatedly, to guarantee that the fee charged charities is not "unreason-

[5]The dissent suggests that the State's regulation is merely economic, having only an indirect effect on protected speech. However, as we demonstrate, the burden here is hardly incidental to speech. Far from the completely incidental impact of, for example, a minimum wage law, a statute regulating how a speaker may speak directly affects that speech. See *Meyer* v. *Grant*, 486 U. S. 414, 421–423, and n. 5 (1988). Here, the desired and intended effect of the statute is to encourage some forms of solicitation and discourage others.

able." Second, the State contends that the Act's flexibility more narrowly tailors it to the State's asserted interests than the laws considered in our prior cases. We find both arguments unavailing.

The State's additional interest in regulating the fairness of the fee may rest on either of two premises (or both): (1) that charitable organizations are economically unable to negotiate fair or reasonable contracts without governmental assistance; or (2) that charities are incapable of deciding for themselves the most effective way to exercise their First Amendment rights. Accordingly, the State claims the power to establish a single transcendent criterion by which it can bind the charities' speaking decisions. We reject both premises.

The first premise, notwithstanding the State's almost talismanic reliance on the mere assertion of it, amounts to little more than a variation of the argument rejected in *Schaumburg* and *Munson* that this provision is simply an economic regulation with no First Amendment implication, and therefore must be tested only for rationality. We again reject that argument; this regulation burdens speech, and must be considered accordingly. There is no reason to believe that charities have been thwarted in their attempts to speak or that they consider the contracts in which they enter to be anything less than equitable.[6] Even if such a showing could be made, the State's solution stands in sharp conflict with the First Amendment's command that government regulation of speech must be measured in minimums, not maximums.

The State's remaining justification—the paternalistic premise that charities' speech must be regulated for their own benefit—is equally unsound. The First Amendment man-

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[6] North Carolina was apparently surprised to learn of the charities' opposition to its law, and at oral argument could only surmise that the charities had been misinformed regarding the pro-charity nature of the statute. Tr. of Oral Arg. 20–21. Nonetheless, every charity that has stated a position before us in this case (and there are almost 60 of them other than appellees) supports the judgment below.

dates that we presume that speakers, not the government, know best both what they want to say and how to say it. See *Tashjian* v. *Republican Party of Connecticut*, 479 U. S. 208, 224 (1987) (criticizing State's asserted interest in protecting "the Republican party from undertaking a course of conduct destructive of its own interests," and reiterating that government "'may not interfere [with expressions of First Amendment freedoms] on the ground that [it] view[s] a particular expression as unwise or irrational'") (quoting *Democratic Party of United States* v. *Wisconsin ex rel. La Follette*, 450 U. S. 107, 124 (1981)); cf. *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 791–792, and n. 31 (1978) (criticizing State's paternalistic interest in protecting the political process by restricting speech by corporations); *Linmark Associates, Inc.* v. *Willingboro*, 431 U. S. 85, 97 (1977) (criticizing, in the commercial speech context, the State's paternalistic interest in maintaining the quality of neighborhoods by restricting speech to residents). "The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion." *Thomas* v. *Collins*, 323 U. S. 516, 545 (1945) (Jackson, J., concurring). To this end, the government, even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers and listeners; free and robust debate cannot thrive if directed by the government. We perceive no reason to engraft an exception to this settled rule for charities.

The foregoing discussion demonstrates that the State's additional interest cannot justify the regulation. But, alternatively, there are several legitimate reasons why a charity might reject the State's overarching measure of a fundraising drive's legitimacy—the percentage of gross receipts remitted to the charity. For example, a charity might choose a particular type of fundraising drive, or a particular solicitor, expecting to receive a large sum as measured by total dollars

rather than the percentage of dollars remitted. Or, a solicitation may be designed to sacrifice short-term gains in order to achieve long-term, collateral, or noncash benefits. To illustrate, a charity may choose to engage in the advocacy or dissemination of information during a solicitation, or may seek the introduction of the charity's officers to the philanthropic community during a special event (*e. g.*, an awards dinner). Consequently, even if the State had a valid interest in protecting charities from their own naiveté or economic weakness, the Act would not be narrowly tailored to achieve it.

The second distinguishing feature the State offers is the flexibility it has built into its Act. The State describes the second of its three-tiered definition of "unreasonable" and "excessive" as imposing no presumption one way or the other as to the reasonableness of the fee, although unreasonableness may be demonstrated by a showing that the solicitation does not involve the advocacy or dissemination of information on the charity's behalf and at the charity's direction. The State points out that even the third tier's presumption of unreasonableness may be rebutted.

It is important to clarify, though, what we mean by "reasonableness" at this juncture. As we have just demonstrated, *supra*, at 790–791 and this page, the State's generalized interest in unilaterally imposing its notions of fairness on the fundraising contract is both constitutionally invalid and insufficiently related to a percentage-based test. Consequently, what remains is the more particularized interest in guaranteeing that the fundraiser's fee be "reasonable" in the sense that it not be fraudulent. The interest in protecting charities (and the public) from fraud is, of course, a sufficiently substantial interest to justify a narrowly tailored regulation. The question, then, is whether the added flexibility of this regulation is sufficient to tailor the law to this remaining interest. We conclude that it is not.

Despite our clear holding in *Munson* that there is no nexus between the percentage of funds retained by the fundraiser and the likelihood that the solicitation is fraudulent, the State defines, prima facie, an "unreasonable" and "excessive" fee according to the percentage of total revenues collected. Indeed, the State's test is even more attenuated than the one held invalid in *Munson*, which at least excluded costs and expenses of solicitation from the fee definition. 467 U. S., at 950, n. 2. Permitting rebuttal cannot supply the missing nexus between the percentages and the State's interest.[7]

But this statute suffers from a more fundamental flaw. Even if we agreed that some form of a percentage-based measure could be used, in part, to test for fraud, we could not agree to a measure that requires the speaker to prove "reasonableness" case by case based upon what is at best a loose inference that the fee might be too high. Under the Act, once a prima facie showing of unreasonableness is made, the fundraiser must rebut the showing. Proof that the solicitation involved the advocacy or dissemination of information is not alone sufficient; it is merely a factor that is added to the calculus submitted to the factfinder, who may still decide that the costs incurred or the fundraiser's profit were excessive. Similarly, the Act is impermissibly insensitive to the realities faced by small or unpopular charities, which must often pay more than 35% of the gross receipts collected to the fundraiser due to the difficulty of attracting donors. See *Munson*, 467 U. S., at 967. Again, the burden is placed on the fundraiser in such cases to rebut the presumption of unreasonableness.

According to the State, we need not worry over this burden, as standards for determining "[r]easonable fundraising fees will be judicially defined over the years." Reply Brief for Appellants 6. Speakers, however, cannot be made to

[7] Even if percentages are not completely irrelevant to the question of fraud, their relationship to the question is at best tenuous, as *Schaumburg* and *Munson* demonstrate.

wait for "years" before being able to speak with a measure of security. In the interim, fundraisers will be faced with the knowledge that every campaign incurring fees in excess of 35%, and many campaigns with fees between 20% and 35%, will subject them to potential litigation over the "reasonableness" of the fee. And, of course, in every such case the fundraiser must bear the costs of litigation and the risk of a mistaken adverse finding by the factfinder, even if the fundraiser and the charity believe that the fee was in fact fair. This scheme must necessarily chill speech in direct contravention of the First Amendment's dictates. See *Munson*, *supra*, at 969; *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 279 (1964).[8]

This chill and uncertainty might well drive professional fundraisers out of North Carolina, or at least encourage them to cease engaging in certain types of fundraising (such as solicitations combined with the advocacy and dissemination of information) or representing certain charities (primarily small or unpopular ones), all of which will ultimately "reduc[e] the quantity of expression." *Buckley* v. *Valeo*, 424 U. S. 1, 19, 39 (1976). Whether one views this as a restriction of the charities' ability to speak, *Munson*, *supra*, at 967, and n. 16, or a restriction of the professional fundraisers' ability to speak, *Munson*, *supra*, at 955, n. 6, the restriction is undoubtedly one on speech, and cannot be countenanced here.

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[8] The dissent is correct that the statute requires that expenses incurred in the dissemination of information be considered legitimate by the factfinder. But that does not address the primary defect here: that fraud is presumed by a surrogate and imprecise formula. Nor does it suffice to argue, as does the dissent, that the statute is valid because the fundraiser, not the charity, is the object of the regulation. Fining the fundraiser based upon its speech for the charity has an obvious and direct relation to the charity's speech. See *Munson*, 467 U. S., at 967, and n. 16. Moreover, the fundraiser has an independent First Amendment interest in the speech, even though payment is received. See, *e. g.*, *New York Times Co.* v. *Sullivan*, 376 U. S., at 265–266.

In striking down this portion of the Act, we do not suggest that States must sit idly by and allow their citizens to be defrauded. North Carolina has an antifraud law, and we presume that law enforcement officers are ready and able to enforce it. Further North Carolina may constitutionally require fundraisers to disclose certain financial information to the State, as it has since 1981. *Munson*, *supra*, at 967, n. 16. If this is not the most efficient means of preventing fraud, we reaffirm simply and emphatically that the First Amendment does not permit the State to sacrifice speech for efficiency. *Schaumburg*, 444 U. S., at 639; *Schneider* v. *State*, 308 U. S. 147, 164 (1939).

III

We turn next to the requirement that professional fundraisers disclose to potential donors, before an appeal for funds, the percentage of charitable contributions collected during the previous 12 months that were actually turned over to charity. Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech. We therefore consider the Act as a content-based regulation of speech. See *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241, 256 (1974) (statute compelling newspaper to print an editorial reply "exacts a penalty on the basis of the content of a newspaper").

The State argues that even if charitable solicitations generally are fully protected, this portion of the Act regulates only commercial speech because it relates only to the professional fundraiser's profit from the solicited contribution. Therefore, the State asks us to apply our more deferential commercial speech principles here. See generally *Virginia Pharmacy Bd.* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748 (1976).

It is not clear that a professional's speech is necessarily commercial whenever it relates to that person's financial motivation for speaking. Cf. *Bigelow* v. *Virginia*, 421 U. S.

809, 826 (1975) (state labels cannot be dispositive of degree of First Amendment protection). But even assuming, without deciding, that such speech in the abstract is indeed merely "commercial," we do not believe that the speech retains its commercial character when it is inextricably intertwined with otherwise fully protected speech. Our lodestars in deciding what level of scrutiny to apply to a compelled statement must be the nature of the speech taken as a whole and the effect of the compelled statement thereon. This is the teaching of *Schaumburg* and *Munson*, in which we refused to separate the component parts of charitable solicitations from the fully protected whole. Regulation of a solicitation "must be undertaken with due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech . . . , and for the reality that without solicitation the flow of such information and advocacy would likely cease." *Schaumburg*, *supra*, at 632, quoted in *Munson*, 467 U. S., at 959–960. See also *Meyer* v. *Grant*, 486 U. S. 414, 422, n. 5 (1988); *Thomas* v. *Collins*, 323 U. S., at 540–541. Thus, where, as here, the component parts of a single speech are inextricably intertwined, we cannot parcel out the speech, applying one test to one phrase and another test to another phrase. Such an endeavor would be both artificial and impractical. Therefore, we apply our test for fully protected expression.[9]

North Carolina asserts that, even so, the First Amendment interest in compelled speech is different than the interest in compelled silence; the State accordingly asks that we apply a deferential test to this part of the Act. There is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance, for the First Amendment

[9] Of course, the dissent's analogy to the securities field entirely misses the point. Purely commercial speech is more susceptible to compelled disclosure requirements. See *Zauderer* v. *Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U. S. 626 (1985).

guarantees "freedom of speech," a term necessarily comprising the decision of both what to say and what *not* to say.

The constitutional equivalence of compelled speech and compelled silence in the context of fully protected expression was established in *Miami Herald Publishing Co.* v. *Tornillo*, *supra*. There, the Court considered a Florida statute requiring newspapers to give equal reply space to those they editorially criticize. We unanimously held the law unconstitutional as content regulation of the press, expressly noting the identity between the Florida law and a direct prohibition of speech. "The Florida statute operates as a command in the same sense as a statute or regulation forbidding appellant to publish a specified matter. Governmental restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers." *Id.*, at 256. That rule did not rely on the fact that Florida restrained the press, and has been applied to cases involving expression generally. For example, in *Wooley* v. *Maynard*, 430 U. S. 705, 714 (1977), we held that a person could not be compelled to display the slogan "Live Free or Die." In reaching our conclusion, we relied on the principle that "[t]he right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind,'" as illustrated in *Tornillo*. 430 U. S., at 714 (quoting *West Virginia Board of Education* v. *Barnette*, 319 U. S. 624, 637 (1943)). See also *Pacific Gas & Electric Co.* v. *Public Utilities Comm'n of California*, 475 U. S. 1, 9–11 (1986) (plurality opinion of Powell, J.) (characterizing *Tornillo* in terms of freedom of speech); *Harper & Row Publishers, Inc.* v. *Nation Enterprises*, 471 U. S. 539, 559 (1985); *Abood* v. *Detroit Board of Education*, 431 U. S. 209, 234–235 (1977); *West Virginia Board of Education* v. *Barnette*, *supra*.

These cases cannot be distinguished simply because they involved compelled statements of opinion while here we deal with compelled statements of "fact": either form of com-

pulsion burdens protected speech. Thus, we would not immunize a law requiring a speaker favoring a particular government project to state at the outset of every address the average cost overruns in similar projects, or a law requiring a speaker favoring an incumbent candidate to state during every solicitation that candidate's recent travel budget. Although the foregoing factual information might be relevant to the listener, and, in the latter case, could encourage or discourage the listener from making a political donation, a law compelling its disclosure would clearly and substantially burden the protected speech.

We believe, therefore, that North Carolina's content-based regulation is subject to exacting First Amendment scrutiny. The State asserts as its interest the importance of informing donors how the money they contribute is spent in order to dispel the alleged misperception that the money they give to professional fundraisers goes in greater-than-actual proportion to benefit charity. To achieve this goal, the State has adopted a prophylactic rule of compelled speech, applicable to all professional solicitations. We conclude that this interest is not as weighty as the State asserts, and that the means chosen to accomplish it are unduly burdensome and not narrowly tailored.

Although we do not wish to denigrate the State's interest in full disclosure, the danger the State posits is not as great as might initially appear. First, the State presumes that the charity derives no benefit from funds collected but not turned over to it. Yet this is not necessarily so. For example, as we have already discussed in greater detail, where the solicitation is combined with the advocacy and dissemination of information, the charity reaps a substantial benefit from the act of solicitation itself. See *Munson*, *supra*, at 963; *Schaumburg*, 444 U. S., at 635. Thus, a significant portion of the fundraiser's "fee" may well go toward achieving the charity's objectives even though it is not remitted to the

charity in cash.[10] Second, an unchallenged portion of the disclosure law requires professional fundraisers to disclose their professional status to potential donors, thereby giving notice that at least a portion of the money contributed will be retained.[11] Donors are also undoubtedly aware that solicitations incur costs, to which part of their donation might apply. And, of course, a donor is free to inquire how much of the contribution will be turned over to the charity. Under another North Carolina statute, also unchallenged, fundraisers must disclose this information upon request. N. C. Gen. Stat. § 131C–16 (1986). Even were that not so, if the solicitor refuses to give the requested information, the potential donor may (and probably would) refuse to donate.

Moreover, the compelled disclosure will almost certainly hamper the legitimate efforts of professional fundraisers to raise money for the charities they represent. First, this provision necessarily discriminates against small or unpopular charities, which must usually rely on professional fundraisers. Campaigns with high costs and expenses carried out by professional fundraisers must make unfavorable disclosures, with the predictable result that such solicitations will prove unsuccessful. Yet the identical solicitation with its high costs and expenses, if carried out by the employees of a charity or volunteers, results in no compelled disclosure, and therefore greater success. Second, in the context of a

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[10] In addition, the net "fee" itself benefits the charity in the same way that an attorney's fee benefits the charity, or the purchase of any other professional service benefits the charity. That the fundraiser's fee does not first pass through the charity's hands is of small import.

[11] The Act, as written, requires the fundraiser to disclose his or her employer's name and address. Arguably, this may not clearly convey to the donor that the solicitor is employed by a for-profit organization, for example, where the employer's name is "Charitable Fundraisers of America." However, nothing in this opinion should be taken to suggest that the State may not require a fundraiser to disclose unambiguously his or her professional status. On the contrary, such a narrowly tailored requirement would withstand First Amendment scrutiny.

verbal solicitation, if the potential donor is unhappy with the disclosed percentage, the fundraiser will not likely be given a chance to explain the figure; the disclosure will be the last words spoken as the donor closes the door or hangs up the phone.[12] Again, the predictable result is that professional fundraisers will be encouraged to quit the State or refrain from engaging in solicitations that result in an unfavorable disclosure.

In contrast to the prophylactic, imprecise, and unduly burdensome rule the State has adopted to reduce its alleged donor misperception, more benign and narrowly tailored options are available. For example, as a general rule, the State may itself publish the detailed financial disclosure forms it requires professional fundraisers to file. This procedure would communicate the desired information to the public without burdening a speaker with unwanted speech during the course of a solicitation. Alternatively, the State may vigorously enforce its antifraud laws to prohibit professional fundraisers from obtaining money on false pretenses or by making false statements. These more narrowly tailored rules are in keeping with the First Amendment directive that government not dictate the content of speech absent compelling necessity, and then, only by means precisely tailored.

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[12] The figure chosen by the State for disclosure is curious. First, it concerns unrelated past solicitations without regard for whether they are similar to the solicitation occurring at the time of disclosure. Thus, the high percentage of retained fees for past dinner-dance fundraisers must be disclosed to potential contributors during a less expensive door-to-door solicitation. Second, the figure does not separate out the costs and expenses of prior solicitations, such as printing, even though these expenses must also be borne by charities not subject to the disclosure requirement (*i. e.*, those engaging in employee or volunteer staffed campaigns). The use of the "gross" percentage is even more curious in light of the fact that most contracts between the solicitor and the charity provide for a fee based on the percentage of "net" funds collected (*i. e.*, the gross funds collected less costs), making this more relevant figure far easier to come by. Brief for Appellants 15.

E. g., *Consolidated Edison Co.* v. *Public Service Comm'n of New York*, 447 U. S. 530, 537–538 (1980). "Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP* v. *Button*, 371 U. S. 415, 438 (1963) (citations omitted).

IV

Finally, we address the licensing requirement. This provision requires professional fundraisers to await a determination regarding their license application before engaging in solicitation, while volunteer fundraisers, or those employed by the charity, may solicit immediately upon submitting an application.

Given our previous discussion and precedent, it will not do simply to ignore the First Amendment interest of professional fundraisers in speaking. It is well settled that a speaker's rights are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak. *E. g.*, *New York Times Co.* v. *Sullivan*, 376 U. S., at 265–266. And the State's asserted power to license professional fundraisers carries with it (unless properly constrained) the power directly and substantially to affect the speech they utter. Consequently, the statute is subject to First Amendment scrutiny. See *Lakewood* v. *Plain Dealer Publishing Co.*, 486 U. S. 750, 755–756 (1988) (when a State enacts a statute requiring periodic licensing of speakers, at least when the law is directly aimed at speech, it is subject to First Amendment scrutiny to ensure that the licensor's discretion is suitably confined).[13]

[13] Even were we to focus only on the charities' First Amendment interest here, we still could not adopt the dissent's reasoning, for its logic in that regard necessarily depends on the premise that professional fundraisers are interchangeable from the charities' vantage. There is no reason to believe that is so. Fundraisers may become associated with particular clients or causes. Regulating these fundraisers with the heavy hand that unbridled discretion allows affects the speech of the clients or causes with

Generally, speakers need not obtain a license to speak. However, that rule is not absolute. For example, States may impose valid time, place, or manner restrictions. See *Cox* v. *New Hampshire*, 312 U. S. 569 (1941). North Carolina seeks to come within the exception by alleging a heightened interest in regulating those who solicit money. Even assuming that the State's interest does justify requiring fundraisers to obtain a license before soliciting, such a regulation must provide that the licensor "will, within a specified brief period, either issue a license or go to court." *Freedman* v. *Maryland*, 380 U. S. 51, 59 (1965). That requirement is not met here, for the Charitable Solicitations Act (as amended) permits a delay without limit. The statute on its face does not purport to require when a determination must be made, nor is there an administrative regulation or interpretation doing so. The State argues, though, that its history of issuing licenses quickly constitutes a practice effectively constraining the licensor's discretion. See *Poulos* v. *New Hampshire*, 345 U. S. 395 (1953). We cannot agree. The history to which the State refers relates to the period before the 1985 amendments, at which time professional fundraisers were permitted to solicit as soon as their applications were filed. Then, delay permitted the speaker's speech; now, delay compels the speaker's silence. Under these circumstances, the licensing provision cannot stand.[14]

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which they are associated. Nor are we persuaded by the dissent's assertion that this statute merely licenses a profession, and therefore is subject only to rationality review. Although Justice Jackson did express his view that solicitors could be licensed, a proposition not before us, he never intimated that the licensure was devoid of all First Amendment implication. *Thomas* v. *Collins*, 323 U. S. 516, 544–545 (1945) (Jackson, J., concurring).

[14] In addition, appellees assert that the Secretary of State has unbridled discretion to grant or deny a license, and that the differential treatment of professional and nonprofessional fundraisers denies them equal protection of the laws. In light of our conclusion that the licensing provision is unconstitutional on other grounds, we do not reach these questions.

V

We hold that the North Carolina Charitable Solicitations Act is unconstitutional in the three respects before us. Accordingly, the judgment of the Court of Appeals is

Affirmed.

JUSTICE SCALIA, concurring in part and concurring in judgment.

We have held the solicitation of money by charities to be fully protected as the dissemination of ideas. See *ante*, at 787–789; *Secretary of State of Maryland* v. *Joseph H. Munson Co.*, 467 U. S. 947, 959–961 (1984); *Schaumburg* v. *Citizens for a Better Environment*, 444 U. S. 620, 628–632 (1980). It is axiomatic that, although fraudulent misrepresentation of facts can be regulated, cf. *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), the dissemination of ideas cannot be regulated to prevent it from being unfair or unreasonable, see, *e. g.*, *Hustler Magazine, Inc.* v. *Falwell*, 485 U. S. 46, 51, 54, 57 (1988); *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241, 256–258 (1974); *Organization for a Better Austin* v. *Keefe*, 402 U. S. 415, 419 (1971); *Kingsley International Pictures Corp.* v. *Regents of University of New York*, 360 U. S. 684, 688–689 (1959); *Baumgartner* v. *United States*, 322 U. S. 665, 673–674 (1944). Because the opinion of the Court, except for footnote 11, is consistent with this principle, I join all of the opinion with that exception.

As to the last two sentences of that footnote, which depart from the case at hand to make a pronouncement upon a situation that is not before us, I do not see how requiring the professional solicitor to disclose his professional status is narrowly tailored to prevent fraud. Where core First Amendment speech is at issue, the State can assess liability for specific instances of deliberate deception, but it cannot impose a prophylactic rule requiring disclosure even where misleading statements are not made. Cf. *Landmark Communications, Inc.* v. *Virginia*, 435 U. S. 829, 843–844 (1978).

Since donors are assuredly aware that a portion of their donations may go to solicitation costs and other administrative expenses—whether the solicitor is a professional, an in-house employee, or even a volunteer—it is not misleading in the great mass of cases for a professional solicitor to request donations "for" a specific charity without announcing his professional status. Compensatory employment is, I would judge, the natural order of things, and one would expect *volunteer* solicitors to announce that status as a selling point.

The dictum in footnote 11 represents a departure from our traditional understanding, embodied in the First Amendment, that where the dissemination of ideas is concerned, it is safer to assume that the people are smart enough to get the information they need than to assume that the government is wise or impartial enough to make the judgment for them.

JUSTICE STEVENS, concurring in part and dissenting in part.

Although I join Parts I, II, and III of the Court's opinion, I agree with THE CHIEF JUSTICE that the licensing provisions in the North Carolina statute do not impose a significant burden on the charities' ability to speak and that there is no evidence suggesting that the State will be dilatory in the processing of license applications. Thus, I respectfully dissent from Part IV of the Court's opinion.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE O'CONNOR joins, dissenting.

I

In 1980 this Court held invalid an ordinance enacted by a suburb of Chicago regulating the percentage of the gross amount of money raised by charitable solicitors which might be used for the cost of conducting the solicitation. *Schaumburg* v. *Citizens for a Better Environment*, 444 U. S. 620. In an effort to comply with that decision, Maryland enacted a statute forbidding charities to contract with professional fundraisers in such a way as would allow the fundraisers to

retain more than 25% of the money collected. Even though an administrative official was empowered to waive this requirement when its imposition would effectively prevent the charitable organization from raising money, the Court nonetheless invalidated the statute. *Secretary of State of Maryland* v. *Joseph H. Munson Co.*, 467 U. S. 947 (1984). Following the decision in *Munson*, North Carolina revised its Charitable Solicitations Act to contain the provisions described in the opinion of the Court today. The Court now invalidates the North Carolina provisions as well.

The Court's opinion in *Schaumburg* relied on the seminal cases of *Lovell* v. *Griffin*, 303 U. S. 444 (1938), *Schneider* v. *State*, 308 U. S. 147 (1939), and *Martin* v. *Struthers*, 319 U. S. 141 (1943), as establishing the right of charitable solicitors under the First Amendment to be free from burdensome governmental regulation. It is interesting to compare the activities of the three "solicitors" in those cases with the activities of professional fundraisers in cases like the present one. In *Lovell*, for example, appellant was convicted for distributing a religious pamphlet and a magazine called the "Golden Age" without a permit. 303 U. S., at 450. In *Schneider*, the evidence showed that one of the petitioners was a "Jehovah's Witness" who canvassed house-to-house seeking to leave behind some literature and to obtain contributions to defray the cost of printing additional literature for others. 308 U. S., at 158. In *Martin*, the appellant was also a Jehovah's Witness, who went door-to-door distributing to residents of homes leaflets advertising a religious meeting. 319 U. S., at 142.

These activities are a far cry indeed from the activities of professional solicitors such as those involved in *Munson* and the present case. In *Munson*, the plaintiff, an Indiana corporation, was "a professional for-profit fundraiser in the business of promoting fundraising events and giving advice to customers on how those events should be conducted. Its Maryland customers include[d] various chapters of the Fra-

ternal Order of Police." 467 U. S., at 950. The professional fundraisers in the present case presumably operate in the same manner. Yet the Court obdurately refuses to allow the various States which have legislated in this area to distinguish between the sort of incidental fundraising involved in *Lovell*, *Schneider*, and *Martin* on the one hand, and the entirely commercial activities of people whose job is, simply put, figuring out how to raise money for charities.

The Court has recognized that the commercial aspects of newsgathering and publishing are different from the editorial function, and has upheld regulation of the former against claims based on the First Amendment. A newsgathering organization is subject to the provisions of the National Labor Relations Act, *Associated Press* v. *NLRB*, 301 U. S. 103 (1937); a newspaper is subject to the antitrust laws, *Indiana Farmer's Guide Publishing Co.* v. *Prairie Farmer Publishing Co.*, 293 U. S. 268 (1934), as well as the provisions of the Fair Labor Standards Act, *Smith* v. *Evening News Assn.*, 371 U. S. 195 (1962). It seems to me that the vaguely defined activity of "charitable solicitation," when pursued by professional fundraisers such as are involved in this case, deserves no more favorable treatment.

II

But even accepting that *Schaumburg* and *Munson* were rightly decided, I cannot join in the extension of their principles to the North Carolina statute involved here. This Act provides, at its heart, only that no professional fundraiser may charge a charity "an excessive and unreasonable fundraising fee." N. C. Gen. Stat. § 131C–17.2(a) (1986). Unlike the statute at issue in *Schaumburg*, which directly prevented charities from soliciting donations unless they could show that 75% of the proceeds were used for charitable purposes, 444 U. S., at 624, the fee provisions of this Act put no direct burden on the charities themselves. And, unlike the Maryland statute in *Munson*, the fee provisions are designed

to allow the professional fundraiser whose fees are challenged to introduce evidence that the fees were in fact reasonable under the circumstances. In my view, the distinctions between the statute in this case and those in *Munson* and *Schaumburg* are crucial to the proper First Amendment analysis of the Act, for they make this Act both less burdensome on the protected speech activities of charitable organizations and more carefully tailored to the interests that the State is trying to serve by regulating fundraising fees.

First, as to the nature of the burden on protected speech: The Court today concludes flatly that "this regulation burdens speech, and must be considered accordingly." *Ante*, at 790. As far as I know, this Court has never held that an economic regulation with some impact on protected speech, no matter how small or indirect, must be subjected to strict scrutiny under the First Amendment. The only burden on speech identified in the Court's opinion is that professional fundraisers may be "chill[ed]" by the risk that if they charge more than 20% of the gross they may be required to show that the fee they charged was reasonable. The Court speculates that this "chill" will "drive professional fundraisers out of North Carolina" or induce them to cease certain types of fundraising. *Ante*, at 794. Of course, it is undeniable that a price control regulation—which is what these fee provisions are, in essence—will have some impact on the supply of the services whose prices are being regulated. See *Munson*, *supra*, at 979 (REHNQUIST, J., dissenting). But to say that professional fundraisers will be driven from the State is the rankest speculation; they may be a far doughtier breed than the Court realizes. I am unwilling to say, on this extremely bare record, that a statute prohibiting a professional fundraiser from charging fees that are "unreasonable and excessive" will have the sort of impact on the availability of fundraising services that the Court hypothesizes. The plaintiffs in this case had an opportunity to put in evidence in the District Court to this effect, but did not do so; we should not

substitute our guesswork as to the economic consequences of the regulation for a conclusion that ought to be deduced from evidence.

I believe that on this record the minimal burden on speech resulting from the statute can be characterized as remote or incidental, and that therefore there is no reason to apply "heightened scrutiny" to the regulation of fees charged by the professional fundraisers. The fee provisions of the Act are rationally related to the State's legitimate interests in preventing fraud on potential donors and protecting against overcharging of charities by professional fundraisers.

Even if heightened scrutiny should apply, the fee provisions in the North Carolina statute in my view still survive. This Court has never indicated that the State's interest in preventing fraud would not be sufficient to support a narrowly tailored regulation of fees. See *Schaumburg*, 444 U. S., at 636–637; *Munson*, 467 U. S., at 961. Here, the State asserts the additional interest of "promot[ing] the efficient transmission of the public's money to the charity through the medium of the for-profit, professional fundraiser," Reply Brief for Appellants 3, or as I put it in *Munson*, protecting the "expectations of the donor who thinks that his money will be used to benefit the charitable purpose in the name of which the money was solicited," 467 U. S., at 980, n. 2.[1]

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[1] I find it hard to understand the Court's complaint that the statute's attempts to encourage charity and charitable contributions and to maximize the funds that flow to charities are based on "the paternalistic premise that charities' speech must be regulated for their own benefit," *ante*, at 790. All economic regulation of this sort is "paternalistic" in the sense that it prevents parties who wish to contract with one another from entering into a contract on precisely the terms that they would choose. But ever since *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379 (1937), finally overruled *Lochner* v. *New York*, 198 U. S. 45 (1905), and *Adkins* v. *Children's Hospital*, 261 U. S. 525 (1923), "paternalism" has been a perfectly acceptable motive for legislative regulation of this sort. *Olsen* v. *Nebraska ex rel. Western Reference & Bond Assn., Inc.*, 313 U. S. 236, 246 (1941).

In determining whether the North Carolina statute narrowly serves these interests, it is important to note that the statute does not impose a blanket prohibition upon fees that exceed a certain proportion of gross receipts, as did the statute in *Munson*.[2] The basic judgment for the trier-of-fact under the fee provisions is whether the fee is "reasonable." This determination is made not only in light of the percentages, but also in light of such factors as whether the solicitation "involve[s] the dissemination of information, discussion, or advocacy relating to public issues as directed by the [charity] which is to benefit from the solicitation," §§ 131C–17.2(c), (d)(1), and whether the ability of the charity to "raise money or communicate its ideas, opinions, and positions to the public would be significantly diminished" by the charging of a lower fee, § 131C–17.2(d)(2).

The inclusion of these factors in the "reasonableness" determination of the factfinder protects against the vices of the fixed-percentage scheme struck down in *Munson*. The limited waiver of the 25% limitation in *Munson* was found unacceptable because the statute gave the State "no discretion to determine that reasons other than financial necessity warrant a waiver." 467 U. S., at 963. This meant that organizations whose high solicitation costs were a result of the dissemination of information would not be able to obtain waivers and would thus be prevented by the 25% limitation from hiring professional fundraisers. *Id.*, at 963–964. No such problem exists here: the statute mandates that First Amendment considerations such as the desire to disseminate information and the ability of the charity to get its message across be taken into account by the factfinder in determining

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[2] Neither *Schaumburg* nor *Munson* holds that the "percentage of gross receipts" figure is *irrelevant* to the question whether a particular fee is unreasonable or fraudulent. See *Munson*, 467 U. S., at 961, 966, and n. 14. The problem with the figure was that, standing alone, it was "simply too imprecise an instrument to accomplish" the end of preventing fraud. *Id.*, at 961.

reasonableness. Thus, unlike the statute in *Munson*, it cannot be said that the reasonableness limitation is overbroad, as the North Carolina statute is designed and carefully tailored to avoid any restrictions on "First Amendment activity that results in high costs but is itself a part of the charity's goal or that is simply attributable to the fact that the charity's cause proves to be unpopular," *Munson*, *supra*, at 967. In my view, the fee provisions of the statute thus satisfy the constitutional requirement that it be narrowly tailored to serve the State's compelling interests. I would reverse the judgment of the Court of Appeals on this issue.

III

The next part of the statute to be considered is the requirement of the Act that the fundraiser disclose to the potential donor "the percentage of charitable contributions collected during the previous 12 months that were actually turned over to charity," *ante*, at 795.[3] The asserted purpose of this provision is to "better inform the donating public as to where its money will go" in order to assist the potential donor in making the decision whether to donate. Brief for Appellants 17. The Court concludes, after a lengthy discussion of the constitutionality of "compelled statements," that strict scrutiny

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[3] In the words of the statute, the fundraiser must disclose "[t]he average of the percentage of gross receipts actually paid to [charities] by the professional fund-raising counsel or professional solicitor conducting the solicitation for all charitable sales promotions conducted in this State by that [fundraiser] for the past 12 months, or for all completed charitable sales promotions where the [fundraiser] has been soliciting funds for less than 12 months." N. C. Gen. Stat. § 131C–16.1(3) (1986).

The statute also contains several other disclosure provisions that are not at issue in this appeal, including a requirement that the professional fundraiser disclose his name, his employer, and his employer's address to potential donors, §§ 131C–16.1(1)–(2), and a requirement that any person subject to licensure under the Act disclose upon request "his percentage of fund-raising expenses and the purpose of the organization," N. C. Gen. Stat. § 131C–16 (1986).

should be applied and that the statute does not survive that scrutiny. I disagree.

This statute requires only that the professional solicitor disclose certain relevant and verifiable facts to the potential donor. Although the disclosure must occur at some point in the context of the solicitation (which can be either oral or written), it is directly analogous to mandatory disclosure requirements that exist in other contexts, such as securities transactions. In my view, the required disclosure of true facts in the course of what is at least in part a "commercial" transaction—the solicitation of money by a professional fundraiser—does not necessarily create such a burden on core protected speech as to require that strict scrutiny be applied. Indeed, it seems to me that even in cases where the solicitation involves dissemination of a "message" by the charity (through the fundraiser), the disclosure required by the statute at issue here will have little, if any, effect on the message itself, though it may have an effect on the potential donor's desire to contribute financially to the cause.

Of course, the percentage of previous collections turned over to charities is only a very rough surrogate for the percentage of collections which will be turned over by the fundraiser in the particular drive in question. The State's position would be stronger if either in the legislative history or in the testimony in the District Court there was some showing that the percentage charged by any particular fundraiser does not vary greatly from one drive to another. Nonetheless, because the statute is aimed at the commercial aspect of the solicitation, and because the State's interests in enacting the disclosure requirements are sufficiently strong, I cannot conclude that the First Amendment prevents the State from imposing the type of disclosure requirement involved here, at least in the absence of a showing that the effect of the disclosure is is to dramatically limit contributions or impede a charity's ability to disseminate ideas or information. But, again, we have nothing but speculation to guide

us here, since neither party offered any evidence as to how this provision would operate when the statute went into effect. On this state of the record, and considering the rule that "[w]hen a statute is assailed as unconstitutional we are bound to assume the existence of any state of facts which would sustain the statute in whole or in part," *Alabama Federation of Labor* v. *McAdory*, 325 U. S. 450, 465 (1945), I would uphold this provision.

IV

The final issue raised here is the validity of the licensing provisions contained in the North Carolina statute. It is beyond dispute that the statute differentiates between professional fundraisers and volunteer or in-house fundraisers; the former may not engage in solicitation until their license application is accepted, while the latter may. But this fact alone does not impose an impermissible burden on protected speech, nor does it require that the licensing provisions be subjected to strict scrutiny.

For one thing, the requirement that a professional fundraiser apply for and receive a license before being allowed to solicit donations does not put any burden on the *charities'* ability to speak. Even if the charity is one that typically relies on professional fundraisers, the effect of the statute is to require only that the fundraiser the charity hires is a fundraiser who has been licensed by the State. While this effect may limit to some degree the charity's ability to hire whomever it chooses as its professional fundraiser, it will still be able to choose from other, licensed professionals and obtain their assistance in soliciting donations.[4] To the extent,

[4] There is absolutely no basis in the record to conclude that the licensing and registration requirements of the Act are so onerous that they would drive professional fundraisers out of the State to such an extent that there would be none left for a charity to hire. If there were such evidence, then I would certainly agree that the licensing provisions did have the effect of restricting speech by charities, at least for those charities who rely heavily on professional fundraising.

then, that the licensing provisions have a burden on speech, it is one that truly can be said to be incidental.[5] In addition, it is a burden that is countenanced in other circumstances without any suggestion that some type of heightened scrutiny should apply. For example, bar admission requirements may have some incidental effect on First Amendment protected activity by restricting a petitioner's right to hire whomever he pleases to serve as his attorney, but we have never suggested that state regulation of admission to the bar should generally be subject to strict scrutiny. In my view, then, requiring a professional fundraiser to wait until its license is approved before engaging in solicitation does not create a sufficiently significant burden on speech by charities that it should be reviewed under any more exacting standard than that which is typically applied to state occupational licensing requirements.

Nor do I think that heightened scrutiny should apply because the statute allegedly has some effect on speech by the professional fundraisers themselves. It simply is not true that in this case the fundraisers are prevented from engaging in any protected speech on their own behalf by the State's licensing requirements; the requirements only restrict their ability to engage in the profession of "solicitation" without a license. We do not view bar admission requirements as invalid because they restrict a prospective lawyer's "right" to be hired as an advocate by a client. So in this case we should not subject to strict scrutiny the State's attempt to license a business—professional fundraising—some of whose members might reasonably be thought to pose a risk of fraudulent activity. As Justice Jackson put it:

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[5] Indeed, the record also indicates that even if the charity decides to wait until the licensing proceedings are complete in order to hire a specific fundraiser, the charity will not have long to wait. See App. 58–62. The speed with which licensing proceedings have been handled by the State in the past belies appellees' claim that the waiting period for professional fundraisers has a chilling effect on the charities' right to speak.

> "The modern state owes and attempts to perform a duty to protect the public from those who seek for one purpose or another to obtain its money. When one does so through the practice of a calling, the state may have an interest in shielding the public against the untrustworthy, the incompetent, or the irresponsible, or against unauthorized representation of agency. A usual method of performing this function is through a licensing system." *Thomas* v. *Collins*, 323 U. S. 516, 545 (1945) (concurring opinion).

In this case, the North Carolina statute's requirement that professional solicitors wait for a license before engaging in any solicitation is rationally related to the State's interest in protecting the public and the charities themselves. The State could reasonably have concluded that professional solicitors pose a greater risk of fraud, see, *e. g.*, App. 60, making it more important that the State have an opportunity to review their license applications before they are allowed to engage in solicitation. Presumably, there is less of a risk that a charity will be defrauded or cheated by volunteer fundraisers and fundraisers who are themselves employed by the charity, as these individuals are more likely to be known to the charity. See *New Orleans* v. *Dukes*, 427 U. S. 297 (1976). I would, accordingly, uphold the licensing provisions of the statute notwithstanding its different treatment of volunteers and professionals.

Syllabus

THOMPSON *v.* OKLAHOMA

CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF OKLAHOMA

No. 86–6169. Argued November 9, 1987—Decided June 29, 1988

Petitioner, when he was 15 years old, actively participated in a brutal murder. Because petitioner was a "child" as a matter of Oklahoma law, the District Attorney filed a statutory petition seeking to have him tried as an adult, which the trial court granted. He was then convicted and sentenced to death, and the Court of Criminal Appeals of Oklahoma affirmed.

Held: The judgment is vacated and the case is remanded.

724 P. 2d 780, vacated and remanded.

JUSTICE STEVENS, joined by JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN, concluded that the "cruel and unusual punishments" prohibition of the Eighth Amendment, made applicable to the States by the Fourteenth Amendment, prohibits the execution of a person who was under 16 years of age at the time of his or her offense. Pp. 821–838.

(a) In determining whether the categorical Eighth Amendment prohibition applies, this Court must be guided by the "evolving standards of decency that mark the progress of a maturing society," *Trop* v. *Dulles*, 356 U. S. 86, 101, and, in so doing, must review relevant legislative enactments and jury determinations and consider the reasons why a civilized society may accept or reject the death penalty for a person less than 16 years old at the time of the crime. Pp. 821–823.

(b) Relevant state statutes—particularly those of the 18 States that have expressly considered the question of a minimum age for imposition of the death penalty, and have uniformly required that the defendant have attained at least the age of 16 at the time of the capital offense—support the conclusion that it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense. That conclusion is also consistent with the views expressed by respected professional organizations, by other nations that share the Anglo-American heritage, and by the leading members of the Western European community. Pp. 823–831.

(c) The behavior of juries—as evidenced by statistics demonstrating that, although between 18 and 20 persons under the age of 16 were executed during the first half of the 20th century, no such execution has taken place since 1948 despite the fact that thousands of murder cases

were tried during that period, and that only 5 of the 1,393 persons sentenced to death for willful homicide during the years 1982 through 1986 were less than 16 at the time of the offense—leads to the unambiguous conclusion that the imposition of the death penalty on a 15-year-old offender is now generally abhorrent to the conscience of the community. Pp. 831–833.

(d) The juvenile's reduced culpability, and the fact that the application of the death penalty to this class of offenders does not measurably contribute to the essential purposes underlying the penalty, also support the conclusion that the imposition of the penalty on persons under the age of 16 constitutes unconstitutional punishment. This Court has already endorsed the proposition that less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult, since inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult. Cf. *Bellotti* v. *Baird*, 443 U. S. 622; *Eddings* v. *Oklahoma*, 455 U. S. 104. Given this lesser culpability, as well as the teenager's capacity for growth and society's fiduciary obligations to its children, the retributive purpose underlying the death penalty is simply inapplicable to the execution of a 15-year-old offender. Moreover, the deterrence rationale for the penalty is equally unacceptable with respect to such offenders, since statistics demonstrate that the vast majority of persons arrested for willful homicide are over 16 at the time of the offense, since the likelihood that the teenage offender has made the kind of cold-blooded, cost-benefit analysis that attaches any weight to the possibility of execution is virtually nonexistent, and since it is fanciful to believe that a 15-year-old would be deterred by the knowledge that a small number of persons his age have been executed during the 20th century. Pp. 833–838.

JUSTICE O'CONNOR concluded that:

1. Although a national consensus forbidding the execution of any person for a crime committed before the age of 16 very likely does exist, this conclusion should not unnecessarily be adopted as a matter of constitutional law without better evidence than is before the Court. The fact that the 18 legislatures that have expressly considered the question have set the minimum age for capital punishment at 16 or above, coupled with the fact that 14 other States have rejected capital punishment completely, suggests the existence of a consensus. However, the Federal Government and 19 States have authorized capital punishment without setting any minimum age, and have also provided for some 15-year-olds to be prosecuted as adults. These laws appear to render 15-year-olds death eligible, and thus pose a real obstacle to finding a consensus.

Moreover, although the execution and sentencing statistics before the Court support the inference of a consensus, they are not dispositive because they do not indicate how many juries have been asked to impose the death penalty on juvenile offenders or how many times prosecutors have exercised their discretion to refrain from seeking the penalty. Furthermore, granting the premise that adolescents are generally less blameworthy than adults who commit similar crimes, it does not necessarily follow that all 15-year-olds are incapable of the moral culpability that would justify the imposition of capital punishment. Nor is there evidence that 15-year-olds as a class are inherently incapable of being deterred from major crimes by the prospect of the death penalty. Thus, there is the danger that any inference of a societal consensus drawn from the evidence in this case might be mistaken. Rather than rely on its inevitably subjective judgment about the best age at which to draw a line forbidding capital punishment, this Court should if possible await the express judgments of additional legislatures. Pp. 849–855.

2. Petitioner's sentence must be set aside on the ground that—whereas the Eighth Amendment requires special care and deliberation in decisions that may lead to the imposition of the death penalty—there is considerable risk that, in enacting a statute authorizing capital punishment for murder without setting any minimum age, and in separately providing that juvenile defendants may be treated as adults in some circumstances, the Oklahoma Legislature either did not realize that its actions would effectively render 15-year-olds death eligible or did not give the question the serious consideration that would have been reflected in the explicit choice of a particular minimum age. Because the available evidence suggests a national consensus forbidding the imposition of capital punishment for crimes committed before the age of 16, petitioner and others whose crimes were committed before that age may not be executed pursuant to a capital punishment statute that specifies no minimum age. Pp. 856–859.

STEVENS, J., announced the judgment of the Court and delivered an opinion in which BRENNAN, MARSHALL, and BLACKMUN, JJ., joined. O'CONNOR, J., filed an opinion concurring in the judgment, *post*, p. 848. SCALIA, J., filed a dissenting opinion, in which REHNQUIST, C. J., and WHITE, J., joined, *post*, p. 859. KENNEDY, J., took no part in the consideration or decision of the case.

Harry F. Tepker, Jr., by appointment of the Court, 480 U. S. 929, argued the cause for petitioner. With him on the briefs was *Victor L. Streib*.

David W. Lee argued the cause for respondent. With him on the brief were *Robert H. Henry*, Attorney General of Oklahoma, and *William H. Luker*, *Susan Stewart Dickerson*, *Sandra D. Howard*, and *M. Caroline Emerson*, Assistant Attorneys General.*

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

Petitioner was convicted of first-degree murder and sentenced to death. The principal question presented is whether the execution of that sentence would violate the constitutional prohibition against the infliction of "cruel and unusual punish-

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*Briefs of *amici curiae* urging reversal were filed for the Child Welfare League of America et al. by *Randy Hertz* and *Martin Guggenheim;* and for the International Human Rights Law Group by *Robert H. Kapp.*

A brief of *amicus curiae* urging affirmance was filed for Kentucky et al. by *David L. Armstrong*, Attorney General of Kentucky, and *David A. Smith* and *Virgil W. Webb III*, Assistant Attorneys General, and by the Attorneys General for their respective States as follows: *Don Siegelman* of Alabama, *Robert K. Corbin* of Arizona, *John Steven Clark* of Arkansas, *John J. Kelly* of Connecticut, *Charles M. Oberly* of Delaware, *Robert Butterworth* of Florida, *Jim Jones* of Idaho, *Robert T. Stephan* of Kansas, *Edwin L. Pittman* of Mississippi, *William L. Webster* of Missouri, *Mike Greely* of Montana, *Brian McKay* of Nevada, *Hal Stratton* of New Mexico, *Lacy H. Thornburg* of North Carolina, *LeRoy S. Zimmerman* of Pennsylvania, *Travis Medlock* of South Carolina, *David L. Wilkinson* of Utah, *Mary Sue Terry* of Virginia, and *Joseph B. Meyer* of Wyoming.

Briefs of *amici curiae* were filed for the American Bar Association by *Eugene C. Thomas*, *Andrew J. Shookhoff*, and *Steven H. Goldblatt;* for the American Society for Adolescent Psychiatry et al. by *Joseph T. McLaughlin*, *Jeremy G. Epstein*, and *Henry Weisburg;* for Amnesty International by *Paul L. Hoffman*, *Joan W. Howarth*, *Joan F. Hartman*, *Mary E. McClymont*, and *John E. Osborn;* for Defense for Children International-USA by *Anna Mamalakis Pappas;* for the National Legal Aid and Defender Association et al. by *James E. Coleman, Jr.*, and *Michael A. Mello;* and for the Office of the State Appellate Defender of Illinois by *Theodore Gottfried.*

ments"[1] because petitioner was only 15 years old at the time of his offense.

I

Because there is no claim that the punishment would be excessive if the crime had been committed by an adult, only a brief statement of facts is necessary. In concert with three older persons, petitioner actively participated in the brutal murder of his former brother-in-law in the early morning hours of January 23, 1983. The evidence disclosed that the victim had been shot twice, and that his throat, chest, and abdomen had been cut. He also had multiple bruises and a broken leg. His body had been chained to a concrete block and thrown into a river where it remained for almost four weeks. Each of the four participants was tried separately and each was sentenced to death.

Because petitioner was a "child" as a matter of Oklahoma law,[2] the District Attorney filed a statutory petition, see Okla. Stat., Tit. 10, § 1112(b) (1981), seeking an order finding "that said child is competent and had the mental capacity to know and appreciate the wrongfulness of his [conduct]." App. 4. After a hearing, the trial court concluded "that there are virtually no *reasonable* prospects for rehabilitation of William Wayne Thompson within the juvenile system and

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[1] The Eighth Amendment provides:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

This proscription must be observed by the States as well as the Federal Government. See, *e. g.*, *Robinson* v. *California*, 370 U. S. 660 (1962).

[2] Oklahoma Stat., Tit. 10, § 1101(1) (Supp. 1987) provides:

"'Child' means any person under eighteen (18) years of age, except for any person sixteen (16) or seventeen (17) years of age who is charged with murder, kidnapping for purposes of extortion, robbery with a dangerous weapon, rape in the first degree, use of a firearm or other offensive weapon while committing a felony, arson in the first degree, burglary with explosives, shooting with intent to kill, manslaughter in the first degree, or nonconsensual sodomy."

that William Wayne Thompson should be held accountable for his acts as if he were an adult and should be certified to stand trial as an adult." *Id.*, at 8 (emphasis in original).

At the guilt phase of petitioner's trial, the prosecutor introduced three color photographs showing the condition of the victim's body when it was removed from the river. Although the Court of Criminal Appeals held that the use of two of those photographs was error,[3] it concluded that the error was harmless because the evidence of petitioner's guilt was so convincing. However, the prosecutor had also used the photographs in his closing argument during the penalty phase. The Court of Criminal Appeals did not consider whether this display was proper.

At the penalty phase of the trial, the prosecutor asked the jury to find two aggravating circumstances: that the murder was especially heinous, atrocious, or cruel; and that there was a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society. The jury found the first, but not the second, and fixed petitioner's punishment at death.

The Court of Criminal Appeals affirmed the conviction and sentence, 724 P. 2d 780 (1986), citing its earlier opinion in *Eddings* v. *State*, 616 P. 2d 1159 (1980), rev'd on other grounds, 455 U. S. 104 (1982), for the proposition that "once a minor is certified to stand trial as an adult, he may also, without violating the Constitution, be punished as an adult." 724 P. 2d, at 784. We granted certiorari to consider whether a sentence of death is cruel and unusual punishment for a crime committed by a 15-year-old child, as well as whether

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[3] "The other two color photographs . . . were gruesome. Admitting them into evidence served no purpose other than to inflame the jury. We do not understand why an experienced prosecutor would risk reversal of the whole case by introducing such ghastly, color photographs with so little probative value. We fail to see how they could possibly assist the jury in the determination of defendant's guilt. The trial court's admission of these two photographs was error." 724 P. 2d 780, 782–783 (1986).

photographic evidence that a state court deems erroneously admitted but harmless at the guilt phase nevertheless violates a capital defendant's constitutional rights by virtue of its being considered at the penalty phase. 479 U. S. 1084 (1987).

II

The authors of the Eighth Amendment drafted a categorical prohibition against the infliction of cruel and unusual punishments, but they made no attempt to define the contours of that category. They delegated that task to future generations of judges who have been guided by the "evolving standards of decency that mark the progress of a maturing society." *Trop* v. *Dulles*, 356 U. S. 86, 101 (1958) (plurality opinion) (Warren, C. J.).[4] In performing that task the

[4] That Eighth Amendment jurisprudence must reflect "evolving standards of decency" was settled early this century in the case of *Weems* v. *United States*, 217 U. S. 349 (1910). The Court held that a sentence of 15 years of hard, enchained labor, plus deprivation of various civil rights and perpetual state surveillance, constituted "cruel and unusual punishment" under the Bill of Rights of the Philippines (then under United States control). Premising its opinion on the synonymity of the Philippine and United States "cruel and unusual punishments" clauses, the Court wrote:

"Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gives it birth.

. . . . .

"The [cruel and unusual punishments clause] in the opinion of the learned commentators may be therefore progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." *Id.*, at 373–374, 378.

See also *Ollman* v. *Evans*, 242 U. S. App. D. C. 301, 326–327, 750 F. 2d 970, 995–996 (1984) (en banc) (Bork, J., concurring):

"Judges given stewardship of a constitutional provision . . . whose core is known but whose outer reach and contours are ill-defined, face the never-ending task of discerning the meaning of the provision from one case to the next. There would be little need for judges—and certainly no office for a philosophy of judging—if the boundaries of every constitutional provision were self-evident. They are not. . . . [I]t is the task of the judge in this generation to discern how the framers' values, defined in the context of the

Court has reviewed the work product of state legislatures and sentencing juries,[5] and has carefully considered the reasons why a civilized society may accept or reject the death penalty in certain types of cases. Thus, in confronting the question whether the youth of the defendant—more specifically, the fact that he was less than 16 years old at the time of his offense—is a sufficient reason for denying the State the power to sentence him to death, we first review relevant legislative enactments,[6] then refer to jury determinations,[7] and

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world they knew, apply to the world we know. The world changes in which unchanging values find their application. . . .

. . . . . .

"We must never hesitate to apply old values to new circumstances . . . . The important thing, the ultimate consideration, is the constitutional freedom that is given into our keeping. A judge who refuses to see new threats to an established constitutional value, and hence provides a crabbed interpretation that robs a provision of its full, fair and reasonable meaning, fails in his judicial duty."

[5] See, *e. g.*, *Woodson* v. *North Carolina*, 428 U. S. 280, 293 (1976) (plurality opinion) (Stewart, Powell, and STEVENS, JJ.); *Coker* v. *Georgia*, 433 U. S. 584, 593–597 (1977) (plurality opinion) (WHITE, J.); *Enmund* v. *Florida*, 458 U. S. 782, 789–796 (1982); *id.*, at 814 (legislative and jury statistics important in Eighth Amendment adjudication) (O'CONNOR, J., dissenting).

[6] See *Furman* v. *Georgia*, 408 U. S. 238, 277–279 (1972) (Court must look to objective signs of how today's society views a particular punishment) (BRENNAN, J., concurring); *Enmund* v. *Florida*, 458 U. S., at 789–793.

[7] Our capital punishment jurisprudence has consistently recognized that contemporary standards, as reflected by the actions of legislatures and juries, provide an important measure of whether the death penalty is "cruel and unusual." Part of the rationale for this index of constitutional value lies in the very language of the construed clause: whether an action is "unusual" depends, in common usage, upon the frequency of its occurrence or the magnitude of its acceptance.

The focus on the acceptability and regularity of the death penalty's imposition in certain kinds of cases—that is, whether imposing the sanction in such cases comports with contemporary standards of decency as reflected by legislative enactments and jury sentences—is connected to the insistence that statutes permitting its imposition channel the sentencing process toward nonarbitrary results. For both a statutory scheme that fails to guide jury discretion in a meaningful way, and a pattern of legislative en-

finally explain why these indicators of contemporary standards of decency confirm our judgment that such a young person is not capable of acting with the degree of culpability that can justify the ultimate penalty.[8]

III

Justice Powell has repeatedly reminded us of the importance of "the experience of mankind, as well as the long history of our law, recognizing that there *are* differences which must be accommodated in determining the rights and duties of children as compared with those of adults. Examples of this distinction abound in our law: in contracts, in torts, in criminal law and procedure, in criminal sanctions and rehabilitation, and in the right to vote and to hold office." *Goss* v. *Lopez*, 419 U. S. 565, 590–591 (1975) (dissenting opinion).[9] Oklahoma recognizes this basic distinction in a number of its statutes. Thus, a minor is not eligible to vote,[10] to sit on a jury,[11] to marry without parental consent,[12] or to purchase alcohol[13] or cigarettes.[14] Like all other States, Oklahoma

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actments or jury sentences revealing a lack of interest on the part of the public in sentencing certain people to death, indicate that contemporary morality is not really ready to permit the regular imposition of the harshest of sanctions in such cases.

[8] Thus, in explaining our conclusion that the death penalty may not be imposed for the crime of raping an adult woman, JUSTICE WHITE stated: "[T]he Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." *Coker* v. *Georgia*, 433 U. S., at 597.

[9] See also *New Jersey* v. *T. L. O.*, 469 U. S. 325, 350, n. 2 (1985) (Powell, J., concurring); *Burger* v. *Kemp*, 483 U. S. 776 (1987) (Powell, J., dissenting).

[10] Okla. Const., Art. 3, § 1.

[11] Okla. Stat., Tit. 38, § 28 (1981), and Okla. Const., Art. 3, § 1.

[12] Okla. Stat., Tit. 43, § 3 (1981).

[13] Okla. Stat., Tit. 21, § 1215 (1981).

[14] Okla. Stat., Tit. 21, § 1241 (Supp. 1987). Additionally, minors may not patronize bingo parlors or pool halls unless accompanied by an adult, Okla. Stat., Tit. 21, §§ 995.13, 1103 (1981), pawn property, Okla. Stat., Tit. 59, § 1511(C)(1) (1981), consent to services by health professionals for most medical care, unless married or otherwise emancipated, Okla. Stat., Tit.

has developed a juvenile justice system in which most offenders under the age of 18 are not held criminally responsible. Its statutes do provide, however, that a 16- or 17-year-old charged with murder and other serious felonies shall be considered an adult.[15] Other than the special certification procedure that was used to authorize petitioner's trial in this case "as an adult," apparently there are no Oklahoma statutes, either civil or criminal, that treat a person under 16 years of age as anything but a "child."

The line between childhood and adulthood is drawn in different ways by various States. There is, however, complete or near unanimity among all 50 States and the District of Columbia[16] in treating a person under 16 as a minor for several important purposes. In no State may a 15-year-old vote or serve on a jury.[17] Further, in all but one State a 15-year-old may not drive without parental consent,[18] and in all but four States a 15-year-old may not marry without parental consent.[19] Additionally, in those States that have legislated on the subject, no one under age 16 may purchase pornographic materials (50 States),[20] and in most States that have some form of legalized gambling, minors are not permitted to participate without parental consent (42 States).[21] Most relevant, however, is the fact that all States have enacted legislation designating the maximum age for juvenile court jurisdiction at no less than 16.[22] All of this legislation is con-

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63, § 2602 (1981), § 2601(a) (Supp. 1987), or operate or work at a shooting gallery, Okla. Stat., Tit. 63, § 703 (1984), and may disaffirm any contract, except for "necessaries," Okla. Stat., Tit. 15, §§ 19, 20 (1981).

[15] See n. 2, *supra;* cf. *Craig* v. *Boren*, 429 U. S. 190, 197 (1976).

[16] Henceforth, the opinion will refer to the 50 States *and* the District of Columbia as "States," for sake of simplicity.

[17] See Appendices A and B, *infra.*

[18] See Appendix C, *infra.*

[19] See Appendix D, *infra.*

[20] See Appendix E, *infra.*

[21] See Appendix F, *infra.*

[22] S. Davis, Rights of Juveniles: The Juvenile Justice System, Appendix B (1987). Thus, every State has adopted "a rebuttable presumption" that

sistent with the experience of mankind, as well as the long history of our law, that the normal 15-year-old is not prepared to assume the full responsibilities of an adult.[23]

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a person under 16 "is not mature and responsible enough to be punished as an adult," no matter how minor the offense may be. *Post*, at 859 (dissenting opinion).

[23] The law must often adjust the manner in which it affords rights to those whose status renders them unable to exercise choice freely and rationally. Children, the insane, and those who are irreversibly ill with loss of brain function, for instance, all retain "rights," to be sure, but often such rights are only meaningful as they are exercised by agents acting with the best interests of their principals in mind. See Garvey, Freedom and Choice in Constitutional Law, 94 Harv. L. Rev. 1756 (1981). It is in this way that paternalism bears a beneficent face, paternalism in the sense of a caring, nurturing parent making decisions on behalf of a child who is not quite ready to take on the fully rational and considered task of shaping his or her own life. The assemblage of statutes in the text above, from both Oklahoma and other States, reflects this basic assumption that our society makes about children as a class; we assume that they do not yet act as adults do, and thus we act in their interest by restricting certain choices that we feel they are not yet ready to make with full benefit of the costs and benefits attending such decisions. It would be ironic if these assumptions that we so readily make about children as a class—about their inherent difference from adults in their capacity as agents, as choosers, as shapers of their own lives—were suddenly unavailable in determining whether it is cruel and unusual to treat children the same as adults for purposes of inflicting capital punishment. Thus, informing the judgment of the Court today is the virtue of consistency, for the very assumptions we make about our children when we legislate on their behalf tells us that it is likely cruel, and certainly unusual, to impose on a child a punishment that takes as its predicate the existence of a fully rational, choosing agent, who may be deterred by the harshest of sanctions and toward whom society may legitimately take a retributive stance. As we have observed: "Children, by definition, are not assumed to have the capacity to take care of themselves. They are assumed to be subject to the control of their parents, and if parental control falters, the State must play its part as *parens patriae*." *Schall* v. *Martin*, 467 U. S. 253, 265 (1984); see also *May* v. *Anderson*, 345 U. S. 528, 536 (1953) (Frankfurter, J., concurring) ("Children have a very special place in life which law should reflect. Legal theories . . . lead to fallacious reasoning if uncritically transferred to determination of a State's duty towards children"); *Ginsberg* v. *New York*, 390 U. S. 629, 649–650 (1968) (Stewart, J., concurring in result) ("[A]t least in some precisely de-

Most state legislatures have not expressly confronted the question of establishing a minimum age for imposition of the death penalty.[24] In 14 States, capital punishment is not authorized at all,[25] and in 19 others capital punishment is au-

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lineated areas, a child . . . is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees. It is only upon such a premise . . . that a State may deprive children of other rights—the right to marry, for example, or the right to vote—deprivations that would be constitutionally intolerable for adults"); *Parham* v. *J. R.*, 442 U. S. 584, 603 (1979) ("Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions").

[24] Almost every State, and the Federal Government, has set a minimum age at which juveniles accused of committing serious crimes can be waived from juvenile court into criminal court. See Davis, *supra*, n. 22; 18 U. S. C. § 5032 (1982 ed., Supp IV). The dissent's focus on the presence of these waiver ages in jurisdictions that retain the death penalty but that have not expressly set a minimum age for the death sentence, see *post*, at 867–868, distorts what is truly at issue in this case. Consider the following example: The States of Michigan, Oregon, and Virginia have all determined that a 15-year-old may be waived from juvenile to criminal court when charged with first-degree murder. See Mich. Comp. Laws § 712A.4(1) (1979); Ore. Rev. Stat. §§ 419.533(1)(a), (1)(b), (3) (1987); Va. Code § 16.1–269(A) (1988). However, in Michigan, that 15-year-old may not be executed—because the State has abolished the death penalty—and, in Oregon, that 15-year-old may not be executed—because the State has expressly set a minimum age of 18 for executions—but, in Virginia, that 15-year-old may be executed—because the State has a death penalty and has not expressly addressed the issue of minimum age for execution. That these three States have all set a 15-year-old waiver floor for first-degree murder tells us that the States consider 15-year-olds to be old enough to be tried in criminal court for serious crimes (or too old to be dealt with effectively in juvenile court), *but tells us nothing about the judgment these States have made regarding the appropriate punishment for such youthful offenders.* As a matter of fact, many States in the Union have waiver ages below 16, including many of the States that have either abolished the death penalty or that have set an express minimum age for the death penalty at 16 or higher. See Davis, *supra*, n. 22. In sum, we believe that the more appropriate measures for determining how the States view the issue of minimum age for the death penalty are those discussed in the text and in n. 29, *infra*.

[25] Alaska (Territory of Alaska, Session Laws, 1957, ch. 132, 23d Sess., an Act abolishing the death penalty for the commission of any crime; see Alaska Stat. Ann. § 12.55.015 (1987), "Authorized sentences" do not in-

thorized but no minimum age is expressly stated in the death penalty statute.[26] One might argue on the basis of this body of legislation that there is no chronological age at which the

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clude the death penalty; § 12.55.125, "Sentences of imprisonment for felonies" do not include the death penalty); District of Columbia (*United States* v. *Lee*, 160 U. S. App. D. C. 118, 122–123, 489 F. 2d 1242, 1246–1247 (1973), death penalty unconstitutional in light of *Furman* v. *Georgia*, 408 U. S. 238 (1972); see D. C. Code § 22–2404 (1981), penalty for first-degree murder does not include death); Hawaii (Territory of Hawaii, Regular Session Laws, 1957, Act 282, 28th Leg., an Act relating to the abolishment of capital punishment; see Hawaii Rev. Stat., § 706–656 (Supp. 1987), sentence for offense of murder does not include death penalty); Iowa (1965 Iowa Acts, ch. 435, Death Penalty Abolished; see Iowa Code § 902.1 (1987), penalties for Class A felonies do not include death); Kansas (*State* v. *Randol*, 212 Kan. 461, 471, 513 P. 2d 248, 256 (1973), death penalty unconstitutional after *Furman* v. *Georgia*, *supra;* death penalty still on books, Kan. Stat. Ann. §§ 22–4001—22–4014 (1981); but see § 21–3401, first-degree murder is a Class A felony, and § 21–4501(a), sentence for a Class A felony does not include death penalty); Maine (1887 Maine Acts, ch. 133, an Act to abolish the death penalty; see Me. Rev. Stat. Ann., Tit. 17–A, §§ 1251, 1152 (1983 and Supp. 1987–1988), authorized sentences for murder do not include death penalty); Massachusetts (*Commonwealth* v. *Colon-Cruz*, 393 Mass. 150, 470 N. E. 2d 116 (1984), death penalty statute violates State Constitution; death penalty law still on books, Mass. Gen. Laws §§ 279:57—279:71 (1986)); Michigan (Const., Art. 4, § 46, "No law shall be enacted providing for the penalty of death"; see Mich. Comp. Laws § 750.316 (Supp. 1988–1989), no death penalty provided for first-degree murder); Minnesota (1911 Minn. Laws, ch. 387, providing for life imprisonment and not death as sentence; see Minn. Stat. § 609.10 (1986), sentences available do not include death penalty, and § 609.185, sentence for first-degree murder is life imprisonment); New York (*People* v. *Smith*, 63 N. Y. 2d 41, 70–79, 468 N. E. 2d 879, 893–899 (1984), mandatory death penalty for first-degree murder while serving a sentence of life imprisonment unconstitutional after *Woodson* v. *North Carolina*, 428 U. S. 280 (1976), thus invalidating remainder of New York's death penalty statute; death penalty still on books, N. Y. Penal Law § 60.06 (McKinney 1987), providing for death penalty for first-degree murder); North Dakota (N. D. Cent. Code, ch. 12–50 (1985), "The Death Sentence and Execution Thereof," repealed by 1973 N. D. Laws, ch. 116, § 41, effective July 1, 1975); Rhode Island (*State* v. *Cline*, 121 R. I. 299, 397 A. 2d 1309 (1979), mandatory death penalty for any prisoner unconstitutional after *Woodson* v. *North Caro-*

[Footnote 26 is on p. 828]

imposition of the death penalty is unconstitutional and that our current standards of decency would still tolerate the execution of 10-year-old children.[27] We think it self-evident that such an argument is unacceptable; indeed, no such argument has been advanced in this case.[28] If, therefore, we accept the

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lina, supra; see R. I. Gen. Laws § 11–23–2 (Supp. 1987), penalties for murder do not include death); West Virginia (W. Va. Code § 61–11–2 (1984), "Capital punishment abolished"); Wisconsin (1853 Wis. Laws, ch. 103, "An act to provide for the punishment of murder in the first degree, and to abolish the penalty of death"; see Wis. Stat. §§ 939.50(3)(a), 940.01 (1985–1986), first-degree murder is a Class A felony, and the penalty for such felonies is life imprisonment).

[26] Alabama (see Ala. Code §§ 13A–5–39—13A–5–59, 13A–6–2 (1982 and Supp. 1987)); Arizona (see Ariz. Rev. Stat. Ann. §§ 13–703—13–706, 13–1105 (1978 and Supp. 1987)); Arkansas (see Ark. Code Ann. §§ 5–4–104(b), 5–4–601—5–4–617, 5–10–101, 5–51–201 (1987 and Supp. 1987)); Delaware (see Del. Code Ann., Tit. 11, §§ 636, 4209 (1987)); Florida (see Fla. Stat. §§ 775.082, 782.04(1), 921.141 (1987)); Idaho (see Idaho Code §§ 18–4001—18–4004, 19–2515 (1987)); Louisiana (see La. Rev. Stat. Ann. §§ 14:30(C), 14:113 (West 1986); La. Code Crim. Proc. Ann., Art. 905 *et seq.* (West 1984 and Supp. 1988)); Mississippi (see Miss. Code Ann. §§ 97–3–21, 97–7–67, 99–19–101—99–19–107 (Supp. 1987)); Missouri (see Mo. Rev. Stat. §§ 565.020, 565.030–565.040 (1986)); Montana (see Mont. Code Ann. §§ 45–5–102, 46–18–301—46–18–310 (1987)); Oklahoma (see Okla. Stat., Tit. 21, §§ 701.10–701.15 (1981 and Supp. 1987)); Pennsylvania (see Pa. Cons. Stat., Tit. 18, § 1102(a), Tit. 42, § 9711 (1982 and Supp. 1987)); South Carolina (see S. C. Code §§ 16–3–10, 16–3–20 (1985 and Supp. 1987)); South Dakota (see S. D. Codified Laws §§ 22–16–4, 22–16–12, 23A–27A–1—23A–27A–41 (1988)); Utah (see Utah Code Ann. §§ 76–3–206, 76–3–207 (1978 and Supp. 1987)); Vermont (see Vt. Stat. Ann., Tit. 13, §§ 2303, 2403, 7101–7107 (1974 and Supp. 1987)); Virginia (see Va. Code §§ 18.2–31 (1988), 19.2–264.2—19.2–264.5 (1983 and Supp. 1987)); Washington (see Wash. Rev. Code §§ 10.95.010—10.95.900 (1987)); Wyoming (see Wyo. Stat. §§ 6–2–101—6–2–103 (1988)).

[27] It is reported that a 10-year-old black child was hanged in Louisiana in 1855 and a Cherokee Indian child of the same age was hanged in Arkansas in 1885. See Streib, Death Penalty for Children: The American Experience with Capital Punishment for Crimes Committed While under Age Eighteen, 36 Okla. L. Rev. 613, 619–620 (1983).

[28] See Tr. of Oral Arg. 31 (respondent suggests a minimum age of 14); *post*, at 872 (dissent agrees that some line exists); *post*, at 848 (concurrence similarly agrees).

premise that some offenders are simply too young to be put to death, it is reasonable to put this group of statutes to one side because they do not focus on the question of where the chronological age line should be drawn.[29] When we confine our attention to the 18 States that have expressly established a minimum age in their death penalty statutes, we find that all of them require that the defendant have attained at least the age of 16 at the time of the capital offense.[30]

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[29] One might argue, of course, that petitioner's execution "could theoretically be imposed" in 19 States, see *post*, at 864 (dissenting opinion), just as execution was *permissible* above the age of 7 in Blackstone's time. *Ibid.* This argument would, though, first have to acknowledge that the execution would be *impermissible* in 32 States. Additionally, 2 of the 19 States that retain a death penalty without setting a minimum age simply do not sentence people to death anymore. Neither South Dakota nor Vermont has imposed a death sentence since our landmark decision in *Furman* v. *Georgia*, 408 U. S. 238 (1972). See Greenberg, Capital Punishment as a System, 91 Yale L. J. 908, 929–936 (1982); NAACP Legal Defense and Educational Fund, Inc., Death Row, U. S. A. (1980–1987). (Vermont is frequently counted as a 15th State without a death penalty, since its capital punishment scheme fails to guide jury discretion, see Vt. Stat. Ann., Tit. 13, §§ 7101–7107 (1974), and has not been amended since our decision in *Furman* v. *Georgia*, *supra*, holding similar statutes unconstitutional. South Dakota's statute does provide for jury consideration of aggravating and mitigating factors. See S. D. Codified Laws, ch. 23A–27A (1988)). Thus, if one were to shift the focus from those States that have expressly dealt with the issue of minimum age and toward a general comparison of States whose statutes, facially, would and would not permit petitioner's execution, one would have to acknowledge a 2-to-1 ratio of States in which it is not even "theoretically" possible that Thompson's execution could occur.

[30] California (Cal. Penal Code Ann. § 190.5 (West 1988)) (age 18); Colorado (Colo. Rev. Stat. § 16–11–103(1)(a) (1986)) (age 18); Connecticut (Conn. Gen. Stat. § 53a–46a(g)(1) (1985)) (age 18); Georgia (Ga. Code Ann. § 17–9–3 (1982)) (age 17); Illinois (Ill. Rev. Stat., ch. 38, ¶ 9–1(b) (1987)) (age 18); Indiana (Ind. Code § 35–50–2–3 (Supp. 1987)) (age 16); Kentucky (Ky. Rev. Stat. § 640.040(1) (1987)) (age 16); Maryland (Md. Ann. Code, Art. 27, § 412(f) (1988)) (age 18); Nebraska (Neb. Rev. Stat. § 28–105.01 (1985)) (age 18); Nevada (Nev. Rev. Stat. § 176.025 (1987)) (age 16); New Hampshire (N. H. Rev. Stat. Ann. § 630:5(XIII) (Supp. 1987)) (prohibiting execution of one who was a minor at time of crime) (§ 21–B:1 indicates that age 18 is age of majority, while § 630:1(V) provides that no one under age 17 shall be held culpable of a capital offense); New Jersey (N. J. Stat.

The conclusion that it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense is consistent with the views that have been expressed by respected professional organizations, by other nations that share our Anglo-American heritage, and by the leading members of the Western European community.[31] Thus, the American Bar Association[32] and the American Law Institute[33] have formally expressed their opposition to the death penalty for juveniles. Although the death penalty has not been entirely abolished in the United Kingdom or New Zealand (it has been abolished in Australia, except in the State of New South Wales, where it is available

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Ann. §§ 2A:4A–22(a) (1987), 2C:11–3(g) (West Supp. 1988)) (age 18); New Mexico (N. M. Stat. Ann. §§ 28–6–1(A), 31–18–14(A) (1987)) (age 18); North Carolina (N. C. Gen. Stat. § 14–17 (Supp. 1987)) (age 17, except death penalty still valid for anyone who commits first-degree murder while serving prison sentence for prior murder or while on escape from such sentence); Ohio (Ohio Rev. Code Ann. § 2929.02(A) (1984)) (age 18); Oregon (Ore. Rev. Stat. §§ 161.620, 419.476(1) (1987)) (age 18); Tennessee (Tenn. Code Ann. §§ 37–1–102(3), (4), 37–1–103, 37–1–134(a)(1) (1984 and Supp. 1987)) (age 18); Texas (Tex. Penal Code Ann. § 8.07(d) (Supp. 1987–1988)) (age 17).

In addition, the Senate recently passed a bill authorizing the death penalty for certain drug-related killings, with the caveat that "[a] sentence of death shall not be carried out upon a person who is under 18 years of age at the time the crime was committed." S. 2455, 100th Cong., 2d Sess.; 134 Cong. Rec. 14118 (1988).

[31] We have previously recognized the relevance of the views of the international community in determining whether a punishment is cruel and unusual. See *Trop* v. *Dulles*, 356 U. S. 86, 102, and n. 35 (1958); *Coker* v. *Georgia*, 433 U. S., at 596, n. 10; *Enmund* v. *Florida*, 458 U. S., at 796–797, n. 22.

[32] "*Be It Resolved*, That the American Bar Association opposes, in principle, the imposition of capital punishment upon any person for any offense committed while under the age of eighteen (18)." American Bar Association, Summary of Action Taken by the House of Delegates 17 (1983 Annual Meeting).

[33] "[C]ivilized societies will not tolerate the spectacle of execution of children . . . ." American Law Institute, Model Penal Code § 210.6, commentary, p. 133 (Official Draft and Revised Comments 1980).

for treason and piracy), in neither of those countries may a juvenile be executed. The death penalty has been abolished in West Germany, France, Portugal, The Netherlands, and all of the Scandinavian countries, and is available only for exceptional crimes such as treason in Canada, Italy, Spain, and Switzerland. Juvenile executions are also prohibited in the Soviet Union.[34]

IV

The second societal factor the Court has examined in determining the acceptability of capital punishment to the American sensibility is the behavior of juries. In fact, the infrequent and haphazard handing out of death sentences by capital juries was a prime factor underlying our judgment in *Furman* v. *Georgia*, 408 U. S. 238 (1972), that the death penalty, as then administered in unguided fashion, was unconstitutional.[35]

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[34] All information regarding foreign death penalty laws is drawn from App. to Brief for Amnesty International as *Amicus Curiae* A–1—A–9, and from Death Penalty in Various Countries, prepared by members of the staff of the Law Library of the Library of Congress, January 22, 1988 (available in Clerk of Court's case file). See also Children and Young Persons Act, 1933, 23 Geo. 5, ch. 12, § 53(1), as amended by the Murder (Abolition of Death Penalty) Act 1965, §§ 1(5), 4 (abolishing death penalty for juvenile offenders in United Kingdom), reprinted in 6 Halsbury's Statutes 55–56 (4th ed. 1985); Crimes Act, 1961, § 16, in 1 Reprinted Statutes of New Zealand 650–651 (1979). In addition, three major human rights treaties explicitly prohibit juvenile death penalties. Article 6(5) of the International Covenant on Civil and Political Rights, Annex to G. A. Res. 2200, 21 U. N. GAOR Res. Supp. (No. 16) 53, U. N. Doc. A/6316 (1966) (signed but not ratified by the United States), reprinted in 6 International Legal Material 368, 370 (1967); Article 4(5) of the American Convention on Human Rights, O. A. S. Official Records, OEA/Ser.K/XVI/1.1, Doc. 65, Rev. 1, Corr. 2 (1970) (signed but not ratified by the United States), reprinted in 9 International Legal Material 673, 676 (1970); Article 68 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, [1955] 6 U. S. T. 3516, 3560, T. I. A. S. No. 3365 (ratified by the United States).

[35] See *Furman* v. *Georgia*, 408 U. S., at 249 (rarity of a sentence leads to an inference of its arbitrary imposition) (Douglas, J., concurring); *id.*, at

While it is not known precisely how many persons have been executed during the 20th century for crimes committed under the age of 16, a scholar has recently compiled a table revealing this number to be between 18 and 20.[36] All of these occurred during the first half of the century, with the last such execution taking place apparently in 1948.[37] In the following year this Court observed that this "whole country has traveled far from the period in which the death sentence was an automatic and commonplace result of convictions . . . ." *Williams* v. *New York*, 337 U. S. 241, 247 (1949). The road we have traveled during the past four decades—in which thousands of juries have tried murder cases—leads to the unambiguous conclusion that the imposition of the death penalty on a 15-year-old offender is now generally abhorrent to the conscience of the community.

Department of Justice statistics indicate that during the years 1982 through 1986 an average of over 16,000 persons were arrested for willful criminal homicide (murder and nonnegligent manslaughter) each year. Of that group of 82,094 persons, 1,393 were sentenced to death. Only 5 of them, including the petitioner in this case, were less than 16 years old

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274–277 (Eighth Amendment prevents arbitrary death sentences; rarity of death sentences results in an inference of arbitrariness) (BRENNAN, J., concurring); *id.*, at 299–300 (BRENNAN, J., concurring); *id.*, at 312 (rarity of imposition indicates arbitrariness; "A penalty with such negligible returns to the State would be patently excessive" and therefore violate the Eighth Amendment) (WHITE, J., concurring); *id.*, at 314 (WHITE, J., concurring); see also *Enmund* v. *Florida*, 458 U. S., at 794–796 (few juries sentence defendants to death who neither killed nor intended to kill).

[36] V. Streib, Death Penalty for Juveniles 190–208 (1987) (compiling information regarding all executions in this country from 1620 through 1986 for crimes committed while under age 18; uncertainty between 18 and 20 because of two persons executed who may have been either 15 or 16 at time of crime).

[37] Professor Streib reports that the last execution of a person for a crime committed under age 16 was on January 9, 1948, when Louisiana executed Irvin Mattio, 15 at the time of his crime. *Id.*, at 197.

at the time of the offense.[38] Statistics of this kind can, of course, be interpreted in different ways,[39] but they do suggest that these five young offenders have received sentences that are "cruel and unusual in the same way that being struck by lightning is cruel and unusual." *Furman* v. *Georgia*, 408 U. S., at 309 (Stewart, J., concurring).

V

"Although the judgments of legislatures, juries, and prosecutors weigh heavily in the balance, it is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty" on one such as petitioner who committed a heinous murder when he was only 15 years old. *Enmund* v. *Florida*, 458 U. S. 782, 797 (1982).[40] In making that judgment, we first ask whether the juvenile's culpability should be measured by the same standard as that of an adult, and then consider whether the application of the death penalty to this class of offenders "measurably contributes" to the social purposes that are served by the death penalty. *Id.*, at 798.

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[38] See U. S. Dept. of Justice, Uniform Crime Reports: Crime in the United States 174 (1986); *id.*, at 174 (1985); *id.*, at 172 (1984); *id.*, at 179 (1983); *id.*, at 176 (1982); U. S. Dept. of Justice, Bureau of Justice Statistics Bulletin: Capital Punishment, 1986, p. 4 (1987); *id.*, Capital Punishment 1985, p. 5 (1986); *id.*, Capital Punishment 1984, p. 6 (1985); Streib, *supra*, n. 36, at 168–169.

[39] For example, one might observe that of the 80,233 people arrested for willful criminal homicide who were over the age of 16, 1,388, or 1.7%, received the death sentence, while 5 of the 1,861, or 0.3%, of those under 16 who were arrested for willful criminal homicide received the death penalty.

[40] That the task of interpreting the great, sweeping clauses of the Constitution ultimately falls to us has been for some time an accepted principle of American jurisprudence. See *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is"). With the Eighth Amendment, whose broad, vague terms do not yield to a mechanical parsing, the method is no different. See, *e. g.*, *Furman* v. *Georgia*, 408 U. S., at 268–269 (BRENNAN, J., concurring); *Coker* v. *Georgia*, 433 U. S., at 598 ("We have the abiding conviction" that the death penalty is an excessive penalty for rape).

It is generally agreed "that punishment should be directly related to the personal culpability of the criminal defendant." *California* v. *Brown*, 479 U. S. 538, 545 (1987) (O'CONNOR, J., concurring). There is also broad agreement on the proposition that adolescents as a class are less mature and responsible than adults. We stressed this difference in explaining the importance of treating the defendant's youth as a mitigating factor in capital cases:

> "But youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults. Particularly 'during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment' expected of adults. *Bellotti* v. *Baird*, 443 U. S. 622, 635 (1979)." *Eddings* v. *Oklahoma*, 455 U. S. 104, 115–116 (1982) (footnotes omitted).

To add further emphasis to the special mitigating force of youth, Justice Powell quoted the following passage from the 1978 Report of the Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders:

> "'[A]dolescents, particularly in the early and middle teen years, are more vulnerable, more impulsive, and less self-disciplined than adults. Crimes committed by youths may be just as harmful to victims as those committed by older persons, but they deserve less punishment because adolescents may have less capacity to control their conduct and to think in long-range terms than adults. Moreover, youth crime as such is not exclusively the offender's fault; offenses by the young also represent a failure of family, school, and the social system, which share responsibility for the development of America's youth.'" 455 U. S., at 115, n. 11.

Thus, the Court has already endorsed the proposition that less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult.[41] The basis for this conclusion is too obvious to require extended explanation.[42] Inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult. The reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult.[43]

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[41] "[T]he conception of criminal responsibility with which the Juvenile Court operates also provides supporting rationale for its role in crime prevention. The basic philosophy concerning this is that criminal responsibility is absent in the case of misbehaving children. . . . But, what does it mean to say that a child has no criminal responsibility? . . . One thing about this does seem clearly implied, . . . and that is an absence of the basis for adult criminal accountability—the exercise of an unfettered free will." S. Fox, The Juvenile Court: Its Context, Problems and Opportunities 11–12 (1967) (publication of the President's Commission on Law Enforcement and Administration of Justice).

[42] A report on a professional evaluation of 14 juveniles condemned to death in the United States, which was accepted for presentation to the American Academy of Child and Adolescent Psychiatry, concluded:

"Adolescence is well recognized as a time of great physiological and psychological stress. Our data indicate that, above and beyond these maturational stresses, homicidal adolescents must cope with brain dysfunction, cognitive limitations, and severe psychopathology. Moreover, they must function in families that are not merely nonsupportive but also violent and brutally abusive. These findings raise questions about the American tradition of considering adolescents to be as responsible as adults for their offenses and of sentencing them to death." Lewis, Pincus, Bard, Richardson, Prichep, Feldman, & Yeager, Neuropsychiatric, Pyschoeducational, and Family Characteristics of 14 Juveniles Condemned to Death in the United States 11 (1987).

[43] See n. 23, *supra;* see also, *e. g.*, E. Erikson, Childhood and Society 261–263 (1985) ("In their search for a new sense of continuity and sameness, adolescents have to refight many of the battles of earlier years, even though to do so they must artificially appoint perfectly well-meaning peo-

"The death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders." *Gregg* v. *Georgia*, 428 U. S. 153, 183 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.). In *Gregg* we concluded that as "an expression of society's moral outrage at particularly offensive conduct," retribution was not "inconsistent with our respect for the dignity of men." *Ibid.*[44] Given the lesser culpability of the juvenile

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ple to play the roles of adversaries"); E. Erikson, Identity: Youth and Crisis 128–135 (1968) (discussing adolescence as a period of "identity confusion," during which youths are "preoccupied with what they appear to be in the eyes of others as compared with what they feel they are"); Gordon, The Tattered Cloak of Immortality, in Adolescence and Death 16, 27 (C. Corr & J. McNeil eds. 1986) ("Risk-taking with body safety is common in the adolescent years, though sky diving, car racing, excessive use of drugs and alcoholic beverages, and other similar activities may not be directly perceived as a kind of flirting with death. In fact, in many ways, this is counterphobic behavior—a challenge to death wherein each survival of risk is a victory over death"); Kastenbaum, Time and Death in Adolescence, in The Meaning of Death 99, 104 (H. Feifel ed. 1959) ("The adolescent lives in an intense present; 'now' is so real to him that past and future seem pallid by comparison. Everything that is important and valuable in life lies either in the immediate life situation or in the rather close future"); Kohlberg, The Development of Children's Orientations Toward a Moral Order, 6 Vita Humana 11, 30 (1963) (studies reveal that "large groups of moral concepts and ways of thought only attain meaning at successively advanced ages and require the extensive background of social experience and cognitive growth represented by the age factor"); Miller, Adolescent Suicide: Etiology and Treatment, 9 Adolescent Psychiatry 327, 329 (S. Feinstein, J. Looney, A. Schwartzberg, & A. Sorosky eds. 1981) (many adolescents possess a "profound conviction of their own omnipotence and immortality. Thus many adolescents may appear to be attempting suicide, but they do not really believe that death will occur"); Streib, *supra* n. 36, at 3–20, 184–189 ("The difference that separates children from adults for most purposes of the law is children's immature, undeveloped ability to reason in an adultlike manner").

[44] We have invalidated death sentences when this significant justification was absent. See *Enmund* v. *Florida*, 458 U. S., at 800–801 (death penalty for one who neither kills nor intends to kill "does not measurably contribute to the retributive end of ensuring that the criminal gets his just

offender, the teenager's capacity for growth, and society's fiduciary obligations to its children, this conclusion is simply inapplicable to the execution of a 15-year-old offender.

For such a young offender, the deterrence rationale is equally unacceptable.[45] The Department of Justice statistics indicate that about 98% of the arrests for willful homicide involved persons who were over 16 at the time of the offense.[46] Thus, excluding younger persons from the class that is eligible for the death penalty will not diminish the deterrent value of capital punishment for the vast majority of potential offenders. And even with respect to those under 16 years of age, it is obvious that the potential deterrent value of the death sentence is insignificant for two reasons. The likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent.

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deserts"); *Ford* v. *Wainwright*, 477 U. S. 399 (1986) (unconstitutional to execute someone when he is insane, in large part because retributive value is so low).

[45] Although we have held that a legislature may base a capital punishment scheme on the goal of deterrence, some Members of the Court have expressed doubts about whether fear of death actually deters crimes in certain instances. See *Lockett* v. *Ohio*, 438 U. S. 586, 624–628 (1978) (deterrence argument unavailable for one who neither kills nor intends to kill; "doubtful" that prospect of death penalty would deter "individuals from becoming involved in ventures in which death may unintentionally result") (WHITE, J., concurring in judgment); *Spaziano* v. *Florida*, 468 U. S. 447, 480 (1984) (because of invalidation of mandatory death penalty laws and additional procedural requirements to death penalty laws in which the jury's discretion must be carefully guided, deterrence rationale now rather weak support for capital punishment) (STEVENS, J., dissenting); *Enmund* v. *Florida*, 458 U. S., at 798–800 (unlikely that prospect of death penalty will deter one who neither kills nor intends to kill) (WHITE, J.); *Furman* v. *Georgia*, 408 U. S., at 301–302 (unverifiable that the death penalty deters more effectively than life imprisonment) (BRENNAN, J., concurring); *id.*, at 345–355, and nn. 124–125 (deterrence rationale unsupported by the evidence) (MARSHALL, J., concurring).

[46] See United States Department of Justice, Uniform Crime Reports, *supra*, n. 38 (80,233 of 82,094, or 97.7%).

And, even if one posits such a cold-blooded calculation by a 15-year-old, it is fanciful to believe that he would be deterred by the knowledge that a small number of persons his age have been executed during the 20th century. In short, we are not persuaded that the imposition of the death penalty for offenses committed by persons under 16 years of age has made, or can be expected to make, any measurable contribution to the goals that capital punishment is intended to achieve. It is, therefore, "nothing more than the purposeless and needless imposition of pain and suffering," *Coker* v. *Georgia*, 433 U. S., at 592, and thus an unconstitutional punishment.[47]

VI

Petitioner's counsel and various *amici curiae* have asked us to "draw a line" that would prohibit the execution of any person who was under the age of 18 at the time of the offense. Our task today, however, is to decide the case before us; we do so by concluding that the Eighth and Fourteenth Amendments prohibit the execution of a person who was under 16 years of age at the time of his or her offense.[48]

The judgment of the Court of Criminal Appeals is vacated, and the case is remanded with instructions to enter an appropriate order vacating petitioner's death sentence.

It is so ordered.

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

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[47] See also *Gregg* v. *Georgia*, 428 U. S. 153, 183 (1976) ("[T]he sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering") (joint opinion of Stewart, Powell, and STEVENS, JJ.).

[48] Given the Court's disposition of the principal issue, it is unnecessary to resolve the second question presented, namely, whether photographic evidence that a state court deems erroneously admitted but harmless at the guilt phase nevertheless violates a capital defendant's constitutional rights by virtue of its being considered at the penalty phase.

APPENDICES*

APPENDIX A

Right to Vote

The United States Constitution, Amendment 26, requires States to permit 18-year-olds to vote. No State has lowered its voting age below 18. The following chart assembles the various provisions from state constitutions and statutes that provide an 18-year-old voting age.

Ala.	[No provisions beyond reference to U. S. Const., Amdt. 26]
Alaska	Alaska Const., Art. V, § 1
Ariz.	Ariz. Rev. Stat. Ann. § 16–121 (Supp. 1987)
Ark.	Ark. Code Ann. § 7–8–401 (1987)
Cal.	Cal. Const., Art. 2, § 2
Colo.	Colo. Rev. Stat. § 1–2–101 (1980)
Conn.	Conn. Const., Art. 9; Conn. Gen. Stat. § 9–12 (Supp. 1988)
Del.	Del. Code Ann., Tit. 15, § 1701 (1981)
D. C.	D. C. Code § 1–1311(b)(1) (1987)
Fla.	Fla. Stat. § 97.041 (1987)
Ga.	Ga. Code Ann. § 21–2–219 (1987)
Haw.	Haw. Rev. Stat. § 11–12 (1985)
Idaho	Idaho Code § 34–402 (Supp. 1988)
Ill.	Ill. Rev. Stat., ch. 46, ¶ 3–1 (1987)
Ind.	Ind. Code § 3–7–1–1 (Supp. 1987)
Iowa	Iowa Code § 47.4 (1987)
Kan.	Kan. Const., Art. 5, § 1
Ky.	Ky. Const. § 145
La.	La. Const., Art. 1, § 10; La. Rev. Stat. Ann. § 18:101(A) (West 1979)
Me.	Me. Rev. Stat. Ann., Tit. 21A, § 111(2) (Supp. 1987–1988)
Md.	Md. Ann. Code, Art. 33, § 3–4(b)(2) (1986)
Mass.	Mass. Gen. Laws § 51:1 (1986)
Mich.	Mich. Comp. Laws § 168.492 (1979)
Minn.	Minn. Stat. § 201.014 (1986)
Miss.	Miss. Const., Art. 12, § 241

*Appendices assembled with the assistance of the Brief for the National Legal Aid and Defender Association, the National Association of Criminal Defense Lawyers, and the American Jewish Committee as *Amici Curiae*.

Mo.	Mo. Const., Art. VIII, § 2
Mont.	Mont. Const., Art. IV, § 2; Mont. Code Ann. § 13–1–111 (1987)
Neb.	Neb. Const., Art. VI, § 1; Neb. Rev. Stat. § 32–223 (1984)
Nev.	Nev. Rev. Stat. § 293.485 (1987)
N. H.	N. H. Const., Pt. 1, Art. 11
N. J.	N. J. Const., Art. 2, ¶ 3
N. M.	[No provisions beyond reference to U. S. Const., Amdt. 26]
N. Y.	N. Y. Elec. Law § 5–102 (McKinney 1978)
N. C.	N. C. Gen. Stat. § 163–55 (1987)
N. D.	N. D. Const., Art. II, § 1
Ohio	Ohio Const., Art. V, § 1; Ohio Rev. Code Ann. §§ 3503.01, 3503.011 (1982)
Okla.	Okla. Const., Art. 3, § 1
Ore.	Ore. Const., Art. II, § 2
Pa.	Pa. Stat. Ann., Tit. 25, § 2811 (Purdon Supp. 1988–1889)
R. I.	R. I. Gen. Laws § 17–1–3 (Supp. 1987)
S. C.	S. C. Code § 7–5–610 (Supp. 1987)
S. D.	S. D. Const., Art. VII, § 2; S. D. Codified Laws § 12–3–1 (1982)
Tenn.	Tenn. Code Ann. § 2–2–102 (1985)
Tex.	Tex. Elec. Code Ann. § 11.002 (Supp. 1988)
Utah	Utah Code Ann. § 20–1–17 (1984)
Vt.	Vt. Stat. Ann., Tit. 17, § 2121 (1982)
Va.	Va. Const., Art. II, § 1
Wash.	Wash. Const., Art. VI, § 1, Amdt. 63
W. Va.	W. Va. Code § 3–1–3 (1987)
Wis.	Wis. Const., Art. 3, § 1; Wis. Stat. §§ 6.02, 6.05 (1985–1986)
Wyo.	Wyo. Stat. § 22–1–102(k) (Supp. 1988)

APPENDIX B

Right to Serve on a Jury

In no State may anyone below the age of 18 serve on a jury. The following chart assembles the various state provisions relating to minimum age for jury service.

Ala.	Ala. Code § 12–16–60(a)(1) (1986)
Alaska	Alaska Stat. Ann. § 09.20.010(a)(3) (Supp. 1987)

Ariz.	Ariz. Rev. Stat. Ann. § 21–301(D) (Supp. 1987)
Ark.	Ark. Code Ann. § 16–31–101 (1987)
Cal.	Cal. Civ. Proc. Code Ann. § 198(a)(1) (West Supp. 1988)
Colo.	Colo. Rev. Stat. § 13–71–109(2)(a) (1973)
Conn.	Conn. Gen. Stat. § 51–217 (Supp. 1988)
Del.	Del. Code Ann., Tit. 10, § 4506(b)(1) (Supp. 1986)
D. C.	D. C. Code § 11–1906(b)(1)(C) (Supp. 1988)
Fla.	Fla. Stat. § 40.01 (1987)
Ga.	Ga. Code Ann. § 15–12–40 (Supp. 1988)
Haw.	Haw. Rev. Stat. § 612–4 (1985)
Idaho	Idaho Code § 2–209(2)(a) (Supp. 1988)
Ill.	Ill. Rev. Stat., ch. 78, ¶ 2 (1987)
Ind.	Ind. Code § 33–4–5–2 (Supp. 1987)
Iowa	Iowa Code § 607A.4(1)(a) (1987)
Kan.	Kan. Stat. Ann. § 43–156 (1986)
Ky.	Ky. Rev. Stat. § 29A.080(2)(a) (1985)
La.	La. Code Crim. Proc. Ann., Art. 401(A)(2) (West Supp. 1988)
Me.	Me. Rev. Stat. Ann., Tit. 14, § 1211 (Supp. 1987–1988)
Md.	Md. Cts. & Jud. Proc. Code Ann. § 8–104 (1984)
Mass.	Mass. Gen. Laws § 234:1 (1986)
Mich.	Mich. Comp. Laws § 600.1307a(1)(a) (Supp. 1988–1989)
Minn.	Minn. Stat. § 593.41, subd. 2(2) (1986)
Miss.	Miss. Code Ann. § 13–5–1 (1972)
Mo.	Mo. Rev. Stat. § 494.010 (1986)
Mont.	Mont. Code Ann. § 3–15–301 (1987)
Neb.	Neb. Rev. Stat. § 25–1601 (1985)
Nev.	Nev. Rev. Stat. § 6.010 (1987)
N. H.	N. H. Rev. Stat. Ann. § 500–A:3 (1983)
N. J.	N. J. Stat. Ann. § 9:17B–1 (West Supp. 1988)
N. M.	N. M. Stat. Ann. § 38–5–1 (1987)
N. Y.	N. Y. Jud. Law § 510(2) (McKinney Supp. 1988)
N. C.	N. C. Gen. Stat. § 9–3 (1986)
N. D.	N. D. Cent. Code § 27–09.1–08(2)(b) (Supp. 1987)
Ohio	Ohio Rev. Code Ann. § 2313.42 (1984)
Okla.	Okla. Stat., Tit. 38, § 28 (1981)
Ore.	Ore. Rev. Stat. § 10.030(2)(c) (1987)
Pa.	Pa. Cons. Stat. § 4521 (1982)
R. I.	R. I. Gen. Laws § 9–9–1 (1985)
S. C.	S. C. Code § 14–7–130 (1987)

S. D.	S. D. Codified Laws § 16–13–10 (1987)
Tenn.	Tenn. Code Ann. § 22–1–101 (1980)
Tex.	Tex. Govt. Code Ann. § 62.102 (1988)
Utah	Utah Code Ann. § 78–46–7(1)(b) (1987)
Vt.	Vt. Stat. Ann.—Administrative Orders and Rules: Qualification, List, Selection and Summoning of All Jurors—Rule 25 (1986)
Va.	Va. Code § 8.01–337 (Supp. 1988)
Wash.	Wash. Rev. Code § 2.36.070 (1987)
W. Va.	W. Va. Code § 52–1–8(b)(1) (Supp. 1988)
Wis.	Wis. Stat. § 756.01 (1985–1986)
Wyo.	Wyo. Stat. § 1–11–101 (1988)

APPENDIX C

Right to Drive Without Parental Consent

Most States have various provisions regulating driving age, from learner's permits through driver's licenses. In all States but one, 15-year-olds either may not drive, or may drive only with parental consent or accompaniment.

Ala.	Ala. Code § 32–6–7(1) (1983)
Alaska	Alaska Stat. Ann. § 28.15.071 (Supp. 1987)
Ariz.	Ariz. Rev. Stat. Ann. § 28–413(A)(1) (Supp. 1987)
Ark.	Ark. Code Ann. § 27–16–604(a)(1) (1987)
Cal.	Cal. Veh. Code Ann. § 12507 (West 1987)
Colo.	Colo. Rev. Stat. § 42–2–107(1) (1984)
Conn.	Conn. Gen. Stat. § 14–36 (1985)
Del.	Del. Code Ann., Tit. 21, § 2707 (1985)
D. C.	D. C. Code § 40–301 (1981)
Fla.	Fla. Stat. § 322.09 (1987)
Ga.	Ga. Code Ann. § 40–5–26 (1985)
Haw.	Haw. Rev. Stat. § 286–112 (1985)
Idaho	Idaho Code § 49–313 (Supp. 1987)
Ill.	Ill. Rev. Stat., ch. 95½, ¶ 6–103 (1987)
Ind.	Ind. Code § 9–1–4–32 (1982)
Iowa	Iowa Code § 321.177 (1987)
Kan.	Kan. Stat. Ann. § 8–237 (1982)
Ky.	Ky. Rev. Stat. Ann. § 186.470 (1980)
La.	La. Rev. Stat. Ann. § 32:407 (West Supp. 1988)
Me.	Me. Rev. Stat. Ann., Tit. 29, § 585 (Supp. 1987–1988)
Md.	Md. Transp. Code Ann. § 16–103 (1987)
Mass.	Mass. Gen. Laws § 90:8 (1986)

Mich.	Mich. Comp. Laws § 257.308 (1979)
Minn.	Minn. Stat. § 171.04 (1986)
Miss.	Miss. Code Ann. § 63–1–23 (Supp. 1987)
Mo.	Mo. Rev. Stat. § 302.060 (Supp. 1987)
Mont.	Mont. Code Ann. § 61–5–105 (1987) (15-year-olds may drive without parental consent if they pass a driver's education course)
Neb.	Neb. Rev. Stat. § 60–407 (1984)
Nev.	Nev. Rev. Stat. § 483.250 (1987)
N. H.	N. H. Rev. Stat. Ann. § 263:17 (Supp. 1987)
N. J.	N. J. Stat. Ann. § 39:3–10 (West Supp. 1988)
N. M.	N. M. Stat. Ann. § 66–5–11 (1984)
N. Y.	N. Y. Veh. & Traf. Law § 502(2) (McKinney 1986)
N. C.	N. C. Gen. Stat. § 20–11 (1983)
N. D.	N. D. Cent. Code § 39–06–08 (1987)
Ohio	Ohio Rev. Code Ann. § 4507.07 (Supp. 1987)
Okla.	Okla. Stat., Tit. 47, § 6–107 (Supp. 1987)
Ore.	Ore. Rev. Stat. § 807.060 (1987)
Pa.	Pa. Cons. Stat., § 1503 (1987)
R. I.	R. I. Gen. Laws § 31–10–3 (Supp. 1987)
S. C.	S. C. Code § 56–1–100 (1976)
S. D.	S. D. Codified Laws § 32–12–6 (1984)
Tenn.	Tenn. Code Ann. § 55–7–104 (Supp. 1987)
Tex.	Tex. Rev. Civ. Stat. Ann., Art. 6687b(4) (Vernon Supp. 1988)
Utah	Utah Code Ann. § 41–2–109 (Supp. 1987)
Vt.	Vt. Stat. Ann., Tit. 23, § 607 (1987)
Va.	Va. Code § 46.1–357 (Supp. 1988)
Wash.	Wash. Rev. Code § 46.20.031 (1987)
W. Va.	W. Va. Code § 17B–2–3 (1986)
Wis.	Wis. Stat. § 343.15 (1985–1986)
Wyo.	Wyo. Stat. § 31–7–112 (Supp. 1988)

APPENDIX D

Right to Marry Without Parental Consent

In all States but four, 15-year-olds may not marry without parental consent.

Ala.	Ala. Code § 30–1–5 (1983)
Alaska	Alaska Stat. Ann. § 25.05.171 (1983) (judge may permit minor to marry without parental consent, even in the face of parental opposition, in certain circumstances)

Ariz.	Ariz. Rev. Stat. Ann. § 25–102(A) (1976)
Ark.	Ark. Code Ann. § 9–11–102 (1987)
Cal.	Cal. Civ. Code Ann. § 4101 (West 1983)
Colo.	Colo. Rev. Stat. § 14–2–106(1)(a)(I) (1987)
Conn.	Conn. Gen. Stat. § 46b–30 (1986)
Del.	Del. Code Ann., Tit. 13, § 123 (1981)
D. C.	D. C. Code § 30–111 (1981)
Fla.	Fla. Stat. § 741.04 (1987)
Ga.	Ga. Code Ann. § 19–3–37 (1982)
Haw.	Haw. Rev. Stat. § 572–2 (1985)
Idaho	Idaho Code § 32–202 (1983)
Ill.	Ill. Rev. Stat., ch. 40, ¶ 203(1) (1987)
Ind.	Ind. Code § 31–7–1–6 (Supp. 1987)
Iowa	Iowa Code § 595.2 (1987)
Kan.	Kan. Stat. Ann. § 23–106 (1981)
Ky.	Ky. Rev. Stat. § 402.210 (1984)
La.	La. Civ. Code Ann., Art. 87 (West Supp. 1988) (minors not legally prohibited from marrying, even without parental consent, but marriage ceremony required); La. Rev. Stat. Ann. § 9:211 (West Supp. 1988) (official may not perform marriage ceremony in which a minor is a party without parental consent; comments to Civ. Code Ann., Art. 87, suggest that such a marriage is valid but that official may face sanctions)
Me.	Me. Rev. Stat. Ann., Tit. 19, § 62 (Supp. 1987–1988)
Md.	Md. Fam. Law Code Ann. § 2–301 (1984) (either party under 16 may marry without parental consent if "the woman to be married . . . is pregnant or has given birth to a child")
Mass.	Mass. Gen. Laws § 207:7 (1988)
Mich.	Mich. Comp. Laws § 551.103 (1988)
Minn.	Minn. Stat. § 517.02 (1986)
Miss.	Miss. Code Ann. § 93–1–5(d) (Supp. 1987) (female may marry at 15 without parental consent)
Mo.	Mo. Rev. Stat. § 451.090 (1986)
Mont.	Mont. Code Ann. § 40–1–202 (1987)
Neb.	Neb. Rev. Stat. § 42–105 (1984)
Nev.	Nev. Rev. Stat. § 122.020 (1987)
N. H.	N. H. Rev. Stat. Ann. § 457:5 (1983)
N. J.	N. J. Stat. Ann. § 9:17B–1 (West Supp. 1988)
N. M.	N. M. Stat. Ann. § 40–1–6 (1986)

N. Y.	N. Y. Dom. Rel. Law § 15 (McKinney 1988)
N. C.	N. C. Gen. Stat. § 51–2 (Supp. 1987)
N. D.	N. D. Cent. Code § 14–03–02 (1981)
Ohio	Ohio Rev. Code Ann. § 3101.01 (Supp. 1987)
Okla.	Okla. Stat., Tit. 43, § 3 (1981)
Ore.	Ore. Rev. Stat. § 106.060 (1987)
Pa.	Pa. Stat. Ann., Tit. 48, § 1–5(c) (Purdon Supp. 1988–1989)
R. I.	R. I. Gen. Laws § 15–2–11 (1981)
S. C.	S. C. Code § 20–1–250 (1985)
S. D.	S. D. Codified Laws § 25–1–9 (1984)
Tenn.	Tenn. Code Ann. § 36–3–106 (Supp. 1987)
Tex.	Tex. Fam. Code Ann. § 1.51 (Supp. 1987–1988)
Utah	Utah Code Ann. § 30–1–9 (1984)
Vt.	Vt. Stat. Ann., Tit. 18, § 5142 (1987)
Va.	Va. Code § 20–48 (1983)
Wash.	Wash. Rev. Code § 26.04.210 (1987)
W. Va.	W. Va. Code § 48–1–1 (1986)
Wis.	Wis. Stat. § 765.02 (1985–1986)
Wyo.	Wyo. Stat. § 20–1–102 (1987)

APPENDIX E

Right to Purchase Pornographic Materials

No minor may purchase pornography in the 50 States that have legislation dealing with obscenity.

Ala.	Ala. Code § 13A–12–170(1) (Supp. 1987)
Alaska	[No legislation]
Ariz.	Ariz. Rev. Stat. Ann. § 13–3506 (Supp. 1987)
Ark.	Ark. Code Ann. §§ 5–68–501, 5–68–502 (1987)
Cal.	Cal. Penal Code Ann. § 313.1 (West 1988)
Colo.	Colo. Rev. Stat. § 18–7–502 (1986)
Conn.	Conn. Gen. Stat. § 53a–196 (1985)
Del.	Del. Code Ann., Tit. 11, § 1361(b) (1987)
D. C.	D. C. Code § 22–2001(b) (1981)
Fla.	Fla. Stat. § 847.012 (1987)
Ga.	Ga. Code Ann. § 16–12–103 (1984)
Haw.	Haw. Rev. Stat. § 712–1215 (1985)
Idaho	Idaho Code § 18–1513 (1987)
Ill.	Ill. Rev. Stat., ch. 38, ¶ 11–21 (1987)
Ind.	Ind. Code § 35–49–3–3 (Supp. 1987)
Iowa	Iowa Code § 728.2 (1987)

Kan.	Kan. Stat. Ann. § 21–4301a (Supp. 1987)
Ky.	Ky. Rev. Stat. § 531–030 (1985)
La.	La. Rev. Stat. Ann. § 14:91.11 (West 1986)
Me.	Me. Rev. Stat. Ann., Tit. 17, § 2911 (1983 and Supp. 1987–1988)
Md.	Md. Ann. Code, Art. 27, § 419 (1987)
Mass.	Mass. Gen. Laws § 272:28 (1986)
Mich.	Mich. Comp. Laws § 750.142 (1979)
Minn.	Minn. Stat. § 617.293 (1986)
Miss.	Miss. Code Ann. § 97–5–27 (Supp. 1987)
Mo.	Mo. Rev. Stat. § 573.040 (Supp. 1987)
Mont.	Mont. Code Ann. § 45–8–201 (1987)
Neb.	Neb. Rev. Stat. § 28–808 (1985)
Nev.	Nev. Rev. Stat. § 201.265 (1987)
N. H.	N. H. Rev. Stat. Ann. § 571–B:2 (1986)
N. J.	N. J. Stat. Ann. §§ 2C:34–2, 2C:34–3 (West 1982 and Supp. 1988)
N. M.	N. M. Stat. Ann. § 30–37–2 (1980)
N. Y.	N. Y. Penal Law § 235.21 (McKinney 1980)
N. C.	N. C. Gen. Stat. § 19–13 (1983)
N. D.	N. D. Cent. Code § 12.1–27.1–03 (1985)
Ohio	Ohio Rev. Code Ann. § 2907.31 (1986)
Okla.	Okla. Stat., Tit. 21, § 1040.8 (Supp. 1987)
Ore.	Ore. Rev. Stat. § 167.065 (1987)
Pa.	Pa. Cons. Stat. § 5903 (1982)
R. I.	R. I. Gen. Laws § 11–31–10 (Supp. 1987)
S. C.	S. C. Code § 16–15–385 (Supp. 1987)
S. D.	S. D. Codified Laws § 22–24–28 (1988)
Tenn.	Tenn. Code Ann. § 39–6–1132 (1982)
Tex.	Tex. Penal Code Ann. § 43.24 (1974)
Utah	Utah Code Ann. § 76–10–1206 (1978)
Vt.	Vt. Stat. Ann., Tit. 13, § 2802 (1974)
Va.	Va. Code § 18.2–391 (1988)
Wash.	Wash. Rev. Code § 9.68.060 (1987)
W. Va.	W. Va. Code § 61–8A–2 (1984)
Wis.	Wis. Stat. § 944.21 (1985–1986)
Wyo.	Wyo. Stat. § 6–4–302 (1988)

APPENDIX F

Right to Participate in Legalized Gambling Without Parental Consent

In 39 of the 48 States in which some form of legalized gambling is permitted, minors are absolutely prohibited from participating in some or all forms of such gambling. In three States parental consent vitiates such prohibition; in six States, no age restrictions are expressed in the statutory provisions authorizing gambling.

Ala.	Ala. Code § 11–65–44 (1985)
Alaska	Alaska Stat. Ann. § 43.35.040(a)(1) (1983)
Ariz.	Ariz. Rev. Stat. Ann. § 5–112(E) (Supp. 1987)
Ark.	Ark. Code Ann. § 23–110–405(c) (Supp. 1987)
Cal.	Cal. Penal Code Ann. § 326.5(e) (West 1988)
Colo.	Colo. Rev. Stat. § 24–35–214(1)(c) (1982)
Conn.	Conn. Gen. Stat. § 7–186a (Supp. 1988)
Del.	Del. Code Ann., Tit. 29, § 4810(a) (1983)
D. C.	D. C. Code § 2–2534 (1988)
Fla.	Fla. Stat. § 849.093(9)(a) (1987)
Ga.	Ga. Code Ann. § 16–12–58 (1984)
Haw.	Haw. Rev. Stat. § 712–1231 (1985)
Idaho	Idaho Code § 67–7415 (Supp. 1988)
Ill.	Ill. Rev. Stat., ch. 120, ¶ 1102(9) (1988)
Ind.	[Gambling not permitted by statute]
Iowa	Iowa Code § 233.1(2)(c) (1987)
Kan.	Kan. Stat. Ann. § 79–4706(m) (1984)
Ky.	[No age restrictions]
La.	La. Rev. Stat. Ann. § 14:92(A)(4) (West 1986)
Me.	Me. Rev. Stat. Ann., Tit. 17, § 319 (1983)
Md.	[No age restrictions]
Mass.	Mass. Gen. Laws § 128A:10 (1986)
Mich.	Mich. Comp. Laws Ann. § 432.110a(a) (Supp. 1988–1989)
Minn.	[No age restrictions]
Miss.	Miss. Code Ann. § 97–33–21 (1972)
Mo.	Mo. Rev. Stat. § 313.280 (1986)
Mont.	Mont. Code Ann. § 23–5–506 (1987)
Neb.	Neb. Rev. Stat. § 9–250 (Supp. 1986)
Nev.	Nev. Rev. Stat. § 463.350 (1987)
N. H.	N. H. Rev. Stat. Ann. §§ 287–A:4, 287–E:7(III), and 287–E:21(V) (1987)

N. J.	N. J. Stat. Ann. § 9:17B–1 (West Supp. 1988)
N. M.	[No age restrictions]
N. Y.	N. Y. Tax Law § 1610 (McKinney 1987)
N. C.	[No age restrictions]
N. D.	N. D. Cent. Code § 53–06.1–07.1 (Supp. 1987)
Ohio	Ohio Rev. Code Ann. § 3770.07 (Supp. 1987)
Okla.	Okla. Stat., Tit. 21, § 995.13 (1981) (permitted with parental consent)
Ore.	Ore. Rev. Stat. § 163.575(1)(c) (1987)
Pa.	Pa. Stat. Ann., Tit. 10, § 305 (Purdon Supp. 1988–1989) (permitted with parental consent)
R. I.	R. I. Gen. Laws § 11–19–32(*l*) (Supp. 1987)
S. C.	[Gambling not permitted by statute]
S. D.	S. D. Codified Laws § 42–7A–32 (Supp. 1988)
Tenn.	Tenn. Code Ann. § 39–6–609(f) (Supp. 1987)
Tex.	Tex. Rev. Civ. Stat. Ann., Art. 179d, § 17 (Vernon Supp. 1987–1988) (permitted with parental consent)
Utah	[Gambling not permitted by statute]
Vt.	Vt. Stat. Ann., Tit. 31, § 674(J) (1986)
Va.	[No age restrictions]
Wash.	Wash. Rev. Code § 67.70.120 (1987)
W. Va.	W. Va. Code § 19–23–9(e) (Supp. 1988)
Wis.	Wis. Stat. § 163.51(13) (1985–1986)
Wyo.	Wyo. Stat. § 11–25–109(c) (Supp. 1988)

JUSTICE O'CONNOR, concurring in the judgment.

The plurality and dissent agree on two fundamental propositions: that there is some age below which a juvenile's crimes can never be constitutionally punished by death, and that our precedents require us to locate this age in light of the "'evolving standards of decency that mark the progress of a maturing society.'" See *ante*, at 821 (quoting *Trop* v. *Dulles*, 356 U. S. 86, 101 (1958) (opinion of Warren, C. J.)); *ante*, at 827–829; *post*, at 864–865, 872. See also, *e. g.*, *McCleskey* v. *Kemp*, 481 U. S. 279, 300 (1987). I accept both principles. The disagreements between the plurality and the dissent rest on their different evaluations of the evidence available to us about the relevant social consensus. Although I believe that a national consensus forbidding the execution of any person

for a crime committed before the age of 16 very likely does exist, I am reluctant to adopt this conclusion as a matter of constitutional law without better evidence than we now possess. Because I conclude that the sentence in this case can and should be set aside on narrower grounds than those adopted by the plurality, and because the grounds on which I rest should allow us to face the more general question when better evidence is available, I concur only in the judgment of the Court.

I

Both the plurality and the dissent look initially to the decisions of American legislatures for signs of a national consensus about the minimum age at which a juvenile's crimes may lead to capital punishment. Although I agree with the dissent's contention, *post*, at 865, that these decisions should provide the most reliable signs of a society-wide consensus on this issue, I cannot agree with the dissent's interpretation of the evidence.

The most salient statistic that bears on this case is that every single American legislature that has expressly set a minimum age for capital punishment has set that age at 16 or above. See *ante*, at 829, and n. 30. When one adds these 18 States to the 14 that have rejected capital punishment completely, see *ante*, at 826, and n. 25, it appears that almost two-thirds of the state legislatures have definitely concluded that no 15-year-old should be exposed to the threat of execution. See also *ante*, at 829, n. 29 (pointing out that an additional two States with death penalty statutes on their books seem to have abandoned capital punishment in practice). Where such a large majority of the state legislatures have unambiguously outlawed capital punishment for 15-year-olds, and where no legislature in this country has affirmatively and unequivocally endorsed such a practice, strong counterevidence would be required to persuade me that a national consensus against this practice does not exist.

The dissent argues that it has found such counterevidence in the laws of the 19 States that authorize capital punishment without setting any statutory minimum age. If we could be sure that each of these 19 state legislatures had deliberately chosen to authorize capital punishment for crimes committed at the age of 15, one could hardly suppose that there is a settled national consensus opposing such a practice. In fact, however, the statistics relied on by the dissent may be quite misleading. When a legislature provides for some 15-year-olds to be processed through the adult criminal justice system, and capital punishment is available for adults in that jurisdiction, the death penalty becomes at least theoretically applicable to such defendants. This is how petitioner was rendered death eligible, and the same possibility appears to exist in 18 other States. See *post*, at 861–862; *ante*, at 828, n. 26. As the plurality points out, however, it does not necessarily follow that the legislatures in those jurisdictions have deliberately concluded that it would be appropriate to impose capital punishment on 15-year-olds (or on even younger defendants who may be tried as adults in some jurisdictions). See *ante*, at 826, n. 24.

There are many reasons, having nothing whatsoever to do with capital punishment, that might motivate a legislature to provide as a general matter for some 15-year-olds to be channeled into the adult criminal justice process. The length or conditions of confinement available in the juvenile system, for example, might be considered inappropriate for serious crimes or for some recidivists. Similarly, a state legislature might conclude that very dangerous individuals, whatever their age, should not be confined in the same facility with more vulnerable juvenile offenders. Such reasons would suggest nothing about the appropriateness of capital punishment for 15-year-olds. The absence of any such implication is illustrated by the very States that the dissent cites as evidence of a trend toward lowering the age at which juveniles may be punished as adults. See *post*, at 867, and n. 3. New York,

which recently adopted legislation allowing juveniles as young as 13 to be tried as adults, does not authorize capital punishment under any circumstances. In New Jersey, which now permits some 14-year-olds to be tried as adults, the minimum age for capital punishment is 18. In both cases, therefore, the decisions to lower the age at which some juveniles may be treated as adults must have been based on reasons quite separate from the legislatures' views about the minimum age at which a crime should render a juvenile eligible for the death penalty.

Nor have we been shown evidence that other legislatures directly considered the fact that the interaction between their capital punishment statutes and their juvenile offender statutes could in theory lead to executions for crimes committed before the age of 16. The very real possibility that this result was not considered is illustrated by the recent federal legislation, cited by the dissent, which lowers to 15 the age at which a defendant may be tried as an adult. See *post*, at 865 (discussing Comprehensive Crime Control Act of 1984, Pub. L. 98–473, 98 Stat. 2149). Because a number of federal statutes have long provided for capital punishment, see *post*, at 866, n. 1, this legislation appears to imply that 15-year-olds may now be rendered death eligible under federal law. The dissent does not point to any legislative history suggesting that Congress considered this implication when it enacted the Comprehensive Crime Control Act. The apparent absence of such legislative history is especially striking in light of the fact that the United States has agreed by treaty to set a minimum age of 18 for capital punishment in certain circumstances. See Article 68 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, [1955] 6 U. S. T. 3516, 3560, T. I. A. S. No. 3365 (rules pertaining to military occupation); *ante*, at 831, n. 34; see also *ibid.* (citing two other international agreements, signed but not ratified by the United States, prohibiting capital punishment for juveniles). Perhaps even more striking is

the fact that the United States Senate recently passed a bill authorizing capital punishment for certain drug offenses, but prohibiting application of this penalty to persons below the age of 18 at the time of the crime. 134 Cong. Rec. 14117, 14118 (1988). Whatever other implications the ratification of Article 68 of the Geneva Convention may have, and whatever effects the Senate's recent action may eventually have, both tend to undercut any assumption that the Comprehensive Crime Control Act signals a decision by Congress to authorize the death penalty for some 15-year-old felons.

Thus, there is no indication that any legislative body in this country has rendered a considered judgment approving the imposition of capital punishment on juveniles who were below the age of 16 at the time of the offense. It nonetheless is true, although I think the dissent has overstated its significance, that the Federal Government and 19 States have adopted statutes that appear to have the legal effect of rendering some of these juveniles death eligible. That fact is a real obstacle in the way of concluding that a national consensus forbids this practice. It is appropriate, therefore, to examine other evidence that might indicate whether or not these statutes are inconsistent with settled notions of decency in our society.

In previous cases, we have examined execution statistics, as well as data about jury determinations, in an effort to discern whether the application of capital punishment to certain classes of defendants has been so aberrational that it can be considered unacceptable in our society. See, *e. g.*, *Coker* v. *Georgia*, 433 U. S. 584, 592 (1977) (plurality opinion); *Enmund* v. *Florida*, 458 U. S. 782, 794–796 (1982); *id.*, at 818–819 (O'CONNOR, J., dissenting). In this case, the plurality emphasizes that four decades have gone by since the last execution of a defendant who was younger than 16 at the time of the offense, and that only 5 out of 1,393 death sentences during a recent 5-year period involved such defendants.

Ante, at 832–833. Like the statistics about the behavior of legislatures, these execution and sentencing statistics support the inference of a national consensus opposing the death penalty for 15-year-olds, but they are not dispositive.

A variety of factors, having little or nothing to do with any individual's blameworthiness, may cause some groups in our population to commit capital crimes at a much lower rate than other groups. The statistics relied on by the plurality, moreover, do not indicate how many juries have been asked to impose the death penalty for crimes committed below the age of 16, or how many times prosecutors have exercised their discretion to refrain from seeking the death penalty in cases where the statutory prerequisites might have been proved. Without such data, raw execution and sentencing statistics cannot allow us reliably to infer that juries are or would be significantly more reluctant to impose the death penalty on 15-year-olds than on similarly situated older defendants.

Nor, finally, do I believe that this case can be resolved through the kind of disproportionality analysis employed in Part V of the plurality opinion. I agree that "proportionality requires a nexus between the punishment imposed and the defendant's blameworthiness." *Enmund*, *supra*, at 825 (O'CONNOR, J., dissenting); see also *Tison* v. *Arizona*, 481 U. S. 137 (1987). Granting the plurality's other premise—that adolescents are generally less blameworthy than adults who commit similar crimes—it does not necessarily follow that all 15-year-olds are incapable of the moral culpability that would justify the imposition of capital punishment. Nor has the plurality educed evidence demonstrating that 15-year-olds as a class are inherently incapable of being deterred from major crimes by the prospect of the death penalty.

Legislatures recognize the relative immaturity of adolescents, and we have often permitted them to define age-based classes that take account of this qualitative difference between juveniles and adults. See, *e. g.*, *Hazelwood School*

District v. *Kuhlmeier*, 484 U. S. 260 (1988); *Schall* v. *Martin*, 467 U. S. 253 (1984); *McKeiver* v. *Pennsylvania*, 403 U. S. 528 (1971); *Ginsberg* v. *New York*, 390 U. S. 629 (1968). But compare *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U. S. 52, 74–75 (1976) (unconstitutional for a legislature to presume that all minors are incapable of providing informed consent to abortion), and *Bellotti* v. *Baird*, 443 U. S. 622, 654 (1979) (STEVENS, J., joined by BRENNAN, MARSHALL, and BLACKMUN, JJ., concurring in judgment) (same), with *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U. S. 416, 469, n. 12 (1983) (O'CONNOR, J., dissenting) (parental notification requirements may be constitutional). The special qualitative characteristics of juveniles that justify legislatures in treating them differently from adults for many other purposes are also relevant to Eighth Amendment proportionality analysis. These characteristics, however, vary widely among different individuals of the same age, and I would not substitute our inevitably subjective judgment about the best age at which to draw a line in the capital punishment context for the judgments of the Nation's legislatures. Cf. *Enmund*, *supra*, at 826, and n. 42 (O'CONNOR, J., dissenting).

The history of the death penalty instructs that there is danger in inferring a settled societal consensus from statistics like those relied on in this case. In 1846, Michigan became the first State to abolish the death penalty for all crimes except treason, and Rhode Island soon thereafter became the first jurisdiction to abolish capital punishment completely. F. Zimring & G. Hawkins, Capital Punishment and the American Agenda 28 (1986). In succeeding decades, other American States continued the trend towards abolition, especially during the years just before and during World War I. *Id.*, at 28–29. Later, and particularly after World War II, there ensued a steady and dramatic decline in executions—both in absolute terms and in relation to the number of homicides occurring in the country. W. Bowers, Legal Homicide

26–28 (1984). In the 1950's and 1960's, more States abolished or radically restricted capital punishment, and executions ceased completely for several years beginning in 1968. H. Bedau, The Death Penalty in America 23, 25 (3d ed. 1982).

In 1972, when this Court heard arguments on the constitutionality of the death penalty, such statistics might have suggested that the practice had become a relic, implicitly rejected by a new societal consensus. Indeed, counsel urged the Court to conclude that "the number of cases in which the death penalty is imposed, as compared with the number of cases in which it is statutorily available, reflects a general revulsion toward the penalty that would lead to its repeal if only it were more generally and widely enforced." *Furman* v. *Georgia*, 408 U. S. 238, 386 (1972) (Burger, C. J., dissenting). We now know that any inference of a societal consensus rejecting the death penalty would have been mistaken. But had this Court then declared the existence of such a consensus, and outlawed capital punishment, legislatures would very likely not have been able to revive it. The mistaken premise of the decision would have been frozen into constitutional law, making it difficult to refute and even more difficult to reject.

The step that the plurality would take today is much narrower in scope, but it could conceivably reflect an error similar to the one we were urged to make in *Furman*. The day may come when we must decide whether a legislature may deliberately and unequivocally resolve upon a policy authorizing capital punishment for crimes committed at the age of 15. In that event, we shall have to decide the Eighth Amendment issue that divides the plurality and the dissent in this case, and we shall have to evaluate the evidence of societal standards of decency that is available to us at that time. In my view, however, we need not and should not decide the question today.

II

Under the Eighth Amendment, the death penalty has been treated differently from all other punishments. See, *e. g.*, *California* v. *Ramos*, 463 U. S. 992, 998–999, and n. 9 (1983). Among the most important and consistent themes in this Court's death penalty jurisprudence is the need for special care and deliberation in decisions that may lead to the imposition of that sanction. The Court has accordingly imposed a series of unique substantive and procedural restrictions designed to ensure that capital punishment is not imposed without the serious and calm reflection that ought to precede any decision of such gravity and finality.

The restrictions that we have required under the Eighth Amendment affect both legislatures and the sentencing authorities responsible for decisions in individual cases. Neither automatic death sentences for certain crimes, for example, nor statutes committing the sentencing decision to the unguided discretion of judges or juries, have been upheld. See, *e. g.*, *Woodson* v. *North Carolina*, 428 U. S. 280 (1976); *Roberts* v. *Louisiana*, 428 U. S. 325 (1976); *Gregg* v. *Georgia*, 428 U. S. 153, 188–189 (1976) (opinion of Stewart, Powell, and STEVENS, JJ.) (discussing *Furman* v. *Georgia*, *supra*). We have rejected both legislative restrictions on the mitigating evidence that a sentencing authority may consider, *e. g.*, *Lockett* v. *Ohio*, 438 U. S. 586 (1978); *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982), and the lack of sufficiently precise restrictions on the aggravating circumstances that may be considered, *e. g.*, *Godfrey* v. *Georgia*, 446 U. S. 420 (1980). As a practical matter we have virtually required that the death penalty be imposed only when a guilty verdict has been followed by separate trial-like sentencing proceedings, and we have extended many of the procedural restrictions applicable during criminal trials into these proceedings. See, *e. g.*, *Gardner* v. *Florida*, 430 U. S. 349 (1977); *Estelle* v. *Smith*, 451 U. S. 454 (1981); *Bullington* v. *Missouri*, 451 U. S. 430

(1981). Legislatures have been forbidden to authorize capital punishment for certain crimes. *Coker* v. *Georgia*, 433 U. S. 584 (1977); *Enmund* v. *Florida*, 458 U. S. 782 (1982); see also *Ford* v. *Wainwright*, 477 U. S. 399 (1986) (Eighth Amendment forbids the execution of insane prisoners). Constitutional scrutiny in this area has been more searching than in the review of noncapital sentences. See *Enmund* v. *Florida*, *supra*, at 815, n. 27 (O'CONNOR, J., dissenting); *Rummel* v. *Estelle*, 445 U. S. 263, 272 (1980).

The case before us today raises some of the same concerns that have led us to erect barriers to the imposition of capital punishment in other contexts. Oklahoma has enacted a statute that authorizes capital punishment for murder, without setting any minimum age at which the commission of murder may lead to the imposition of that penalty. The State has also, but quite separately, provided that 15-year-old murder defendants may be treated as adults in some circumstances. Because it proceeded in this manner, there is a considerable risk that the Oklahoma Legislature either did not realize that its actions would have the effect of rendering 15-year-old defendants death eligible or did not give the question the serious consideration that would have been reflected in the explicit choice of some minimum age for death eligibility. Were it clear that no national consensus forbids the imposition of capital punishment for crimes committed before the age of 16, the implicit nature of the Oklahoma Legislature's decision would not be constitutionally problematic. In the peculiar circumstances we face today, however, the Oklahoma statutes have presented this Court with a result that is of very dubious constitutionality, and they have done so without the earmarks of careful consideration that we have required for other kinds of decisions leading to the death penalty. In this unique situation, I am prepared to conclude that petitioner and others who were below the age of 16 at the time of their offense may not be executed under the authority of a capital punishment statute that specifies no mini-

mum age at which the commission of a capital crime can lead to the offender's execution.*

The conclusion I have reached in this unusual case is itself unusual. I believe, however, that it is in keeping with the principles that have guided us in other Eighth Amendment cases. It is also supported by the familiar principle—applied in different ways in different contexts—according to which we should avoid unnecessary, or unnecessarily broad, constitutional adjudication. See generally, *e. g.*, *Ashwander* v. *TVA*, 297 U. S. 288, 341–356 (1936) (Brandeis, J., concurring). The narrow conclusion I have reached in this case is consistent with the underlying rationale for that principle, which was articulated many years ago by Justice Jackson: "We are not final because we are infallible, but we are infallible only because we are final." *Brown* v. *Allen*, 344 U. S. 443, 540 (1953) (opinion concurring in result); see also *Califano* v. *Yamasaki*, 442 U. S. 682, 692–693 (1979). By leaving open for now the broader Eighth Amendment question that both the plurality and the dissent would resolve, the approach I take allows the ultimate moral issue at stake in the constitutional question to be addressed in the first in-

*Contrary to the dissent's suggestion, the conclusion I have reached in this case does not imply that I would reach a similar conclusion in cases involving "those of extremely low intelligence, or those over 75, or any number of other appealing groups as to which the existence of a national consensus regarding capital punishment may be in doubt . . . because they are not specifically named in the capital statutes." See *post*, at 877. In this case, there is significant affirmative evidence of a national consensus forbidding the execution of defendants who were below the age of 16 at the time of the offense. The evidence includes 18 state statutes setting a minimum age of 16 or more, and it is such evidence—not the mere failure of Oklahoma to specify a minimum age or the "appealing" nature of the group to which petitioner belongs—that leaves me unwilling to conclude that petitioner may constitutionally be executed. Cases in which similarly persuasive evidence was lacking would in my view not be analogous to the case before us today. The dissent is mistaken both when it reads into my discussion a contrary implication and when it suggests that there are ulterior reasons behind the implication it has incorrectly drawn.

stance by those best suited to do so, the people's elected representatives.

For the reasons stated in this opinion, I agree that petitioner's death sentence should be vacated, and I therefore concur in the judgment of the Court.

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

If the issue before us today were whether an automatic death penalty for conviction of certain crimes could be extended to individuals younger than 16 when they commit the crimes, thereby preventing individualized consideration of their maturity and moral responsibility, I would accept the plurality's conclusion that such a practice is opposed by a national consensus, sufficiently uniform and of sufficiently long standing, to render it cruel and unusual punishment within the meaning of the Eighth Amendment. We have already decided as much, and more, in *Lockett* v. *Ohio*, 438 U. S. 586 (1978). I might even agree with the plurality's conclusion if the question were whether a person under 16 when he commits a crime can be deprived of the benefit of a rebuttable presumption that he is not mature and responsible enough to be punished as an adult. The question posed here, however, is radically different from both of these. It is whether there is a national consensus that no criminal so much as one day under 16, after individuated consideration of his circumstances, including the overcoming of a presumption that he should not be tried as an adult, can possibly be deemed mature and responsible enough to be punished with death for any crime. Because there seems to me no plausible basis for answering this last question in the affirmative, I respectfully dissent.

I

I begin by restating the facts since I think that a fuller account of William Wayne Thompson's participation in the murder, and of his certification to stand trial as an adult,

is helpful in understanding the case. The evidence at trial left no doubt that on the night of January 22–23, 1983, Thompson brutally and with premeditation murdered his former brother-in-law, Charles Keene, the motive evidently being, at least in part, Keene's physical abuse of Thompson's sister. As Thompson left his mother's house that evening, in the company of three older friends, he explained to his girlfriend that "we're going to kill Charles." Several hours later, early in the morning of January 23, a neighbor, Malcolm "Possum" Brown, was awakened by the sound of a gunshot on his front porch. Someone pounded on his front door shouting: "Possum, open the door, let me in. They're going to kill me." Brown telephoned the police, and then opened the front door to see a man on his knees attempting to repel blows with his arms and hands. There were four other men on the porch. One was holding a gun and stood apart, while the other three were hitting and kicking the kneeling man, who never attempted to hit back. One of them was beating the victim with an object 12 to 18 inches in length. The police called back to see if the disturbance was still going on, and while Brown spoke with them on the telephone the men took the victim away in a car.

Several hours after they had left Thompson's mother's house, Thompson and his three companions returned. Thompson's girlfriend helped him take off his boots, and heard him say: "[W]e killed him. I shot him in the head and cut his throat and threw him in the river." Subsequently, the former wife of one of Thompson's accomplices heard Thompson tell his mother that "he killed him. Charles was dead and Vicki didn't have to worry about him anymore." During the days following the murder Thompson made other admissions. One witness testified that she asked Thompson the source of some hair adhering to a pair of boots he was carrying. He replied that was where he had kicked Charles Keene in the head. Thompson also told her that he had cut Charles' throat and chest and had shot him in the head. An-

other witness testified that when she told Thompson that a friend had seen Keene dancing in a local bar, Thompson remarked that that would be hard to do with a bullet in his head. Ultimately, one of Thompson's codefendants admitted that after Keene had been shot twice in the head Thompson had cut Keene "so the fish could eat his body." Thompson and a codefendant had then thrown the body into the Washita River, with a chain and blocks attached so that it would not be found. On February 18, 1983, the body was recovered. The Chief Medical Examiner of Oklahoma concluded that the victim had been beaten, shot twice, and that his throat, chest, and abdomen had been cut.

On February 18, 1983, the State of Oklahoma filed an information and arrest warrant for Thompson, and on February 22 the State began proceedings to allow Thompson to be tried as an adult. Under Oklahoma law, anyone who commits a crime when he is under the age of 18 is defined to be a child, unless he is 16 or 17 and has committed murder or certain other specified crimes, in which case he is automatically certified to stand trial as an adult. Okla. Stat., Tit. 10, §§ 1101, 1104.2 (Supp. 1987). In addition, under the statute the State invoked in the present case, juveniles may be certified to stand trial as adults if: (1) the State can establish the "prosecutive merit" of the case, and (2) the court certifies, after considering six factors, that there are no reasonable prospects for rehabilitation of the child within the juvenile system. Okla. Stat., Tit. 10, § 1112(b) (1981).

At a hearing on March 29, 1983, the District Court found probable cause to believe that the defendant had committed first-degree murder and thus concluded that the case had prosecutive merit. A second hearing was therefore held on April 21, 1983, to determine whether Thompson was amenable to the juvenile system, or whether he should be certified to stand trial as an adult. A clinical psychologist who had examined Thompson testified at the second hearing that in her opinion Thompson understood the difference between

right and wrong but had an antisocial personality that could not be modified by the juvenile justice system. The psychologist testified that Thompson believed that because of his age he was beyond any severe penalty of the law, and accordingly did not believe there would be any severe repercussions from his behavior. Numerous other witnesses testified about Thompson's prior abusive behavior. Mary Robinson, an employee of the Oklahoma juvenile justice system, testified about her contacts with Thompson during several of his previous arrests, which included arrests for assault and battery in August 1980; assault and battery in October 1981; attempted burglary in May 1982; assault and battery with a knife in July 1982; and assault with a deadly weapon in February 1983. She testified that Thompson had been provided with all the counseling the State's Department of Human Services had available, and that none of the counseling or placements seemed to improve his behavior. She recommended that he be certified to stand trial as an adult. On the basis of the foregoing testimony, the District Court filed a written order certifying Thompson to stand trial as an adult. That was appealed and ultimately affirmed by the Oklahoma Court of Criminal Appeals.

Thompson was tried in the District Court of Grady County between December 4 and December 9, 1983. During the guilt phase of the trial, the prosecutor introduced three color photographs showing the condition of the victim's body when it was removed from the river. The jury found Thompson guilty of first-degree murder. At the sentencing phase of the trial, the jury agreed with the prosecution on the existence of one aggravating circumstance, that the murder was "especially heinous, atrocious, or cruel." As required by our decision in *Eddings* v. *Oklahoma*, 455 U. S. 104, 115–117 (1982), the defense was permitted to argue to the jury the youthfulness of the defendant as a mitigating factor. The jury recommended that the death penalty be imposed, and the trial judge, accordingly, sentenced Thompson to death.

Thompson appealed, and his conviction and capital sentence were affirmed. Standing by its earlier decision in *Eddings* v. *State*, 616 P. 2d 1159, 1166–1167 (1980), rev'd on other grounds, 455 U. S. 104 (1982), the Oklahoma Court of Criminal Appeals held that "once a minor is certified to stand trial as an adult, he may also, without violating the Constitution, be punished as an adult." 724 P. 2d 780, 784 (1986). It also held that admission of two of the three photographs was error in the guilt phase of the proceeding, because their prejudicial effect outweighed their probative value; but found that error harmless in light of the overwhelming evidence of Thompson's guilt. It held that their prejudicial effect did not outweigh their probative value in the sentencing phase, and that they were therefore properly admitted, since they demonstrated the brutality of the crime. Thompson petitioned for certiorari with respect to both sentencing issues, and we granted review. 479 U. S. 1084 (1987).

II

A

As the foregoing history of this case demonstrates, William Wayne Thompson is not a juvenile caught up in a legislative scheme that unthinkingly lumped him together with adults for purposes of determining that death was an appropriate penalty for him and for his crime. To the contrary, Oklahoma first gave careful consideration to whether, in light of his young age, he should be subjected to the normal criminal system at all. That question having been answered affirmatively, a jury then considered whether, despite his young age, his maturity and moral responsibility were sufficiently developed to justify the sentence of death. In upsetting this particularized judgment on the basis of a constitutional absolute, the plurality pronounces it to be a fundamental principle of our society that no one who is as little as one day short of his 16th birthday can have sufficient maturity and moral responsibility to be subjected to capital punishment for any

crime. As a sociological and moral conclusion that is implausible; and it is doubly implausible as an interpretation of the United States Constitution.

The text of the Eighth Amendment, made applicable to the States by the Fourteenth, prohibits the imposition of "cruel and unusual punishments." The plurality does not attempt to maintain that this was originally understood to prohibit capital punishment for crimes committed by persons under the age of 16; the evidence is unusually clear and unequivocal that it was not. The age at which juveniles could be subjected to capital punishment was explicitly addressed in Blackstone's Commentaries on the Laws of England, published in 1769 and widely accepted at the time the Eighth Amendment was adopted as an accurate description of the common law. According to Blackstone, not only was 15 above the age (viz., 7) at which capital punishment could theoretically be imposed; it was even above the age (14) up to which there was a rebuttable presumption of incapacity to commit a capital (or any other) felony. 4 W. Blackstone, Commentaries *23–*24. See also M. Hale, Pleas of the Crown *22 (describing the age of absolute incapacity as 12 and the age of presumptive incapacity as 14); Kean, The History of the Criminal Liability of Children, 53 L.Q. Rev. 364, 369–370 (1937); Streib, Death Penalty for Children: The American Experience with Capital Punishment for Crimes Committed While under Age Eighteen, 36 Okla. L. Rev. 613, 614–615 (1983) (hereinafter Streib, Death Penalty for Children). The historical practice in this country conformed with the common-law understanding that 15-year-olds were not categorically immune from commission of capital crimes. One scholar has documented 22 executions, between 1642 and 1899, for crimes committed under the age of 16. See Streib, Death Penalty for Children 619.

Necessarily, therefore, the plurality seeks to rest its holding on the conclusion that Thompson's punishment as an adult is contrary to the "evolving standards of decency that

mark the progress of a maturing society." *Trop* v. *Dulles*, 356 U. S. 86, 101 (1958) (plurality opinion) (Warren, C. J.). *Ante*, at 821. Of course, the risk of assessing evolving standards is that it is all too easy to believe that evolution has culminated in one's own views. To avoid this danger we have, when making such an assessment in prior cases, looked for objective signs of how today's society views a particular punishment. *Furman* v. *Georgia*, 408 U. S. 238, 277–279 (1972) (BRENNAN, J., concurring). See also *Woodson* v. *North Carolina*, 428 U. S. 280, 293 (1976) (plurality opinion) (Stewart, Powell, and STEVENS, JJ.); *Coker* v. *Georgia*, 433 U. S. 584, 593–597 (1977); *Enmund* v. *Florida*, 458 U. S. 782, 788–789 (1982). The most reliable objective signs consist of the legislation that the society has enacted. It will rarely if ever be the case that the Members of this Court will have a better sense of the evolution in views of the American people than do their elected representatives.

It is thus significant that, only four years ago, in the Comprehensive Crime Control Act of 1984, Pub. L. 98–473, 98 Stat. 2149, Congress expressly addressed the effect of youth upon the imposition of criminal punishment, and changed the law in precisely the opposite direction from that which the plurality's perceived evolution in social attitudes would suggest: It lowered from 16 to 15 the age at which a juvenile's case can, "in the interest of justice," be transferred from juvenile court to Federal District Court, enabling him to be tried and punished as an adult. 18 U. S. C. § 5032 (1982 ed., Supp. IV). This legislation was passed in light of Justice Department testimony that many juvenile delinquents were "cynical, street-wise, repeat offenders, indistinguishable, except for their age, from their adult criminal counterparts," Hearings on S. 829 before the Subcommittee on Criminal Law of the Senate Committee on the Judiciary, 98th Cong., 1st Sess., 551 (1983), and that in 1979 alone juveniles under the age of 15, *i. e.*, almost a year *younger* than Thompson, had committed a total of 206 homicides nationwide, more than

1,000 forcible rapes, 10,000 robberies, and 10,000 aggravated assaults. *Id.*, at 554. Since there are federal death penalty statutes[1] which have not been determined to be unconstitutional, adoption of this new legislation could at least theoretically result in the imposition of the death penalty upon a 15-year-old. There is, to be sure, no reason to believe that the Members of Congress had the death penalty specifically in mind; but that does not alter the reality of what federal law now on its face permits. Moreover, if it is appropriate to go behind the face of the statutes to the subjective intentions of those who enacted them, it would be strange to find the consensus regarding criminal liability of juveniles to be moving in the direction the plurality perceives for capital punishment, while moving in precisely the opposite direction for all other penalties.[2]

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[1] See 10 U. S. C. § 906a (peacetime espionage); 10 U. S. C. § 918 (murder while member of Armed Forces); 18 U. S. C. §§ 32, 33, and 34 (1982 ed. and Supp. IV) (destruction of aircraft, motor vehicles, or related facilities resulting in death); 18 U. S. C. § 115(b)(3) (1982 ed., Supp. IV) (retaliatory murder of member of immediate family of law enforcement officials) (by cross reference to 18 U. S. C. § 1111); 18 U. S. C. § 351 (1982 ed. and Supp. IV) (murder of Member of Congress, important Executive official, or Supreme Court Justice) (by cross reference to 18 U. S. C. § 1111); 18 U. S. C. § 794 (espionage); 18 U. S. C. § 844(f) (1982 ed., Supp. IV) (destruction of government property resulting in death); 18 U. S. C. § 1111 (1982 ed. and Supp. IV) (first-degree murder within federal jurisdiction); 18 U. S. C. § 1716 (mailing of injurious articles with intent to kill resulting in death); 18 U. S. C. § 1751 (assassination or kidnaping resulting in death of President or Vice President) (by cross reference to 18 U. S. C. § 1111); 18 U. S. C. § 1992 (willful wrecking of train resulting in death); 18 U. S. C. § 2113 (bank robbery-related murder or kidnaping); 18 U. S. C. § 2381 (treason); 49 U. S. C. App. §§ 1472 and 1473 (death resulting from aircraft hijacking).

[2] The concurrence disputes the significance of Congress' lowering of the federal waiver age by pointing to a recently approved Senate bill that would set a minimum age of 18 before capital punishment could be imposed for certain narcotics-related offenses. This bill has not, however, been passed by the House of Representatives and signed into law by the President. Even if it eventually were, it would not result in the setting of a

Turning to legislation at the state level, one observes the same trend of *lowering* rather than raising the age of juvenile criminal liability.[3] As for the state status quo with respect to the death penalty in particular: The plurality chooses to "confine [its] attention" to the fact that all 18 of the States that establish a minimum age for capital punishment have chosen at least 16. *Ante*, at 829. But it is beyond me why an accurate analysis would not include within the computa-

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minimum age of 18 for any of the other federal death penalty statutes set forth in n. 1, *supra*. It would simply reflect a judgment by Congress that the death penalty is inappropriate for juvenile narcotics offenders. That would have minimal relevance to the question of consensus at issue here, which is not whether criminal offenders under 16 can be executed for *all* crimes, but whether they can be executed for *any* crimes. For the same reason, there is no significance to the concurrence's observation that the Federal Government has by Treaty agreed to a minimum death penalty age in certain very limited circumstances.

[3] Compare S. Davis, Rights of Juveniles, App. B–1 to B–26 (1987), with S. Davis, Rights of Juveniles 233–249 (1974). Idaho has twice lowered its waiver age, most recently from 15 to 14; Idaho Code § 16–1806 (Supp. 1988); Illinois has added as excluded offenses: murder, criminal sexual assault, armed robbery with a firearm, and possession of a deadly weapon in a school committed by a child 15 or older; Ill. Ann. Stat., ch. 37, § 805–4(6) (Supp. 1988); Indiana has lowered its waiver age to 14 where aggravating circumstances are present, and it has made waiver mandatory where child is 10 or older and has been charged with murder; Ind. Code §§ 31–6–2–4(b)—(e) (Supp. 1987); Kentucky has established a waiver age of 14 for juveniles charged with capital offenses or Class A or B felonies; Ky. Rev. Stat. §§ 635.020(2)–(4), 640.010 (Supp. 1986); Minnesota has made waiver mandatory for offenses committed by children 14 years or older who were previously certified for criminal prosecution and convicted of the offense or a lesser included offense; Minn. Stat. § 260.125, subd. 1, 3, and 3a (1986); and Montana has lowered its waiver age from 16 to 12 for children charged with sexual intercourse without consent, deliberate homicide, mitigated deliberate homicide, or attempted deliberate homicide or attempted mitigated deliberate homicide; Mont. Code Ann. § 41–5–206(1)(a) (1987); New Jersey lowered its waiver age from 16 to 14 for certain aggravated offenses; N. J. Stat. Ann. § 2A:4A–26 (West 1987); and New York recently amended its law to allow certain 13-, 14- and 15-year-olds to be tried and punished as adults; N. Y. Crim. Proc. Law § 190.71 (McKinney 1982).

tion the larger number of States (19) that have determined that no minimum age for capital punishment is appropriate, leaving that to be governed by their general rules for the age at which juveniles can be criminally responsible. A survey of state laws shows, in other words, that a majority of the States for which the issue exists (the rest do not have capital punishment) are of the view that death is not different insofar as the age of juvenile criminal responsibility is concerned. And the latter age, while presumed to be 16 in all the States, see *ante*, at 824, can, in virtually all the States, be less than 16 when individuated consideration of the particular case warrants it. Thus, what Oklahoma has done here is precisely what the majority of capital-punishment States would do.

When the Federal Government, and almost 40% of the States, including a majority of the States that include capital punishment as a permissible sanction, allow for the imposition of the death penalty on any juvenile who has been tried as an adult, which category can include juveniles under 16 at the time of the offense, it is obviously impossible for the plurality to rely upon any evolved societal consensus discernible in legislation—or at least discernible in the legislation of *this* society, which is assuredly all that is relevant.[4] Thus, the

[4] The plurality's reliance upon Amnesty International's account of what it pronounces to be civilized standards of decency in other countries, *ante*, at 830–831, and n. 34, is totally inappropriate as a means of establishing the fundamental beliefs of this Nation. That 40% of our States do not rule out capital punishment for 15-year-old felons is determinative of the question before us here, even if that position contradicts the uniform view of the rest of the world. We must never forget that it is a Constitution for the United States of America that we are expounding. The practices of other nations, particularly other democracies, can be relevant to determining whether a practice uniform among our people is not merely a historical accident, but rather so "implicit in the concept of ordered liberty" that it occupies a place not merely in our mores but, text permitting, in our Constitution as well. See *Palko* v. *Connecticut*, 302 U. S. 319, 325 (1937) (Cardozo, J.). But where there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans

plurality falls back upon what it promises will be an examination of "the behavior of juries." *Ante*, at 831. It turns out not to be that, perhaps because of the inconvenient fact that no fewer than five murderers who committed their crimes under the age of 16 were sentenced to death, in five different States, between the years 1984 and 1986. V. Streib, Death Penalty for Juveniles 168–169 (1987). Instead, the plurality examines the statistics on capital executions, which are of course substantially lower than those for capital sentences because of various factors, most notably the exercise of executive clemency. See Streib, Death Penalty for Children 619. Those statistics show, unsurprisingly, that capital punishment for persons who committed crimes under the age of 16 is rare. We are not discussing whether the Constitution requires such procedures as will continue to cause it to be rare, but whether the Constitution prohibits it entirely. The plurality takes it to be persuasive evidence that social attitudes have changed to embrace such a prohibition—changed so clearly and permanently as to be irrevocably enshrined in the Constitution—that in this century all of the 18 to 20 executions of persons below 16 when they committed crimes occurred before 1948.

Even assuming that the execution rather than the sentencing statistics are the pertinent data, and further assuming that a 4-decade trend is adequate to justify calling a constitutional halt to what may well be a pendulum swing in social attitudes, the statistics are frail support for the existence of the *relevant* trend. There are many reasons that adequately account for the drop in excecutions other than the premise of general agreement that no 15-year-old murderer should ever be executed. Foremost among them, of course, was a reduc-

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through the Constitution. In the present case, therefore, the fact that a majority of foreign nations would not impose capital punishment upon persons under 16 at the time of the crime is of no more relevance than the fact that a majority of them would not impose capital punishment at all, or have standards of due process quite different from our own.

tion in public support for capital punishment in general. Of the 14 States (including the District of Columbia) that currently have no death penalty statute, 11 have acquired that status since 1950. V. Streib, Death Penalty for Juveniles 42, Table 3–1. That reduction in willingness to impose capital punishment (which may reasonably be presumed to have been felt even in those States that did not entirely abolish it), combined with the modern trend, constitutionalized in *Lockett* v. *Ohio*, 438 U. S. 586 (1978), towards individualized sentencing determinations rather than automatic death sentences for certain crimes, reduced the total number of executions nationwide from an average of 1,272 per decade in the first half of the century to 254 per decade since then. See V. Streib, Death Penalty for Juveniles 56, Table 4–1. A society less ready to impose the death penalty, and entirely unwilling to impose it without individualized consideration, will of course pronounce death for a crime committed by a person under 16 very rarely. There is absolutely no basis, however, for attributing that phenomenon to a modern consensus that such an execution should never occur—any more than it would have been accurate to discern such a consensus in 1927 when, despite a level of total executions almost five times higher than that of the post-1950 period, there had been no execution for crime committed by juveniles under the age of 16 for almost 17 years. That that did not reflect a new societal absolute was demonstrated by the fact that in approximately the next 17 years there were 10 such executions. *Id.*, at 191–208.

In sum, the statistics of executions demonstrate nothing except the fact that our society has always agreed that executions of 15-year-old criminals should be rare, and in more modern times has agreed that they (like all other executions) should be even rarer still. There is no rational basis for discerning in that a societal judgment that no one so much as a day under 16 can *ever* be mature and morally responsible enough to deserve that penalty; and there is no justification

except our own predeliction for converting a statistical rarity of occurrence into an absolute constitutional ban. One must surely fear that, now that the Court has taken the first step of requiring individualized consideration in capital cases, today's decision begins a second stage of converting into constitutional rules the general results of that individuation. One could readily run the same statistical argument with respect to other classes of defendants. Between 1930 and 1955, for example, 30 women were executed in the United States. Only three were executed between then and 1986—and none in the 22-year period between 1962 and 1984. Proportionately, the drop is as impressive as that which the plurality points to in 15-year-old executions. (From 30 in 25 years to 3 in the next 31 years, versus from 18 in 50 years to potentially 1—the present defendant—in the next 40 years.) Surely the conclusion is not that it is unconstitutional to impose capital punishment upon a woman.[5]

If one believes that the data the plurality relies upon are effective to establish, with the requisite degree of certainty, a constitutional consensus in this society that no person can

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[5] I leave to a footnote my discussion of the plurality's reliance upon the fact that in most or all States, juveniles under 16 cannot vote, sit on a jury, marry without parental consent, participate in organized gambling, patronize pool halls, pawn property, or purchase alcohol, pornographic materials, or cigarettes. *Ante*, at 823, 824, and nn. 10–14. Our cases sensibly suggest that constitutional rules relating to the maturity of minors must be drawn with an eye to the decision for which the maturity is relevant. See *Fare* v. *Michael C.*, 442 U. S. 707, 725–727 (1979) (totality of the circumstances test for juvenile waiver of Fifth Amendment rights permits evaluation of the juvenile's age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him); *Bellotti* v. *Baird*, 443 U. S. 622, 634–637, 642 (1979) (abortion decision differs in important ways from other decisions that may be made during minority). It is surely constitutional for a State to believe that the degree of maturity that is necessary fully to appreciate the pros and cons of smoking cigarettes, or even of marrying, may be somewhat greater than the degree necessary fully to appreciate the pros and cons of brutally killing a human being.

ever be executed for a crime committed under the age of 16, it is difficult to see why the same judgment should not extend to crimes committed under the age of 17, or of 18. The frequency of such executions shows an almost equivalent drop in recent years, *id.*, at 191–208; and of the 18 States that have enacted age limits upon capital punishment, only 3 have selected the age of 16, only 4 the age of 17, and all the rest the age of 18, *ante*, at 829, n. 29. It seems plain to me, in other words, that there is no clear line here, which suggests that the plurality is inappropriately acting in a legislative rather than a judicial capacity. Doubtless at some age a line does exist—as it has always existed in the common law, see *supra*, at 864—below which a juvenile can *never* be considered fully responsible for murder. The evidence that the views of our society, so steadfast and so uniform that they have become part of the agreed-upon laws that we live by, regard that absolute age to be 16 is nonexistent.

B

Having avoided any attempt to justify its holding on the basis of the original understanding of what was "cruel and unusual punishment," and having utterly failed in justifying its holding on the basis of "evolving standards of decency" evidenced by "the work product of state legislatures and sentencing juries," *ante*, at 822, the plurality proceeds, in Part V of the opinion, to set forth its views regarding the desirability of ever imposing capital punishment for a murder committed by a 15-year-old. That discussion begins with the recitation of propositions upon which there is "broad agreement" within our society, namely, that "punishment should be directly related to the personal culpability of the criminal defendant," and that "adolescents as a class are less mature and responsible than adults." *Ante*, at 834. It soon proceeds, however, to the conclusion that "[g]iven the lesser culpability of the juvenile offender, the teenager's capacity for growth, and society's fiduciary obligations to its children," none of the

rationales for the death penalty can apply to the execution of a 15-year-old criminal, so that it is "'nothing more than the purposeless and needless imposition of pain and suffering.'" *Ante*, at 838, quoting *Coker* v. *Georgia*, 433 U. S., at 592. On this, as we have seen, there is assuredly not general agreement. Nonetheless, the plurality would make it one of the fundamental laws governing our society solely because it has an "'abiding conviction'" that it is so, *ante*, at 833, n. 40, quoting *Coker* v. *Georgia*, *supra*, at 598.

This is in accord with the proposition set out at the beginning of the plurality's discussion in Part V, that "'[a]lthough the judgments of legislatures, juries, and prosecutors weigh heavily in the balance, it is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty.'" *Ante*, at 833, quoting *Enmund* v. *Florida*, 458 U. S., at 797. I reject that proposition in the sense intended here. It is assuredly "for us ultimately to judge" what the Eighth Amendment permits, but that means it is for us to judge whether certain punishments are forbidden because, despite what the current society thinks, they were forbidden under the original understanding of "cruel and unusual," cf. *Brown* v. *Board of Education*, 347 U. S. 483 (1954); or because they come within current understanding of what is "cruel and unusual," because of the "evolving standards of decency" *of our national society;* but not because they are out of accord with the perceptions of decency, or of penology, or of mercy, entertained—or strongly entertained, or even held as an "abiding conviction"—by a majority of the small and unrepresentative segment of our society that sits on this Court. On its face, the phrase "cruel *and unusual* punishments" limits the evolving standards appropriate for our consideration to those entertained by the society rather than those dictated by our personal consciences.

Because I think the views of this Court on the policy questions discussed in Part V of the plurality opinion to be irrelevant, I make no attempt to refute them. It suffices to say

that there is another point of view, suggested in the following passage written by our esteemed former colleague Justice Powell, whose views the plurality several times invokes for support, *ante*, at 823–825, 834:

> "Minors who become embroiled with the law range from the very young up to those on the brink of majority. Some of the older minors become fully 'street-wise,' hardened criminals, deserving no greater consideration than that properly accorded all persons suspected of crime." *Fare* v. *Michael C.*, 442 U. S. 707, 734, n. 4 (1979) (dissenting opinion).

The view that it is possible for a 15-year-old to come within this category uncontestably prevailed when the Eighth and Fourteenth Amendments were adopted, and, judging from the actions of the society's democratically elected representatives, still persuades a substantial segment of the people whose "evolving standards of decency" we have been appointed to discern rather than decree. It is not necessary, as the plurality's opinion suggests, that "we [be] persuaded," *ante*, at 838, of the correctness of the people's views.

III

If I understand JUSTICE O'CONNOR's separate concurrence correctly, it agrees (1) that we have no constitutional authority to set aside this death penalty unless we can find it contrary to a firm national consensus that persons younger than 16 at the time of their crime cannot be executed, and (2) that we cannot make such a finding. It does not, however, reach the seemingly inevitable conclusion that (3) we therefore have no constitutional authority to set aside this death penalty. Rather, it proceeds (in Part II) to state that since (a) we have treated the death penalty "differently from all other punishments," *ante*, at 856, imposing special procedural and substantive protections not required in other contexts, and (b) although we cannot actually *find* any national consensus forbidding execution for crimes committed under 16, there

may *perhaps* be such a consensus, therefore (c) the Oklahoma statutes plainly authorizing the present execution by treating 15-year-old felons (after individuated findings) as adults, and authorizing execution of adults, are not adequate, and what is needed is a statute explicitly stating that "15-year-olds can be guilty of capital crimes."

First, of course, I do not agree with (b)—that there is any doubt about the nonexistence of a national consensus. The concurrence produces the doubt only by arbitrarily refusing to believe that what the laws of the Federal Government and 19 States clearly provide for represents a "considered judgment." *Ante*, at 852. Second, I do not see how (c) follows from (b)—how the problem of doubt about whether what the Oklahoma laws permit is contrary to a firm national consensus and therefore unconstitutional is solved by making *absolutely sure* that the citizens of Oklahoma really want to take this unconstitutional action. And finally, I do not see how the procedural and substantive protections referred to in (a) provide any precedent for what is done in (c). Those special protections for capital cases, such as the prohibition of unguided discretion, *Gregg* v. *Georgia*, 428 U. S. 153, 176–196 (1976) (joint opinion) (Stewart, Powell, and STEVENS, JJ.) and the prohibition of automatic death sentences for certain crimes, *Woodson* v. *North Carolina*, 428 U. S., at 289–301 (plurality opinion) (Stewart, Powell, and STEVENS, JJ.), were not drawn from a hat, but were thought to be (once again) what a national consensus required. I am unaware of any national consensus, and the concurrence does not suggest the existence of any, that the death penalty for felons under 16 can only be imposed by a single statute that explicitly addresses that subject. Thus, part (c) of the concurrence's argument, its conclusion, could be replaced with almost anything. There is no more basis for imposing the particular procedural protection it announces than there is for imposing a requirement that the death penalty for felons under 16 be adopted by a two-thirds vote of each house of the

state legislature, or by referendum, or by bills printed in 10-point type. I am also left in some doubt whether this new requirement will be lifted (since its supposed rationale would disappear) when enough States have complied with it to render the nonexistence of a national consensus against such executions no longer doubtful; or only when enough States have done so to demonstrate that there is a national consensus in favor of such executions; or never.

It could not possibly be the concurrence's concern that this death sentence is a fluke—a punishment not really contemplated by Oklahoma law but produced as an accidental result of its interlocking statutes governing capital punishment and the age for treating juveniles as adults. The statutes, and their consequences, are quite clear. The present case, moreover, is of such prominence that it has received extensive coverage not only in the Oklahoma press but nationally. It would not even have been necessary for the Oklahoma Legislature to act in order to remedy the miscarriage of its intent, if that is what this sentence was. The Governor of Oklahoma, who can certainly recognize a frustration of the will of the citizens of Oklahoma more readily than we, would certainly have used his pardon power if there was some mistake here. What the concurrence proposes is obviously designed to nullify rather than effectuate the will of the people of Oklahoma, even though the concurrence cannot find that will to be unconstitutional.

What the concurrence proposes is also designed, of course, to make it more difficult for all States to enact legislation resulting in capital punishment for murderers under 16 when they committed their crimes. It is difficult to pass a law saying explicitly "15-year-olds can be executed," just as it would be difficult to pass a law saying explicitly "blind people can be executed," or "white-haired grandmothers can be executed," or "mothers of two-year-olds can be executed." But I know of no authority whatever for our specifying the precise form that state legislation must take, as opposed to its constitu-

tionally required content. We have in the past studiously avoided that sort of interference in the States' legislative processes, the heart of their sovereignty. Placing restraints upon the manner in which the States make their laws, in order to give 15-year-old criminals special protection against capital punishment, may well be a good idea, as perhaps is the abolition of capital punishment entirely. It is not, however, an idea it is ours to impose. Thus, while the concurrence purports to be adopting an approach more respectful of States' rights than the plurality, in principle it seems to me much more disdainful. It says to those jurisdictions that have laws like Oklahoma's: We cannot really say that what you are doing is contrary to national consensus and therefore unconstitutional, but since we are not entirely sure you must in the future legislate in the manner that we say.

In my view the concurrence also does not fulfill its promise of arriving at a more "narrow conclusion" than the plurality, and avoiding an "unnecessarily broad" constitutional holding. *Ante*, at 858. To the contrary, I think it hoists on to the deck of our Eighth Amendment jurisprudence the loose cannon of a brand new principle. If the concurrence's view were adopted, henceforth a finding of national consensus would no longer be required to invalidate state action in the area of capital punishment. All that would be needed is uncertainty regarding the existence of a national consensus, whereupon various protective requirements could be imposed, even to the point of specifying the process of legislation. If 15-year-olds must be explicitly named in capital statutes, why not those of extremely low intelligence, or those over 75, or any number of other appealing groups as to which the existence of a national consensus regarding capital punishment may be in doubt for the same reason the concurrence finds it in doubt here, viz., because they are not specifically named in the capital statutes? Moreover, the motto that "death is different" would no longer mean that the firm view of our society demands that it be treated differently in certain identifiable re-

spects, but rather that this Court can attach to it whatever limitations seem appropriate. I reject that approach, and would prefer to it even the misdescription of what constitutes a national consensus favored by the plurality. The concurrence's approach is a Solomonic solution to the problem of how to prevent execution in the present case while at the same time not holding that the execution of those under 16 when they commit murder is categorically unconstitutional. Solomon, however, was not subject to the constitutional constraints of the judicial department of a national government in a federal, democratic system.

IV

Since I find Thompson's age inadequate grounds for vacating his sentence, I must reach the question whether the Constitution was violated by permitting the jury to consider in the sentencing stage the color photographs of Charles Keene's body. Thompson contends that this rendered his sentencing proceeding so unfair as to deny him due process of law.

The photographs in question, showing gunshot wounds in the head and chest, and knife slashes in the throat, chest and abdomen, were certainly probative of the aggravating circumstance that the crime was "especially heinous, atrocious, or cruel." The only issue, therefore, is whether they were unduly inflammatory. We have never before held that the excessively inflammatory character of concededly relevant evidence can form the basis for a constitutional attack, and I would decline to do so in this case. If there is a point at which inflammatoriness so plainly exceeds evidentiary worth as to violate the federal Constitution, it has not been reached here. The balancing of relevance and prejudice is generally a state evidentiary issue, which we do not sit to review. *Lisenba* v. *California*, 314 U. S. 219, 227–228 (1941).

For the foregoing reasons, I respectfully dissent from the judgment of the Court.

Syllabus

BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. *v.* MASSACHUSETTS

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

No. 87–712. Argued April 20, 1988—Decided June 29, 1988*

The federal contribution (referred to as a "reimbursement") to a State's Medicaid program takes the form of advances based on the State's estimate of its future expenditures for covered services. Overpayments may be withheld from future advances, or, if a disallowance dispute develops, may be retained by the State at its option pending resolution of the dispute. After Massachusetts was reimbursed by the Department of Health and Human Services (HHS) for its expenditures for particular services during two time periods, HHS subsequently disallowed the reimbursements on the ground that the services in question were not covered by the Medicaid statute or HHS regulations. The Departmental Grant Appeals Board (Board) affirmed. Unlike orders in the related compliance proceedings, which are expressly made reviewable by the regional courts of appeals, disallowance orders are not explicitly made judicially reviewable by the Medicaid statute. Nevertheless, the State filed two suits, each with respect to one of the disallowance decisions, in the Federal District Court, seeking declaratory and injunctive relief and specifically asking the court to "set aside" the Board's orders. In one case, the court issued a declaratory judgment agreeing with the State on the merits, and "reversed" the disallowance decision. In the second case, the court issued an order based on its earlier decision. The Court of Appeals agreed with the Secretary of HHS that the District Court lacked jurisdiction to order him to pay money to the State, and therefore reversed the "money judgment" against him. The court also held, however, that the District Court had jurisdiction to review the Board's disallowance decisions and to grant declaratory and injunctive relief having prospective effect, and affirmed the declaratory judgment on the merits. In this Court, the Secretary contends that the United States Claims Court had jurisdiction over the State's claim, since §§ 702 and 704 of the Administrative Procedure Act preclude district court review.

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*Together with No. 87–929, *Massachusetts* v. *Bowen, Secretary of Health and Human Services, et al.*, also on certiorari to the same court.

Held:

1. The federal district courts, rather than the Claims Court, have jurisdiction to review a final HHS order refusing to reimburse a State for a category of expenditures under its Medicaid program. Pp. 891–912.

(a) Although § 702 denies the district courts review jurisdiction in actions against federal agencies seeking "money damages," the plain meaning of that language does not foreclose review of the Secretary's disallowance decisions in cases such as the present. First, insofar as the State's complaints sought declaratory and injunctive relief, they were not actions for money damages. Second, and most importantly, even the monetary aspects of the relief sought by the State are not "money damages" as that term is used in § 702. The ordinary meaning of the term is compensatory relief for an injury suffered. Here, the State's suits are in the nature of an equitable action for specific relief seeking reimbursement to which the State was allegedly already entitled, rather than money in compensation for losses suffered as a result of the disallowance. Cf. *Maryland Dept. of Human Resources* v. *Department of Health and Human Services*, 246 U. S. App. D. C. 180, 763 F. 2d 1441. Thus, the statutory text is unambiguous and, given the well-settled presumption that Congress understands the state of existing law when it legislates, the Secretary's suggestion that the words "monetary relief" must be substituted for the words "money damages" could be accepted only for the most compelling reasons. In fact, however, the legislative history demonstrates conclusively that § 702's exception for an action seeking "money damages" should not be broadened beyond the meaning of its plain language. Pp. 891–901.

(b) Section 704—which provides for district court review of final agency actions "for which there is no other adequate remedy in any court"—does not bar relief, since the doubtful and limited relief available in the Claims Court under the Tucker Act is not an adequate substitute for district court review. Section 704 was intended to avoid duplication when there are special statutory review procedures relating to specific agencies, whereas the Tucker Act relates broadly to monetary relief against the United States. The Tucker Act remedy available in the Claims Court is deficient for several reasons. That court has no power to grant equitable relief. Such relief may be appropriate in the disallowance context, and it cannot be assumed categorically that a naked money judgment against the United States will always be an adequate substitute for prospective relief. Furthermore, the Claims Court would be unable to entertain any action in a case in which the State retained a disallowed amount pending Board review until the Government recouped the disallowed amount from a future payment, and might be unable to enter a money judgment against the Government, since reimbursements

are actually advances against expenses not yet incurred. In addition, disallowance controversies typically involve state governmental activities that a district court would be in a much better position to understand and evaluate than would a single, specialized tribunal headquartered in Washington. It is anomalous to assume that Congress would channel the review of compliance decisions to the regional courts of appeals, but intend that the same kinds of controversies in the disallowance context should be resolved by the Claims Court or the Federal Circuit. Pp. 901–908.

2. The Court of Appeals erred in not affirming the judgments of the District Court in their entirety, for the reasons set forth above. Moreover, neither of the District Court's orders was a "money judgment," as the Court of Appeals held, since the first order (followed in the second) simply "reversed" the Board's decision, and did not order that any amount be paid or purport to be based on a finding that any amount was owed. The District Court had the power to grant the complete relief that it did under 5 U. S. C. § 706. Pp. 909–912.

816 F. 2d 796, affirmed in part, reversed in part, and remanded.

STEVENS, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, BLACKMUN, and O'CONNOR, JJ., joined. WHITE, J., filed an opinion concurring in the judgment, *post*, p. 912. SCALIA, J., filed a dissenting opinion, in which REHNQUIST, C. J., and KENNEDY, J., joined, *post*, p. 913.

Roy T. Englert, Jr., argued the cause for petitioners in No. 87–712 and respondents in No. 87–929. With him on the briefs were *Solicitor General Fried, Acting Assistant Attorney General Spears, Deputy Solicitor General Merrill, William Kanter*, and *Howard S. Scher*.

Thomas A. Barnico, Assistant Attorney General of Massachusetts, argued the cause for respondent in No. 87–712 and petitioner in No. 87–929. With him on the brief were *James M. Shannon*, Attorney General, and *William L. Pardee*, Assistant Attorney General.†

†Briefs of *amici curiae* were filed for the State of Alabama et al. by *Charles A. Miller* and *Bruce N. Kuhlik*, and by the Attorneys General for their respective States as follows: *Grace Berg Schaible* of Alaska, *Joseph I. Lieberman* of Connecticut, *Warren Price III* of Hawaii, *J. Joseph Curran, Jr.*, of Maryland, *Frank J. Kelley* of Michigan, *David L. Wilkinson* of Utah, and *Charles G. Brown* of West Virginia; for the State of California

JUSTICE STEVENS delivered the opinion of the Court.

The principal question presented by these cases is whether a federal district court has jurisdiction to review a final order of the Secretary of Health and Human Services refusing to reimburse a State for a category of expenditures under its Medicaid program. All of the Courts of Appeals that have confronted this precise question have agreed that district courts do have jurisdiction in such cases.[1] We implicitly

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by *John K. Van de Kamp*, Attorney General, and *John J. Klee, Jr.*, Deputy Attorney General; for the State of New York by *Robert Abrams*, Attorney General, *O. Peter Sherwood*, Solicitor General, *Lawrence S. Kahn*, Deputy Solicitor General, and *Lillian Z. Cohen* and *Mary Fisher Bernet*, Assistant Attorneys General; for the Council of State Governments et al. by *Benna Ruth Solomon*, *Joyce Holmes Benjamin*, and *Barry Sullivan*; and for Victoria Grimesy et al. by *Richard Rothschild*.

[1] Five Circuits have held that district courts have jurisdiction over a State's appeal from a federal administrative disallowance in a grant-in-aid program. *Massachusetts* v. *Secretary of Health and Human Services*, 816 F. 2d 796 (CA1 1987) (case below); *Maryland Dept. of Human Resources* v. *Department of Health and Human Services*, 246 U. S. App. D. C. 180, 763 F. 2d 1441 (1985) (action for wrongful disallowance of Title XX moneys is one for specific relief, and therefore not barred by 5 U. S. C. § 702's "money damages" exception; such an action is not cognizable in Claims Court because Title XX, 95 Stat. 867, 42 U. S. C. § 1397, although mandating payment by the United States for certain programs and services, does not create a cause of action for compensation for damages sustained by a State); *Minnesota ex rel. Noot* v. *Heckler*, 718 F. 2d 852 (CA8 1983) (District Court's prospective order upheld, money judgment vacated); *Illinois Dept. of Public Aid* v. *Schweiker*, 707 F. 2d 273 (CA7 1983) (district court, not court of appeals, is proper forum for review of disallowance under 42 U. S. C. § 1316(d); 5 U. S. C. §§ 702 and 704 issues not addressed); *County of Alameda* v. *Weinberger*, 520 F. 2d 344 (CA9 1975) (disallowances by Department of Health, Education, and Welfare of asserted overpayments to California pursuant to Titles I, X, and XIV of the Social Security Act are reviewable in district court even though 42 U. S. C. § 1316(d) does not specifically authorize judicial review; §§ 702 and 704 issues not addressed). In a case involving a federal grant program but not concerning a situation such as the one at bar, the Federal Circuit has held the Claims Court to be the proper tribunal to resolve administrative appeals. *Chula Vista City School Dist.* v. *Bennett*, 824 F. 2d 1573 (1987) (claim that Federal

answered the question in the same way when we accepted jurisdiction and decided the merits in *Connecticut Dept. of Income Maintenance* v. *Heckler*, 471 U. S. 524 (1985). Moreover, although the Medicaid program was established in 1965, the novel proposition that the Claims Court is the exclusive forum for judicial review of this type of agency action does not appear to have been advocated by the Secretary until this case reached the Court of Appeals. As we shall explain, the conclusion that the District Court had jurisdiction in these cases is supported by the plain language of the relevant statutes, their legislative history, and a practical understanding of their efficient administration. Before turning to the legal arguments, however, it is appropriate to say a few words about the mechanics of the federal financial participation (FFP) in the States' Medicaid programs and the character of the issue decided by the District Court.

I

In 1965 Congress authorized the Medicaid program by adding Title XIX to the Social Security Act, 79 Stat. 343. The program is "a cooperative endeavor in which the Federal Government provides financial assistance to participating States to aid them in furnishing health care to needy persons." *Harris* v. *McRae*, 448 U. S. 297, 308 (1980). Subject to the federal standards incorporated in the statute and the Secretary's regulations, each participating State must develop its own program describing conditions of eligibility and covered services. At present, 18 different categories of medical assistance are authorized. See *Connecticut Dept. of Income Maintenance* v. *Heckler*, 471 U. S., at 528–529.

Although the federal contribution to a State's Medicaid program is referred to as a "reimbursement," the stream of revenue is actually a series of huge quarterly advance pay-

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Government had misconstrued federal law providing funding to local school districts, where result would be increased payments to plaintiff district, held properly in Claims Court), cert. denied, 484 U. S. 1042 (1988).

ments that are based on the State's estimate of its anticipated future expenditures.[2] The estimates are periodically adjusted to reflect actual experience. Overpayments may be withheld from future advances or, in the event of a dispute over a disallowance, may be retained by the State at its option pending resolution of the dispute.[3]

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[2] Title 42 U. S. C. § 1396b(d) (1982 ed., Supp. V) provides, in part:

"(d) Estimates of State entitlement; installments; adjustments to reflect overpayments or underpayments; time for recovery or adjustment; uncollectable or discharged debts; obligated appropriations; disputed claims

"(1) Prior to the beginning of each quarter, the Secretary shall estimate the amount to which a State will be entitled under subsections (a) and (b) of this section for such quarter, such estimates to be based on (A) a report filed by the State containing its estimate of the total sum to be expended in such quarter in accordance with the provisions of such subsections, and stating the amount appropriated or made available by the State and its political subdivisions for such expenditures in such quarter, and if such amount is less than the State's proportionate share of the total sum of such estimated expenditures, the source or sources from which the difference is expected to be derived, and (B) such other investigation as the Secretary may find necessary.

"(2)(A) The Secretary shall then pay to the State, in such installments as he may determine, the amount so estimated, reduced or increased to the extent of any overpayment or underpayment which the Secretary determines was made under this section to such State for any prior quarter and with respect to which adjustment has not already been made under this subsection."

[3] Title 42 U. S. C. § 1396b(d)(5) provides:

"(5) In any case in which the Secretary estimates that there has been an overpayment under this section to a State on the basis of a claim by such State that has been disallowed by the Secretary under section 1316(d) of this title, and such State disputes such disallowance, the amount of the Federal payment in controversy shall, at the option of the State, be retained by such State or recovered by the Secretary pending a final determination with respect to such payment amount. If such final determination is to the effect that any amount was properly disallowed, and the State chose to retain payment of the amount in controversy, the Secretary shall offset, from any subsequent payments made to such State under this subchapter, an amount equal to the proper amount of the disallowance plus interest on such amount disallowed for the period beginning on the date such amount was disallowed and ending on the date of such final determina-

Two procedures are available to the Secretary if he believes that a State's expenditures do not comply with either the Act or his regulations. First: If he concludes that the State's administration of its plan is in "substantial noncompliance" with federal requirements, he may initiate a compliance proceeding pursuant to 42 U. S. C. § 1316(a); in such a proceeding he may order termination of FFP for entire categories of state assistance, or even (theoretically) the entire state program.[4] Should the Secretary subsequently conclude that his initial determination was incorrect, the statute provides that "he shall certify restitution forthwith in a lump sum of any funds incorrectly withheld or otherwise denied." § 1316(c). A final order in a compliance proceeding is reviewable in the "United States court of appeals for the circuit in which such State is located." § 1316(a)(3). Second: The Secretary may "disallow" reimbursement for "any item or class of items." § 1316(d). "In general, . . . a disallowance represents an isolated and highly focused inquiry into a State's operation of the assistance program."[5] The statute does not expressly provide for judicial review of a disallowance order. In several cases a State has sought direct review of a disallowance order in a Court of Appeals, but in each such case the court has concluded that the State should proceed in the district court. See *Illinois Dept. of Public Aid* v. *Schweiker*, 707 F. 2d 273 (CA7 1983), and cases cited therein.

Massachusetts has participated in the Medicaid program continuously since 1966. One of the categories of assistance covered by the Massachusetts program is the provision of medical and rehabilitative services to patients in intermedi-

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tion at a rate (determined by the Secretary) based on the average of the bond equivalent of the weekly 90-day treasury bill auction rates during such period."

[4] See *Massachusetts Dept. of Public Welfare*, No. 82–169, Decision No. 438, Health and Human Services Grant Appeals Board (May 31, 1983), App. to Pet. for Cert. 78a.

[5] *Ibid.*

ate care facilities for the mentally retarded (ICF/MR services).[6] These services include such matters as "'training in "the activities of daily living" (such as dressing and feeding oneself),'" *Massachusetts* v. *Heckler*, 616 F. Supp. 687, 691 (Mass. 1985) (citation omitted) (case below), and are performed jointly by personnel from the State Departments of Mental Health and Education, working pursuant to state mental health and "special education" laws. See *Massachusetts* v. *Secretary of Health and Human Services*, 816 F. 2d 796, 798 (CA1 1987) (case below). Although the Secretary apparently would have regarded these services as covered had they been performed solely by the Massachusetts Department of Mental Health, his auditors classified them as uncovered educational services because they were performed in part by employees of the State Department of Education.[7] On August 23, 1982, the Regional Administrator of the De-

[6] An "intermediate care facility" is "an institution which . . . is licensed under State law to provide, on a regular basis, health-related care and services to individuals who do not require the degree of care and treatment which a hospital or skilled nursing facility is designed to provide, but who because of their mental or physical condition require care and services (above the level of room and board) which can be made available to them only through institutional facilities." 42 U. S. C. § 1396d(c)(1). "'Intermediate care facility services' may include services in a public institution . . . for the mentally retarded or persons with related conditions if—(1) the primary purpose of such institution . . . is to provide health or rehabilitative services for mentally retarded individuals . . . ." § 1396d(d)(1).

The Federal Government contributed $546 million to Massachusetts for ICF/MR services during the years 1978–1982. Letter from Anthony Parker, Statistician, Division of Medicaid Statistics, Department of Health and Human Services, dated June 14, 1988 (available in Clerk of Court's case file). Since this amount is only a fraction of the Federal Government's total Medicaid contribution to the State for those years—which amounted to nearly $5 billion, see *ibid.*—it is apparent that, as the Secretary's Grant Appeals Board noted, the disallowances at issue in this case affected only "a proportionally small amount" of the federal subsidy. App to Pet. for Cert. 80a.

[7] See 816 F. 2d, at 802; *Massachusetts* v. *Heckler*, 616 F. Supp. 687, 693–695 (Mass. 1985) (case below).

partment's Health Care Financing Administration (HCFA) notified the State that he had disallowed $6,414,964 in FFP for the period July 1, 1978, to December 31, 1980. See App. to Pet. for Cert. 97a.[8] The Departmental Grant Appeals Board affirmed this decision on May 31, 1983. *Id.*, at 53a.[9]

On August 26, 1983, the State filed a complaint in the Federal District Court for the District of Massachusetts. The State's complaint invoked federal jurisdiction pursuant to 28 U. S. C. § 1331 and alleged that the United States had waived its sovereign immunity through 5 U. S. C. § 702. The complaint requested declaratory and injunctive relief and specifically asked the District Court to "set aside" the Board's order.[10] While the case was pending, on August 20, 1984, the HCFA notified the State of a $4,908,994 FFP disallowance for the same category of ICF/MR services based on its audit of the period January 1, 1981, through June 30,

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[8] The record does not tell us whether the State then elected to retain the amount in dispute pending a final review of the agency's preliminary decision, as authorized by § 1396b(d)(5), see n. 3, *supra*. The HCFA notification of disallowance informed the State that it had one month to decide whether to retain the funds. See 3 Record 363. The State's appeal to the Board, filed one month later, is silent on the issue of funds retention. See *id.*, at 356–359.

[9] Thereafter, the Secretary was entitled to withhold the disputed amounts from its next quarterly payment to Massachusetts. Whether it in fact did so, or indeed, whether the next quarterly payment was made before the State commenced these actions in the United States District Court for the District of Massachusetts to obtain review of the Board's order, is not clear from the record.

[10] The complaint requested the following relief:

"Wherefore, the plaintiff requests that this Court grant the following relief:

"1. Enjoin the Secretary and the Administrator from failing or refusing to reimburse the Commonwealth or from recovering from the Commonwealth the federal share of expenditures for medical assistance to eligible residents of intermediate care facilities for the mentally retarded.

"2. Set aside the Board's Decision No. 438.

"3. Grant such declaratory and other relief as the Court deems just." App. to Pet. for Cert. 98a–99a.

1982. See App. to Pet. for Cert. 92a. On March 29, 1985, this second disallowance period was upheld by the Board. On June 5, 1985, the State filed a second complaint in District Court, seeking to overturn the second disallowance. *Id.*, at 89a.

On August 27, 1985, the District Court issued an opinion in the first disallowance case. It did not discuss the jurisdictional issue. On the merits, it held that the services in question were in fact rehabilitative, and that this classification was not barred by the fact that the Department of Education had played a role in their provision. *Massachusetts* v. *Heckler*, 616 F. Supp. 687 (Mass. 1985) (case below). Its judgment, dated October 7, 1985, simply "reversed" the Board's decision disallowing reimbursement of the sum of $6,414,964 in FFP under the Medicaid program. App. to Pet. for Cert. 32a. On November 25, 1985, in a second opinion relying on the analysis of the first, the court reversed the Board's second disallowance determination. *Massachusetts* v. *Heckler*, 622 F. Supp. 266 (Mass. 1985) (case below). It entered an appropriate judgment on December 2, 1985. App. to Pet. for Cert. 36a. That judgment did not purport to state what amount of money, if any, was owed by the United States to Massachusetts, nor did it order that any payment be made.

The Secretary at first had challenged the District Court's subject-matter jurisdiction,[11] but later filed a memorandum stating that as "a matter of policy, HHS has decided not to press the defense of lack of jurisdiction in this action." App. 20.[12] In his consolidated appeal to the First Circuit, the Sec-

[11] The Government's memorandum concerning subject-matter jurisdiction dated December 29, 1983, App. 19, see n. 12, *infra*, indicates that it had challenged the District Court's subject-matter jurisdiction in its answer filed October 28, 1983. That answer is not included in any of the papers filed with us, including the certified record.

[12] The memorandum had concluded, though, that two significant jurisdictional questions are presented by these cases: (1) Whether 42 U. S. C. § 1316 gives a district court jurisdiction to review a disallowance decision; and (2) whether a district court or the Claims Court has "jurisdiction over plain-

retary reexamined this policy decision and decided to argue that the District Court did not have jurisdiction. The Court of Appeals accepted the Secretary's argument that the District Court could not order him to pay money to the State, but held that the District Court had jurisdiction to review the Board's disallowance decision and to grant declaratory and injunctive relief. The court explained its understanding of the difference between relief that was wholly retrospective in nature and relief that affected the future relationship between the parties as follows:

> "The disallowance decision at issue in this case, unlike that at issue in [*Massachusetts* v. *Departmental Grant Appeals Bd. of Health and Human Services*, 815 F. 2d 778 (CA1 1987)], represents an ongoing policy that has significant prospective effect. The structure of the Medicaid program (in which the Secretary 'reimburses' the states in advance) makes it inevitable that disallowance decisions concern money past due. Yet the Secretary uses these decisions to implement important policies governing ongoing programs. *Grant Appeals Board* concerned the unusual situation in which the disallowance decision had no significant prospective effect; the challenge *only* concerned the money allegedly past due.
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> "Here, in contrast, the interpretation of the Medicaid Act announced in the disallowance decision affects far more than any money past due. The special education exclusion defines the respective roles of the Commonwealth and HHS in a continuing program.
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> . . . . . .
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> "Prospective relief is important to the Commonwealth both because the ICF/MR program is still active and because the legal issues involved have ramifications that affect other aspects of the Medicaid program. What is at

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tiff's claims, which can be construed as monetary claims over $10,000." App. 22.

stake here is the scope of the Medicaid program, not just how many dollars Massachusetts should have received in any particular year." 816 F. 2d, at 799 (emphasis in original).

On the merits, the Court of Appeals agreed with the District Court that the Secretary could not lawfully exclude the rehabilitative services provided to the mentally retarded just because the State had labeled them (in part) "educational" services and had used Department of Education personnel to help provide them. It therefore affirmed the District Court's holding that the decisions of the Grant Appeals Board must be reversed because the Secretary's "special education exclusion" violated the statute. It held, however, that it could not rule that the services in dispute were reimbursable because it had "no evidentiary basis for doing so." *Id.*, at 804. In sum, the Court of Appeals affirmed the District Court's declaratory judgment, vacated the "money judgment" against the Secretary, and remanded to the Secretary for further determinations regarding whether the services are reimbursable.[13]

In his petition for certiorari, the Secretary asked us to decide that the United States Claims Court had exclusive jurisdiction over the State's claim.[14] In its cross-petition, the

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[13] The Court of Appeals explained:

"On remand the district court should send the case back to the Secretary for action consistent with the Medicaid Act as interpreted in this decision. Should the Secretary persist in withholding reimbursement for reasons inconsistent with our decision, the Commonwealth's remedy would be a suit for money past due under the Tucker Act in the Claims Court. In that subsequent suit we assume that the Secretary would be collaterally estopped from raising issues decided here." 816 F. 2d, at 800.

[14] The question presented in the Government's certiorari petition reads as follows:

"Whether the United States Claims Court has exclusive jurisdiction over a civil action against the United States that includes both a Tucker Act claim for more than $10,000 in money damages and a claim for declaratory or injunctive relief involving the same issues as the Tucker Act claim, or

State asked us to decide that the District Court had jurisdiction to grant complete relief.[15] We granted both petitions. 484 U. S. 1003 (1988). The basic jurisdictional dispute is over the meaning of the Administrative Procedure Act (APA), 5 U. S. C. §§ 702, 704.[16] The Secretary argues that § 702, as amended in 1976, does not authorize review because this is not an action "seeking relief other than money damages" within the meaning of the 1976 amendment to that section; he also argues that even if § 702 is satisfied, § 704 bars relief because the State has an adequate remedy in the Claims Court. The State must overcome both arguments in order to prevail; we shall discuss them separately.

II

Since it is undisputed that the 1976 amendment to § 702 was intended to broaden the avenues for judicial review of

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whether such an action can be split into two lawsuits, with the district court and the regional court of appeals having jurisdiction over the claim for prospective relief, and the Claims Court having jurisdiction over the claim for retrospective relief." Pet. for Cert. (I).

[15] The question presented by the cross-petition reads as follows:

"Whether the United States District Court has jurisdiction under 28 U. S. C. § 1331, and 5 U. S. C. § 701 *et seq.*, to grant complete relief in an action which seeks judicial review of a final decision of the Secretary of Health and Human Services to deny coverage under the Medicaid Act of certain services rendered by a State to retarded citizens." Pet. for Cert. in No. 87–929, p. i.

[16] Certain jurisdictional arguments that have been advanced and rejected in similar cases are no longer pressed by either party. Thus, the State does not argue that a disallowance decision is the functional equivalent of a noncompliance decision that is specifically reviewable in the Court of Appeals pursuant to § 1316(a)(3). See *supra*, at 885, and n. 1. It acknowledges that there is no special statutory procedure covering disallowance decisions and relies entirely on the general provision for judicial review of agency action contained in the APA, 5 U. S. C. § 701 *et seq.* On the other hand, the Government no longer contends that § 701 forecloses judicial review of disallowance decisions because they are committed to the discretion of the Secretary. Further, it is common ground that if review is proper under the APA, the District Court had jurisdiction under 28 U. S. C. § 1331.

agency action by eliminating the defense of sovereign immunity in cases covered by the amendment, it is appropriate to begin by quoting the original text of § 702. Prior to 1976, it simply provided:

> "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." [17]

In 1975, in a case seeking review of a disallowance decision by the Secretary of the Department of Health, Education, and Welfare, the Court of Appeals for the Ninth Circuit concluded that the decision was reviewable in the District Court. *County of Alameda* v. *Weinberger*, 520 F. 2d 344. It would be difficult to question the fact that the disallowance decision was "agency action" that "adversely affected" the State, and that, accordingly, the State was "entitled to judicial review thereof."

The 1976 amendment contains no language suggesting that Congress disagreed with the Ninth Circuit decision. The amendment added the following sentence to the already broad coverage of § 702:

> "An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party." [18]

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[17] See, *e. g.*, S. Rep. No. 94–996, pp. 19–20 (1976) (S. Rep.).

[18] The balance of § 702 provides:

"The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or

There are two reasons why the plain language of this amendment does not foreclose judicial review of the actions brought by the State challenging the Secretary's disallowance decisions. First, insofar as the complaints sought declaratory and injunctive relief, they were certainly not actions for money damages. Second, and more importantly, even the monetary aspects of the relief that the State sought are not "money damages" as that term is used in the law.

Neither a disallowance decision, nor the reversal of a disallowance decision, is properly characterized as an award of "damages." Either decision is an adjustment—and, indeed, usually a relatively minor one—in the size of the federal grant to the State that is payable in huge quarterly installments. Congress has used the terms "overpayment" and "underpayment" to describe such adjustments in the open account between the parties,[19] and the specific agency action that reverses a disallowance decision is described as "restitution" in the statute.[20]

Our cases have long recognized the distinction between an action at law for damages—which are intended to provide a victim with monetary compensation for an injury to his person, property, or reputation—and an equitable action for specific relief—which may include an order providing for the reinstatement of an employee with backpay, or for "the recovery of specific property *or monies*, ejectment from land, or injunction either directing or restraining the defendant officer's actions." *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U. S. 682, 688 (1949) (emphasis added). The fact that a judicial remedy may require one party to pay money to another is not a sufficient reason to characterize the relief as "money damages." Thus, we have recognized that relief

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deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought."

[19] See 42 U. S. C. § 1396b(d); n. 2, *supra*.

[20] See § 1316(c); *supra*, at 885.

that orders a town to reimburse parents for educational costs that Congress intended the town to pay is not "damages":

> "Because Congress undoubtedly did not intend this result, we are confident that by empowering the court to grant 'appropriate' relief Congress meant to include retroactive reimbursement to parents as an available remedy in a proper case.
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> "In this Court, the Town repeatedly characterizes reimbursement as 'damages,' but that simply is not the case. Reimbursement merely requires the Town to belatedly pay expenses that it should have paid all along and would have borne in the first instance had it developed a proper IEP." *School Committee of Burlington* v. *Department of Education of Massachusetts*, 471 U. S. 359, 370–371 (1985).

Judge Bork's explanation of the plain meaning of the critical language in this statute merits quotation in full. In his opinion for the Court of Appeals for the District of Columbia Circuit in *Maryland Dept. of Human Resources* v. *Department of Health and Human Services*, 246 U. S. App. D. C. 180, 763 F. 2d 1441 (1985),[21] he wrote:

> "We turn first to the question whether the relief Maryland seeks is equivalent to money damages. Maryland asked the district court for a declaratory judgment and for injunctive relief 'enjoin[ing] defendants from reducing funds otherwise due to plaintiffs, or imposing any sanctions on such funds for alleged Title XX violations.' . . . We are satisfied that the relief Maryland seeks here is not a claim for money damages, although it is a claim that would require the payment of money by the federal government.

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[21] The District of Columbia Circuit has recently reaffirmed *Maryland Dept. of Human Resources* in *National Assn. of Counties* v. *Baker*, 268 U. S. App. D. C. 373, 842 F. 2d 369 (1988).

"We begin with the ordinary meaning of the words Congress employed. The term 'money damages,' 5 U. S. C. § 702, we think, normally refers to a sum of money used as compensatory relief. Damages are given to the plaintiff to *substitute* for a suffered loss, whereas specific remedies 'are not substitute remedies at all, but attempt to give the plaintiff the very thing to which he was entitled.' D. Dobbs, *Handbook on the Law of Remedies* 135 (1973). Thus, while in many instances an award of money is an award of damages, '[o]ccasionally a money award is also a specie remedy.' *Id.* Courts frequently describe equitable actions for monetary relief under a contract in exactly those terms. *See, e. g., First National State Bank* v. *Commonwealth Federal Savings & Loan Association*, 610 F. 2d 164, 171 (3d Cir. 1979) (specific performance of contract to borrow money); *Crouch* v. *Crouch*, 566 F. 2d 486, 488 (5th Cir. 1978) (contrasting lump-sum damages for breach of promise to pay monthly support payments with an order decreeing specific performance as to future installments); *Joyce* v. *Davis*, 539 F. 2d 1262, 1265 (10th Cir. 1976) (specific performance of a promise to pay money bonus under a royalty contract).

"In the present case, Maryland is seeking funds to which a statute allegedly entitles it, rather than money in compensation for the losses, whatever they may be, that Maryland will suffer or has suffered by virtue of the withholding of those funds. If the program in this case involved in-kind benefits this would be altogether evident. The fact that in the present case it is money rather than in-kind benefits that pass from the federal government to the states (and then, in the form of services, to program beneficiaries) cannot transform the nature of the relief sought—specific relief, not relief in the form of damages. *Cf. Clark* v. *Library of Congress*, 750 F. 2d 89, 104 n. 33 (D.C. Cir. 1984) (dictum) (describing

an action to compel an official to repay money improperly recouped as 'in essence, specific relief')." *Id.*, at 185, 763 F. 2d, at 1446 (emphasis in original) (citation omitted).

In arguing for a narrow construction of the 1976 amendment—which was unquestionably intended to broaden the coverage of § 702—the Secretary asks us to substitute the words "monetary relief" for the words "money damages" actually selected by Congress. Given the obvious difference in meaning between the two terms and the well-settled presumption that Congress understands the state of existing law when it legislates, see, *e. g.*, *Cannon* v. *University of Chicago*, 441 U. S. 677, 696–697 (1979), only the most compelling reasons could justify a revision of a statutory text that is this unambiguous. Nevertheless, we have considered the Secretary's argument that the legislative history of § 702 supports his reading of the amendment.

The 1976 amendment to § 702 was an important part of a major piece of legislation designed to remove "technical" obstacles to access to the federal courts.[22] The statute was the culmination of an effort generated by scholarly writing and bar association work in the early 1960's.[23] Although the Department of Justice initially opposed the proposal, it eventually reversed course and offered its support.[24] We shall com-

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[22] See H. R. Rep. No. 94–1656, pp. 3, 23 (1976) (H. R. Rep.); S. Rep., at 2, 22 (same).

[23] See, *e. g.*, Byse, Proposed Reforms in Federal "Nonstatutory" Judicial Review: Sovereign Immunity, Indispensable Parties, Mandamus, 75 Harv. L. Rev. 1479 (1962); Cramton, Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant, 68 Mich. L. Rev. 387 (1970).

[24] See, *e. g.*, Sovereign Immunity: Hearing on S. 3568 before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 91st Cong., 2d Sess., 255–257 (1970) (hereafter 1970 Hearing) (letter of William D. Ruckleshaus, Assistant Attorney General, to Sen. Kennedy, dated July 8, 1970) ("The record is not established

ment first on the legislative materials that relate directly to the bill that passed in 1976, and then refer to the 1970 Hearing on which the Government places its principal reliance.

Two propositions are perfectly clear. The first concerns the text of the amendment. There is no evidence that any legislator in 1976 understood the words "money damages" to have any meaning other than the ordinary understanding of the term as used in the common law for centuries. No one suggested that the term was the functional equivalent of a broader concept such as "monetary relief" and no one proposed that the broader term be substituted for the familiar one.[25] Each of the Committee Reports repeatedly used the term "money damages";[26] the phrase "monetary relief" was used in each Report once, and only in intentional juxtaposition and distinction to "specific relief," indicating that the drafters had in mind the time-honored distinction between damages and specific relief.[27] There is no support in that his-

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that the defense of sovereign immunity is all bad"); H. R. Rep., at 2, 4, 6, 25–30 (letter of Assistant Attorney General Scalia stating that although the Department had opposed the amendment, it had reconsidered its position and decided to endorse the amendment); S. Rep., at 3, 5, 24–29 (same).

[25] The Department of Justice proposed other technical changes but did not object to the use of the term "money damages." See H. R. Rep., at 27–28; S. Rep., at 26–27 (same).

[26] See H. R. Rep., at 4, 7, 11, 20, 25; S. Rep., at 4, 6, 10, 19, 25 (same).

[27] See H. R. Rep., at 11 ("The first of the additional sentences provides that claims challenging official action or nonaction, and seeking relief other than money damages, should not be barred by sovereign immunity. The explicit exclusion of monetary relief makes it clear that sovereign immunity is abolished only in actions for specific relief (injunction, declaratory judgment, mandatory relief, etc.))"; S. Rep., at 10 (same). The First Circuit has construed this passage as using "the terms 'money damages' and 'monetary relief' interchangeably and oppos[ing] money in general to 'specific relief.'" *Massachusetts* v. *Departmental Grant Appeals Bd. of Health and Human Services*, 815 F. 2d 778, 782 (1987). That the passage uses "money damages" and "monetary relief" interchangeably, however, does not answer the question whether Congress intended the former or the latter to be the excluded category of relief under the APA. Reading the passage as "oppos[ing] money in general to 'specific relief'"

tory for a departure from the plain meaning of the text that Congress enacted.

Second, both the House and Senate Committee Reports indicate that Congress understood that § 702, as amended, would authorize judicial review of the "administration of Federal grant-in-aid programs."[28] The fact that grant-in-aid programs were expressly included in the list of proceedings in which the Committees wanted to be sure the sovereign-immunity defense was waived is surely strong affirmative evidence that the members did not regard judicial review of an agency's disallowance decision as an action for damages.

If we turn to the 1970 Hearing and the earlier scholarly writings, we find that the terms "monetary relief" and "money damages" were sometimes used interchangeably. That fact is of only minimal significance, however, for several reasons. First, given the high caliber of the scholars who testified, it seems obvious that if they had intended the exclusion for proceedings seeking "money damages" to encompass all proceedings seeking any form of monetary relief, they would have drafted their proposal differently. Second, they cited cases involving challenges to federal grant-in-aid programs as examples of the Government's reliance on a sovereign-immunity defense that should be covered by the proposed legislation.[29] Third, the case that they discussed at

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assumes that specific relief may not include an order for the payment of money, a proposition that has never been the law. See *supra*, at 893–896. Thus, the better reading of the above passage is that "monetary relief" was meant as a synonym for "money damages." See also H. R. Rep., at 4–5, 7, 19–20 (contrasting money damages with specific, or equitable, relief); S. Rep., at 4, 6, 19 (same).

[28] H. R. Rep., at 9; S. Rep., at 8 (same).

[29] See, *e. g.*, 1970 Hearing, at 121 (Cramton, Committee on Judicial Review: Memorandum in support of the recommendation relating to statutory reform of the sovereign immunity doctrine) (citing *Lee County School Dist. No. 1* v. *Gardner*, 263 F. Supp. 26 (SC 1967) and *Dermott Special School Dist.* v. *Gardner*, 278 F. Supp. 687 (ED Ark. 1968), and specifically de-

the greatest length in the 1970 Hearing was *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U. S. 682 (1949).[30] Although they criticized the reliance on sovereign immunity in that opinion, they made no objection to its recognition of the classic distinction between the recovery of money damages and "the recovery of specific property or monies." *Id.*, at 688.

Judge Bork's summary of the legislative history is especially convincing:

> "Neither the House nor Senate Reports (there was no Conference Report) intimates that Congress intended the term 'money damages' as a shorthand for 'whatever forms of monetary relief would be available under the Tucker Act.' To the contrary, the federal sovereign immunity case law, which the Reports discuss at length, *see* H. R. Rep. No. 1656, *supra*, at 5–8; S. Rep. No. 996, 94th Cong., 2d Sess. 4–8 (1976), suggests that Congress would have understood the recovery of specific monies to be specific relief in this context. *See, e. g., Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U. S. 682, 688 (1949) (contrasting 'damages' and 'specific relief' and including in the latter category 'the recovery of specific property or monies').
>
> "Moreover, while reiterating that Congress intended 'suits for damages' to be barred, both Reports go on to say that 'the time [has] now come to eliminate the sovereign immunity defense in *all equitable actions for specific relief* against a Federal agency or officer acting in an official capacity.' H. R. Rep. No. 1656, *supra*, at 9; S. Rep. No. 996, *supra*, at 8, U. S. Code Cong. & Admin. News 1976, p. 6129 (emphasis added). That sweeping declaration strongly suggests that Congress intended to authorize equitable suits for specific mone-

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scribing the former case as "challenge of HEW deferral of payment of federal funds to school district").

[30] See, *e. g.*, 1970 Hearing, at 102–109, 111–115, 120, 125–126, 132–133.

> tary relief as we have defined that category. This inference is made virtually conclusive by the fact that both Reports then enumerate several kinds of cases in which the sovereign immunity defense had continued to pose an undesirable bar to consideration of the merits: that listing includes cases involving 'administration of Federal grant-in-aid programs.' H. R. Rep. No. 1656, *supra*, at 9; S. Rep. No. 996, *supra*, at 8, U. S. Code Cong. & Admin. News 1976, p. 6129. Specific relief in cases involving such programs will, of course, often result in the payment of money from the federal treasury. It seems to us, then, that the legislative history supports the proposition that Congress used the term 'money damages' in its ordinary signification of compensatory relief. We therefore hold that Maryland's claims for specific relief, albeit monetary, are for 'relief other than money damages' and therefore within the waiver of sovereign immunity in section 702." 246 U. S. App. D. C., at 186–187, 763 F. 2d, at 1447–1448.

Thus, the combined effect of the 1970 Hearing and the 1976 legislative materials is to demonstrate conclusively that the exception for an action seeking "money damages" should not be broadened beyond the meaning of its plain language. The State's suit to enforce § 1396b(a) of the Medicaid Act, which provides that the Secretary "shall pay" certain amounts for appropriate Medicaid services, is not a suit seeking money in *compensation* for the damage sustained by the failure of the Federal Government to pay as mandated; rather, it is a suit seeking to enforce the statutory mandate itself, which happens to be one for the payment of money.[31] The fact that the

[31] There are, of course, many statutory actions over which the Claims Court has jurisdiction that enforce a statutory mandate for the payment of money rather than obtain compensation for the Government's failure to so pay. See n. 42, *infra*. The jurisdiction of the Claims Court, however, is not expressly limited to actions for "money damages," see n. 48, *infra*, whereas that term does define the limits of the exception to § 702. More-

mandate is one for the payment of money must not be confused with the question whether such payment, in these circumstances, is a payment of money as damages or as specific relief. Judge Bork's explanation bears repeating:

> "[The State] is seeking funds to which a statute allegedly entitles it, rather than money in compensation for the losses, whatever they may be, that [the State] will suffer or has suffered by virtue of the withholding of those funds. If the program in this case involved in-kind benefits this would be altogether evident. The fact that in the present case it is money rather than in-kind benefits that pass from the federal government to the states (and then, in the form of services, to program beneficiaries) cannot transform the nature of the relief sought—specific relief, not relief in the form of damages." 246 U. S. App. D. C., at 185, 763 F. 2d, at 1446.

III

The Secretary's novel submission that the entire action is barred by § 704 must be rejected because the doubtful and limited relief available in the Claims Court is not an adequate substitute for review in the District Court. A brief review of the principal purpose of § 704 buttresses this conclusion.

Section 704 was enacted in 1946 as § 10(c) of the APA. In pertinent part, it provided:

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over, such statutes, unlike a complex scheme such as the Medicaid Act that governs a set of intricate, ongoing relationships between the States and the Federal Government, are all statutes that provide compensation for specific instances of past injuries or labors; suits brought under these statutes do not require the type of injunctive and declaratory powers that the district courts can bring to bear in suits under the Medicaid Act. Thus, to the extent that suits to enforce these statutes can be considered suits for specific relief, but see n. 42, *infra*, suits under the Tucker Act in the Claims Court offer precisely the sort of "special and adequate review procedures" that § 704 requires to direct litigation away from the district courts. See *infra*, at 903–905, and n. 39.

> "Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review." 60 Stat. 243.[32]

Earlier drafts of what became § 704 provided that "only final actions, rules, or orders, *or* those for which there is no other adequate judicial remedy . . . shall be subject to such review," or that "[e]very final agency action, *or* agency action for which there is no other adequate remedy in any court, shall be subject to judicial review."[33] Professor Davis, a widely respected administrative law scholar, has written that § 704 "has been almost completely ignored in judicial opinions,"[34] and has discussed § 704's bar to judicial review of agency action when there is an "adequate remedy" elsewhere as merely a restatement of the proposition that "[o]ne need not exhaust administrative remedies that are inadequate."[35]

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[32] The provision now reads "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U. S. C. § 704.

[33] See Administrative Procedure Act: Legislative History, S. Doc. No. 248, pp. 145, 154, 160, 176, 179, 335 (Comm. Print 1946) (hereafter APA Leg. Hist.) (emphases added). The Senate Judiciary Committee Print of June 1945 contained the language that eventually was adopted along with an explanatory column that read "Subsection (c), defining reviewable acts, is designed also to negative any intention to make reviewable merely preliminary or procedural orders where there is a subsequent and adequate remedy at law available, as is presently the rule." APA Leg. Hist. 37. At least one Court of Appeals has construed § 704 as addressing only finality concerns. *Massachusetts* v. *Departmental Grant Appeals Bd. of Health and Human Services*, 815 F. 2d, at 784 ("The legislative history of § 704 shows that Congress intended thereby to codify the existing law concerning ripeness and exhaustion of remedies").

[34] K. Davis, Administrative Law § 26:12, p. 468 (2d ed. 1983).

[35] *Id.*, at § 26:11, p. 464. Further, § 704 is titled "Actions reviewable" and it discusses, in the two sentences that follow the one at issue today, matters regarding finality. Thus, it is certainly arguable that by enacting § 704 Congress merely meant to ensure that judicial review would be limited to final agency actions and to those nonfinal agency actions for which there would be no adequate remedy later.

However, although the primary thrust of § 704 was to codify the exhaustion requirement, the provision as enacted also makes it clear that Congress did not intend the general grant of review in the APA to duplicate existing procedures for review of agency action. As Attorney General Clark put it the following year, § 704 "does not provide additional judicial remedies in situations where the Congress has provided special and adequate review procedures."[36] At the time the APA was enacted, a number of statutes creating administrative agencies defined the specific procedures to be followed in reviewing a particular agency's action; for example, Federal Trade Commission and National Labor Relations Board orders were directly reviewable in the regional courts of appeals,[37] and Interstate Commerce Commission orders were subject to review in specially constituted three-judge district courts.[38] When Congress enacted the APA to provide a general authorization for review of agency action in the district courts, it did not intend that general grant of jurisdiction to duplicate the previously established special statutory procedures relating to specific agencies.

The exception that was intended to avoid such duplication should not be construed to defeat the central purpose of providing a broad spectrum of judicial review of agency action.

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[36] Attorney General's Manual on the Administrative Procedure Act 101 (1947). It should be noted that Attorney General Clark's statement would also fit the interpretation that § 704 was intended only to codify traditional rules of finality, for the "special and adequate review procedures" to which he referred could well have been the various administrative-level procedures that litigants have traditionally been required to exhaust before coming into court.

[37] See 15 U. S. C. § 45(c) (1940 ed.); 29 U. S. C. § 160(f) (1946 ed.). These provisions remain in today's Code. See 15 U. S. C. § 45(c); 29 U. S. C. § 160(f).

[38] See 38 Stat. 219 (1913). This provision has since been repealed. See 49 U. S. C. App. § 17 (1988 ed.). Cases decided by this Court reviewing decisions of such three-judge panels include *Pennsylvania R. Co.* v. *United States*, 323 U. S. 588 (1945), and *Chesapeake & Ohio R. Co.* v. *United States*, 283 U. S. 35 (1931).

In our leading opinion explaining the significance of this provision, Justice Harlan wrote:

> "The Administrative Procedure Act provides specifically not only for review of '[a]gency action made reviewable by statute' but also for review of 'final agency action for which there is no other adequate remedy in a court,' 5 U. S. C. § 704. The legislative material elucidating that seminal act manifests a congressional intention that it cover a broad spectrum of administrative actions, and this Court has echoed that theme by noting that the Administrative Procedure Act's 'generous review provisions' must be given a 'hospitable' interpretation." *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 140–141 (1967) (footnote omitted).

A restrictive interpretation of § 704 would unquestionably, in the words of Justice Black, "run counter to § 10 and § 12 of the Administrative Procedure Act. Their purpose was to remove obstacles to judicial review of agency action under subsequently enacted statutes . . . ." *Shaughnessy* v. *Pedreiro*, 349 U. S. 48, 51 (1955).

The Secretary argues that § 704 should be construed to bar review of the agency action in the District Court because monetary relief against the United States is available in the Claims Court under the Tucker Act. This restrictive—and unprecedented—interpretation of § 704 should be rejected because the remedy available to the State in the Claims Court is plainly not the kind of "special and adequate review procedure" that will oust a district court of its normal jurisdiction under the APA.[39] Moreover, the availability of

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[39] As noted above, see n. 31, *supra*, litigation in the Claims Court can offer precisely the kind of "special and adequate review procedures" that are needed to remedy particular categories of past injuries or labors for which various federal statutes provide compensation. See n. 42, *infra*. Managing the relationships between States and the Federal Government that occur over time and that involve constantly shifting balance sheets re-

any review of a disallowance decision in the Claims Court is doubtful.

The Claims Court does not have the general equitable powers of a district court to grant prospective relief. Indeed, we have stated categorically that "the Court of Claims has no power to grant equitable relief."[40] As the facts of these cases illustrate, the interaction between the State's administration of its responsibilities under an approved Medicaid plan and the Secretary's interpretation of his regulations may make it appropriate for judicial review to culminate in the entry of declaratory or injunctive relief that requires the Secretary to modify future practices. We are not willing to assume, categorically, that a naked money judgment against the United States will always be an adequate substitute for prospective relief fashioned in the light of the rather complex ongoing relationship between the parties.[41]

Moreover, in some cases the jurisdiction of the Claims Court to entertain the action, or perhaps even to enter a specific money judgment against the United States, would be at least doubtful.[42] Regarding the former dilemma: If a State

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quires a different sort of review and relief process. The APA is tailored to fit the latter situation; the Tucker Act, the former.

[40] *Richardson* v. *Morris*, 409 U. S. 464, 465 (1973) *(per curiam);* see also, *e. g., Glidden Co.* v. *Zdanok*, 370 U. S. 530, 557 (1962) (opinion of Harlan, J.) ("From the beginning [the Court of Claims] has been given jurisdiction only to award damages, not specific relief"). Although Congress has subsequently given the Claims Court certain equitable powers in specific kinds of litigation, see 28 U. S. C. §§ 1491(a)(2)–(3), the statements from *Richardson* and *Glidden* are still applicable to actions involving review of an agency's administration of a grant-in-aid program.

[41] See, *e. g., Massachusetts* v. *Departmental Grant Appeals Bd. of Health and Human Services*, 815 F. 2d, at 789 (suit for unique reimbursement of court-ordered abortions outside the APA's waiver of sovereign immunity only because the requested relief "is unlikely to have any significant prospective effect upon the ongoing grant-in-aid relationship between the Commonwealth and the United States") (Coffin, J., concurring).

[42] As a threshold matter, it is not altogether clear that the Claims Court would have jurisdiction under the Tucker Act, 28 U. S. C. § 1491(a)(1), to

elects to retain the amount covered by a disallowance until completion of review by the Grant Appeals Board, see 42 U. S. C. § 1396b(d)(5); n. 3, *supra*, it will not be able to file suit in the Claims Court until after the disallowance is recouped from a future quarterly payment. It is no answer to suggest that a State will not be harmed as long as it retains the money, because its interest in planning future programs

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review a disallowance claim. To determine whether one may bring, pursuant to Tucker Act jurisdiction, a "claim against the United States founded . . . upon . . . any Act of Congress," *ibid.*, "one must always ask . . . whether the . . . legislation which the claimant cites can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." *Eastport S. S. Corp.* v. *United States*, 372 F. 2d 1002, 1009 (1967) (cited with approval in *United States* v. *Testan*, 424 U. S. 392, 398, 400 (1976)). Statutes that have been "interpreted as mandating compensation by the Federal Government for the damage sustained," 372 F. 2d, at 1009, generally are provisions such as the Back Pay Act, 5 U. S. C. § 5596(b), see *United States* v. *Testan*, 424 U. S., at 405, and 37 U. S. C. § 242 (1958 ed.) (repealed, see 76 Stat. 498 (1962)), which provided compensation to prisoners of war, see *Bell* v. *United States*, 366 U. S. 393, 398 (1961). These laws attempt to compensate a particular class of persons for past injuries or labors. In contrast, the statutory mandate of a federal grant-in-aid program directs the Secretary to pay money to the State, not as compensation for a past wrong, but to subsidize future state expenditures. See *supra*, at 900–901; see also *United States* v. *Mottaz*, 476 U. S. 834, 850–851 (1986) (suit to force Government to buy property interests not viewed as "representing damages for the Government's past acts, the essence of a Tucker Act claim for monetary relief").

Moreover, Congress has not created an express cause of action providing for the review of disallowance decisions in the Claims Court. To construe statutes such as the Back Pay Act and the old 37 U. S. C. § 242, *supra* this page, as "mandating compensation by the Federal Government for the damage sustained," 372 F. 2d, at 1009, one must imply from the language of such statutes a cause of action. The touchstone here, of course, is whether Congress intended a cause of action that it did not expressly provide. See, *e. g.*, *Thompson* v. *Thompson*, 484 U. S. 174 (1988); *Cort* v. *Ash*, 422 U. S. 66 (1975). It seems likely that while Congress intended "shall pay" language in statutes such as the Back Pay Act to be self-enforcing—*i. e.*, to create both a right and a remedy—it intended similar language in § 1396b(a) of the Medicaid Act to provide merely a right, knowing that the APA provided for review of this sort of agency action.

for groups such as the mentally retarded who must be trained in ICF's may be more pressing than the monetary amount in dispute. Such planning may make it important to seek judicial review—perhaps in the form of a motion for a preliminary injunction—as promptly as possible after the agency action becomes final. A district court has jurisdiction both to grant such relief and to do so while the funds are still on the State's side of the ledger (assuming administrative remedies have been exhausted); the Claims Court can neither grant equitable relief, *supra*, at 905, nor act in any fashion so long as the Federal Government has not yet offset the disallowed amount from a future payment. See § 1396b(d)(5); n. 3, *supra*.[43] Regarding the latter problem: Given the fact that the quarterly payments of federal money are actually advances against expenses that have not yet been incurred by the State, it is arguable that a dispute concerning the status of the open account is not one in which the State can claim an entitlement to a specific sum of money that the Federal Government owes to it.[44]

Further, the nature of the controversies that give rise to disallowance decisions typically involve state governmental

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[43] It is important to remember that whether injunctive or declaratory relief is appropriate in a given case will not always be apparent at the outset. Since, as a *category of case*, alleged "improper Medicaid disallowances" cannot always be adequately remedied in the Claims Court, as a jurisdictional, or threshold matter, these actions should proceed in the district court. Then, the district court judge can award proper relief.

[44] "The statute requires that the Secretary of HHS recover disallowed Medicaid payments by offsetting such payments against future quarterly advances. 42 U. S. C. § 1396b(d)(2). It cannot be determined from the record whether this procedure has been followed in the instant case. Judge Blumenfeld assumed that once his decision was filed, HHS would 'promptly restore any setoff already taken.' *Connecticut* v. *Schweiker*, 557 F. Supp. [1077,] 1091 [(Conn. 1983)]. Again, the record is silent on whether HHS had done so. However, the parties have not requested judicial resolution of the matter." *Connecticut Dept. of Income Maintenance* v. *Heckler*, 731 F. 2d 1052, 1055, n. 3 (CA2 1984), aff'd, 471 U. S. 524 (1985).

activities that a district court would be in a better position to understand and evaluate than a single tribunal headquartered in Washington. We have a settled and firm policy of deferring to regional courts of appeals in matters that involve the construction of state law.[45] That policy applies with special force in this context because neither the Claims Court nor the Court of Appeals for the Federal Circuit has any special expertise in considering the state-law aspects of the controversies that give rise to disallowances under grant-in-aid programs. It would be nothing less than remarkable to conclude that Congress intended judicial review of these complex questions of federal-state interaction to be reviewed in a specialized forum such as the Court of Claims. More specifically, it is anomalous to assume that Congress would channel the review of compliance decisions to the regional courts of appeals, see 42 U. S. C. § 1316(a)(3); *supra*, at 885, and yet intend that the same type of questions arising in the disallowance context should be resolved by the Claims Court or the Federal Circuit.[46]

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[45] See, *e. g.*, *Brockett* v. *Spokane Arcades, Inc.*, 472 U. S. 491, 499–500 (1985); *Bishop* v. *Wood*, 426 U. S. 341, 345–346 (1976); *Cort* v. *Ash*, 422 U. S. 66, 73, n. 6 (1975).

[46] See *Delaware Div. of Health and Social Services* v. *Department of Health and Human Services*, 665 F. Supp. 1104, 1117, n. 15 (Del. 1987) (pointing out this anomaly). It should be remembered that in the Federal Courts Improvement Act of 1982, Congress established the United States Claims Court to replace the old Court of Claims, pursuant to its Article I powers. See 28 U. S. C. § 171(a). Claims Court judges, unlike the life-tenured Article III judges who sit in district courts, serve for limited terms of 15 years. See 28 U. S. C. § 172(a). Although it is true that the Federal Circuit is an Article III court, it seems highly unlikely that Congress intended to designate an Article I court as the primary forum for judicial review of agency action that may involve questions of policy that can arise in cases such as these.

In rejecting the Government's plea for Claims Court jurisdiction in a similar case, Judge Wright of the Delaware District Court explained "the importance of District Court review of agency action":

"[T]he policies of the APA take precedence over the purposes of the Tucker Act. In the conflict between two statutes, established principles of statu-

IV

We agree with the position advanced by the State in its cross-petition—that the judgments of the District Court should have been affirmed in their entirety—for two independent reasons. First, neither of the District Court's orders in these cases was a "money judgment," as the Court of Appeals held. The first order (followed in the second, see Part I, *supra*) simply "reversed" the "decision of the Department Grant Appeals Board of the United States Department of Health and Human Services in Decision No. 438 (May 31, 1983)."[47] It is true that it describes Decision No. 438 as one that had disallowed reimbursement of $6,414,964 to the State, but it did not order that amount to be paid, and it did not purport to be based on a finding that the Federal Gov-

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tory construction mandate a broad construction of the APA and a narrow interpretation of the Tucker Act. The Court of Claims is a court of limited jurisdiction, because its jurisdiction is statutorily granted and it is to be strictly construed.

. . . . . .

"Much recent academic writing emphasizes the importance of District Court review of agency action. The theoretical justification for judicial review of agency action is grounded in concerns about constraining the exercise of discretionary power by administrative agencies. That power is legitimized by the technical expertise of agencies. But judicial review promotes fidelity to statutory requirements, and, when congresional intent is ambiguous, it increases the likelihood that the regulatory process will be a responsible exercise of discretion.

. . . . . .

"The policies of the APA take precedence over the Tucker Act and plaintiff's action should properly be treated as a final agency action reviewable in District Court." 665 F. Supp., at 1117–1118 (citations omitted).

[47] The full text of the District Court's judgment reads as follows:

"For the reasons set forth in this Court's August 27, 1985 Memorandum and Order, it is hereby ordered and adjudged that the decision of the Department Grant Appeals Board of the United States Department of Health and Human Services in Decision No. 438 (May 31, 1983) which disallowed reimbursement to the Commonwealth of Massachusetts the sum of $6,414,964 in federal financial participation under the Medicaid program, 42 U. S. C. §§ 1396 *et seq.*, is reversed.

"Dated this 7th day of October, 1985." App. to Pet. for Cert. 32a.

ernment owed Massachusetts that amount, or indeed, any amount of money. Granted, the judgment tells the United States that it may not disallow the reimbursement on the grounds given, and thus it is likely that the Government will abide by this declaration and reimburse Massachusetts the requested sum. But to the extent that the District Court's judgment engenders this result, this outcome is a mere by-product of that court's primary function of reviewing the Secretary's interpretation of federal law.

Second, even if the District Court's orders are construed in part as orders for the payment of money by the Federal Government to the State, such payments are not "money damages," see Part II, *supra*, and the orders are not excepted from § 702's grant of power by § 704, see Part III, *supra*. That is, since the orders are for specific relief (they undo the Secretary's refusal to reimburse the State) rather than for money damages (they do not provide relief that substitutes for that which ought to have been done) they are within the District Court's jurisdiction under § 702's waiver of sovereign immunity. See Part II, *supra*. The District Court's jurisdiction to award complete relief in these cases is not barred by the possibility that a purely monetary judgment may be entered in the Claims Court. See Part III, *supra*.[48]

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[48] It is often assumed that the Claims Court has exclusive jurisdiction of Tucker Act claims for more than $10,000. (Title 28 U. S. C. § 1346(a)(2) expressly authorizes concurrent jurisdiction in the district courts and the Claims Court for claims under $10,000.) That assumption is not based on any language in the Tucker Act granting such exclusive jurisdiction to the Claims Court. Rather, that court's jurisdiction is "exclusive" only to the extent that Congress has not granted any other court authority to hear the claims that may be decided by the Claims Court. If, however, § 702 of the APA is construed to authorize a district court to grant monetary relief—other than traditional "money damages"—as an incident to the complete relief that is appropriate in the review of agency action, the fact that the purely monetary aspects of the case could have been decided in the Claims

The question whether the District Court had the power to enter the orders it did is governed by the plain language of 5 U. S. C. § 706.[49] It seems perfectly clear that, as "the reviewing court," the District Court had the authority to "hold unlawful and set aside agency action" that it found to be "not in accordance with law." As long as it had jurisdiction under § 702 to review the disallowance orders of the Secretary, it also had the authority to grant the complete relief authorized by § 706. Neither the APA nor any of our decisions required the Court of Appeals to split either of these cases into two parts.[50]

Court is not a sufficient reason to bar that aspect of the relief available in a district court.

[49] Section 706 provides:

"To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

"(1) compel agency action unlawfully withheld or unreasonably delayed; and

"(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

"(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

"(B) contrary to constitutional right, power, privilege, or immunity;

"(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

"(D) without observance of procedure required by law;

"(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

"(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

"In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error."

[50] See, *e. g.*, *Delaware Div. of Health and Social Services* v. *Department of Health and Human Services*, 665 F. Supp., at 1117 ("[B]ifurcated proceedings . . . would add another layer of complexity to an arena already straining under excess jurisdictional baggage and procedural weightiness").

In his explanation to Congress of the basic purpose of what became the 1976 amendment to the APA, Dean Cramton endorsed the view that "'today the doctrine [of sovereign immunity] may be satisfactory to technicians but not at all to persons whose main concern is with justice. . . . The trouble with the sovereign immunity doctrine is that it interferes with consideration of practical matters, and transforms everything into a play on words.'"[51] In our judgment a fair consideration of "practical matters" supports the conclusion that the district courts and the regional courts of appeals have jurisdiction to review agency action of the kind involved in these cases and to grant the complete relief authorized by § 706. Accordingly, the Court of Appeals should have affirmed the judgments of the District Court in their entirety.

Thus, we affirm in part, reverse in part, and remand to the Court of Appeals for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE WHITE, concurring in the judgment.

The Court construes the District Court's orders as not having entered a judgment for money damages within the meaning of 5 U. S. C. § 702. I am prepared to accept that view of what the District Court did, although the Court of Appeals had a different view.

The Court's opinion, as I understand it, also concludes that the District Court, in the circumstances present here, would have had jurisdiction to entertain and expressly grant a prayer for a money judgment against the United States. I am unprepared to agree with this aspect of the opinion and hence concur only in the result the Court reaches with respect to the construction of § 702.

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[51] 1970 Hearing, at 115 (quoting Carrow, Sovereign Immunity in Administrative Law—A New Diagnosis, 9 J. Pub. L. 1, 22 (1960) (in turn quoting letter written by Professor Walter Gellhorn)).

The Court is correct in holding that § 704 does not bar District Court review of the challenged orders, the reason being that the Claims Court could not entertain and grant the claims presented to and granted by the District Court. I thus agree with the result reached in Part III of the Court's opinion.

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

The Court holds for the State because it finds that these suits do not seek money damages, and involve claims for which there is no "adequate remedy" in the Claims Court. I disagree with both propositions, and therefore respectfully dissent.

I

"The States of the Union, like all other entities, are barred by federal sovereign immunity from suing the United States in the absence of an express waiver of this immunity by Congress." *Block* v. *North Dakota ex rel. Bd. of Univ. and School Lands*, 461 U. S. 273, 280 (1983). For this waiver, the Commonwealth of Massachusetts (hereafter respondent) relies on a provision added to § 10 of the Administrative Procedure Act (APA) in 1976:

> "An action in a court of the United States *seeking relief other than money damages* and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party." 5 U. S. C. § 702 (emphasis added).

The Government contends that respondent's lawsuits seek "money damages" and therefore § 702 is unavailing.

In legal parlance, the term "damages" refers to money awarded as reparation for injury resulting from breach of legal duty. Webster's Third New International Dictionary

571 (1981); Black's Law Dictionary 351–352 (5th ed. 1979); D. Dobbs, Law of Remedies § 3.1, p. 135 (1973); W. Hale, Law of Damages 1 (Cooley 2d ed. 1912). Thus the phrase "money damages" is something of a redundancy, but it is, nonetheless, a common usage and refers to one of the two broad categories of judicial relief in the common-law system. The other, of course, is denominated "specific relief." Whereas damages compensate the plaintiff for a loss, specific relief prevents or undoes the loss—for example, by ordering return to the plaintiff of the precise property that has been wrongfully taken, or by enjoining acts that would damage the plaintiff's person or property. See 5A A. Corbin, Contracts § 1141, p. 113 (1964); Dobbs, *supra*, at 135.

The use of the term "damages" (or "money damages") in a context dealing with legal remedies would naturally be thought to advert to this classic distinction. This interpretation is reinforced by the desirability of reading § 702 *in pari materia* with the Tucker Act, 28 U. S. C. § 1491, which grants the Claims Court jurisdiction over certain suits against the Government. Although the Tucker Act is not expressly limited to claims for money damages, it "has long been construed as authorizing only actions for money judgments and not suits for equitable relief against the United States. See *United States* v. *Jones*, 131 U. S. 1 (1889). The reason for the distinction flows from the fact that the Court of Claims has no power to grant equitable relief . . . ." *Richardson* v. *Morris*, 409 U. S. 464, 465 (1973) *(per curiam);* see *Lee* v. *Thornton*, 420 U. S. 139, 140 (1975) *(per curiam)* (Tucker Act jurisdiction empowers courts "to award damages but not to grant injunctive or declaratory relief"); *United States* v. *King*, 395 U. S. 1, 3 (1969) (relief the Claims Court can give is "limited to actual, presently due money damages from the United States"); *Glidden Co.* v. *Zdanok*, 370 U. S. 530, 557 (1962) (Harlan, J., announcing the judgment of the Court) ("From the beginning [the Court of Claims] has been given jurisdiction only to award dam-

ages, not specific relief"). Since under the Tucker Act the *absence* of Claims Court jurisdiction generally turns upon the distinction between money damages and specific relief,[1] it is sensible, if possible (and here it is not only possible but most natural), to interpret § 702 so that the *presence* of district court jurisdiction will turn upon the same distinction. Otherwise, there would be a gap in the scheme of relief—an utterly irrational gap, which we have no reason to believe was intended.

The Court agrees that "the words 'money damages' [were not intended to] have any meaning other than the ordinary understanding of the term as used in the common law for centuries," *ante*, at 897, and that § 702 encompasses "the time-honored distinction between damages and specific relief," *ibid.* It concludes, however, that respondent's suits seek the latter and not the former. The first theory the Court puts forward to support this conclusion is that, "insofar as [respondent's] complaints sought declaratory and injunctive relief, they were certainly not actions for money damages," *ante*, at 893, and since the District Court simply reversed the decision of the Departmental Grant Appeals Board, "neither of [its] orders in this case was a 'money judgment,'" *ante*, at 909. I cannot agree (nor do I think the Court really agrees) with this reasoning. If the jurisdictional division established by Congress is not to be reduced to an absurdity, the line between damages and specific relief must surely be drawn on the basis of the substance of the claim, and not its mere form. It does not take much lawyerly inventiveness to convert a

[1] In 1972 the Tucker Act was amended to give the Claims Court jurisdiction to issue "orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records," and "[i]n any case within its jurisdiction, . . . to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just." 28 U. S. C. § 1491(a)(2). In 1982 the Tucker Act was again amended to give the Claims Court exclusive jurisdiction to grant declaratory and equitable relief "on any contract claim brought before the contract is awarded." 28 U. S. C. § 1491(a)(3).

claim for payment of a past due sum (damages) into a prayer for an injunction against refusing to pay the sum, or for a declaration that the sum must be paid, or for an order reversing the agency's decision not to pay. It is not surprising, therefore, that "in the 'murky' area of Tucker Act jurisprudence . . . one of the few clearly established principles is that the substance of the pleadings must prevail over their form," *Amoco Production Co.* v. *Hodel*, 815 F. 2d 352, 361 (CA5 1987), cert. pending, No. 87–372. All the Courts of Appeals that to my knowledge have addressed the issue, 12 out of 13, are unanimous that district court jurisdiction is not established merely because a suit fails to pray for a money judgment. See, *e. g.*, *Massachusetts* v. *Departmental Grant Appeals Bd. of Health and Human Services*, 815 F. 2d 778, 783 (CA1 1987); *B. K. Instrument, Inc.* v. *United States*, 715 F. 2d 713, 727 (CA2 1983); *Hahn* v. *United States*, 757 F. 2d 581, 589 (CA3 1985); *Portsmouth Redevelopment & Housing Authority* v. *Pierce*, 706 F. 2d 471, 474 (CA4), cert. denied, 464 U. S. 960 (1983); *Alabama Rural Fire Ins. Co.* v. *Naylor*, 530 F. 2d 1221, 1228–1230 (CA5 1976); *Tennessee ex rel. Leech* v. *Dole*, 749 F. 2d 331, 336 (CA6 1984), cert. denied, 472 U. S. 1018 (1985); *Clark* v. *United States*, 596 F. 2d 252, 253–254 (CA7 1979) *(per curiam); Minnesota ex rel. Noot* v. *Heckler*, 718 F. 2d 852, 859, n. 12 (CA8 1983); *Rowe* v. *United States*, 633 F. 2d 799, 802 (CA9 1980); *United States* v. *Kansas City*, 761 F. 2d 605, 608–609 (CA10 1985); *Megapulse, Inc.* v. *Lewis*, 217 U. S. App. D. C. 397, 405, 672 F. 2d 959, 967 (1982); *Chula Vista City School Dist.* v. *Bennett*, 824 F. 2d 1573, 1579 (CA Fed. 1987). The Court cannot intend to stand by a theory that obliterates § 702's jurisdictional requirements, that permits every Claims Court suit to be brought in district court merely because the complaint prays for injunctive relief, and that is contrary to the law of all 12 Circuits that have addressed the issue. Therefore, although the Court describes this first theory as an "in-

dependent reaso[n]" for its conclusion, *ante*, at 909, I must believe that its decision actually rests on different grounds.

The Court's second theory is that "the monetary aspects of the relief that the State sought are not 'money damages' as that term is used in the law," *ante*, at 893; see *ante*, at 910. This at least focuses on the right question: whether the claim is in substance one for money damages. But the reason the Court gives for answering the question negatively, that respondent's suits are not "seeking money in *compensation* for the damage sustained by the failure of the Federal Government to pay as mandated," *ante*, at 900, is simply wrong. Respondent sought money to compensate for the monetary loss (damage) it sustained by expending resources to provide services to the mentally retarded in reliance on the Government's statutory duty to reimburse, just as a Government contractor's suit seeks compensation for the loss the contractor sustains by expending resources to provide services to the Government in reliance on the Government's contractual duty to pay. Respondent's lawsuits thus precisely fit the classic definition of suits for money damages.[2] It is true, of course, that they also fit a general description of a suit for spe-

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[2] The Court points out that "the specific agency action that reverses a disallowance decision is described as 'restitution' in the statute [42 U. S. C. § 1316(c)]." *Ante*, at 893. I doubt that the term in the statute is a term of art, or has anything to do with the issue before us here. But if the Court means to suggest otherwise, I point out that "restitution" in the judicial context commonly consists of money damages. See E. Farnsworth, Contracts § 12.20, p. 911 (1982). Accordingly, in *Acme Process Equipment Co.* v. *United States*, 171 Ct. Cl. 324, 357–358, 347 F. 2d 509, 529 (1965), the Court of Claims held that it had jurisdiction over claims for restitution, since they are not claims for specific relief. Although we reversed that judgment on the merits, we did not question its jurisdictional holding, but rather ourselves described the suit as one "to recover damages for breach of a contract." *United States* v. *Acme Process Equipment Co.*, 385 U. S. 138 (1966). The Court of Claims has continued to exercise jurisdiction over claims for restitutionary "damages" for breach of contract. See, *e. g.*, *Kurz & Root Co.* v. *United States*, 227 Ct. Cl. 522, 531–532 (1981); *Arizona* v. *United States*, 216 Ct. Cl. 221, 237–238, 575 F. 2d 855, 864–865 (1978).

cific relief, since the award of money undoes a loss by giving respondent the very thing (money) to which it was legally entitled. As the Court recognizes, however, the terms "damages" and "specific relief" have been "used in the common law for centuries," *ante*, at 897, and have meanings well established by tradition. Part of that tradition was that a suit seeking to recover a past due sum of money that does no more than compensate a plaintiff's loss is a suit for damages, not specific relief; a successful plaintiff thus obtains not a decree of specific performance requiring the defendant to pay the sum due on threat of punishment for contempt, but rather a money judgment permitting the plaintiff to order "the sheriff to seize and sell so much of the defendant's property as was required to pay the plaintiff." Farnsworth, Legal Remedies for Breach of Contract, 70 Colum. L. Rev. 1145, 1152 (1970). Those rare suits for a sum of money that were not suits for money damages (and that resulted at common law in an order to the defendant rather than a judgment executable by the sheriff) did not seek to compensate the plaintiff for a past loss in the amount awarded, but rather to prevent future losses that were either incalculable or would be greater than the sum awarded. *Id.*, at 1154; 5A A. Corbin, Contracts § 1142, pp. 117–126 (1964); H. McClintock, Principles of Equity § 60, p. 149 (2d ed 1948); T. Waterman, Specific Performance of Contracts § 20, p. 25 (1881). Specific relief was available, for example, to enforce a promise to loan a sum of money when the unavailability of alternative financing would leave the plaintiff with injuries that are difficult to value; or to enforce an obligor's duty to make future monthly payments, after the obligor had consistently refused to make past payments concededly due, and thus threatened the obligee with the burden of bringing multiple damages actions. Almost invariably, however, suits seeking (whether by judgment, injunction, or declaration) to compel the de-

fendant to pay a sum of money[3] to the plaintiff are suits for "money damages," as that phrase has traditionally been applied, since they seek no more than compensation for loss resulting from the defendant's breach of legal duty. The present cases are quite clearly of this usual sort.

The Court's second theory, that "the monetary aspects of the relief that the State sought are not 'money damages,'" *ante*, at 893, is not only wrong, but it produces the same disastrous consequences as the first theory. As discussed above, see *supra*, at 913–915, and as the Court recognizes, see *ante*, at 905, and n. 40, the Claims Court has jurisdiction only to award damages, not specific relief. But if actions seeking past due sums are actions for specific relief, since "they undo the [Government's] refusal" to pay the plaintiff, *ante*, at 910, then the Claims Court is out of business. Almost its entire docket fits this description. In the past, typical actions have included suits by Government employees to obtain money allegedly due by statute which the Government refused to pay. See, *e. g.*, *Ellis* v. *United States*, 222 Ct. Cl. 65, 610 F. 2d 760 (1979) (claim under 5 U. S. C. § 8336(c), entitling law enforcement officers and firefighters to special retirement benefits); *Friedman* v. *United States*, 159 Ct. Cl. 1, 30–31, 310 F. 2d 381, 396–397 (1962) (claim under 10 U. S. C. § 1201 *et seq.*, entitling servicemen to disability retirement benefits), cert. denied *sub nom. Lipp* v. *United States*, 373 U. S. 932 (1963); *Smykowski* v. *United States*, 227 Ct. Cl. 284, 285, 647 F. 2d 1103, 1104 (1981) (claim under

[3] Suit for a sum of money is to be distinguished from suit for *specific* currency or coins in which the plaintiff claims a present possessory interest. Specific relief is available for that, through a suit at law for replevin or detinue, see generally, D. Dobbs, Law of Remedies § 5.13, p. 399 (1973); J. Cribbett, Cases and Materials on Judicial Remedies § 3, pp. 94–116 (1954), or through a suit in equity for injunctive relief, if the currency or coins in question (for example, a collection of rare coins) are "unique" or have an incalculable value. That is obviously not the case here. Respondent seeks fungible funds, not any particular notes in the United States Treasury.

42 U. S. C. §§ 3796–3796c, granting survivors' death benefits for public safety officers). Another large category of the Claims Court's former jurisdiction consisted of suits for money allegedly due under Government grant programs that the Government refused to pay. See, *e. g.*, *Missouri Health & Medical Organization, Inc.* v. *United States*, 226 Ct. Cl. 274, 277–279, 641 F. 2d 870, 873 (1981) (grant awarded by Public Health Service); *Idaho Migrant Council, Inc.* v. *United States*, 9 Cl. Ct. 85, 88 (1985) ("The United States, for public purposes, has undertaken numerous programs to make grant funds available to various governmental and private organizations. Many hundreds of grants are made each year to states, municipalities, schools and colleges and other public and private organizations. . . . Obligations of the United States assumed in [grant] programs . . . are within this court's Tucker Act jurisdiction"). All these suits, and even actions for tax refunds, see, *e. g.*, *Yamamoto* v. *United States*, 9 Cl. Ct. 207 (1985), are now disclosed to be actions for specific relief and beyond the Claims Court's jurisdiction, since they merely seek "to enforce the statutory mandate . . . which happens to be one for the payment of money," *ante*, at 900.

Most of these suits will now have to be brought in the district courts, as suits for specific relief "to undo the Government's refusal to pay." Alas, however, not all can be. The most regrettable consequence of the Court's analysis is its effect upon suits for a sum owed under a contract with the Government. In the past, the Claims Court has routinely exercised jurisdiction over a seller's action for the price. See, *e. g.*, *Dairylea Cooperative, Inc.* v. *United States*, 210 Ct. Cl. 46, 535 F. 2d 24 (1976); *Northern Helex Co.* v. *United States*, 197 Ct. Cl. 118, 455 F. 2d 546 (1972); *Paisner* v. *United States*, 138 Ct. Cl. 420, 150 F. Supp. 835 (1957), cert. denied, 355 U. S. 941 (1958); *R. M. Hollingshead Corp.* v. *United States*, 124 Ct. Cl. 681, 111 F. Supp. 285 (1953). But since, on the Court's theory, such a suit is not a suit for money damages but rather for specific relief, that jurisdiction

will have to be abandoned. Unfortunately, however, those suits will not lie in district court either. It is settled that sovereign immunity bars a suit against the United States for specific performance of a contract, see *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U. S. 682 (1949), and that this bar was not disturbed by the 1976 amendment to § 702, see *Spectrum Leasing Corp.* v. *United States*, 246 U. S. App. D. C. 258, 260, and n. 2, 262, 764 F. 2d 891, 893, and n. 2, 895 (1985); *Sea-Land Service, Inc.* v. *Brown*, 600 F. 2d 429, 432–433 (CA3 1979); *American Science & Engineering, Inc.* v. *Califano*, 571 F. 2d 58, 63 (CA1 1978). Thus, the Court of Appeals for the District of Columbia Circuit, applying the logic (which the Court has today specifically adopted as its own, *ante*, at 894–896, 901) of its earlier decision in *Maryland Dept. of Human Resources* v. *Department of Health and Human Services*, 246 U. S. App. D. C. 180, 763 F. 2d 1441 (1985), has held that a contractor cannot sue the Government in district court for the amount due under a contract, *not* because that would be a suit for money damages within the exclusive jurisdiction of the Claims Court, but because it is a suit for specific performance of the contract. *Spectrum Leasing Corp.* v. *United States*, *supra*, at 262, 764 F. 2d, at 895. But since the Claims Court is also barred from granting specific performance, the Court's theory, in addition to leaving the Claims Court without a docket, leaves the contractor without a forum.

I am sure, however, that neither the judges of the Claims Court nor Government contractors need worry. The Court cannot possibly mean what it says today—except, of course, the judgment. What that leaves, unfortunately, is a judgment without a reason.

II

I agree with the Court that sovereign immunity does not bar respondent's actions insofar as they seek injunctive or declaratory relief with prospective effect. An action seeking an order that will prevent the wrongful disallowance of fu-

ture claims is an action seeking specific relief and not damages, since no damage has yet occurred. Cf. *United States* v. *Testan*, 424 U. S. 392, 403 (1976) (distinguishing "between prospective reclassification, on the one hand, and retroactive reclassification resulting in money damages, on the other").

I do not agree, however, that respondent can pursue these suits in district court, as it has sought to, under the provisions of the APA, since in my view they are barred by 5 U. S. C. § 704, which is entitled "Actions reviewable," and which reads in relevant part:

> "Agency action made reviewable by statute and final agency action for which there is *no other adequate remedy in a court* are subject to judicial review."

The purpose and effect of this provision is to establish that the APA "does not provide additional judicial remedies in situations where the Congress has provided special and adequate review procedures." Attorney General's Manual on the Administrative Procedure Act § 10(c), p. 101 (1947); see *Estate of Watson* v. *Blumenthal*, 586 F. 2d 925, 934 (CA2 1978); *Alabama Rural Fire Ins. Co.* v. *Naylor*, 530 F. 2d, at 1230; *International Engineering Co.* v. *Richardson*, 167 U. S. App. D. C. 396, 403, 512 F. 2d 573, 580 (1975); *Warner* v. *Cox*, 487 F. 2d 1301, 1304 (CA5 1974); *Mohawk Airlines, Inc.* v. *CAB*, 117 U. S. App. D. C. 326, 329 F. 2d 894 (1964); *Ove Gustavsson Contracting Co.* v. *Floete*, 278 F. 2d 912, 914 (CA2 1960); K. Davis, Administrative Law § 211, p. 720 (1951). Respondent has an adequate remedy in a court and may not proceed under the APA in the District Court because (1) an action for reimbursement may be brought in the Claims Court pursuant to the Tucker Act, and (2) that action provides all the relief respondent seeks.

The Tucker Act grants the Claims Court

> "jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution,

or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U. S. C. § 1491(a)(1).

The Claims Court has not always clearly identified which of the several branches of jurisdiction recited in this provision it is proceeding under. It has held that Government grant instruments, although not formal contracts, give rise to enforceable obligations analogous to contracts. See, *e. g.*, *Missouri Health & Medical Organization, Inc.* v. *United States*, 226 Ct. Cl., at 278, 641 F. 2d, at 873; *Idaho Migrant Council, Inc.* v. *United States*, 9 Cl. Ct., at 89. The Medicaid Act itself can be analogized to a unilateral offer for contract—offering to pay specified sums in return for the performance of specified services and inviting the States to accept the offer by performance. But regardless of the propriety of invoking the Claims Court's contractual jurisdiction, I agree with the Secretary that respondent can assert a claim "founded . . . upon [an] Act of Congress," to wit, the Medicaid provision mandating that "the Secretary (except as otherwise provided in this section) *shall pay* to each State which has a plan approved under this subchapter" the amounts specified by statutory formula. 42 U. S. C. § 1396b(a) (emphasis added).

We have held that a statute does not create a cause of action for money damages unless it "'can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.'" *United States* v. *Testan*, *supra*, at 400, quoting *Eastport S. S. Corp.* v. *United States*, 178 Ct. Cl. 599, 607, 372 F. 2d 1002, 1009 (1967). Although § 1396b(a) does not, in so many words, mandate damages, a statute commanding the payment of a specified amount of money by the United States impliedly authorizes (absent other indication) a claim for damages in the defaulted amount. See, *e. g.*, *Bell* v. *United States*, 366 U. S. 393, 398

(1961) (claim brought under statute providing that captured soldiers "shall be entitled to receive" specified amounts); *Sullivan* v. *United States*, 4 Cl. Ct. 70, 72 (1983) (claim brought under 5 U. S. C. § 5595(b)(2), providing that employees are "entitled to be paid severance pay" in specified amounts), aff'd, 742 F. 2d 628 (CA Fed. 1984) *(per curiam); Ellis* v. *United States*, 222 Ct. Cl. 65, 610 F. 2d 760 (1979) (claim under 5 U. S. C. § 8336(c), entitling law enforcement officers and firefighters to special retirement benefits); *Friedman* v. *United States*, 159 Ct. Cl., at 30–31, 310 F. 2d, at 396–397 (claim under 10 U. S. C. § 1201 *et seq.*, entitling servicemen to disability retirement benefits), cert. denied *sub nom. Lipp* v. *United States*, 373 U. S. 932 (1963); *Smykowski* v. *United States*, 227 Ct. Cl., at 285, 647 F. 2d, at 1104 (claim under 42 U. S. C. §§ 3796–3796c, granting survivors' death benefits for public safety officers); *Biagioli* v. *United States*, 2 Cl. Ct. 304, 306–307 (1983) (claim brought under 5 U. S. C. § 5596, providing that employees subject to unjustified personnel action are "entitled . . . to receive" backpay); see also *Testan*, *supra*, at 406 (dicta) ("Congress . . . has provided specifically . . . in the Back Pay Act [5 U. S. C. § 5596] for the award of money damages for a wrongful deprivation of pay").

I conclude, therefore, that respondent may bring an action in the Claims Court based on § 1396b(a). The Court does not disagree with this conclusion but does comment that "[i]t seems likely that while Congress intended 'shall pay' language in statutes such as the Back Pay Act to be self-enforcing—*i. e.*, to create both a right and a remedy—it intended similar language in § 1396b(a) of the Medicaid Act to provide merely a right, knowing that the APA provided for review of this sort of agency action." *Ante*, at 906, n. 42. I fail to understand this reasoning, if it is intended as reasoning rather than as an unsupported conclusion. The only basis the Court provides for treating differently statutes with identical language is that Congress knew "that the APA provided for review of this sort of agency action [*i. e.*, denial of

Medicare reimbursement]." *Ibid.* But that does not distinguish the Medicaid Act from any statute enacted after 1946 when the APA became effective, including the Back Pay Act, 5 U. S. C. § 5596, and most other statutory bases for Claims Court jurisdiction.

There remains to be considered whether the relief available in the Claims Court, damages for failure to pay a past due allocation, is an "adequate remedy" within the meaning of § 704. Like the term "damages," the phrase "adequate remedy" is not of recent coinage. It has an established, centuries-old, common-law meaning in the context of specific relief—to wit, that specific relief will be denied when damages are available and are sufficient to make the plaintiff whole. See, *e. g.*, 1 W. Holdsworth, A History of English Law 457 (7th ed. 1956) (by the 18th century "it was settled that equity would only grant specific relief if damages were not an adequate remedy"). Thus, even though a plaintiff may often prefer a judicial order enjoining a harmful act or omission before it occurs, damages after the fact are considered an "adequate remedy" in all but the most extraordinary cases. See, *e. g.*, *Schoenthal* v. *Irving Trust Co.*, 287 U. S. 92, 94 (1932); *Gaines* v. *Miller*, 111 U. S. 395, 397–398 (1884); 5A A. Corbin, Contracts § 1136, pp. 95–96, § 1142, pp. 117–120 (1964); H. Hunter, Modern Law of Contracts: Breaches and Remedies ¶ 6.01[3], pp. 6–7 to 6–8 (1986); Farnsworth, 70 Colum. L. Rev. 1154; cf. *Ruckelshaus* v. *Monsanto Co.*, 467 U. S. 986, 1017 (1984). There may be circumstances in which damages relief in the Claims Court is available, but is not an adequate remedy. For example, if a State could prove that the Secretary intended in the future to deny Medicaid reimbursement in bad faith, forcing the State to commence a new suit for each disputed period, an action for injunctive relief in district court would lie. See, *e. g.*, *Franklin Telegraph Co.* v. *Harrison*, 145 U. S. 459, 474 (1892). Or if a State wished to set up a new program providing certain services that the Secretary had made clear his intention to dis-

allow for reimbursement, an action seeking a declaration as to the correct interpretation of the statute would lie, since it would be necessary to prevent the irreparable injury of either forgoing a reimbursable program or mistakenly expending state funds that will not be reimbursed. But absent such unusual circumstances, the availability of damages in the Claims Court precludes suit in district court under the provision of the APA permitting review of "agency action for which there is no other adequate remedy." See *Estate of Watson* v. *Blumenthal*, 586 F. 2d, at 934 (emphasis omitted); *Warner* v. *Cox*, 487 F. 2d, at 1304; *Mohawk Airlines, Inc.* v. *CAB*, 117 U. S. App. D. C. 326, 329 F. 2d 894 (1964); *Ove Gustavsson Contracting Co.* v. *Floete*, 278 F. 2d, at 914; cf. *Monsanto*, *supra*, at 1019 (equitable relief to enjoin taking barred since Tucker Act provides an "adequate remedy").[4]

The Court does not dispute that in the present cases an action in Claims Court would provide respondent complete relief. Respondent can assert immediately a claim for money damages in Claims Court, which if successful will as effectively establish its rights as would a declaratory judgment in district court. Since there is no allegation that the Secretary will not honor in the future a Claims Court judgment that would have not only precedential but collateral-estoppel effect, see *Montana* v. *United States*, 440 U. S. 147, 157–158, 162–163 (1979), the ability to bring an action in Claims Court

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[4] Of course, many suits, both for specific relief and for damages, reach district court under the APA because they come within the more specific rubric of § 704, "[a]gency action made reviewable by statute." See, *e. g.* 42 U. S. C. § 405(g) (Social Security benefits); 42 U. S. C. § 1395*oo*(f) (reimbursement of Medicare providers). And even where no special review statute exists, the vast majority of specific-relief suits challenging agency action will reach district court because they are unaffected by the "other adequate remedy" provision of § 704, since they challenge the application of statutes or regulations that cannot be regarded as providing for damages. See, *e. g.*, *Abbott Laboratories* v. *Gardner*, 387 U. S. 136 (1967) (suit challenging drug-labeling regulations).

with regard to disallowance decisions already made provides effective prospective relief as well.

Rather than trying to argue that the Claims Court remedy is inadequate in this case, the Court declares in a footnote that "[s]ince, as a *category of case*, alleged 'improper Medicaid disallowances' cannot always be adequately remedied in the Claims Court, as a jurisdictional, or threshold matter, these actions should proceed in the district court." *Ante*, at 907, n. 43. This novel approach completely ignores the well-established meaning of "adequate remedy," which refers to the adequacy of a remedy for a particular plaintiff in a particular case rather than the adequacy of a remedy for the average plaintiff in the average case of the sort at issue. Although the Court emphasizes that the phrase "money damages" should be interpreted according to "the ordinary understanding of the term as used in the common law for centuries," *ante*, at 897, it appears to forget that prescription when it turns to the equally ancient phrase "adequate remedy." Evidently, whether to invoke "ordinary understanding" rather than novel meaning depends on the task at hand. In any event, were the Court's rationale taken seriously, it would (like the Court's novel analysis of "money damages" in § 702) divest the Claims Court of the bulk of its docket. It is difficult to think of a category of case that can "always be adequately remedied in the Claims Court." Nor is a categorical rule for challenges to Medicaid disallowance decisions justifiable on the basis that in *most* (not just some) such cases prospective or injunctive relief is required, and therefore it is efficient to have a bright-line rule. The traditional legal presumption (and the common-sense presumption) with respect to all other statutes that obligate the Government to pay money is that money damages are ordinarily an adequate remedy. I am aware of no empirical evidence to rebut that presumption with respect to Medicaid. Among the reported disallowance decisions, there appear to be none where a State has asserted a basis for prospective injunctive relief.

Nor can Medicaid disallowance cases be singled out for special treatment as a group because, as the Court declares, "[m]anaging the relationships between States and the Federal Government that occur over time and that involve constantly shifting balance sheets requires a different sort of review and relief process" than is provided in Claims Court, *ante*, at 904–905, n. 39, since the Medicaid Act is a "complex scheme . . . that governs a set of intricate, ongoing relationships between the States and the Federal Government," *ante*, at 901, n. 31. All aspects of this assertion are without foundation. The area of law involved here, Medicaid, is indistiguishable for all relevant purposes from many other areas of law the Claims Court routinely handles. Medicaid statutes and regulations are not more complex than, for example, the federal statutes and regulations governing income taxation or Government procurement, and the Government's relationship with the States is neither more intricate and ongoing nor uses a different kind of balance sheet than its relationship with many defense contractors or with large corporate taxpayers subject to perpetual audit. And I cannot imagine in what way district courts adjudicating Medicaid disallowance claims would apply "a different sort of review and relief process" so as to "manag[e] the relationships between States and Federal Governments." Just like the Claims Court, district courts adjudicate concrete cases, one at at a time, that present discrete factual and legal disputes.

Finally, the Court suggests that Medicaid disallowance suits are more suitably heard in district court with appeal to the regional courts of appeals than in the Claims Court with appeal to the Court of Appeals for the Federal Circuit, because (1) disallowance decisions have "state-law aspects" over which the regional courts of appeals have a better grasp, *ante*, at 908, (2) it is anomalous to have Medicaid compliance decisions reviewed in the regional courts of appeals while reviewing disallowance decisions in Claims Court, *ibid.*, and (3) it is "highly unlikely that Congress intended to designate an

Article I court as the primary forum for judicial review of agency action that may involve questions of policy," *ante*, at 908, n. 46. I do not see how these points have anything to do with the question before us (whether the Claims Court can provide an adequate remedy in these cases), but even if relevant they seem to me wrong. (1) Adjudicating a disallowance decision does not directly implicate state law. As the present cases illustrate, the typical dispute involves only the interpretation of federal statutes and regulations. I suppose it is conceivable that a state-law issue could sometimes be relevant—for example, the Government might contend that the State was, under state law, entitled to reimbursement for a particular expenditure from some third party and thus could not claim it against the Government. But there is no area of federal law that does not contain these incidental references to state law, and perhaps none does so as much as federal tax law, which is, of course, routinely adjudicated in the Claims Court. (2) It is not at all anomalous for the Claims Court to share jurisdiction over controversies arising from Medicaid. In fact, quite to the contrary, the Claims Court *never* exercises exclusive jurisdiction over any body of law, but only over particular types of claims. (3) It is not more likely that Congress intended disputes involving "questions of policy" to be heard in district court before appeal to an Article III court, since it is the business neither of district courts nor of Article III appellate courts to determine questions of policy. It is the norm for Congress to designate an Article I judge, usually an administrative law judge, as the initial forum for resolving policy disputes (to the extent they are to resolved in adjudication rather than by rulemaking), with the first stop in an Article III court being a court of appeals such as the Federal Circuit—where, of course, the policy itself would not be reviewed but merely its legality and the procedures by which it was pronounced. Ordinarily, when Congress creates a special judicial review mechanism using district courts, it is to get an independent adjudication of the facts, not an

unconstitutional judicial determination of policy. See, *e. g.*, 42 U. S. C. § 405(g).

* * *

Nothing is more wasteful than litigation about where to litigate, particularly when the options are all courts within the same legal system that will apply the same law. Today's decision is a potential cornucopia of waste. Since its reasoning cannot possibly be followed where it leads, the jurisdiction of the Claims Court has been thrown into chaos. On the other hand, perhaps this is the opinion's greatest strength. Since it cannot possibly be followed where it leads, the lower courts may have the sense to conclude that it leads nowhere, and to limit it to the single type of suit before us. Even so, because I think there is no justification in law for treating this single type of suit differently, I dissent.

Syllabus

UNITED STATES *v.* KOZMINSKI ET AL.

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

No. 86–2000. Argued February 23, 1988—Decided June 29, 1988

After two mentally retarded men were found laboring on respondents' farm in poor health, in squalid conditions, and in relative isolation from the rest of society, respondents were charged with violating 18 U. S. C. § 241 by conspiring to prevent the men from exercising their Thirteenth Amendment right to be free from involuntary servitude, and with violating 18 U. S. C. § 1584 by knowingly holding the men in involuntary servitude. At respondents' trial in Federal District Court, the Government's evidence indicated, *inter alia*, that the two men worked on the farm seven days a week, often 17 hours a day, at first for $15 per week and eventually for no pay, and that, in addition to actual or threatened physicial abuse and a threat to reinstitutionalize one of the men if he did not do as he was told, respondents had used various forms of psychological coercion to keep the men on the farm. The court instructed the jury that, under both statutes, involuntary servitude may include situations involving any "means of compulsion . . . , sufficient in kind and degree, to subject a person having the same general station in life as the alleged victims to believe they had no reasonable means of escape and no choice except to remain in the service of the employer." The jury found respondents guilty, and the court imposed sentences. However, the Court of Appeals reversed and remanded for a new trial, concluding that the trial court's definition of involuntary servitude was too broad in that it included general psychological coercion. The court held that involuntary servitude exists only when the master subjects the servant to (1) threatened or actual physical force, (2) threatened or actual state-imposed legal coercion, or (3) fraud or deceit where the servant is a minor or an immigrant or is mentally incompetent.

Held: For purposes of criminal prosecution under § 241 or § 1584, the term "involuntary servitude" necessarily means a condition of servitude in which the victim is forced to work for the defendant by the use or threat of physical restraint or physical injury or by the use or threat of coercion through law or the legal process. This definition encompasses cases in which the defendant holds the victim in servitude by placing him or her in fear of such physical restraint or injury or legal coercion. Pp. 939–953.

(a) The Government cannot prove a § 241 conspiracy to violate rights secured by the Thirteenth Amendment without proving that the conspir-

acy involved the use or threatened use of physical or legal coercion. The fact that the Amendment excludes from its prohibition involuntary servitude imposed "as a punishment for crime whereof the party shall have been duly convicted" indicates that the Amendment's drafters thought that involuntary servitude generally includes situations in which the victim is compelled to work by law. Moreover, the facts that the phrase "involuntary servitude" was intended "to cover those forms of compulsory labor akin to African slavery," *Butler* v. *Perry*, 240 U. S. 328, 332, and that the Amendment extends beyond state action, cf. U. S. Const., Amdt. 14, § 1, imply an intent to prohibit compulsion through physical coercion. These assessments are confirmed by this Court's decisions construing the Amendment, see, *e. g.*, *Clyatt* v. *United States*, 197 U. S. 207, which have never interpreted the guarantee of freedom from involuntary servitude to specifically prohibit compulsion of labor by other means, such as psychological coercion. Pp. 941–944.

(b) The language and legislative history of § 1584 and its statutory progenitors indicate that its reach should be limited to cases involving the compulsion of services by the use or threatened use of physical or legal coercion. That is the understanding of the Thirteenth Amendment's "involuntary servitude" phrase that prevailed at the time of § 1584's enactment and, since Congress clearly borrowed that phrase in enacting § 1584, the phrase should have the same meaning in both places absent any contrary indications. Section 1584's history undercuts the contention that Congress had a broader concept of involuntary servitude in mind when it enacted the statute, and does not support the Court of Appeals' conclusion that immigrants, children, and mental incompetents are entitled to any special protection. Pp. 944–948.

(c) The Government's broad construction of "involuntary servitude"—which would prohibit the compulsion of services by any type of speech or intentional conduct that, from the victim's point of view, either leaves the victim with no tolerable alternative but to serve the defendant or deprives the victim of the power of choice—could not have been intended by Congress. That interpretation would appear to criminalize a broad range of day-to-day activity; would delegate to prosecutors and juries the inherently legislative task of determining what type of coercive activities are so morally reprehensible that they should be punished as crimes; would subject individuals to the risk of arbitrary or discriminatory prosecution and conviction; and would make the type of coercion prohibited depend entirely on the victim's state of mind, thereby depriving ordinary people of fair notice of what is required of them. These defects are not cured by the Government's ambiguous specific intent requirement. JUSTICE BRENNAN's position—that § 1584 prohibits any means of coercion that actually succeeds in reducing the victim to a con-

dition of servitude resembling that in which antebellum slaves were held—although theoretically narrower than the Government's interpretation, suffers from the same flaws. JUSTICE STEVENS' conclusion that Congress intended to delegate to the Judiciary the task of defining "involuntary servitude" on a case-by-case basis is unsupported and could lead to the arbitrary and unfair imposition of criminal punishment. The purposes underlying the rule of lenity for interpreting ambiguous statutory provisions are served by construing § 241 and § 1584 to prohibit only compulsion of services through physical or legal coercion. Pp. 949–952.

(d) The latter construction does not imply that evidence of other means of coercion, or of extremely poor working conditions, or of the victim's special vulnerabilities, is irrelevant. The victim's vulnerabilities are relevant in determining whether the physical or legal coercion or threats thereof could plausibly have compelled the victim to serve. Moreover, a trial court could properly find that evidence of other means of coercion or of poor working conditions is relevant to corroborate disputed evidence regarding the use or threats of physical or legal coercion, the defendant's intent in using such means, or the causal effect of such conduct. Pp. 952–953.

(e) Since the District Court's jury instructions encompassed means of coercion other than actual or threatened physical or legal coercion, the instructions may have caused respondents to be convicted for conduct that does not violate § 241 or § 1584. The convictions must therefore be reversed. Because the record contains sufficient evidence of physical or legal coercion to permit a conviction, however, a judgment of acquittal is unwarranted, and the case is remanded for further proceedings consistent with this opinion. P. 953.

821 F. 2d 1186, affirmed and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, SCALIA, and KENNEDY, JJ., joined. BRENNAN, J., filed an opinion concurring in the judgment, in which MARSHALL, J., joined, *post*, p. 953. STEVENS, J., filed an opinion concurring in the judgment, in which BLACKMUN, J., joined, *post*, p. 965.

Assistant Attorney General Reynolds argued the cause for the United States. With him on the briefs were *Solicitor General Fried*, *Deputy Solicitor General Bryson*, *Deputy Assistant Attorney General Clegg*, *Richard J. Lazarus*, and *Jessica Dunsay Silver*.

Carl Ziemba argued the cause and filed a brief for respondents.*

JUSTICE O'CONNOR delivered the opinion of the Court.

This case concerns the scope of two criminal statutes enacted by Congress to enforce the Thirteenth Amendment. Title 18 U. S. C. § 241 prohibits conspiracy to interfere with an individual's Thirteenth Amendment right to be free from "involuntary servitude." Title 18 U. S. C. § 1584 makes it a crime knowingly and willfully to hold another person "to involuntary servitude." We must determine the meaning of "involuntary servitude" under these two statutes.

I

In 1983, two mentally retarded men were found laboring on a Chelsea, Michigan, dairy farm in poor health, in squalid conditions, and in relative isolation from the rest of society. The operators of the farm—Ike Kozminski, his wife Margarethe, and their son John—were charged with violating 18 U. S. C. § 241 by conspiring to "injure, oppress, threaten, or intimidate" the two men in the free exercise and enjoyment of their federal right to be free from involuntary servitude. The Kozminskis were also charged with knowingly holding, or aiding and abetting in the holding of, the two men to involuntary servitude in violation of 18 U. S. C. § 1584 and § 2.[1] The case was tried before a jury in the United States District Court for the Eastern District of Michigan. The Government's evidence is summarized below.

The victims, Robert Fulmer and Louis Molitoris, have intelligence quotients of 67 and 60 respectively. Though chronologically in their 60's during the period in question,

**Alan G. Martin* and *David M. Liberman* filed a brief for the International Society for Krishna Consciousness of California, Inc., as *amicus curiae.*

[1] Title 18 U. S. C. § 2 provides, in pertinent part, that "[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

they viewed the world and responded to authority as would someone of 8 to 10 years. Margarethe Kozminski picked Fulmer up one evening in 1967 while he was walking down the road, and brought him to work at one of the Kozminski farms. He was working on another farm at the time, but Mrs. Kozminski simply left a note telling his former employer that he had gone. Molitoris was living on the streets of Ann Arbor, Michigan, in the early 1970's when Ike Kozminski brought him to work on the Chelsea farm. He had previously spent several years at a state mental hospital.

Fulmer and Molitoris worked on the Kozminskis' dairy farm seven days a week, often 17 hours a day, at first for $15 per week and eventually for no pay. The Kozminskis subjected the two men to physical and verbal abuse for failing to do their work and instructed herdsmen employed at the farm to do the same. The Kozminskis directed Fulmer and Molitoris not to leave the farm, and on several occasions when the men did leave, the Kozminskis or their employees brought the men back and discouraged them from leaving again. On one occasion, John Kozminski threatened Molitoris with institutionalization if he did not do as he was told.

The Kozminskis failed to provide Fulmer and Molitoris with adequate nutrition, housing, clothing, or medical care. They directed the two men not to talk to others and discouraged the men from contacting their relatives. At the same time, the Kozminskis discouraged relatives, neighbors, farm hands, and visitors from contacting Fulmer and Molitoris. Fulmer and Molitoris asked others for help in leaving the farm, and eventually a herdsman hired by the Kozminskis was concerned about the two men and notified county officials of their condition. County officials assisted Fulmer and Molitoris in leaving the farm and placed them in an adult foster care home.

In attempting to persuade the jury that the Kozminskis held their victims in involuntary servitude, the Government did not rely solely on evidence regarding their use or threat-

ened use of physical force or the threat of institutionalization. Rather, the Government argued that the Kozminskis had used various coercive measures—including denial of pay, subjection to substandard living conditions, and isolation from others—to cause the victims to believe they had no alternative but to work on the farm. The Government argued that Fulmer and Molitoris were "psychological hostages" whom the Kozminskis had "brainwash[ed]" into serving them. Tr. 15, 23.[2]

At the conclusion of the evidence, the District Court instructed the jurors that in order to convict the Kozminskis of conspiracy under § 241, they must find (1) the existence of a conspiracy including the Kozminskis, (2) that the purpose of the conspiracy was to injure, oppress, threaten, or intimidate a United States citizen in the free exercise or enjoyment of a federal right to be free from involuntary servitude, and (3) that one of the conspirators knowingly committed an overt act in furtherance of that purpose. The court further instructed the jury that § 1584 required the Government to prove (1) that the Kozminskis held the victims in involuntary servitude, (2) that they acted knowingly or willfully, and (3) that their actions were a necessary cause of the victims' decision to continue working for them. The court delivered the following instruction on the meaning of involuntary servitude under both statutes:

> "Involuntary servitude consists of two terms.
>
> "Involuntary means 'done contrary to or without choice'—'compulsory'—'not subject to control of the will.'

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[2] The Government produced an expert witness who testified that the Kozminskis' general treatment of the two men caused the men to undergo an "involuntary conversion" to complete dependency. App. to Pet. for Cert. 15a. The Court of Appeals held that this expert testimony was admitted in violation of Federal Rule of Evidence 702. The Government has not sought review of this ruling, and we do not address it.

"Servitude means '[a] condition in which a person lacks liberty especially to determine one's course of action or way of life'—'slavery'—'the state of being subject to a master.'

"Involuntary servitude involves a condition of having some of the incidents of slavery.

"It may include situations in which persons are forced to return to employment by law.

"It may also include persons who are physically restrained by guards from leaving employment.

"It may also include situations involving either physical and other coercion, or a combination thereof, used to detain persons in employment.

. . . . .

"In other words, based on all the evidence it will be for you to determine if there was a means of compulsion used, sufficient in kind and degree, to subject a person having the same general station in life as the alleged victims to believe they had no reasonable means of escape and no choice except to remain in the service of the employer." App. to Pet. for Cert. 109a–110a.

So instructed, the jury found Ike and Margarethe Kozminski guilty of violating both statutes. John Kozminski was convicted only on the § 241 charge. Each of the Kozminskis was placed on probation for two years. In addition, Ike Kozminski was fined $20,000 and was ordered to pay $6,190.80 in restitution to each of the victims. John Kozminski was fined $10,000.

A divided panel of the Court of Appeals for the Sixth Circuit affirmed the convictions. App. to Pet. for Cert. 72a. After rehearing the case en banc, however, the Court of Appeals reversed the convictions and remanded the case for a new trial. 821 F. 2d 1186 (1987). The majority concluded that the District Court's definition of involuntary servitude, which would bring cases involving general psychological coer-

cion within the reach of § 241 and § 1584, was too broad. The court held that involuntary servitude exists only when

> "(a) the servant believes that he or she has no viable alternative but to perform service for the master (b) because of (1) the master's use or threatened use of physical force, or (2) the master's use or threatened use of state-imposed legal coercion (*i. e.*, peonage), or (3) the master's use of fraud or deceit to obtain or maintain services where the servant is a minor, an immigrant or one who is mentally incompetent." 821 F. 2d, at 1192 (footnote omitted).

The dissenting judges charged that the majority had "rewritten rather than interpreted" § 1584. *Id.*, at 1213. They argued that involuntary servitude may arise from whatever means the defendant intentionally uses to subjugate the will of the victim so as to render the victim "'incapable of making a rational choice.'" *Id.*, at 1212–1213 (quoting *United States* v. *Shackney*, 333 F. 2d 475, 488 (CA2 1964) (Dimock, J., concurring)).

The Court of Appeals' definition of involuntary servitude conflicts with the definitions adopted by other Courts of Appeals. Writing for the Second Circuit in *United States* v. *Shackney*, *supra*, Judge Friendly reasoned that

> "a holding in involuntary servitude means to us action by the master causing the servant to have, or to believe he has, no way to avoid continued service or confinement, . . . not a situation where the servant knows he has a choice between continued service and freedom, even if the master has led him to believe that the choice may entail consequences that are exceedingly bad." *Id.*, at 486.

Accordingly, Judge Friendly concluded that § 1584 prohibits only "service compelled by law, by force or by the threat of continued confinement of some sort." *Id.*, at 487. See also *United States* v. *Harris*, 701 F. 2d 1095, 1100 (CA4 1983) (in-

voluntary servitude exists under § 241 and § 1584 where labor is coerced by "threat of violence or confinement, backed sufficiently by deeds"); *United States* v. *Bibbs*, 564 F. 2d 1165, 1168 (CA5 1977) (involuntary servitude exists under § 1584 where the defendant places the victim "in such fear of physical harm that the victim is afraid to leave"). The Ninth Circuit, in contrast, has not limited the reach of § 1584 to cases involving physical force or legal sanction, but has concluded that

> "[a] holding in involuntary servitude occurs when an individual coerces another into his service by improper or wrongful conduct that is intended to cause, and does cause, the other person to believe that he or she has no alternative but to perform labor." *United States* v. *Mussry*, 726 F. 2d 1448, 1453 (1984).

See also *United States* v. *Warren*, 772 F. 2d 827, 833–834 (CA11 1985) ("Various forms of coercion may constitute a holding in involuntary servitude. The use, or threatened use, of physical force to create a climate of fear is the most grotesque example of such coercion").

We granted the Government's petition for a writ of certiorari, 484 U. S. 894 (1987), to resolve this conflict among the Courts of Appeals on the meaning of involuntary servitude for the purpose of criminal prosecution under § 241 and § 1584.

II

Federal crimes are defined by Congress, and so long as Congress acts within its constitutional power in enacting a criminal statute, this Court must give effect to Congress' expressed intention concerning the scope of conduct prohibited. See *Dowling* v. *United States*, 473 U. S. 207, 213, 214 (1985) (citing *United States* v. *Wiltberger*, 5 Wheat. 76, 95 (1820)). Congress' power to enforce the Thirteenth Amendment by enacting § 241 and § 1584 is clear and undisputed. See U. S. Const., Amdt. 13, § 2 ("Congress shall have power to enforce

this article by appropriate legislation"); *Griffin* v. *Breckenridge*, 403 U. S. 88, 105 (1971). The scope of conduct prohibited by these statutes is therefore a matter of statutory construction.

The Court of Appeals reached its conclusions regarding the meaning of involuntary servitude under both § 241 and § 1584 based solely on its analysis of the language and history of § 1584. A reading of these statutes, however, reveals an obvious difference between them. Unlike § 1584, which by its terms prohibits holding to involuntary servitude, § 241 prohibits conspiracies to interfere with rights secured "by the Constitution or laws of the United States," and thus incorporates the prohibition of involuntary servitude contained in the Thirteenth Amendment. See *United States* v. *Price*, 383 U. S. 787, 805 (1966). The indictment in this case, which was read to the jury, specifically charged the Kozminskis with conspiring to interfere with the "right and privilege secured . . . by the Constitution and laws of the United States *to be free from involuntary servitude as provided by the Thirteenth Amendment of the United States Constitution.*" App. 177 (emphasis added). Thus, the indictment clearly specified a conspiracy to violate the Thirteenth Amendment. The indictment cannot be read to charge a conspiracy to violate § 1584 rather than the Thirteenth Amendment, because the criminal sanction imposed by § 1584 does not create any individual "right or privilege" as those words are used in § 241. The Government has not conceded that the definition of involuntary servitude as used in the Thirteenth Amendment is limited by the meaning of the same phrase in § 1584. To the contrary, the Government argues (1) that the Thirteenth Amendment should be broadly construed, and (2) that Congress did not intend § 1584 to have a narrower scope. Brief for United States 22–32. The District Court defined involuntary servitude broadly under both § 241 and § 1584. The Court of Appeals reversed the convictions under both counts because it concluded that the defini-

tion of involuntary servitude given for each count was erroneous. Since the proper interpretation of each statute is squarely before us, we construe each statute separately to ascertain the conduct it prohibits.

A

Section 241 authorizes punishment when

> "two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same."

This Court interpreted the purpose and effect of § 241 over 20 years ago in *United States* v. *Guest*, 383 U. S. 745 (1966), and *United States* v. *Price*, *supra*. Section 241 creates no substantive rights, but prohibits interference with rights established by the Federal Constitution or laws and by decisions interpreting them. *Guest*, *supra*, at 754–755; *Price*, *supra*, at 803. Congress intended the statute to incorporate by reference a large body of potentially evolving federal law. This Court recognized, however, that a statute prescribing criminal punishment must be interpreted in a manner that provides a definite standard of guilt. The Court resolved the tension between these two propositions by construing § 241 to prohibit only intentional interference with rights made specific either by the express terms of the Federal Constitution or laws or by decisions interpreting them. *Price*, *supra*, at 806, n. 20; *Guest*, *supra*, at 754–755. Cf. *Screws* v. *United States*, 325 U. S. 91, 102 (1945).

The Kozminskis were convicted under § 241 for conspiracy to interfere with the Thirteenth Amendment guarantee against involuntary servitude. Applying the analysis set out in *Price* and *Guest*, our task is to ascertain the precise definition of that crime by looking to the scope of the Thirteenth Amendment prohibition of involuntary servitude specified in our prior decisions.

The Thirteenth Amendment declares that "[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." The Amendment is "self-executing without any ancillary legislation, so far as its terms are applicable to any existing state of circumstances," *Civil Rights Cases*, 109 U. S. 3, 20 (1883), and thus establishes a constitutional guarantee that is protected by § 241. See *Price*, *supra*, at 805. The primary purpose of the Amendment was to abolish the institution of African slavery as it had existed in the United States at the time of the Civil War, but the Amendment was not limited to that purpose; the phrase "involuntary servitude" was intended to extend "to cover those forms of compulsory labor akin to African slavery which in practical operation would tend to produce like undesirable results." *Butler* v. *Perry*, 240 U. S. 328, 332 (1916). See also *Robertson* v. *Baldwin*, 165 U. S. 275, 282 (1897); *Slaughter-House Cases*, 16 Wall. 36, 69 (1873).

While the general spirit of the phrase "involuntary servitude" is easily comprehended, the exact range of conditions it prohibits is harder to define. The express exception of involuntary servitude imposed as a punishment for crime provides some guidance. The fact that the drafters felt it necessary to exclude this situation indicates that they thought involuntary servitude includes at least situations in which the victim is compelled to work by law. Moreover, from the general intent to prohibit conditions "akin to African slavery," see *Butler* v. *Perry*, *supra*, at 332–333, as well as the fact that the Thirteenth Amendment extends beyond state action, compare U. S. Const., Amdt. 14, § 1, we readily can deduce an intent to prohibit compulsion through physical coercion.

This judgment is confirmed when we turn to our previous decisions construing the Thirteenth Amendment. Looking behind the broad statements of purpose to the actual hold-

ings, we find that in every case in which this Court has found a condition of involuntary servitude, the victim had no available choice but to work or be subject to legal sanction. In *Clyatt* v. *United States*, 197 U. S. 207 (1905), for example, the Court recognized that peonage—a condition in which the victim is coerced by threat of legal sanction to work off a debt to a master—is involuntary servitude under the Thirteenth Amendment. *Id.*, at 215, 218. Similarly, in *United States* v. *Reynolds*, 235 U. S. 133 (1914), the Court held that "[c]ompulsion of . . . service by the constant fear of imprisonment under the criminal laws" violated "rights intended to be secured by the Thirteenth Amendment." *Id.*, at 146, 150. In that case the Court struck down a criminal surety system under which a person fined for a misdemeanor offense could contract to work for a surety who would, in turn, pay the convict's fine to the State. The critical feature of the system was that that breach of the labor contract by the convict was a crime. The convict was thus forced to work by threat of criminal sanction. The Court has also invalidated state laws subjecting debtors to prosecution and criminal punishment for failing to perform labor after receiving an advance payment. *Pollock* v. *Williams*, 322 U. S. 4 (1944); *Taylor* v. *Georgia*, 315 U. S. 25 (1942); *Bailey* v. *Alabama*, 219 U. S. 219 (1911). The laws at issue in these cases made failure to perform services for which money had been obtained prima facie evidence of intent to defraud. The Court reasoned that "the State could not avail itself of the sanction of the criminal law to supply the compulsion [to enforce labor] any more than it could use or authorize the use of physical force." *Bailey*, *supra*, at 244.

Our precedents reveal that not all situations in which labor is compelled by physical coercion or force of law violate the Thirteenth Amendment. By its terms the Amendment excludes involuntary servitude imposed as legal punishment for a crime. Similarly, the Court has recognized that the prohibition against involuntary servitude does not prevent the

State or Federal Governments from compelling their citizens, by threat of criminal sanction, to perform certain civic duties. See *Hurtado* v. *United States*, 410 U. S. 578, 589, n. 11 (1973) (jury service); *Selective Draft Law Cases*, 245 U. S. 366, 390 (1918) (military service); *Butler* v. *Perry*, *supra* (roadwork). Moreover, in *Robertson* v. *Baldwin*, 165 U. S. 275 (1897), the Court observed that the Thirteenth Amendment was not intended to apply to "exceptional" cases well established in the common law at the time of the Thirteenth Amendment, such as "the right of parents and guardians to the custody of their minor children or wards," *id.*, at 282, or laws preventing sailors who contracted to work on vessels from deserting their ships. *Id.*, at 288.

Putting aside such exceptional circumstances, none of which are present in this case, our precedents clearly define a Thirteenth Amendment prohibition of involuntary servitude enforced by the use or threatened use of physical or legal coercion. The guarantee of freedom from involuntary servitude has never been interpreted specifically to prohibit compulsion of labor by other means, such as psychological coercion. We draw no conclusions from this historical survey about the potential scope of the Thirteenth Amendment. Viewing the Amendment, however, through the narrow window that is appropriate in applying § 241, it is clear that the Government cannot prove a conspiracy to violate rights secured by the Thirteenth Amendment without proving that the conspiracy involved the use or threatened use of physical or legal coercion.

B

Section 1584 authorizes criminal punishment of

> "[w]hoever knowingly and willfully holds to involuntary servitude or sells into any condition of involuntary servitude any other person for any term."

This is our first occasion to consider the reach of this statute. The pivotal phrase, "involuntary servitude," clearly was bor-

rowed from the Thirteenth Amendment. Congress' use of the constitutional language in a statute enacted pursuant to its constitutional authority to enforce the Thirteenth Amendment guarantee makes the conclusion that Congress intended the phrase to have the same meaning in both places logical, if not inevitable. In the absence of any contrary indications, we therefore give effect to congressional intent by construing "involuntary servitude" in a way consistent with the understanding of the Thirteenth Amendment that prevailed at the time of § 1584's enactment. See *United States* v. *Shackney*, 333 F. 2d 475 (CA2 1964) (Friendly, J.).

Section 1584 was enacted as part of the 1948 revision to the Criminal Code. At that time, all of the Court's decisions identifying conditions of involuntary servitude had involved compulsion of services through the use or threatened use of physical or legal coercion. See, *e. g.*, *Clyatt* v. *United States*, *supra; United States* v. *Reynolds*, *supra; Pollock* v. *Williams*, *supra; Bailey* v. *Alabama*, *supra*. By employing the constitutional language, Congress apparently was focusing on the prohibition of comparable conditions.

The legislative history of § 1584 confirms this conclusion and undercuts the Government's claim that Congress had a broader concept of involuntary servitude in mind. No significant legislative history accompanies the 1948 enactment of § 1584; the statute was adopted as part of a general revision of the Criminal Code. The 1948 version of § 1584 was a consolidation, however, of two earlier statutes: the Slave Trade statute, as amended in 1909, formerly 18 U. S. C. § 423 (1940 ed.), and the 1874 Padrone statute, formerly 18 U. S. C. § 446 (1940 ed.). There are some indications that § 1584 was intended to have the same substantive reach as these statutes. See, *e. g.*, A. Holtzoff, Preface to Title 18 U. S. C. A. (1969) ("In general, with a few exceptions, the Code does not attempt to change existing law"); Revision of Titles 18 and 28 of the United States Code: Hearings on H. R. 1600 and H. R. 2055 before Subcommittee No. 1 of the

House Committee on the Judiciary, 80th Cong., 1st Sess., 13–14 (1947) (statement of advisory committee member Justin Miller). But see *United States* v. *Shackney*, *supra*, at 482 (viewing changes made in the course of consolidation as significant and § 1584 as positive law). Whether or not § 1584 was intended to track these earlier statutes exactly, it was most assuredly not intended to work a radical change in the law. We therefore review the legislative history of the Slave Trade statute and the Padrone statute to inform our construction of § 1584.

The original Slave Trade statute authorized punishment of persons who "hold, sell, or otherwise dispose of any . . . negro, mulatto, or person of colour, so brought [into the United States] as a slave, or to be held to service or labour." Act of Apr. 20, 1818, ch. 91, § 6, 3 Stat. 452. This statute was one of several measures passed in the early 19th century for the purpose of ending the African slave trade. A 1909 amendment removed the racial restriction, extending the statute to the holding of "any person" as a slave. This revision, however, left unchanged that portion of the statute describing the condition under which such persons were held. See 42 Cong. Rec. 1114 (1908). The Government attempts to draw a contrary conclusion from a comment by Senator Heyburn to the effect that the 1909 amendment was intended to protect vulnerable people who were brought into the United States for labor or for immoral purposes. *Id.*, at 1115. This comment is inconclusive, however. Other Senators expressly disagreed with the view that the elimination of the racial restriction changed the meaning of the word "slavery." See *id.*, at 1114–1115. Moreover, the 1909 reenactment of the Slave Trade statute was part of a general codification of the federal penal laws, which Senator Heyburn himself stated was "in no instance to change the practice of the law." *Id.*, at 2226. Thus, we conclude that nothing in the history of the Slave Trade statute suggests that it was intended to extend

to conditions of servitude beyond those applied to slaves, *i. e.*, physical or legal coercion.

The other precursor of § 1584, the Padrone statute, reflects a similarly limited scope. The "padrones" were men who took young boys away from their families in Italy, brought them to large cities in the United States, and put them to work as street musicians or beggars. Congress enacted the Padrone statute in 1874 "to prevent [this] practice of enslaving, buying, selling, or using Italian children." 2 Cong. Rec. 4443 (1874) (Rep. Cessna). The statute provided that

> "whoever shall knowingly and wilfully bring into the United States . . . any person inveigled or forcibly kidnapped in any other country, with intent to hold such person . . . in confinement or to any involuntary service, and whoever shall knowingly and wilfully sell, or cause to be sold, into any condition of involuntary servitude, any other person for any term whatever, and every person who shall knowingly and wilfully hold to involuntary service any person so sold and bought, shall be deemed guilty of a felony." Act of June 23, 1874, ch. 464. 18 Stat. 251.

This statute, too, was aimed only at compulsion of service through physical or legal coercion. To be sure, use of the term "inveigled" indicated that the statute was intended to protect persons brought into this country by other means. But the statute drew a careful distinction between the manner in which persons were brought into the United States and the conditions in which they were subsequently held, which are expressly identified as "confinement" or "involuntary servitude." Our conclusion that Congress believed these terms to be limited to situations involving physical or legal coercion is confirmed when we examine the actual physical conditions facing the victims of the padrone system. These young children were literally stranded in large, hostile cities in a foreign country. They were given no education or other assistance toward self-sufficiency. Without such as-

sistance, without family, and without other sources of support, these children had no actual means of escaping the padrones' service; they had no choice but to work for their masters or risk physical harm. The padrones took advantage of the special vulnerabilities of their victims, placing them in situations where they were physically unable to leave.

The history of the Padrone statute reflects Congress' view that a victim's age or special vulnerability may be relevant in determining whether a particular type or a certain degree of physical or legal coercion is sufficient to hold that person to involuntary servitude. For example, a child who is told he can go home late at night in the dark through a strange area may be subject to physical coercion that results in his staying, although a competent adult plainly would not be. Similarly, it is possible that threatening an incompetent with institutionalization or an immigrant with deportation could constitute the threat of legal coercion that induces involuntary servitude, even though such a threat made to an adult citizen of normal intelligence would be too implausible to produce involuntary servitude. But the Padrone statute does not support the Court of Appeals' conclusion that involuntary servitude can exist absent the use or threatened use of physical or legal coercion to compel labor. Moreover, far from broadening the definition of involuntary servitude for immigrants, children, or mental incompetents, § 1584 eliminated any special distinction among, or protection of, special classes of victims.

Thus, the language and legislative history of § 1584 both indicate that its reach should be limited to cases involving the compulsion of services by the use or threatened use of physical or legal coercion. Congress chose to use the language of the Thirteenth Amendment in § 1584 and this was the scope of that constitutional provision at the time § 1584 was enacted.

C

The Government has argued that we should adopt a broad construction of "involuntary servitude," which would prohibit the compulsion of services by any means that, from the victim's point of view, either leaves the victim with no tolerable alternative but to serve the defendant or deprives the victim of the power of choice. Under this interpretation, involuntary servitude would include compulsion through psychological coercion as well as almost any other type of speech or conduct intentionally employed to persuade a reluctant person to work.

This interpretation would appear to criminalize a broad range of day-to-day activity. For example, the Government conceded at oral argument that, under its interpretation, § 241 and § 1584 could be used to punish a parent who coerced an adult son or daughter into working in the family business by threatening withdrawal of affection. Tr. of Oral Arg. 12. It has also been suggested that the Government's construction would cover a political leader who uses charisma to induce others to work without pay or a religious leader who obtains personal services by means of religious indoctrination. See Brief in Opposition 4; Brief for the International Society for Krishna Consciousness of California, Inc., as *Amicus Curiae* 25. As these hypotheticals suggest, the Government's interpretation would delegate to prosecutors and juries the inherently legislative task of determining what type of coercive activities are so morally reprehensible that they should be punished as crimes. It would also subject individuals to the risk of arbitrary or discriminatory prosecution and conviction.

Moreover, as the Government would interpret the statutes, the type of coercion prohibited would depend entirely upon the victim's state of mind. Under such a view, the statutes would provide almost no objective indication of the conduct or condition they prohibit, and thus would fail to provide fair notice to ordinary people who are required to con-

form their conduct to the law. The Government argues that any such difficulties are eliminated by a requirement that the defendant harbor a specific intent to hold the victim in involuntary servitude. But in light of the Government's failure to give any objective content to its construction of the phrase "involuntary servitude," this specific intent requirement amounts to little more than an assurance that the defendant sought to do "an unknowable something." *Screws* v. *United States*, 325 U. S., at 105.

In short, we agree with Judge Friendly's observation that

> "[t]he most ardent believer in civil rights legislation might not think that cause would be advanced by permitting the awful machinery of the criminal law to be brought into play whenever an employee asserts that his will to quit has been subdued by a threat which seriously affects his future welfare but as to which he still has a choice, however painful." *United States* v. *Schackney*, 333 F. 2d., at 487.

Accordingly, we conclude that Congress did not intend § 1584 to encompass the broad and undefined concept of involuntary servitude urged upon us by the Government.

JUSTICE BRENNAN would hold that § 1584 prohibits not only the use or threatened use of physical or legal coercion, but also any means of coercion "that actually succeeds in reducing the victim to a condition of servitude resembling that in which slaves were held before the Civil War." *Post*, at 962. This formulation would be useful if it were accompanied by a recognition that the use or threat of physical or legal coercion was a necessary incident of pre-Civil War slavery and thus of the "'slavelike' conditions of servitude Congress most clearly intended to eradicate." *Post*, at 961. Instead, finding no objective factor to be necessary to a "slavelike condition," JUSTICE BRENNAN would delegate to prosecutors and juries the task of determining what working conditions are so oppressive as to amount to involuntary servitude.

Such a definition of involuntary servitude is theoretically narrower than that advocated by the Government, but it suffers from the same flaws. The ambiguity in the phrase "slavelike conditions" is not merely a question of degree, but instead concerns the very nature of the conditions prohibited. Although we can be sure that Congress intended to prohibit "'slavelike' conditions of servitude," we have no indication that Congress thought that conditions maintained by means other than by the use or threatened use of physical or legal coercion were "slavelike." Whether other conditions are so intolerable that they, too, should be deemed to be involuntary is a value judgment that we think is best left for Congress.

JUSTICE STEVENS concludes that Congress intended to delegate to the Judiciary the inherently legislative task of defining "involuntary servitude" through case-by-case adjudication. *Post*, at 965. Neither the language nor the legislative history of § 1584 provides an adequate basis for such a conclusion. Reference to the Sherman Act does not advance JUSTICE STEVENS' argument, for that Act does not authorize courts to develop standards for the imposition of criminal punishment. To the contrary, this Court determined that the objective standard to be used in deciding whether conduct violates the Sherman Act—the rule of reason—was evinced by the language and the legislative history of the Act. *Standard Oil Co.* v. *United States*, 221 U. S. 1, 60 (1911). It is one thing to recognize that some degree of uncertainty exists whenever judges and juries are called upon to apply substantive standards established by Congress; it would be quite another thing to tolerate the arbitrariness and unfairness of a legal system in which the judges would develop the standards for imposing criminal punishment on a case-by-case basis.

Sound principles of statutory construction lead us to reject the amorphous definitions of involuntary servitude proposed by the Government and by JUSTICES BRENNAN and STE-

VENS. By construing § 241 and § 1584 to prohibit only compulsion of services through physical or legal coercion, we adhere to the time-honored interpretive guideline that uncertainty concerning the ambit of criminal statutes should be resolved in favor of lenity. See, *e. g.*, *McNally* v. *United States*, 483 U. S. 350 (1987); *Dowling* v. *United States*, 473 U. S. 207, 229 (1985); *Liparota* v. *United States*, 471 U. S. 419, 427 (1985); *Rewis* v. *United States*, 401 U. S. 808, 812 (1971). The purposes underlying the rule of lenity—to promote fair notice to those subject to the criminal laws, to minimize the risk of selective or arbitrary enforcement, and to maintain the proper balance between Congress, prosecutors, and courts—are certainly served by its application in this case.

III

Absent change by Congress, we hold that, for purposes of criminal prosecution under § 241 or § 1584, the term "involuntary servitude" necessarily means a condition of servitude in which the victim is forced to work for the defendant by the use or threat of physical restraint or physical injury, or by the use or threat of coercion through law or the legal process. This definition encompasses those cases in which the defendant holds the victim in servitude by placing the victim in fear of such physical restraint or injury or legal coercion. Our holding does not imply that evidence of other means of coercion, or of poor working conditions, or of the victim's special vulnerabilities is irrelevant in a prosecution under these statutes. As we have indicated, the vulnerabilities of the victim are relevant in determining whether the physical or legal coercion or threats thereof could plausibly have compelled the victim to serve. In addition, a trial court could properly find that evidence of other means of coercion or of extremely poor working conditions is relevant to corroborate disputed evidence regarding the use or threatened use of physical or legal coercion, the defendant's intention in using such means, or the causal effect of such conduct. We hold only that the jury

must be instructed that compulsion of services by the use or threatened use of physical or legal coercion is a necessary incident of a condition of involuntary servitude.

The District Court's instruction on involuntary servitude, which encompassed other means of coercion, may have caused the Kozminskis to be convicted for conduct that does not violate either statute. Accordingly, we agree with the Court of Appeals that the convictions must be reversed and the case remanded for a new trial.

We disagree with the Court of Appeals to the extent it determined that a defendant could violate § 241 or § 1584 by means other than the use or threatened use of physical or legal coercion where the victim is a minor, an immigrant, or one who is mentally incompetent. But because we believe the record contains sufficient evidence of physical or legal coercion to enable a jury to convict the Kozminskis even under the stricter standard of involuntary servitude that we announce today, we agree with the Court of Appeals that a judgment of acquittal is unwarranted.

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

It is so ordered.

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

I agree with the Court that the construction given 18 U. S. C. § 1584 by the District Court and the Government either sweeps beyond the intent of Congress or fails to define the criminal conduct with sufficient specificity, and that a new trial under different instructions is therefore required. I cannot, however, square the Court's decision to add a physical or legal coercion limitation to the statute with either the statutory text or legislative history, and would adopt a different statutory construction that, I think, defines the crime with sufficient specificity but comports better with the evident intent of Congress.

I

It is common ground among the parties and all the courts and Justices that have interpreted § 1584[1] that it encompasses, at a minimum, the compulsion of labor via the use or threat of physical or legal coercion. That much need not be belabored, for the use of the master's whip and the power of the State to compel one human to labor for another were clearly core elements of slavery that the Thirteenth Amendment and its statutory progeny intended to eliminate. As the Government points out, however, the language of both the Thirteenth Amendment and § 1584 simply prohibits "involuntary servitude" and contains no words limiting the prohibition to servitude compelled by particular methods. "[The Thirteenth] amendment denounces a status or condition, irrespective of the manner or authority by which it is created." *Clyatt* v. *United States*, 197 U. S. 207, 216 (1905).

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[1] The District Court instructed the jury to incorporate the definition of "involuntary servitude" from § 1584 into 18 U. S. C. § 241. The parties did not challenge this incorporation either below or in this Court, but rather argued only that the § 1584 definition the District Court incorporated was incorrect. 821 F. 2d 1186, 1188, n. 3 (CA6 1987). I therefore believe it appropriate to address only the proper construction of § 1584. I note also that the § 241 count of the indictment charged a conspiracy to interfere with the "free exercise and enjoyment of the right and privilege secured to [the victims] by the Constitution *and laws* of the United States to be free from involuntary servitude as provided by the Thirteenth Amendment of the United States Constitution." App. 177 (emphasis added). Thus, the parties may have assumed that § 1584 is a "la[w] of the United States" specifying the content of the constitutional right to be free from involuntary servitude, cf. *ante*, at 941, and that accordingly if respondents' actions violated § 1584, the conspiracy to engage in those actions would necessarily constitute a violation of § 241. Such an assumption does not strike me as at all unreasonable. At any rate, for whatever reason the parties never raised the argument that the definition of "involuntary servitude" under § 241 should differ from that under § 1584, and I think it imprudent to decide that issue in the first instance in this Court and without briefing.

If as a factual matter the use or threat of physical or legal coercion were the only methods by which a condition of involuntary servitude could be created, then the constitutional and statutory text might provide some support for the Court's conclusion. But the Court does not dispute that other methods can coerce involuntary labor—indeed it is precisely the broad range of nonphysical private activities capable of coercing labor that the Court cites as the basis for its vagueness concerns. See *ante*, at 949; see also n. 5, *infra*. I address those concerns below, but the point here is only that those concerns, however serious, are not textual concerns, for the text suggests no grounds for distinguishing among different means of coercing involuntary servitude. Nor do I know of any empirical grounds for assuming that involuntary servitude can be coerced only by physical or legal means.[2] To the contrary, it would seem that certain psychological, economic, and social means of coercion can be just as effective as physical or legal means, particularly where the victims are especially vulnerable, such as the mentally disabled victims in this case. Surely threats to burn down a person's home or business or to rape or kill a person's spouse or children can have greater coercive impact than the mere threat of a beating, yet the coercive impact of such threats turns not on any direct physical effect that would be felt by the laborer but on the psychological, emotional, social, or economic injury the

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[2] In other contexts, we have recognized that nonphysical coercion can induce involuntary action. For example, we have interpreted the federal crime of kidnaping to include the imposition of "an unlawful physical *or mental* restraint" to confine the victim against his will. *Chatwin* v. *United States*, 326 U. S. 455, 460 (1946) (emphasis added). Similarly, in determining when confessions are involuntary, we have noted "coercion can be mental as well physical . . . . [T]he efficiency of the rack and the thumbscrew can be matched, given the proper subject, by more sophisticated modes of 'persuasion.'" *Blackburn* v. *Alabama*, 361 U. S. 199, 206 (1960). "When a suspect speaks because he is overborne, it is immaterial whether he has been subjected to a physical or a mental ordeal." *Watts* v. *Indiana*, 338 U. S. 49, 53 (1949) (plurality opinion of Frankfurter, J.).

laborer would suffer as a result of harm to his or her home, business, or loved ones. And drug addiction or the weakness resulting from a lack of food, sleep, or medical care can eliminate the will to resist as readily as the fear of a physical blow. Hypnosis, blackmail, fraud, deceit, and isolation are also illustrative methods—but it is unnecessary here to canvas the entire spectrum of nonphysical machinations by which humans coerce each other. It suffices to observe that one can imagine many situations in which nonphysical means of private coercion can subjugate the will of a servant.

Indeed, this case and others readily reveal that the typical techniques now used to hold persons in slavelike conditions are not limited to physical or legal means. The techniques in this case, for example, included disorienting the victims with frequent verbal abuse and complete authoritarian domination; inducing poor health by denying medical care and subjecting the victims to substandard food, clothing, and living conditions; working the victims from 3 a.m. to 8:30 p.m. with no days off, leaving them tired and without free time to seek alternative work; denying the victims any payment for their labor; and active efforts to isolate the victims from contact with outsiders who might help them.[3] Without considering these techniques (and their particular effect on a mentally disabled person), one would hardly have a complete picture of whether the coercion inflicted on the victims was sufficient to

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[3] Although not detailed by the Court, the Government introduced evidence that the Kozminskis (1) ripped a phone off the wall in the barn when one of the victims was caught using it, and did not simply "discourage" contact with relatives but falsely told relatives who asked to speak to the victims that the victims did not want to see them and falsely told the victims that their relatives were not interested in them; (2) falsely told neighbors that the victims were in their custody as wards of the State; and (3) refused to allow the victims to seek medical care, even when one was gored by a bull and the tip of the other's thumb was cut off (both victims eventually became very ill while serving the Kozminskis). The Court also neglects to mention that the Government has conceded that the victims were not forcibly held to work on the farm. 821 F. 2d, at 1188.

make their servitude involuntary. Other involuntary servitude cases have also chronicled a variety of nonphysical and nonlegal means of coercion including trickery; isolation from friends, family, transportation or other sources of food, shelter, clothing, or jobs; denying pay or creating debt that is greater than the worker's income by charging exorbitant rates for food, shelter, or clothing; disorienting the victims by placing them in an unfamiliar environment, barraging them with orders, and controlling every detail of their lives; and weakening the victims with drugs, alcohol, or by lack of food, sleep, or proper medical care. See, *e. g.*, *United States* v. *Warren*, 772 F. 2d 827 (CA11 1985); *United States* v. *Mussry*, 726 F. 2d 1448 (CA9 1984); *United States* v. *Ingalls*, 73 F. Supp. 76 (SD Cal. 1947). One presumes these methods of coercion would not reappear with such depressing regularity if they were ineffective.[4]

My reading of the statutory language as not limited to physical or legal coercion is strongly bolstered by the legislative history. Section 1584 was created out of the consolidation of the Slave Trade statute and the Padrone statute. *Ante*, at 945. I agree with the Government that the background of both those statutes suggests that Congress intended to protect persons subjected to involuntary servitude by forms of coercion more subtle than force. The Padrone statute, for example, was designed to outlaw what was known as the "padrone system" whereby padrones in Italy inveigled from their parents young boys whom the padrones then used without pay as beggars, bootblacks, or street musicians. Once in this country, without relatives to turn to, the children had little choice but to submit to the demands of those asserting authority over them, yet this form of coercion was deemed sufficient—without any evidence of physical or legal coercion—to hold the boys in "involuntary servitude." See

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[4] Because the Court today adopts an expansive but rather obscure understanding of what "physical" coercion encompasses, see nn. 5, 12, *infra*, it is difficult to tell which, if any, of the means of coercion described in the last two paragraphs the Court would deem "physical."

United States v. *Ancarola*, 1 F. 676, 682–684 (CC SDNY 1880). Given the nature of the system the Padrone statute aimed to eliminate, the statute's use of the words "involuntary servitude" demonstrates not that the statute was "aimed only at compulsion of service through physical or legal coercion," *ante*, at 947, but that Congress understood "involuntary servitude" to cover servitude compelled through other means of coercion.[5] Indeed, the official title of the Padrone statute was "An act to protect persons of foreign birth against forcible constraint *or* involuntary servitude," Act of June 23, 1874, ch. 464, 18 Stat. 251 (emphasis added); 2 Cong. Rec. 4443 (1874), and the legislative history describes the statute as broadly "intended to prevent the practice of enslaving, buying, selling, *or using* Italian children," *ibid.* (Rep. Cessna) (emphasis added).[6]

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[5] The Court attempts to evade the inconsistency between its interpretation of § 1584 and the coercion covered by the Padrone statute by asserting that the child victims of the padrone system were in a "situatio[n] involving physical . . . coercion." *Ante*, at 947. Yet the coercion involved, even as the Court describes it, was obviously psychological, social, and economic in nature: "These young children were literally stranded in large, hostile cities in a foreign country. They were given no education or other assistance toward self-sufficiency." *Ibid.* Although it is heartening that the Court recognizes that strange environs and the lack of money, maturity, education, or family support can establish the coercion necessary for involuntary servitude, labeling such coercion "physical" is at best strained and (other than making the legislative history fit the Court's statutory interpretation) accomplishes little but the elimination of whatever certainty the "physical or legal coercion" test would otherwise provide. See n. 12, *infra*.

[6] The legislative history of the Slave Trade statute is less conclusive, but in explaining the necessity of reenacting this ban on importing slaves despite the abolition of slavery and without the statute's original limitation to blacks, Senator Heyburn did make clear that the new statute was intended to protect those who come here "without being a party to the disposition of their services or the control of their rights, whether they be children of irresponsible years and conditions or whether they be people who, because of their environment or the condition of their lives, cannot protect themselves." 42 Cong. Rec. 1115 (1908).

In light of this legislative history, the Court of Appeals below concluded that § 1584 must at least be construed to criminalize nonphysical means of private coercion used to obtain the services of particularly vulnerable victims such as minors, immigrants, or the mentally disabled. 821 F. 2d 1186, 1190–1192 (CA6 1987). I agree with the Court, however, that this creation of specially protected classes of victims is both textually unsupported and inconsistent with Congress' decision to eliminate such distinctions in enacting § 1584, *ante*, at 950, and thus turn to the task of defining what I regard as the proper construction of the statute.

II

Based on an analysis of the statutory language and legislative history similar to that set forth in Part I, the Government concludes that § 1584 criminalizes any conduct that intentionally coerces involuntary service. It is of course not easy to articulate when a person's actions are "involuntary." In some minimalist sense the laborer always has a choice no matter what the threat: the laborer can choose to work, or take a beating; work, or go to jail. We can all agree that these choices are so illegitimate that any decision to work is "involuntary." But other coercive choices, even if physical or legal in nature, might present closer questions. Happily, our task is not to resolve the philosophical meaning of free will, but to determine what coercion Congress would have regarded as sufficient to deem any resulting labor "involuntary" within the meaning of § 1584.

The Government concludes that the statute encompasses any coercion that either leaves the victim with "no tolerable alternative" but to serve the defendant or deprives the victim of "the capacity for rational calculation." Brief for United States 19, 33. As the Court notes, however, such a statutory construction potentially sweeps in a broad range of conduct that Congress could not have intended to criminalize. *Ante*, at 949. The Government attempts to avoid many of

these problems by stressing that a victim does not lack "tolerable alternatives" when he simply has "no attractive or painless options"; the alternatives must be as bad for the victim as physical injury. Brief for United States 33. One can, however, imagine troublesome applications of that test, such as the employer who coerces an employee to remain at her job by threatening her with bad recommendations if she leaves, the religious leader who admonishes his adherents that unless they work for the church they will rot in hell, or the husband who relegates his wife to years of housework by threatening to seek custody of the children if she leaves. Surely being unable to work in one's chosen field, suffering eternal damnation, or losing one's children can be far worse than taking a beating, but are all these instances of involuntary servitude? The difficulty with the Government's test is that although nonphysical forms of private coercion can indeed be as traumatic as physical force, their coercive impact is more highly individualized than that of physical and legal threats. I thus agree with the Court that criminal punishment cannot turn on a case-by-case assessment of whether the alternatives confronting an individual are sufficiently intolerable to render any continued service "involuntary." Such an approach either renders the test hopelessly subjective (if it relies on the victim's assessment of what is tolerable) or delegates open-ended authority to prosecutors and juries (if it relies on what a reasonable person would consider intolerable).[7] Similarly, I agree with the Court that the difficulty of distinguishing the victim deprived of "the capacity for rational calculation" from the victim influenced by love,

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[7] These problems are not solved by limiting the Government's test to "*improper or wrongful* conduct that is intended to cause, and does cause, the other person to believe that he or she has no alternative but to perform the labor," *United States* v. *Mussry*, 726 F. 2d 1448, 1453 (CA9 1984) (emphasis added), for the criminal has no way of knowing what conduct the prosecutor or jury will deem sufficiently improper or wrongful to criminalize.

charisma, persuasive argument, or religious fervor is sufficiently great that the standard fails to define the criminal conduct with sufficient specificity.

The solution, however, lies not in ignoring those forms of coercion that are perhaps less universal in their effect than physical or legal coercion, but in focusing on the "slavelike" conditions of servitude Congress most clearly intended to eradicate. That the statute prohibits "involuntary servitude" rather than "involuntary service" provides no small insight into the central evil the statute unambiguously aimed to eliminate.[8] For "servitude" generally denotes a relation of complete domination and lack of personal liberty resembling the conditions in which slaves were held prior to the Civil War. Thus, in 1910 and 1949, Webster's defined "servitude" as the "[c]ondition of a slave; slavery; serfdom; bondage; state of compulsory subjection to a master. . . . In French and English Colonies of the 17th and 18th centuries, the condition of transported or colonial laborers who, under contract or by custom, rendered service with temporary and limited loss of political and personal liberty." Webster's New International Dictionary of the English Language. And in 1913 and 1944 Funk and Wagnalls defined "servitude" as "[t]he condition of a slave; a state of subjection to a master or to arbitrary power of any kind" and cited the same colonial practice. Funk and Wagnalls, New Standard Dictionary of the

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[8] Because, as a criminal statute, § 1584 must be interpreted to conform with special doctrines concerning notice, vagueness, and the rule of lenity, the issue here focuses on what *central* evil the words "involuntary servitude" unambiguously encompass in a way that can be defined with specificity. The interpretation of "involuntary servitude" here is thus necessarily narrower than it would be if the issue were what enforceable civil rights the Thirteenth Amendment provides of its own force or if the issue here concerned the scope of Congress' Thirteenth Amendment authority to pass laws for abolishing all badges or incidents of slavery or servitude. See *Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409, 437–444 (1968).

English Language.[9] Our cases have expressed the same understanding. "The word servitude is of larger meaning than slavery, as the latter is popularly understood in this country, and the obvious purpose was to forbid all shades and conditions of African slavery." *Slaughter-House Cases*, 16 Wall. 36, 69 (1873). "[T]he term involuntary servitude was intended to cover those forms of compulsory labor akin to African slavery which in practical operation would tend to produce like undesirable results." *Butler* v. *Perry*, 240 U. S. 328, 332 (1916). See also *Bailey* v. *Alabama*, 219 U. S. 219, 241 (1911); *Hodges* v. *United States*, 203 U. S. 1, 17 (1906).

I thus conclude that whatever irresolvable ambiguity there may be in determining (for forms of coercion less universal than physical or legal coercion) the degree of coercion Congress would have regarded as sufficient to render any resulting labor "involuntary" within the meaning of § 1584, Congress clearly intended to encompass coercion of any form that actually succeeds in reducing the victim to a condition of servitude resembling that in which slaves were held before the Civil War.[10] While no one factor is dispositive, complete

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[9] See also 9 Oxford English Dictionary 522 (1933) ("The condition of being a slave or serf, or of being the property of another person; absence of personal freedom. Often, and now usually, with the added notion of subjection to the necessity of excessive labor"); Webster's American Dictionary of the English Language 1207 (1869) ("the state of voluntary or involuntary subjection to a master; service; the condition of a slave; slavery; bondage; hence, a state of slavish dependence").

[10] The case involving the crime of holding to slavery that is most contemporaneous with the 1948 passage of § 1584 defined a slave mainly in terms of total domination of person and services and lack of freedom. *United States* v. *Ingalls*, 73 F. Supp. 76, 78–79 (SD Cal. 1947).

Significantly, the Padrone statute, which encompassed coercion through other than physical or legal means, see *supra*, at 957–958, was designed to prevent boys from being "held in a condition of practical slavery," 42 Cong. Rec. 1122 (1908) (Sen. Lodge), or "in something kindred to slavery," 2 Cong. Rec. 2 (1873) (Sen. Sumner). See also *United States* v. *Ancarola*, 1 F. 676, 682–683 (CC SDNY 1880) (determining whether such boys were held to involuntary servitude by relying on the defendant's control over the

domination over all aspects of the victim's life, oppressive working and living conditions, and lack of pay or personal freedom are the hallmarks of that slavelike condition of servitude. Focusing on such a slavelike condition not only accords with the type of servitude Congress unambiguously intended to eliminate but also comports well with the policies behind the statute, for the concern that coerced laborers will be unable to relieve themselves from harsh work conditions by changing employers is less likely to be implicated if that laborer has a normal job with time off, personal freedom, and some money, and has contact with other people.[11]

This focus on the actual conditions of servitude also provides an objective benchmark by which to judge either the "intolerability" of alternatives or the victim's capacity for "rational" thought: the alternatives can justifiably be deemed intolerable, or the victim can justifiably be deemed incapable of thinking rationally, if the victim actually felt compelled to live in a slavelike condition of servitude. True, in marginal cases it may well be difficult to determine whether a slavelike condition of servitude existed, but the ambiguity will be a matter of degree on a factual spectrum,[12] not, as in the "no

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boys and his use of them for his profit and to the injury of their morals). These slavelike conditions can presumably be contrasted with the conditions normally implicated by "'the right of parents and guardians to the custody of their minor children or wards.'" *Ante*, at 944, quoting *Robertson* v. *Baldwin*, 165 U. S. 275, 282 (1897).

[11] "The undoubted aim of the Thirteenth Amendment . . . was not merely to end slavery but to maintain a system of completely free and voluntary labor throughout the United States. . . . [I]n general the defense against oppressive hours, pay, working conditions, or treatment is the right to change employers. When the master can compel and the laborer cannot escape the obligation to go on, there is no power below to redress and no incentive above to relieve a harsh overlordship or unwholesome conditions of labor." *Pollock* v. *Williams*, 322 U. S. 4, 17–18 (1944).

[12] "That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense." *United States* v. *Petrillo*, 332 U. S. 1, 7 (1947) (rejecting vagueness challenge to statute making it a crime to coerce the employment of "persons in

tolerable alternative" or "improper or wrongful conduct" tests, a matter of value on which one would expect wide variation among different prosecutors or jurors. The risk of selective or arbitrary enforcement is thus minimized, and the defendant who, as a result of intentional coercion, employs persons in conditions resembling slavery has fair notice regarding the applicability of the criminal laws. And many of the more troublesome applications of the Government's open-ended test would be avoided. For example, § 1584 would not encompass a claim that a regime of religious indoctrination psychologically coerced adherents to work for the church unless it could also be shown that the adherents worked in a slavelike condition of servitude and (given the intent requirement) that the religious indoctrination was not motivated by a desire to spread sincerely held religious beliefs but rather by the intent to coerce adherents to labor in a slavelike condition of servitude.

This restrictive construction of limiting the statute to slavelike conditions, although necessary to comply with the rule of lenity given the inherent ambiguity of the statute

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excess of the number of employees needed"). Ambiguity over such matters of degree is not obviated by the Court's test, since it requires a determination of whether the degree of physical or legal coercion used was sufficient to compel "involuntary" service. Cf. *Steward Machine Co.* v. *Davis*, 301 U. S. 548, 590 (1937). Indeed, the Court introduces a far more profound uncertainty by adopting an understanding of "physical" coercion that encompasses a broad array of what might commonly be understood to be nonphysical forms of coercion. See n. 5, *supra*. Although these forms of coercion certainly deserve to be encompassed within § 1584, it is at best obscure under the Court's test what line divides the forms of coercion that are covered by § 1584 from those that are not because the Court never defines its rather unique understanding of "physical" coercion. Instead, the Court seems to use "physical" as no more than a formal label it applies to those forms of coercion it deems sufficiently egregious to criminalize. Such a mode of analysis is, of course, conclusory. Worse, it merely reintroduces all the difficulties of the Government's test in a more obscure and exacerbated form.

where the coercion is neither physical nor legal, is not, however, necessary where the defendant compels involuntary service by the use or threat of legal or physical means. Because the coercive impact of legal or physical coercion is less individualized than other forms of coercion, we need be less concerned about selective or arbitrary enforcement; and the defendant who intentionally employs physical or legal means to coerce labor has fair notice his acts may be criminal. The ambiguity justifying a restrictive reading is, moreover, not present when the means of coercion are those at the heart of the institution of slavery, and it seems clear that Congress would have regarded a victim working under a legal or physical threat as serving in a condition of servitude, however limited in time or scope.[13]

III

In sum, I conclude that § 1584 reaches cases where the defendant intentionally coerced the victim's labor by the use or threat of legal or physical means or the defendant intentionally coerced the victim into a slavelike condition of servitude by other forms of coercion or by rendering the defendant incapable of rational choice. I therefore concur in the judgment.

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

No matter what we write, this case must be remanded for a new trial because the Court of Appeals held that expert testimony was erroneously admitted and the Government has not asked us to review that holding. My colleagues' opinions attempting to formulate an all-encompassing definition of the term "involuntary servitude" demonstrate that this legislative task is not an easy one. They also persuade me that Congress probably intended the definition to be developed in

[13] Like the Court, I put aside the exceptional cases it discusses *ante*, at 944.

the common-law tradition of case-by-case adjudication, much as the term "restraint of trade" has been construed in an equally vague criminal statute.

In rejecting an argument that the Sherman Act was unconstitutionally vague, Justice Holmes wrote:

> "But apart from the common law as to restraint of trade thus taken up by the statute the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death. 'An act causing death may be murder, manslaughter, or misadventure according to the degree of danger attending it' by common experience in the circumstances known to the actor. 'The very meaning of the fiction of implied malice in such cases at common law was, that a man might have to answer with his life for consequences which he neither intended nor foresaw.' *Commonwealth* v. *Pierce*, 138 Massachusetts, 165, 178 [(1884)]. *Commonwealth* v. *Chance*, 174 Massachusetts, 245, 252 [(1899)]. 'The criterion in such cases is to examine whether common social duty would, under the circumstances, have suggested a more circumspect conduct.' [1 E. East, Pleas of the Crown 262 (1803)]." *Nash* v. *United States*, 229 U. S. 373, 377 (1913).

A similar approach to the statute before us in this case was expressed by Judge Guy in his dissenting opinion in the Court of Appeals:

> "It is clear that 18 U. S. C. § 1584 is lacking in definitional precision when it makes criminal the holding of one in 'involuntary servitude.' Whether this is the genius of this section or a deficiency to be cured by judicial legislation is not so clear. The majority apparently concludes it is a deficiency and proceeds to cure it by

substituting an arbitrary definition that raises more questions than it answers. In discussing this specific section, Judge Dimock, who concurred in *Shackney*, prophetically wrote:

"'To have an arbitrary classification which will resolve with equal facility all of the cases that would arise under the statute is indeed a tempting prospect. It is much harder to have to work under a statute which will raise difficult questions in the borderline cases inevitable whenever the application of a statute depends upon an appraisal of the state of the human mind. 333 F. 2d at 488.'

. . . . .

"This is not an easy definitional question and it is one on which reasonable minds and federal circuits might differ. I write in dissent, however, primarily because I believe the majority has rewritten rather than interpreted 18 U. S. C. § 1584." 821 F. 2d 1186, 1212–1213 (CA6 1987).

I have a similar reaction to both JUSTICE O'CONNOR's opinion for the Court and to JUSTICE BRENNAN's concurrence. They are both unduly concerned with hypothetical cases that are not before the Court and that, indeed, are far removed from the facts of this case. Although these hypothetical cases present interesting and potentially difficult philosophical puzzles, I doubt that they have any significant relationship to real world decisions that will be faced by possible defendants, prosecutors, or jurors.[1]

[1] Although the Government conceded at oral argument that "a parent who coerced an adult son or daughter into working in the family business by threatening withdrawal of affection," might be in violation of the statute, *ante*, at 949, I cannot believe that we need adopt a narrow construction of § 1584 to avoid uncertainty as to such cases. No parent would expect to be prosecuted, no responsible prosecutor would seek indictment, and no reasonable jury would convict for this sort of conduct. Of course, increasingly difficult hypothetical cases can be developed to a point at which rea-

The text of § 1584 identifies three components of this criminal offense.[2] First, the defendant must have acted "knowingly and willfully." As the District Court instructed the jury, the Government has the burden of proving that the defendants had "the specific intent" to commit the offense.[3] *Infra*, at 975. Second, they must have imposed an "involuntary" condition upon their victims. As the District Court correctly stated, the term "involuntary" means "'done contrary to or without choice'—'compulsory'—'not subject to control of the will.'" *Infra*, at 971. Third, the condition that must have been deliberately imposed on the victims against their will must have been a condition of "servitude." As the District Court explained, the term "servitude" means "'[a] condition in which a person lacks liberty especially to de-

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sonable persons may disagree. No legal rule, however, produces certainty and I am convinced that § 1584 is sufficiently definite on its face to apprise the public of what it may and may not do. The seemingly unambiguous rule adopted by the majority itself admits of grey area. The Court asserts: "The history of the Padrone statute reflects Congress' view that a victim's age or special vulnerability may be relevant in determining whether a particular type or a certain degree of physical or legal coercion is sufficient to hold that person to involuntary servitude." *Ante*, at 948. Thus, the public is left to ask how young is too young, how vulnerable is too vulnerable, and how much coercion is permissible in light of the victim's age or vulnerability? The answer to each question, however, like the question presented in this case, is best—if not only—resolved on a case-by-case basis.

[2] As the Court of Appeals noted, "[t]he trial court instructed the jury to incorporate the definition of involuntary servitude from § 1584 into § 241 which encompasses the Thirteenth Amendment." 821 F. 2d 1186, 1188, n. 3 (CA6 1987). Because the parties did not challenge this process of incorporation, the Court of Appeals did not reach the question whether § 241 requires a different set of instructions from § 1584 concerning the meaning of "involuntary servitude." *Ibid.* Because our decision in this case does not affect the ultimate disposition—that is, a new trial is necessary in any event—I would not extend our analysis beyond the scope of the question considered by the Court of Appeals.

[3] The full text of the relevant jury instructions appears as an appendix to this opinion.

termine one's course of action or way of life'—'slavery'—'the state of being subject to a master.'"[4] *Ibid.* The judge further instructed the jury that the defendants could not be found guilty unless they had used "a means of compulsion . . . sufficient in kind and degree, to subject a person having the same general station in life as the alleged victims to believe they had no reasonable means of escape and no choice except to remain in the service of the employer." *Infra*, at 972.

I agree with JUSTICE BRENNAN that the reach of the statute extends beyond compulsion that is accompanied by actual or threatened physical means or by the threat of legal action. See *ante*, at 954–959. The statute applies equally to "physical or mental restraint," cf. *Chatwin* v. *United States*, 326 U. S. 455, 460 (1946), and I would not distinguish between the two kinds of compulsion. However, unlike JUSTICE BRENNAN, I would not impose the additional requirement in cases involving mental restraint that the victim be coerced into a "slavelike condition of servitude." To the extent the phrase "slavelike condition of servitude" simply mirrors the term "involuntary servitude," I see no reason for imposing this additional level of definitional complexity. In my view, individuals attempting to conform their conduct to the rule of law, prosecutors, and jurors are just as capable of understanding and applying the term "involuntary servitude" as they are of applying the concept of "slavelike condition." Moreover, to the extent "slavelike condition of servitude" means something less than "involuntary servitude," I see no

[4] This definition of "servitude" closely resembles the definitions found in the dictionaries that JUSTICE BRENNAN considers in drawing the conclusion that psychological coercion is only covered by the statute if accompanied by a "'slavelike' conditio[n] of servitude." See *ante*, at 961, and n. 9 ("[I]n 1910 and 1949, Webster's defined 'servitude' as the '[c]ondition of a slave; slavery; serfdom; bondage; state of compulsory subjection to a master. . . . In French and English Colonies of the 17th and 18th centuries, the condition of transported or colonial laborers who, under contract or by custom, rendered service with temporary and limited loss of political and personal liberty'").

basis for reading the statute more narrowly than written. Instead, in determining whether the victims' servitude was "involuntary," I would allow the jury to consider the "totality of the circumstances" just as we do when it is necessary to decide whether a custodial statement is voluntary or involuntary, see, *e. g.*, *Mincey* v. *Arizona*, 437 U. S. 385, 401 (1978). In this case, however, the burden is of course on the Government to prove that the victims did not accept the terms of their existence voluntarily.

In sum, taking the evidence in the light most favorable to the Government, see *Glasser* v. *United States*, 315 U. S. 60, 80 (1942), I am persuaded that the statute gave the defendants fair notice that their conduct was unlawful and that the trial court's instructions, read as a whole, adequately informed the jury as to the elements of the crime. I think they were fairly convicted.

Nevertheless, as I stated at the outset, I must concur in the Court's judgment.

APPENDIX

RELEVANT JURY INSTRUCTIONS

(App. to Pet. for Cert. 108a–114a.)

"[Court:] In order to find a particular defendant guilty as charged in Counts II and III of the Indictment, the government must prove beyond a reasonable doubt each of the following elements as to Robert Fulmer for Count II and as to Louis Molitoris for Count III:

"1. That a particular defendant held or aided and abetted in the holding of Robert Fulmer under Count II or Louis Molitoris under Count III to involuntary servitude for a term.

"2. That the act or acts of the defendants were done knowingly or willfully.

"If you find that the government has proved the above two elements as to a particular defendant and as to a particular

count beyond a reasonable doubt, then your verdict will be guilty as to that count and that defendant.

"If, however, you find that the government has failed to prove either or both of the elements set forth above as to a particular defendant and as to a particular count, then your verdict will be not guilty as to that defendant and that count.

"As stated before, the burden is always upon the prosecution to prove beyond a reasonable doubt every element essential to the crime charged; the law never imposes upon the defendant in a criminal case the burden or duty of calling any witnesses or of producing any evidence.

"A person who willfully aids and abets another in the commission of an offense is punishable as a principal.

"In order to aid and abet another to commit a crime it is necessary that the accused willfully associate himself in some way with the criminal venture, and willfully participate in it as in something he wishes to bring about; that is to say, that he willfully seeks by some act or omission to make the criminal venture succeed.

"You, of course, may not find a defendant guilty as to a particular count unless you find beyond a reasonable doubt that every element of the particular offense as defined in these instructions was committed by some person or persons, and that that defendant participated in its commission.

"The government is not required to prove that a defendant personally committed the offense charged. Rather, the government bears the burden of showing (1) that every element of a particular offense as defined in these instructions was committed by some person or persons and (2) that a defendant (a) was that person or one of those persons, or (b) aided and abetted that person or those persons in the commission of the offense.

"Involuntary servitude consists of two terms.

"Involuntary means 'done contrary to or without choice'—'compulsory'—'not subject to control of the will.'

"Servitude means '[a] condition in which a person lacks liberty especially to determine one's course of action or way of life'—'slavery'—'the state of being subject to a master.'

"Involuntary servitude involves a condition of having some of the incidents of slavery.

"It may include situations in which persons are forced to return to employment by law.

"It may also include persons who are physically restrained by guards from leaving employment.

"It may also include situations involving either physical and other coercion, or a combination thereof, used to detain persons in employment.

"It may include situations in which the coercive acts or words cause persons in employment to believe they cannot freely leave employment if the acts are done or the words spoken with the intent to cause this result.

"In other words, based on all the evidence it will be for you to determine if there was a means of compulsion used, sufficient in kind and degree, to subject a person having the same general station in life as the alleged victims to believe they had no reasonable means of escape and no choice except to remain in the service of the employer. In this respect you are instructed that you may find that not all persons are of like courage and firmness. You may consider the character and condition of life of the parties, the relative inferiority or inequality between the persons who perform the service and the persons exercising the force or influence to compel its performance and the defendants' knowledge of these matters.

"The matter involves the knowledge and intent of the person charged as well as the character and understanding of the alleged victim.

"It is not part of the Government's burden of proof, in order for you to return a verdict of guilty, to show that an alleged victim named in the Indictment made an attempt to escape. You may, however, consider any evidence of escape attempts as well as the opportunities to leave and the volun-

tary remaining or returning as bearing upon the voluntariness of the person's labor.

"In determining whether the service was involuntary, you are instructed that it makes no difference whether or not the persons alleged to have been held in involuntary servitude initially agreed voluntarily to work. If a person desires to withdraw, and then is forced to remain and perform services against his will, his service is involuntary.

"In the same sense, the failure to pay a person who voluntarily performs labor does not transform that labor into an 'involuntary servitude.'

"Of course, an employer can use any legitimate means to retain the services of an employee, such as offering the employee benefits, or seeking to convince the employee that he would be better off if he continued in his employment.

"Payment of wages to the alleged victims or the conferring of other benefits on them is of course a proper means of attempting to retain their services. You should take evidence of such payment or benefits into account in your determination of whether or not the improper conduct of a particular defendant, if you find such improper conduct to have occurred, was a necessary cause of the decision of one or both of the alleged victims to remain on the farm. However, the fact that the alleged victims were paid or were given other benefits does not necessarily mean that they were not held in involuntary servitude.

"As I have instructed you, you must consider all of the factors that might have influenced the decision of both of the alleged victims to remain on the farm. The desire to receive wages and benefits may have been one such factor. However, you must still determine whether or not the improper conduct of a defendant, if any, was a necessary cause of the decision of one or both of the alleged victims to remain.

"In order to find that a particular defendant is guilty of holding one or both of the alleged victims in involuntary servitude, in addition to the necessary coercion and intention on

the part of the defendants, you must find that those means were an actual and necessary cause of the decision of one or both of the alleged victims to continue working for the Kozminskis. In other words, you must determine if one or both of the alleged victims would have left the employment if they had not been subjected to improper conduct on the part of that particular defendant.

"In determining whether or not the improper means was a necessary cause of the decision of the alleged victim to continue working for the Kozminskis, you must evaluate all of the factors that might have affected that decision, including any legitimate means used by that defendant to convince the alleged victim to retain the employment. After considering all of the factors that might have affected that decision, you must decide whether or not the decision of either or both of the alleged victims to remain on the farm would have been made if improper means had not been used by a particular defendant.

"If you determine that either or both of the alleged victims would have continued to work for the Kozminskis regardless of the use of improper means by that particular defendant then you must find that the improper conduct of that defendant was not a necessary cause of the decision of both victims to retain their employment.

"In making the determination involving involuntary servitude, you may consider all of the evidence in this case to determine if a particular defendant held or aided and abetted in the holding of either Louis Molitoris or Robert Arthur Fulmer to involuntary servitude.

"I caution you again as I have before, however, the defendants are not on trial for failure to comply with minimum wage laws, or for violating certain social regulations or for assault or battery or for using bad language in a coercive way. Neither are they on trial for neglect, for misappropriation of money, or for breach of an employment contract. Your at-

tention must be directed to the discrete charge outlined in these instructions.

"You will note that Element One requires proof that the victim was held 'for a term,' that is, a period of time. In that respect, I instruct you that it is not necessary for the Government to prove any given specific term of an appreciable length of time. If the person was held for any term, regardless of how short such term may be, it would come within the 'held for a term' provisions of the statute.

"Element Two requires that the acts of the defendants were done knowingly and willfully.

"An act, omission, or failure to act is done 'knowingly' if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

"The word 'knowingly' is used to insure that no one will be convicted for an act done because of mistake, or accident, or other innocent reason.

"An act, omission, or failure to act is done 'willfully' if done voluntarily and intentionally, and with the specific intent to do something the law forbids; that is to say, with bad purpose either to disobey or to disregard the law.

"You will note that to act knowingly requires that the act be done intentionally. The crimes charged requires proof of specific intent before a defendant can be convicted. Specific intent, as the term implies, means more than the general intent to commit the act. To establish specific intent the government must prove that the defendant knowingly did an act which the law forbids, or knowingly failed to do an act which the law requires, purposely intending to violate the law.

"Such intent may be determined from all the facts and circumstances surrounding the case. Specific intent must be proved beyond a reasonable doubt before there can be a conviction.

"Intent ordinarily may not be proved directly, because there is no way of fathoming or scrutinizing the operations of

the human mind. But, you may infer the defendant's intent from the surrounding circumstances.

"You may consider any statement made by the defendant, and all other facts and circumstances in evidence which indicate the state of mind. You may consider it reasonable to draw the inference and find that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted.

"As I have said, it is entirely up to you to decide what facts to find from the evidence.

"You will note that the Indictment charges that the offense was committed 'on or about' a certain date. The proof need not establish with certainty the exact date of the alleged offense. It is sufficient if the evidence in the case establishes, beyond a reasonable doubt, that the offense was committed on a date reasonably near the date alleged.

"That is the end of the instructions relating to Counts II and III of the Indictment."

Syllabus

WATSON *v.* FORT WORTH BANK & TRUST

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

No. 86-6139. Argued January 20, 1988—Decided June 29, 1988

Petitioner employee, who is black, was rejected in favor of white applicants for four promotions to supervisory positions in respondent bank, which had not developed precise and formal selection criteria for the positions, but instead relied on the subjective judgment of white supervisors who were acquainted with the candidates and with the nature of the jobs. After exhausting her administrative remedies, petitioner filed suit in Federal District Court, alleging, *inter alia*, that respondent's promotion policies had unlawfully discriminated against blacks generally and her personally in violation of Title VII of the Civil Rights Act of 1964. As to petitioner's individual claim, the court held that she had not met her burden of proof under the discriminatory treatment evidentiary standard and, for this and other reasons, dismissed the action. The Court of Appeals affirmed in relevant part, rejecting petitioner's contention that the District Court erred in failing to apply "disparate impact" analysis to her promotion claims. The court held that, under its precedent, a Title VII challenge to a discretionary or subjective promotion system can only be analyzed under the disparate treatment model.

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

798 F. 2d 791, vacated and remanded.

JUSTICE O'CONNOR delivered the opinion of the Court with respect to Parts I, II-A, II-B, and III, concluding that disparate impact analysis may be applied to a subjective or discretionary promotion system. Pp. 985-991, 999-1000.

(a) Each of this Court's decisions applying disparate impact analysis—under which facially neutral employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to illegal intentional discrimination—involved standardized tests or criteria, such as written aptitude tests or high school diploma requirements, see, *e. g.*, *Griggs* v. *Duke Power Co.*, 401 U. S. 424, and the Court has consistently used disparate treatment theory, in which proof of intent to discriminate is required, to review hiring or promotion decisions that were based on the exercise of personal judgment or the application of subjective criteria, see, *e. g.*, *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792. Until today, the Court has never addressed the

question whether disparate impact analysis may be applied to subjective employment criteria. Pp. 985–989.

(b) The reasons supporting the use of disparate impact analysis apply to subjective employment practices. That analysis might effectively be abolished if it were confined to objective, standardized selection practices, since an employer could insulate itself from liability under *Griggs* and its progeny simply by combining such practices with a subjective component, such as a brief interview, in a system that refrained from making the objective tests absolutely determinative, and could thereby remain free to give those tests almost as much weight as it chose without risking a disparate impact challenge. Moreover, disparate impact analysis is in principle no less applicable to subjective employment criteria than to objective or standardized tests, since, in either case, a facially neutral practice, adopted without discriminatory intent, may have effects that are indistinguishable from intentionally discriminatory practices. Simply because no inference of discriminatory intent can be drawn from the customary and reasonable practice in some businesses of leaving promotion decisions to the unchecked discretion of the lower level supervisors most familiar with the jobs and candidates, it does not follow that these supervisors always act without discriminatory intent. Even if it is assumed that discrimination by individual supervisors can be adequately policed through disparate treatment analysis, that analysis would not solve the problem created by subconscious stereotypes and prejudices that lead to conduct prohibited by Title VII. Pp. 989–991.

(c) Since neither the District Court nor the Court of Appeals has evaluated the statistical evidence to determine whether petitioner made out a prima facie case of discrimination under disparate impact theory, the case must be remanded. Pp. 999–1000.

JUSTICE O'CONNOR, joined by THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE SCALIA, concluded in Parts II–C and II–D that:

1. The extension of disparate impact analysis to subjective employment practices could increase the risk that, in order to avoid liability, employers will adopt surreptitious numerical goals and quotas in the belief that, since disparate impact analysis inevitably focuses on statistical evidence, which cannot practically be rebutted by the kind of counterevidence typically used to defend objective criteria, the threat of ruinious litigation requires steps to ensure that no plaintiff can establish a prima facie case under disparate impact theory. That result would be contrary to Congress' clearly expressed intent in 42 U. S. C. § 2000(e)–2(j) that no employer shall be required to grant preferential treatment to any protected individual or group because of a numerical imbalance in its work force. Pp. 991–993.

2. However, the application of disparate impact theory to subjective employment criteria should not have any chilling effect on legitimate

business practices, since the high standards of proof applicable in such cases operate to constrain the theory within its proper bounds and provide adequate safeguards against the danger that quotas or preferential treatment will be adopted by employers. Pp. 993–999.

(a) In establishing a prima facie case when subjective selection criteria are at issue, the plaintiff may have difficulty satisfying the initial burden of identifying the specific employment practices that are allegedly responsible for any observed statistical disparity, especially where the employer has combined the subjective criteria with more rigid standardized rules or tests. Moreover, the plaintiff's statistical evidence must be sufficiently substantial to prove that the practice in question has caused the exclusion of job or promotion applicants because of their membership in a protected group, and the defendant is free to attack the probative weight of that evidence, to point out fallacies or deficiencies in the plaintiff's data or statistical techniques, and to adduce countervailing evidence of its own. Pp. 994–997.

(b) The nature of the "business necessity" or "job relatedness" defense—under which the defendant has a burden of producing evidence after the plaintiff has made out a prima facie case—also constrains the application of the disparate impact theory. Employers are not required, even when defending standardized or objective tests, to introduce formal "validation studies" showing that particular criteria predict actual on-the-job performance. In the context of subjective or discretionary decisions, the employer will often find it easier than in the case of standardized tests to produce evidence of a "manifest relationship to the employment in question." Many jobs, for example those involving managerial responsibilities, require personal qualities that are not amenable to standardized testing but are nevertheless job related. In evaluating claims that discretionary practices are insufficiently related to legitimate business purposes, courts are generally less competent than employers to restructure business practices and therefore should not attempt to do so. Pp. 997–999.

JUSTICE BLACKMUN, joined by JUSTICE BRENNAN and JUSTICE MARSHALL, agreeing that disparate-impact analysis may be applied to claims of discrimination caused by subjective or discretionary selection processes, concluded that:

1. In the disparate-*impact* context, a plaintiff who successfully establishes a prima facie case shifts the burden of *proof*, not production, to the defendant to establish that the employment practice in question is a business necessity. See, *e. g.*, *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 425; *Dothard* v. *Rawlinson*, 433 U. S. 321, 329; and *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 432. The plurality's assertion to the contrary mimics the allocation of burdens this Court has established in the very different context of individual disparate-treatment claims. Unlike a

disparate-treatment claim of intentional discrimination, which a prima facie case establishes only by inference, the disparate impact caused by an employment practice is *directly* established by the numerical disparity shown by the prima facie case, and the employer can avoid liability only if it can prove that the discriminatory effect is justified. To be justified as a business *necessity*, a practice must directly relate to a prospective employee's ability to perform the job effectively; *i. e.*, it must be necessary to fulfill legitimate business requirements. Pp. 1000–1006.

2. The plurality's suggestion that the employer will often find it easier to produce evidence of job-relatedness for a subjective factor than for standardized tests may prove misleading, since the employer still has the obligation to *persuade* the court of job-relatedness through the introduction of relevant evidence. Pp. 1006–1011.

(a) The fact that the formal validation techniques endorsed by the Equal Employment Opportunity Commission's Uniform Guidelines on Employee Selection Procedures cannot always be used to prove the job-relatedness of subjective-selection processes does not free an employer from its burden of proof. The link between such processes and job performance may, depending on the type and size of the business and the nature of the particular job, be established by a variety of methods, including the results of studies, expert testimony, and prior successful experience. Although common sense plays a part in the assessment, a reviewing court may not rely on its own, or an employer's, sense of what is "normal" as a substitute for a neutral assessment of the evidence. Pp. 1006–1008.

(b) The employer's burden of justifying an employment practice that produces a disparate impact is not lessened simply because the practice relies upon subjective assessments. Establishing a general rule allowing an employer to escape liability simply by articulating vague, inoffensive-sounding subjective criteria would disserve Title VII's goal of eradicating employment discrimination by encouraging employers to abandon attempts to construct neutral selection mechanisms in favor of broad generalities. While subjective criteria will sometimes pose difficult problems for courts charged with assessing job-relatedness, requiring the development of a greater factual record, and, perhaps, the exercise of a greater degree of judgment, that does not dictate that subjective-selection processes generally are to be accepted at face value. Pp. 1008–1011.

JUSTICE STEVENS, agreeing that the racially adverse impact of an employer's practice of simply committing employment decisions to the unchecked discretion of a white supervisory corps is subject to the test of *Griggs* v. *Duke Power Co.*, 401 U. S. 424, concluded that, since cases

involving such practices will include too many variables to be adequately considered in a general context, further discussion of evidentiary standards should be postponed until after the District Court has made appropriate findings concerning petitioner's prima facie evidence of disparate impact and respondent's explanation for its subjective practice. P. 1011.

O'CONNOR, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II–A, II–B, and III, in which REHNQUIST, C. J., and BRENNAN, WHITE, MARSHALL, BLACKMUN, and SCALIA, JJ., joined, and an opinion with respect to Parts II–C and II–D in which REHNQUIST, C. J., and WHITE and SCALIA, JJ., joined. BLACKMUN, J., filed an opinion concurring in part and concurring in the judgment, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 1000. STEVENS, J., filed an opinion concurring in the judgment, *post*, p. 1011. KENNEDY, J., took no part in the consideration or decision of the case.

Art Brender argued the cause and filed briefs for petitioner.

Bruce W. McGee argued the cause and filed a brief for respondent.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Texas et al. by *Jim Mattox*, Attorney General, *Mary F. Keller*, Executive Assistant Attorney General, and *James C. Todd;* for the American Civil Liberties Union et al. by *Deborah A. Ellis*, *Isabelle Katz Pinzler*, and *Joan E. Bertin;* for the American Psychological Association by *Donald N. Bersoff;* for the Lawyers' Committee for Civil Rights Under Law by *John Townsend Rich*, *Conrad K. Harper*, *Stuart J. Land*, *Norman Redlich*, *William L. Robinson*, *Judith A. Winston*, and *Richard T. Seymour;* and for the NAACP Legal Defense and Educational Fund, Inc., et al. by *Bill Lann Lee*, *Stephen M. Cutler*, *Joan M. Graff*, *Patricia A. Shiu*, *Julius LeVonne Chambers*, *Ronald L. Ellis*, *Charles Stephen Ralston*, *Antonia Hernandez*, and *E. Richard Larson.*

Briefs of *amici curiae* urging affirmance were filed for the United States by *Solicitor General Fried*, *Assistant Attorney General Reynolds*, *Deputy Solicitor General Ayer*, *Deputy Assistant Attorney General Clegg*, *David K. Flynn*, and *Charles A. Shanor;* for the Equal Employment Advisory Council by *Robert E. Williams*, *Douglas S. McDowell*, *Edward E. Potter*, and *Garen E. Dodge;* for the American Society for Personnel Administration et al. by *Lawrence Z. Lorber* and *J. Robert Kirk;* for the Landmark Legal Foundation by *Jerald L. Hill* and *Mark J. Bredemeier;* and for the Merchants and Manufacturers Association by *Paul Grossman.*

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

This case requires us to decide what evidentiary standards should be applied under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. § 2000e *et seq.*, in determining whether an employer's practice of committing promotion decisions to the subjective discretion of supervisory employees has led to illegal discrimination.

I

Petitioner Clara Watson, who is black, was hired by respondent Fort Worth Bank and Trust (the Bank) as a proof operator in August 1973. In January 1976, Watson was promoted to a position as teller in the Bank's drive-in facility. In February 1980, she sought to become supervisor of the tellers in the main lobby; a white male, however, was selected for this job. Watson then sought a position as supervisor of the drive-in bank, but this position was given to a white female. In February 1981, after Watson had served for about a year as a commercial teller in the Bank's main lobby, and informally as assistant to the supervisor of tellers, the man holding that position was promoted. Watson applied for the vacancy, but the white female who was the supervisor of the drive-in bank was selected instead. Watson then applied for the vacancy created at the drive-in; a white male was selected for that job. The Bank, which has about 80 employees, had not developed precise and formal criteria for evaluating candidates for the positions for which Watson unsuccessfully applied. It relied instead on the subjective judgment of supervisors who were acquainted with the candidates and with the nature of the jobs to be filled. All the supervisors involved in denying Watson the four promotions at issue were white.

Watson filed a discrimination charge with the Equal Employment Opportunity Commission (EEOC). After exhausting her administrative remedies, she filed this lawsuit in the United States District Court for the Northern District of Texas. She alleged that the Bank had unlawfully discriminated against blacks in hiring, compensation, initial placement, promotions, terminations, and other terms and conditions of employment. On Watson's motion under Federal Rule of Civil Procedure 23, the District Court certified a class consisting of "blacks who applied to or were employed by [respondent] on or after October 21, 1979 or who may submit employment applications to [respondent] in the future." App. 190. The District Court later decertified this broad class because it concluded, in light of the evidence presented at trial, that there was not a common question of law or fact uniting the groups of applicants and employees. After splitting the class along this line, the court found that the class of black employees did not meet the numerosity requirement of Rule 23(a); accordingly, this subclass was decertified. The court also concluded that Watson was not an adequate representative of the applicant class because her promotion claims were not typical of the claims of the members of that group. Because Watson had proceeded zealously on behalf of the job applicants, however, the court went on to address the merits of their claims. It concluded that Watson had failed to establish a prima facie case of racial discrimination in hiring: the percentage of blacks in the Bank's work force approximated the percentage of blacks in the metropolitan area where the Bank is located. App. 199–202.

The District Court addressed Watson's individual claims under the evidentiary standards that apply in a discriminatory treatment case. See *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792 (1973), and *Texas Dept. of Community Affairs* v. *Burdine*, 450 U. S. 248 (1981). It concluded, on the evidence presented at trial, that Watson had established a prima facie case of employment discrimination, but that the

Bank had met its rebuttal burden by presenting legitimate and nondiscriminatory reasons for each of the challenged promotion decisions. The court also concluded that Watson had failed to show that these reasons were pretexts for racial discrimination. Accordingly, the action was dismissed. App. 195–197, 203.

A divided panel of the United States Court of Appeals for the Fifth Circuit affirmed in part. 798 F. 2d 791 (1986). The majority concluded that there was no abuse of discretion in the District Court's class decertification decisions. In order to avoid unfair prejudice to members of the class of black job applicants, however, the Court of Appeals vacated the portion of the judgment affecting them and remanded with instructions to dismiss those claims without prejudice. The majority affirmed the District Court's conclusion that Watson had failed to prove her claim of racial discrimination under the standards set out in *McDonnell Douglas*, *supra*, and *Burdine*, *supra*.[1]

Watson argued that the District Court had erred in failing to apply "disparate impact" analysis to her claims of discrimination in promotion. Relying on Fifth Circuit precedent, the majority of the Court of Appeals panel held that "a Title VII challenge to an allegedly discretionary promotion system is properly analyzed under the disparate treatment model rather than the disparate impact model." 798 F. 2d, at 797. Other Courts of Appeals have held that disparate impact analysis may be applied to hiring or promotion systems that involve the use of "discretionary" or "subjective" criteria. See, *e. g.*, *Atonio* v. *Wards Cove Packing Co.*, 810 F. 2d 1477 (CA9) (en banc), on return to panel, 827 F. 2d

[1] The dissenting judge argued that the District Court had abused its discretion in decertifying the broad class of black employees and applicants. He also argued that Watson had succeeded in proving that the Bank had discriminated against this class, and that the case should be remanded so that appropriate relief could be ordered. 798 F. 2d, at 800–815.

439 (1987), cert denied, No. 87–1388, 485 U. S. 989 (1988), cert. pending, No. 87–1387; *Griffin* v. *Carlin*, 755 F. 2d 1516, 1522–1525 (CA11 1985). Cf. *Segar* v. *Smith*, 238 U. S. App. D. C. 103, 738 F. 2d 1249 (1984), cert. denied, 471 U. S. 1115 (1985). We granted certiorari to resolve the conflict. 483 U. S. 1004 (1987).

II

A

Section 703 of the Civil Rights Act of 1964, 42 U. S. C. § 2000e–2, provides:

> "(a) It shall be an unlawful employment practice for an employer—
>
> "(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> "(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.
>
> . . . . . .
>
> "(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer . . . to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. . . ."

Several of our decisions have dealt with the evidentiary standards that apply when an individual alleges that an employer has treated that particular person less favorably than

others because of the plaintiff's race, color, religion, sex, or national origin. In such "disparate treatment" cases, which involve "the most easily understood type of discrimination," *Teamsters* v. *United States*, 431 U. S. 324, 335, n. 15 (1977), the plaintiff is required to prove that the defendant had a discriminatory intent or motive. In order to facilitate the orderly consideration of relevant evidence, we have devised a series of shifting evidentiary burdens that are "intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination." *Texas Dept. of Community Affairs* v. *Burdine*, 450 U. S., at 255, n. 8. Under that scheme, a prima facie case is ordinarily established by proof that the employer, after having rejected the plaintiff's application for a job or promotion, continued to seek applicants with qualifications similar to the plaintiff's. *Id.*, at 253, and n. 6. The burden of proving a prima facie case is "not onerous," *id.*, at 253, and the employer in turn may rebut it simply by producing some evidence that it had legitimate, nondiscriminatory reasons for the decision. *Id.*, at 254–255. If the defendant carries this burden of production, the plaintiff must prove by a preponderance of all the evidence in the case that the legitimate reasons offered by the defendant were a pretext for discrimination. *Id.*, at 253, 255, n. 10. We have cautioned that these shifting burdens are meant only to aid courts and litigants in arranging the presentation of evidence: "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Id.*, at 253. See also *United States Postal Service Bd. of Governors* v. *Aikens*, 460 U. S. 711, 715 (1983).

In *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971), this Court held that a plaintiff need not necessarily prove intentional discrimination in order to establish that an employer has violated § 703. In certain cases, facially neutral employment practices that have significant adverse effects on protected *groups* have been held to violate the Act without proof

that the employer adopted those practices with a discriminatory intent. The factual issues and the character of the evidence are inevitably somewhat different when the plaintiff is exempted from the need to prove intentional discrimination. See *Burdine*, *supra*, at 252, n. 5; see also *United States Postal Service Bd. of Governors* v. *Aikens*, *supra*, at 713, n. 1; *McDonnell Douglas*, 411 U. S., at 802, n. 14; *Teamsters*, *supra*, at 335–336, n. 15. The evidence in these "disparate impact" cases usually focuses on statistical disparities, rather than specific incidents, and on competing explanations for those disparities.

The distinguishing features of the factual issues that typically dominate in disparate impact cases do not imply that the ultimate legal issue is different than in cases where disparate treatment analysis is used. See, *e. g.*, *Washington* v. *Davis*, 426 U. S. 229, 253–254 (1976) (STEVENS, J., concurring). Nor do we think it is appropriate to hold a defendant liable for unintentional discrimination on the basis of less evidence than is required to prove intentional discrimination. Rather, the necessary premise of the disparate impact approach is that some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination.

Perhaps the most obvious examples of such functional equivalence have been found where facially neutral job requirements necessarily operated to perpetuate the effects of intentional discrimination that occurred before Title VII was enacted. In *Griggs* itself, for example, the employer had a history of overt racial discrimination that predated the enactment of the Civil Rights Act of 1964. 401 U. S., at 426–428. Such conduct had apparently ceased thereafter, but the employer continued to follow employment policies that had "a markedly disproportionate" adverse effect on blacks. *Id.*, at 428–429. Cf. *Teamsters*, *supra*, at 349, and n. 32. The *Griggs* Court found that these policies, which involved the use of general aptitude tests and a high school di-

ploma requirement, were not demonstrably related to the jobs for which they were used. 401 U. S., at 431–432. Believing that diplomas and tests could become "masters of reality," *id.*, at 433, which would perpetuate the effects of pre-Act discrimination, the Court concluded that such practices could not be defended simply on the basis of their facial neutrality or on the basis of the employer's lack of discriminatory intent.

This Court has repeatedly reaffirmed the principle that some facially neutral employment practices may violate Title VII even in the absence of a demonstrated discriminatory intent. We have not limited this principle to cases in which the challenged practice served to perpetuate the effects of pre-Act intentional discrimination. Each of our subsequent decisions, however, like *Griggs* itself, involved standardized employment tests or criteria. See, *e. g.*, *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405 (1975) (written aptitude tests); *Washington* v. *Davis*, *supra* (written test of verbal skills); *Dothard* v. *Rawlinson*, 433 U. S. 321 (1977) (height and weight requirements); *New York City Transit Authority* v. *Beazer*, 440 U. S. 568 (1979) (rule against employing drug addicts); *Connecticut* v. *Teal*, 457 U. S. 440 (1982) (written examination). In contrast, we have consistently used conventional disparate treatment theory, in which proof of intent to discriminate is required, to review hiring and promotion decisions that were based on the exercise of personal judgment or the application of inherently subjective criteria. See, *e. g.*, *McDonnell Douglas Corp.* v. *Green*, *supra* (discretionary decision not to rehire individual who engaged in criminal acts against employer while laid off); *Furnco Construction Corp.* v. *Waters*, 438 U. S. 567 (1978) (hiring decisions based on personal knowledge of candidates and recommendations); *Texas Dept. of Community Affairs* v. *Burdine*, *supra* (discretionary decision to fire individual who was said not to get along with co-workers); *United States Postal Serv-*

ice Bd. of Governors v. *Aikens*, 460 U. S., at 715 (discretionary promotion decision).

Our decisions have not addressed the question whether disparate impact analysis may be applied to cases in which subjective criteria are used to make employment decisions. As noted above, the Courts of Appeals are in conflict on the issue. In order to resolve this conflict, we must determine whether the reasons that support the use of disparate impact analysis apply to subjective employment practices, and whether such analysis can be applied in this new context under workable evidentiary standards.

B

The parties present us with stark and uninviting alternatives. Petitioner contends that subjective selection methods are at least as likely to have discriminatory effects as are the kind of objective tests at issue in *Griggs* and our other disparate impact cases. Furthermore, she argues, if disparate impact analysis is confined to objective tests, employers will be able to substitute subjective criteria having substantially identical effects, and *Griggs* will become a dead letter. Respondent and the United States (appearing as *amicus curiae*) argue that conventional disparate treatment analysis is adequate to accomplish Congress' purpose in enacting Title VII. They also argue that subjective selection practices would be so impossibly difficult to defend under disparate impact analysis that employers would be forced to adopt numerical quotas in order to avoid liability.

We are persuaded that our decisions in *Griggs* and succeeding cases could largely be nullified if disparate impact analysis were applied only to standardized selection practices. However one might distinguish "subjective" from "objective" criteria, it is apparent that selection systems that combine both types would generally have to be considered subjective in nature. Thus, for example, if the employer in *Griggs* had consistently preferred applicants who had a high school di-

ploma and who passed the company's general aptitude test, its selection system could nonetheless have been considered "subjective" if it also included brief interviews with the candidates. So long as an employer refrained from making standardized criteria absolutely determinative, it would remain free to give such tests almost as much weight as it chose without risking a disparate impact challenge. If we announced a rule that allowed employers so easily to insulate themselves from liability under *Griggs*, disparate impact analysis might effectively be abolished.

We are also persuaded that disparate impact analysis is in principle no less applicable to subjective employment criteria than to objective or standardized tests. In either case, a facially neutral practice, adopted without discriminatory intent, may have effects that are indistinguishable from intentionally discriminatory practices. It is true, to be sure, that an employer's policy of leaving promotion decisions to the unchecked discretion of lower level supervisors should itself raise no inference of discriminatory conduct. Especially in relatively small businesses like respondent's, it may be customary and quite reasonable simply to delegate employment decisions to those employees who are most familiar with the jobs to be filled and with the candidates for those jobs. It does not follow, however, that the particular supervisors to whom this discretion is delegated always act without discriminatory intent. Furthermore, even if one assumed that any such discrimination can be adequately policed through disparate treatment analysis, the problem of subconscious stereotypes and prejudices would remain. In this case, for example, petitioner was apparently told at one point that the teller position was a big responsibility with "a lot of money . . . for blacks to have to count." App. 7. Such remarks may not prove discriminatory intent, but they do suggest a lingering form of the problem that Title VII was enacted to combat. If an employer's undisciplined system of subjective decisionmaking has precisely the same effects as

a system pervaded by impermissible intentional discrimination, it is difficult to see why Title VII's proscription against discriminatory actions should not apply. In both circumstances, the employer's practices may be said to "adversely affect [an individual's] status as an employee, because of such individual's race, color, religion, sex, or national origin." 42 U. S. C. §2000e–2(a)(2). We conclude, accordingly, that subjective or discretionary employment practices may be analyzed under the disparate impact approach in appropriate cases.

C

Having decided that disparate impact analysis may in principle be applied to subjective as well as to objective practices, we turn to the evidentiary standards that should apply in such cases. It is here that the concerns raised by respondent have their greatest force. Respondent contends that a plaintiff may establish a prima facie case of disparate impact through the use of bare statistics, and that the defendant can rebut this statistical showing only by justifying the challenged practice in terms of "business necessity," *Griggs*, 401 U. S., at 431, or "job relatedness," *Albemarle Paper Co.*, 422 U. S., at 426. Standardized tests and criteria, like those at issue in our previous disparate impact cases, can often be justified through formal "validation studies," which seek to determine whether discrete selection criteria predict actual on-the-job performance. See generally *id.*, at 429–436. Respondent warns, however, that "validating" subjective selection criteria in this way is impracticable. Some qualities—for example, common sense, good judgment, originality, ambition, loyalty, and tact—cannot be measured accurately through standardized testing techniques. Moreover, success at many jobs in which such qualities are crucial cannot itself be measured directly. Opinions often differ when managers and supervisors are evaluated, and the same can be said for many jobs that involve close cooperation with one's co-workers or complex and subtle tasks like the provision of

professional services or personal counseling. Because of these difficulties, we are told, employers will find it impossible to eliminate subjective selection criteria and impossibly expensive to defend such practices in litigation. Respondent insists, and the United States agrees, that employers' only alternative will be to adopt surreptitious quota systems in order to ensure that no plaintiff can establish a statistical prima facie case.

We agree that the inevitable focus on statistics in disparate impact cases could put undue pressure on employers to adopt inappropriate prophylactic measures. It is completely unrealistic to assume that unlawful discrimination is the sole cause of people failing to gravitate to jobs and employers in accord with the laws of chance. See *Sheet Metal Workers* v. *EEOC*, 478 U. S. 421, 489 (1986) (O'CONNOR, J., concurring in part and dissenting in part). It would be equally unrealistic to suppose that employers can eliminate, or discover and explain, the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces. Congress has specifically provided that employers are *not* required to avoid "disparate impact" as such:

> "Nothing contained in [Title VII] shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer . . . in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area." 42 U. S. C. § 2000e–2(j).

Preferential treatment and the use of quotas by public employers subject to Title VII can violate the Constitution, see, *e. g.*, *Wygant* v. *Jackson Bd. of Education*, 476 U. S. 267 (1986), and it has long been recognized that legal rules leaving any class of employers with "little choice" but to adopt such measures would be "far from the intent of Title VII." *Albemarle Paper Co.*, *supra*, at 449 (BLACKMUN, J., concurring in judgment). Respondent and the United States are thus correct when they argue that extending disparate impact analysis to subjective employment practices has the potential to create a Hobson's choice for employers and thus to lead in practice to perverse results. If quotas and preferential treatment become the only cost-effective means of avoiding expensive litigation and potentially catastrophic liability, such measures will be widely adopted. The prudent employer will be careful to ensure that its programs are discussed in euphemistic terms, but will be equally careful to ensure that the quotas are met. Allowing the evolution of disparate impact analysis to lead to this result would be contrary to Congress' clearly expressed intent, and it should not be the effect of our decision today.

D

We do not believe that disparate impact theory need have any chilling effect on legitimate business practices. We recognize, however, that today's extension of that theory into the context of subjective selection practices could increase the risk that employers will be given incentives to adopt quotas or to engage in preferential treatment. Because Congress has so clearly and emphatically expressed its intent that Title VII not lead to this result, 42 U. S. C. § 2000e–2(j), we think it imperative to explain in some detail why the evidentiary standards that apply in these cases should serve as adequate safeguards against the danger that Congress recog-

nized. Our previous decisions offer guidance, but today's extension of disparate impact analysis calls for a fresh and somewhat closer examination of the constraints that operate to keep that analysis within its proper bounds.[2]

First, we note that the plaintiff's burden in establishing a prima facie case goes beyond the need to show that there are statistical disparities in the employer's work force. The plaintiff must begin by identifying the specific employment practice that is challenged. Although this has been relatively easy to do in challenges to standardized tests, it may sometimes be more difficult when subjective selection criteria are at issue. Especially in cases where an employer combines subjective criteria with the use of more rigid standardized rules or tests, the plaintiff is in our view responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities. Cf. *Connecticut* v. *Teal*, 457 U. S. 440 (1982).

Once the employment practice at issue has been identified, causation must be proved; that is, the plaintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group. Our formulations, which have never

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[2] Both concurrences agree that we should, for the first time, approve the use of disparate impact analysis in evaluating subjective selection practices. Unlike JUSTICE STEVENS, we believe that this step requires us to provide the lower courts with appropriate evidentiary guidelines, as we have previously done for disparate treatment cases. Moreover, we do not believe that each verbal formulation used in prior opinions to describe the evidentary standards in disparate impact cases is automatically applicable in light of today's decision. Cf. *post*, at 1000–1001, 1005–1006 (BLACKMUN, J., concurring in part and concurring in judgment). Congress expressly provided that Title VII not be read to require preferential treatment or numerical quotas. 42 U. S. C. § 2000e–2(j). This congressional mandate requires in our view that a decision to extend the reach of disparate impact theory be accompanied by safeguards against the result that Congress clearly said it did not intend.

been framed in terms of any rigid mathematical formula, have consistently stressed that statistical disparities must be sufficiently substantial that they raise such an inference of causation. In *Griggs*, for example, we examined "requirements [that] operate[d] to disqualify Negroes at a substantially higher rate than white applicants." 401 U. S., at 426. Similarly, we said in *Albemarle Paper Co.* that plaintiffs are required to show "that the tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants." 422 U. S., at 425. Later cases have framed the test in similar terms. See, *e. g.*, *Washington* v. *Davis*, 426 U. S., at 246–247 ("hiring and promotion practices disqualifying substantially disproportionate numbers of blacks"); *Dothard*, 433 U. S., at 329 (employment standards that "select applicants for hire in a significantly discriminatory pattern"); *Beazer*, 440 U. S., at 584 ("statistical evidence showing that an employment practice has the effect of denying the members of one race equal access to employment opportunities"); *Teal*, *supra*, at 446 ("significantly discriminatory impact").[3]

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[3] Faced with the task of applying these general statements to particular cases, the lower courts have sometimes looked for more specific direction in the EEOC's Uniform Guidelines on Employee Selection Procedures, 29 CFR pt. 1607 (1987). See, *e. g.*, *Bushey* v. *New York State Civil Service Comm'n*, 733 F. 2d 220, 225–226 (CA2 1984), cert. denied, 469 U. S. 1117 (1985); *Firefighters Institute* v. *St. Louis*, 616 F. 2d 350, 356–357 (CA8 1980), cert. denied *sub nom. St. Louis* v. *United States*, 452 U. S. 938 (1981). These Guidelines have adopted an enforcement rule under which adverse impact will not ordinarily be inferred unless the members of a particular race, sex, or ethnic group are selected at a rate that is less than four-fifths of the rate at which the group with the highest rate is selected. 29 CFR § 1607.4(D) (1987). This enforcement standard has been criticized on technical grounds, see, *e. g.*, Boardman & Vining, The Role of Probative Statistics in Employment Discrimination Cases, 46 Law & Contemp. Prob., No. 4, pp. 189, 205–207 (1983); Shoben, Differential Pass-Fail Rates in Employment Testing: Statistical Proof Under Title VII, 91 Harv. L. Rev. 793, 805–811 (1978), and it has not provided more than a rule of thumb

Nor are courts or defendants obliged to assume that plaintiffs' statistical evidence is reliable. "If the employer discerns fallacies or deficiencies in the data offered by the plaintiff, he is free to adduce countervailing evidence of his own." *Dothard*, 433 U. S., at 331. See also *id.*, at 338–339 (REHNQUIST, J., concurring in result and concurring in part) ("If the defendants in a Title VII suit believe there to be any reason to discredit plaintiffs' statistics that does not appear on their face, the opportunity to challenge them is available to the defendants just as in any other lawsuit. They may endeavor to impeach the reliability of the statistical evidence, they may offer rebutting evidence, or they may disparage in arguments or in briefs the probative weight which the plaintiffs' evidence should be accorded"). Without attempting to catalog all the weaknesses that may be found in such evidence, we may note that typical examples include small or incomplete

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for the courts, see, *e. g.*, *Clady* v. *County of Los Angeles*, 770 F. 2d 1421, 1428–1429 (CA9 1985), cert. denied, 475 U. S. 1109 (1986).

Courts have also referred to the "standard deviation" analysis sometimes used in jury-selection cases. See, *e. g.*, *Rivera* v. *Wichita Falls*, 665 F. 2d 531, 536, n. 7 (CA5 1982) (citing *Casteneda* v. *Partida*, 430 U. S. 482 (1977)); *Guardians Association of New York City Police Dept.* v. *Civil Service Comm'n of New York*, 630 F. 2d 79, 86, and n. 4 (CA2 1980) (same), cert. denied, 452 U. S. 940 (1981). We have emphasized the useful role that statistical methods can have in Title VII cases, but we have not suggested that any particular number of "standard deviations" can determine whether a plaintiff has made out a prima facie case in the complex area of employment discrimination. See *Hazelwood School Dist.* v. *United States*, 433 U. S. 299, 311, n. 17 (1977).

Nor has a consensus developed around any alternative mathematical standard. Instead, courts appear generally to have judged the "significance" or "substantiality" of numerical disparities on a case-by-case basis. See *Clady*, *supra*, at 1428–1429; B. Schlei & P. Grossman, Employment Discrimination Law 98–99, and n. 77 (2d ed. 1983); *id.*, at 18–19, and n. 33 (Supp. 1983–1985). At least at this stage of the law's development, we believe that such a case-by-case approach properly reflects our recognition that statistics "come in infinite variety and . . . their usefulness depends on all of the surrounding facts and circumstances." *Teamsters* v. *United States*, 431 U. S. 324, 340 (1977).

data sets and inadequate statistical techniques. See, *e. g.*, *Fudge* v. *Providence Fire Dept.*, 766 F. 2d 650, 656–659 (CA1 1985). Similarly, statistics based on an applicant pool containing individuals lacking minimal qualifications for the job would be of little probative value. See, *e. g.*, *Hazelwood School Dist.* v. *United States*, 433 U. S. 299, 308 (1977) ("[P]roper comparison was between the racial composition of [the employer's] teaching staff and the racial composition of the qualified public school teacher population in the relevant labor market") (footnote omitted). Other kinds of deficiencies in facially plausible statistical evidence may emerge from the facts of particular cases. See, *e. g.*, *Carroll* v. *Sears, Roebuck & Co.*, 708 F. 2d 183, 189 (CA5 1983) ("The flaw in the plaintiffs' proof was its failure to establish the required causal connection between the challenged employment practice (testing) and discrimination in the work force. Because the test does not have a cut-off and is only one of many factors in decisions to hire or promote, the fact that blacks score lower does not automatically result in disqualification of disproportionate numbers of blacks as in cases involving cut-offs") (citation omitted); *Contreras* v. *Los Angeles*, 656 F. 2d 1267, 1273–1274 (CA9 1981) (probative value of statistics impeached by evidence that plaintiffs failed a written examination at a disproportionately high rate because they did not study seriously for it), cert. denied, 455 U. S. 1021 (1982).

A second constraint on the application of disparate impact theory lies in the nature of the "business necessity" or "job relatedness" defense. Although we have said that an employer has "the burden of showing that any given requirement must have a manifest relationship to the employment in question," *Griggs*, 401 U. S., at 432, such a formulation should not be interpreted as implying that the ultimate burden of proof can be shifted to the defendant. On the contrary, the ultimate burden of proving that discrimination against a protected group has been caused by a specific employment practice remains with the plaintiff at all times.

Thus, when a plaintiff has made out a prima facie case of disparate impact, and when the defendant has met its burden of producing evidence that its employment practices are based on legitimate business reasons, the plaintiff must "show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in efficient and trustworthy workmanship." *Albemarle Paper Co.*, 422 U. S., at 425 (citation omitted; internal quotation marks omitted). Factors such as the cost or other burdens of proposed alternative selection devices are relevant in determining whether they would be equally as effective as the challenged practice in serving the employer's legitimate business goals. The same factors would also be relevant in determining whether the challenged practice has operated as the functional equivalent of a pretext for discriminatory treatment. Cf. *ibid.*

Our cases make it clear that employers are not required, even when defending standardized or objective tests, to introduce formal "validation studies" showing that particular criteria predict actual on-the-job performance. In *Beazer*, for example, the Court considered it obvious that "legitimate employment goals of safety and efficiency" permitted the exclusion of methadone users from employment with the New York City Transit Authority; the Court indicated that the "manifest relationship" test was satisfied even with respect to non-safety-sensitive jobs because those legitimate goals were "significantly served by" the exclusionary rule at issue in that case even though the rule was not required by those goals. 440 U. S., at 587, n. 31. Similarly, in *Washington* v. *Davis*, the Court held that the "job relatedness" requirement was satisfied when the employer demonstrated that a written test was related to success at a police training academy "wholly aside from [the test's] possible relationship to actual performance as a police officer." 426 U. S., at 250. See also *id.*, at 256 (STEVENS, J., concurring) ("[A]s a matter of law, it is permissible for the police department to use a test

for the purpose of predicting ability to master a training program even if the test does not otherwise predict ability to perform on the job").

In the context of subjective or discretionary employment decisions, the employer will often find it easier than in the case of standardized tests to produce evidence of a "manifest relationship to the employment in question." It is self-evident that many jobs, for example those involving managerial responsibilities, require personal qualities that have never been considered amenable to standardized testing. In evaluating claims that discretionary employment practices are insufficiently related to legitimate business purposes, it must be borne in mind that "[c]ourts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it." *Furnco Construction Corp.* v. *Waters*, 438 U. S., at 578. See also *Zahorik* v. *Cornell University*, 729 F. 2d 85, 96 (CA2 1984) ("[The] criteria [used by a university to award tenure], however difficult to apply and however much disagreement they generate in particular cases, are job related. . . . It would be a most radical interpretation of Title VII for a court to enjoin use of an historically settled process and plainly relevant criteria largely because they lead to decisions which are difficult for a court to review"). In sum, the high standards of proof in disparate impact cases are sufficient in our view to avoid giving employers incentives to modify any normal and legitimate practices by introducing quotas or preferential treatment.

III

We granted certiorari to determine whether the court below properly held disparate impact analysis inapplicable to a subjective or discretionary promotion system, and we now hold that such analysis may be applied. We express no opinion as to the other rulings of the Court of Appeals.

Neither the District Court nor the Court of Appeals has evaluated the statistical evidence to determine whether peti-

tioner made out a prima facie case of discriminatory promotion practices under disparate impact theory. It may be that the relevant data base is too small to permit any meaningful statistical analysis, but we leave the Court of Appeals to decide in the first instance, on the basis of the record and the principles announced today, whether this case can be resolved without further proceedings in the District Court. The judgment of the Court of Appeals is vacated, 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 BLACKMUN, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, concurring in part and concurring in the judgment.

I agree that disparate-impact analysis may be applied to claims of discrimination caused by subjective or discretionary selection processes, and I therefore join Parts I, II–A, II–B, and III of the Court's opinion. I am concerned, however, that the plurality mischaracterizes the nature of the burdens this Court has allocated for proving and rebutting disparate-impact claims. In so doing, the plurality projects an application of disparate-impact analysis to subjective employment practices that I find to be inconsistent with the proper evidentiary standards and with the central purpose of Title VII. I therefore cannot join Parts II–C and II–D. I write separately to reiterate what I thought our prior cases had made plain about the nature of claims brought within the disparate-impact framework.

I

The plurality's discussion of the allocation of burdens of proof and production that apply in litigating a disparate-impact claim under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. § 2000e *et seq.*, is flatly

contradicted by our cases.[1] The plurality, of course, is correct that the initial burden of proof is borne by the plaintiff, who must establish, by some form of numerical showing, that a facially neutral hiring practice "select[s] applicants . . . in a significantly discriminatory pattern." *Dothard* v. *Rawlinson*, 433 U. S. 321, 329 (1977).[2] Our cases make clear, however, that, contrary to the plurality's assertion, *ante*, at 997, a plaintiff who successfully establishes this prima facie case shifts the burden of *proof*, not production, to the defendant to establish that the employment practice in question is a business necessity. See, *e. g.*, *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 425 (1975) (employer must "meet the burden of *proving* that its tests are 'job related'"); *Dothard* v. *Rawlinson*, 433 U. S., at 329 (employer must "*prov[e]* that the challenged requirements are job related"); *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 432 (1971) ("Congress has placed on the employer the burden of *showing* that any given requirement must have a manifest relationship to the employment in question") (emphasis added in each quotation).

The plurality's suggested allocation of burdens bears a closer resemblance to the allocation of burdens we established for disparate-treatment claims in *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, 802–804 (1973), and *Texas Dept. of Community Affairs* v. *Burdine*, 450 U. S. 248, 252–256 (1981), than it does to those the Court has established for disparate-impact claims. Nothing in our cases supports the plurality's declaration that, in the context of a disparate-*impact* challenge, "the ultimate burden of prov-

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[1] It bears noting that the question on which we granted certiorari, and the question presented in petitioner's brief, is whether disparate-impact analysis applies to subjective practices, not where the burdens fall, if the analysis applies. The plurality need not have reached its discussion of burden allocation and evidentiary standards to resolve the question presented. I, however, find it necessary to reach this issue in order to respond to remarks made by the plurality.

[2] I have no quarrel with the plurality's characterization of the plaintiff's burden of establishing that any disparity is significant. See *ante*, at 994–997.

ing that discrimination against a protected group has been caused by a specific employment practice remains with the plaintiff at all times." *Ante*, at 997. What is most striking about this statement is that it is a near-perfect echo of this Court's declaration in *Burdine* that, in the context of an individual disparate-*treatment* claim, "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." 450 U. S., at 253. In attempting to mimic the allocation of burdens the Court has established in the very different context of individual disparate-treatment claims, the plurality turns a blind eye to the crucial distinctions between the two forms of claims.[3]

The violation alleged in a disparate-treatment challenge focuses exclusively on the intent of the employer. See *Teamsters* v. *United States*, 431 U. S. 324, 335, n. 15 (1977) (in disparate-treatment challenge "[p]roof of discriminatory motive is critical"). Unless it is proved that an employer intended to disfavor the plaintiff because of his membership in a protected class, a disparate-treatment claim fails. A disparate-impact claim, in contrast, focuses on the *effect* of the employment practice. See *id.*, at 336, n. 15 (disparate-impact claims "involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another"). Unless an employment practice producing the disparate effect is justified by "business necessity," *ibid.*, it violates Title VII, for "good intent or absence of discriminatory intent does not re-

[3] See *Texas Dept. of Community Affairs* v. *Burdine*, 450 U. S. 248, 252, n. 5 (1981) (recognizing, in the context of articulating allocation of burdens applicable to disparate-treatment claims, that "the factual issues, and therefore the character of the evidence presented, differ when the plaintiff claims that a facially neutral employment policy has a discriminatory impact on protected classes"); *United States Postal Service Bd. of Governors* v. *Aikens*, 460 U. S. 711, 713, n. 1 (1983) ("We have consistently distinguished disparate-treatment cases from cases involving facially neutral employment standards that have disparate impact on minority applicants").

deem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups." *Griggs* v. *Duke Power Co.*, 401 U. S., at 432.

In *McDonnell Douglas* and *Burdine*, this Court formulated a scheme of burden allocation designed "progressively to sharpen the inquiry into the elusive factual question of intentional discrimination." *Texas Dept. of Community Affairs* v. *Burdine*, 450 U. S., at 255, n. 8. The plaintiff's initial burden of establishing a prima facie case of disparate treatment is "not onerous," *id.*, at 253, and "raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." *Furnco Construction Corp.* v. *Waters*, 438 U. S. 567, 577 (1978).[4] An employer may rebut this presumption if it asserts that plaintiff's rejection was based on "a legitimate, nondiscriminatory reason" and produces evidence sufficient to "rais[e] a genuine issue of fact as to whether it discriminated against the plaintiff." *Texas Dept. of Community Affairs* v. *Burdine*, 450 U. S., at 254–255. If the employer satisfies "this burden of production," then "the factual inquiry proceeds to a new level of specificity," *id.*, at 255, and it is up to the plaintiff to prove that the proffered reason was a pretext for discrimination. *Id.*, at 256. This allocation of burdens reflects the Court's unwillingness to *require* a trial court to presume, on the basis of the facts establishing a prima facie case, that an employer intended to discriminate, in the face of evidence suggesting that the plaintiff's rejection might have been justified by

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[4] In *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, 802 (1973), the Court explained that a plaintiff could meet his burden of establishing a prima facie case of racial discrimination by showing:

"(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications."

some nondiscriminatory reason. The prima facie case is therefore insufficient to shift the burden of *proving* a lack of discriminatory intent to the defendant.

The prima facie case of disparate impact established by a showing of a significant statistical disparity is notably different. Unlike a claim of intentional discrimination, which the *McDonnell Douglas* factors establish only by inference, the disparate impact caused by an employment practice is *directly* established by the numerical disparity. Once an employment practice is shown to have discriminatory consequences, an employer can escape liability only if it persuades the court that the selection process producing the disparity has "'a manifest relationship to the employment in question.'" *Connecticut* v. *Teal*, 457 U. S. 440, 446 (1982), quoting *Griggs* v. *Duke Power Co.*, 401 U. S., at 432. The plaintiff in such a case already has proved that the employment practice has an improper effect; it is up to the employer to prove that the discriminatory effect is justified.

Intertwined with the plurality's suggestion that the defendant's burden of establishing business necessity is merely one of production is the implication that the defendant may satisfy this burden simply by "producing evidence that its employment practices are based on legitimate business reasons." *Ante*, at 998. Again, the echo from the disparate-treatment cases is unmistakable. In that context, it is enough for an employer "to articulate some legitimate, nondiscriminatory reason" for the allegedly discriminatory act in order to rebut the presumption of intentional discrimination. *McDonnell Douglas*, 411 U. S., at 802. But again the plurality misses a key distinction: An employer accused of discriminating intentionally need only dispute that it had any such intent—which it can do by offering *any* legitimate, nondiscriminatory justification. Such a justification is simply not enough to legitimize a practice that has the effect of excluding a protected class from job opportunities at a significantly disproportionate rate. Our cases since *Griggs* make

clear that this effect itself runs afoul of Title VII unless it is "necessary to safe and efficient job performance." *Dothard* v. *Rawlinson*, 433 U. S., at 332, n. 14. See also *Nashville Gas Co.* v. *Satty*, 434 U. S. 136, 143 (1977) (issue is whether "a company's business necessitates the adoption of particular leave policies"); *Griggs* v. *Duke Power Co.*, 401 U. S., at 432 ("[A]ny given requirement must have a *manifest* relationship to the employment in question") (emphasis added).

Precisely what constitutes a business necessity cannot be reduced, of course, to a scientific formula, for it necessarily involves a case-specific judgment which must take into account the nature of the particular business and job in question. The term itself, however, goes a long way toward establishing the limits of the defense: To be justified as a business *necessity* an employment criterion must bear more than an indirect or minimal relationship to job performance. See *Dothard* v. *Rawlinson*, 433 U. S., at 331–332 (absent proof that height and weight requirements directly correlated with amount of strength deemed "essential to good job performance," requirements not justified as business necessity); *Albemarle Paper Co.* v. *Moody*, 422 U. S., at 431, quoting the Equal Employment Opportunity Commission's (EEOC's) Uniform Guidelines on Employee Selection Procedures, 29 CFR §1607.4(c) (1974) ("The message of these Guidelines is the same as that of the *Griggs* case—that discriminatory tests are impermissible unless shown, by professionally acceptable methods, to be 'predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job'"). Cf. *Washington* v. *Davis*, 426 U. S. 229, 247 (1976) (Title VII litigation "involves a more probing judicial review, and less deference to the seemingly reasonable acts of [employers] than is appropriate under the Constitution where special racial impact, without discriminatory purpose, is claimed"). The criterion must directly relate to a prospective employee's ability to perform the job effectively. And even where an employer

proves that a particular selection process is sufficiently job related, the process in question may still be determined to be unlawful, if the plaintiff persuades the court that other selection processes that have a lesser discriminatory effect could also suitably serve the employer's business needs. *Albemarle Paper Co.* v. *Moody*, 422 U. S., at 425. In sum, under *Griggs* and its progeny, an employer, no matter how well intended, will be liable under Title VII if it relies upon an employment-selection process that disadvantages a protected class, unless that process is shown to be necessary to fulfill legitimate business requirements. The plurality's suggestion that the employer does not bear the burden of making this showing cannot be squared with our prior cases.

II

I am also concerned that, unless elaborated upon, the plurality's projection of how disparate-impact analysis should be applied to subjective-selection processes may prove misleading. The plurality suggests: "In the context of subjective or discretionary employment decisions, the employer will often find it easier than in the case of standardized tests to produce evidence of a 'manifest relationship to the employment in question.'" *Ante*, at 999. This statement warrants further comment in two respects.

A

As explained above, once it has been established that a selection method has a significantly disparate impact on a protected class, it is clearly not enough for an employer merely to *produce* evidence that the method of selection is job related. It is an employer's obligation to *persuade* the reviewing court of this fact.

While the formal validation techniques endorsed by the EEOC in its Uniform Guidelines may sometimes not be effective in measuring the job-relatedness of subjective-selection

processes,[5] a variety of methods are available for establishing the link between these selection processes and job performance, just as they are for objective-selection devices. See 29 CFR §§ 1607.6(B)(1) and (2) (1987) (where selection procedure with disparate impact cannot be formally validated, employer can "justify continued use of the procedure in accord with Federal law"). Cf. *Washington* v. *Davis*, 426 U. S., at 247, and n. 13 (hiring and promotion practices can be validated in "any one of several ways"). The proper means of establishing business necessity will vary with the type and size of the business in question, as well as the particular job for which the selection process is employed. Courts have recognized that the results of studies, see *Davis* v. *Dallas*, 777 F. 2d 205, 218–219 (CA5 1985) (nationwide studies and reports showing job-relatedness of college-degree requirement), cert. denied, 476 U. S. 1116 (1986); the presentation of expert testimony, 777 F. 2d, at 219–222, 224–225 (criminal justice scholars' testimony explaining job-relatedness of college-degree requirement and psychologist's testimony explaining job-relatedness of prohibition on recent marijuana use); and prior successful experience, *Zahorik* v. *Cornell University*, 729 F. 2d 85, 96 (CA2 1984) ("generations" of experience reflecting job-relatedness of decentralized decisionmaking structure based on peer judgments in academic setting), can all be used, under appropriate circumstances, to establish business necessity.[6] Moreover, an employer that

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[5] The American Psychological Association, co-author of Standards for Educational and Psychological Testing (1985), which is relied upon by the EEOC in its Uniform Guidelines, has submitted a brief as *amicus curiae* explaining that subjective-assessment devices are, in fact, amenable to the same "psychometric scrutiny" as more objective screening devices, such as written tests. Brief for the American Psychological Association as *Amicus Curiae* 2. See also Bartholet, Application of Title VII to Jobs in High Places, 95 Harv. L. Rev. 947, 987–988 (1982) (discussing feasibility of validating subjective hiring assessments).

[6] As a corollary, of course, a Title VII plaintiff can attack an employer's offer of proof by presenting contrary evidence, including proof that the em-

complies with the EEOC's recordkeeping requirements, 29 CFR §§ 1607.4 and 1607.15 (1987), and keeps track of the effect of its practices on protected classes, will be better prepared to document the correlation between its employment practices and successful job performance when required to do so by Title VII.

The fact that job-relatedness cannot always be established with mathematical certainty does not free an employer from its burden of proof, but rather requires a trial court to look to different forms of evidence to assess an employer's claim of business necessity. And while common sense surely plays a part in this assessment, a reviewing court may not rely on its own, or an employer's, sense of what is "normal," *ante*, at 999, as a substitute for a neutral assessment of the evidence presented. Indeed, to the extent an employer's "normal" practices serve to perpetuate a racially disparate status quo, they clearly violate Title VII unless they can be shown to be necessary, in addition to being "normal." See *Griggs* v. *Duke Power Co.*, 401 U. S., at 430 ("[P]ractices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the [discriminatory] status quo").

B

The plurality's prediction that an employer "will often find it easier" *ante*, at 999, to justify the use of subjective practices as a business necessity is difficult to analyze in the abstract. Nevertheless, it bears noting that this statement

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ployer's hiring methods failed in fact to screen for the qualities identified as central to successful job performance. In this case, for example, petitioner could produce evidence that Kevin Brown, one of the white employees chosen over her for a promotion, allegedly in part because of his greater "supervisory experience," proved to be totally unqualified for the position. App. 113. Six months after Brown was promoted, his performance was evaluated as only "close to being 'competent.'" 1 Record 68. When he resigned soon thereafter, allegedly under pressure, he questioned whether "poor communication . . . , inadequate training," or his personality had rendered him unqualified for the job. *Id.*, at 85.

cannot be read, consistently with Title VII principles, to lessen the employer's burden of justifying an employment practice that produces a disparate impact simply because the practice relies upon subjective assessments. Indeed, the less defined the particular criteria involved, or the system relied upon to assess these criteria, the more difficult it may be for a reviewing court to assess the connection between the selection process and job performance. Cf. *Albemarle Paper Co.* v. *Moody*, 422 U. S., at 433 (validation mechanism that fails to identify "whether the criteria *actually* considered were sufficiently related to the [employer's] legitimate interest in job-specific ability" cannot establish that test in question was sufficiently job related). For example, in this case the Bank supervisors were given complete, unguided discretion in evaluating applicants for the promotions in question.[7] If petitioner can successfully establish that respondent's hiring practice disfavored black applicants to a significant extent, the bald assertion that a purely discretionary selection process allowed respondent to discover the best people for the job, without any further evidentiary support, would not be enough to prove job-relatedness.[8]

Allowing an employer to escape liability simply by articulating vague, inoffensive-sounding subjective criteria would disserve Title VII's goal of eradicating discrimination in employment. It would make no sense to establish a general rule whereby an employer could more easily establish busi-

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[7] One of the hiring supervisors testified that she was never given any guidelines or instructions on her hiring and promotion decisions. App. 161–162. Another testified that he could not attribute specific weight to any particular factors considered in his promotion decisions because "fifty or a hundred things" might enter into such decisions. *Id.*, at 135.

[8] Because the establishment of business necessity is necessarily case specific, I am unwilling to preclude the possibility that an employer could *ever* establish that a successful selection among applicants required granting the hirer near-absolute discretion. Of course, in such circumstances, the employer would bear the burden of establishing that an absence of specified criteria was necessary for the proper functioning of the business.

ness necessity for an employment practice, which left the assessment of a list of general character qualities to the hirer's discretion, than for a practice consisting of the evaluation of various objective criteria carefully tailored to measure relevant job qualifications. Such a rule would encourage employers to abandon attempts to construct selection mechanisms subject to neutral application for the shelter of vague generalities.[9]

While subjective criteria, like objective criteria, will sometimes pose difficult problems for the court charged with assessing the relationship between selection process and job performance, the fact that some cases will require courts to develop a greater factual record and, perhaps, exercise a greater degree of judgment, does not dictate that subjective-selection processes generally are to be accepted at face value, as long as they strike the reviewing court as "normal and legitimate." *Ante*, at 999.[10] *Griggs* teaches that employment practices "fair in form, but discriminatory in opera-

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[9] See *Atonio* v. *Wards Cove Packing Co.*, 810 F. 2d 1477, 1485 (CA9) (en banc) ("It would subvert the purpose of Title VII to create an incentive to abandon efforts to validate objective criteria in favor of purely discretionary hiring methods"), on return to panel, 827 F. 2d 439 (1987), cert. denied, No. 87–1388, 485 U. S. 989 (1988), cert. pending, No. 87–1387; *Miles* v. *M.N.C. Corp.*, 750 F. 2d 867, 871 (CA11 1985) (subjective assessments involving white supervisors provide "ready mechanism" for racial discrimination). Cf. Doverspike, Barrett, & Alexander, The Feasibility of Traditional Validation Procedures for Demonstrating Job-Relatedness, 9 Law & Psychology Rev. 35, 35 (1985) (noting that "litigious climate has resulted in a decline in the use of tests and an increase in more subjective methods of hiring").

[10] Nor can the requirement that a plaintiff in a disparate-impact case specify the employment practice responsible for the statistical disparity be turned around to shield from liability an employer whose selection process is so poorly defined that no specific criterion can be identified with any certainty, let alone be connected to the disparate effect. Cf. *ante*, at 994 (plaintiff is responsible "for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities").

tion," cannot be tolerated under Title VII. 401 U. S., at 431. This lesson should not be forgotten simply because the "fair form" is a subjective one.

JUSTICE STEVENS, concurring in the judgment.

The question we granted certiorari to decide, though extremely important, is also extremely narrow. It reads as follows:

> "Is the racially adverse impact of an employer's practice of simply committing employment decisions to the unchecked discretion of a white supervisory corps subject to the test of *Griggs vs. Duke Power Co.*, 401 U. S. 424 (1971)?" Pet. for Cert. i.

Essentially for the reasons set forth in Parts II–A and II–B of JUSTICE O'CONNOR's opinion, I agree that this question must be answered in the affirmative. At this stage of the proceeding, however, I believe it unwise to announce a "fresh" interpretation of our prior cases applying disparate-impact analysis to objective employment criteria. See *ante*, at 994. Cases in which a Title VII plaintiff challenges an employer's practice of delegating certain kinds of decisions to the subjective discretion of its executives will include too many variables to be adequately discussed in an opinion that does not focus on a particular factual context. I would therefore postpone any further discussion of the evidentiary standards set forth in our prior cases until after the District Court has made appropriate findings concerning this plaintiff's prima facie evidence of disparate impact and this defendant's explanation for its practice of giving supervisors discretion in making certain promotions.

COY *v.* IOWA

APPEAL FROM THE SUPREME COURT OF IOWA

No. 86–6757. Argued January 13, 1988—Decided June 29, 1988

Appellant was charged with sexually assaulting two 13-year-old girls. At appellant's jury trial, the court granted the State's motion, pursuant to a 1985 state statute intended to protect child victims of sexual abuse, to place a screen between appellant and the girls during their testimony, which blocked him from their sight but allowed him to see them dimly and to hear them. The court rejected appellant's argument that this procedure violated the Confrontation Clause of the Sixth Amendment, which gives a defendant the right "to be confronted with the witnesses against him." Appellant was convicted of two counts of lascivious acts with a child, and the Iowa Supreme Court affirmed.

Held:

1. The Confrontation Clause by its words provides a criminal defendant the right to "confront" face-to-face the witnesses giving evidence against him at trial. That core guarantee serves the general perception that confrontation is essential to fairness, and helps to ensure the integrity of the factfinding process by making it more difficult for witnesses to lie. Pp. 1015–1020.

2. Appellant's right to face-to-face confrontation was violated since the screen at issue enabled the complaining witnesses to avoid viewing appellant as they gave their testimony. There is no merit to the State's assertion that its statute creates a presumption of trauma to victims of sexual abuse that outweighs appellant's right to confrontation. Even if an exception to this core right can be made, it would have to be based on something more than the type of generalized finding asserted here, unless it were "firmly . . . rooted in our jurisprudence." *Bourjaily* v. *United States*, 483 U. S. 171, 183. An exception created by a 1985 statute can hardly be viewed as "firmly rooted," and there have been no individualized findings that these particular witnesses needed special protection. Pp. 1020–1021.

3. Since the State Supreme Court did not address the question whether the Confrontation Clause error was harmless beyond a reasonable doubt under *Chapman* v. *California*, 386 U. S. 18, 24, the case must be remanded. Pp. 1021–1022.

397 N. W. 2d 730, reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, STEVENS, and O'CONNOR, JJ., joined. O'CONNOR, J., filed a concurring opinion, in which WHITE, J., joined, *post*, p. 1022. BLACKMUN, J., filed a dissenting opinion, in which REHNQUIST, C. J., joined, *post*, p. 1025. KENNEDY, J., took no part in the consideration or decision of the case.

Paul Papak, by appointment of the Court, 484 U. S. 810, argued the cause and filed briefs for appellant.

Gordon E. Allen, Deputy Attorney General of Iowa, argued the cause for appellee. With him on the brief were *Thomas J. Miller*, Attorney General, and *Roxann M. Ryan*, Assistant Attorney General.*

**John L. Walker* filed a brief for the National Association of Criminal Defense Lawyers as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the State of Connecticut et al. by *John J. Kelly*, Chief State's Attorney of Connecticut and *John M. Massameno*, Senior Appellate Attorney, and by the Attorneys General for their respective States as follows: *John Van de Kamp* of California, *Charles M. Oberly III* of Delaware, *Linley E. Pearson* of Indiana, *Stephen E. Merrill* of New Hampshire, *Hal Stratton* of New Mexico, *David Frohnmayer* of Oregon, *T. Travis Medlock* of South Carolina, and *W. J. Michael Cody* of Tennessee; and for the State of Kentucky et al. by *David L. Armstrong*, Attorney General of Kentucky, *Penny R. Warren* and *John S. Gillig*, Assistant Attorneys General, and by the Attorneys General for their respective jurisdictions as follows: *Don Siegelman* of Alabama, *Grace Berg Schaible* of Alaska, *Robert K. Corbin* of Arizona, *John Steven Clark* of Arkansas, *Duane Woodard* of Colorado, *Charles M. Oberly III* of Delaware, *Robert Butterworth* of Florida, *Warren Price III* of Hawaii, *Jim Jones* of Idaho, *Neil F. Hartigan* of Illinois, *Linley E. Pearson* of Indiana, *Robert T. Stephan* of Kansas, *William J. Guste, Jr.*, of Louisiana, *James E. Tierney* of Maine, *J. Joseph Curran, Jr.*, of Maryland, *Frank J. Kelley* of Michigan, *Hubert H. Humphrey III* of Minnesota, *Edwin L. Pittman* of Mississippi, *William L. Webster* of Missouri, *Mike Greely* of Montana, *Brian McKay* of Nevada, *W. Cary Edwards* of New Jersey, *Lacy H. Thornburg* of North Carolina, *Nicholas Spaeth* of North Dakota, *Robert Henry* of Oklahoma, *LeRoy S. Zimmerman* of Pennsylvania, *Roger A. Tellinghuisen* of South Dakota, *W. J. Michael Cody* of Tennessee, *David L. Wilkinson* of Utah, *Jeffrey Amestoy* of Vermont, *Mary Sue Terry* of Virginia, *Godfrey R. de Castro* of the Virgin Islands, *Kenneth*

JUSTICE SCALIA delivered the opinion of the Court.

Appellant was convicted of two counts of lascivious acts with a child after a jury trial in which a screen placed between him and the two complaining witnesses blocked him from their sight. Appellant contends that this procedure, authorized by state statute, violated his Sixth Amendment right to confront the witnesses against him.

I

In August 1985, appellant was arrested and charged with sexually assaulting two 13-year-old girls earlier that month while they were camping out in the backyard of the house next door to him. According to the girls, the assailant entered their tent after they were asleep wearing a stocking over his head, shined a flashlight in their eyes, and warned them not to look at him; neither was able to describe his face. In November 1985, at the beginning of appellant's trial, the State made a motion pursuant to a recently enacted statute, Act of May 23, 1985, § 6, 1985 Iowa Acts 338, now codified at Iowa Code § 910A.14 (1987),[1] to allow the complaining witnesses to testify either via closed-circuit television or behind a screen. See App. 4–5. The trial court approved the use of a large screen to be placed between appellant and the witness stand during the girls' testimony. After certain lighting ad-

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O. Eikenberry of Washington, *Charlie Brown* of West Virginia, and *Joseph B. Meyer* of Wyoming.

Briefs of *amici curiae* were filed for the American Bar Association by *Robert MacCrate;* and for Judge Schudson by *Charles B. Schudson, pro se,* and *Martha L. Minow.*

[1] Section 910A.14 provides in part as follows:

"The court may require a party be confined *[sic]* to an adjacent room or behind a screen or mirror that permits the party to see and hear the child during the child's testimony, but does not allow the child to see or hear the party. However, if a party is so confined, the court shall take measures to insure that the party and counsel can confer during the testimony and shall inform the child that the party can see and hear the child during testimony."

justments in the courtroom, the screen would enable appellant dimly to perceive the witnesses, but the witnesses to see him not at all.

Appellant objected strenuously to use of the screen, based first of all on his Sixth Amendment confrontation right. He argued that, although the device might succeed in its apparent aim of making the complaining witnesses feel less uneasy in giving their testimony, the Confrontation Clause directly addressed this issue by giving criminal defendants a right to face-to-face confrontation. He also argued that his right to due process was violated, since the procedure would make him appear guilty and thus erode the presumption of innocence. The trial court rejected both constitutional claims, though it instructed the jury to draw no inference of guilt from the screen.

The Iowa Supreme Court affirmed appellant's conviction, 397 N. W. 2d 730 (1986). It rejected appellant's confrontation argument on the ground that, since the ability to cross-examine the witnesses was not impaired by the screen, there was no violation of the Confrontation Clause. It also rejected the due process argument, on the ground that the screening procedure was not inherently prejudicial. We noted probable jurisdiction, 483 U. S. 1019 (1987).

II

The Sixth Amendment gives a criminal defendant the right "to be confronted with the witnesses against him." This language "comes to us on faded parchment," *California* v. *Green*, 399 U. S. 149, 174 (1970) (Harlan, J., concurring), with a lineage that traces back to the beginnings of Western legal culture. There are indications that a right of confrontation existed under Roman law. The Roman Governor Festus, discussing the proper treatment of his prisoner, Paul, stated: "It is not the manner of the Romans to deliver any man up to die before the accused has met his accusers face to face, and has been given a chance to defend himself against the

charges." Acts 25:16. It has been argued that a form of the right of confrontation was recognized in England well before the right to jury trial. Pollitt, The Right of Confrontation: Its History and Modern Dress, 8 J. Pub. L. 381, 384–387 (1959).

Most of this Court's encounters with the Confrontation Clause have involved either the admissibility of out-of-court statements, see, *e. g.*, *Ohio* v. *Roberts*, 448 U. S. 56 (1980); *Dutton* v. *Evans*, 400 U. S. 74 (1970), or restrictions on the scope of cross-examination, *Delaware* v. *Van Arsdall*, 475 U. S. 673 (1986); *Davis* v. *Alaska*, 415 U. S. 308 (1974). Cf. *Delaware* v. *Fensterer*, 474 U. S. 15, 18–19 (1985) *(per curiam)* (noting these two categories and finding neither applicable). The reason for that is not, as the State suggests, that these elements are the essence of the Clause's protection—but rather, quite to the contrary, that there is at least some room for doubt (and hence litigation) as to the extent to which the Clause includes those elements, whereas, as Justice Harlan put it, "[s]imply as a matter of English" it confers at least "a right to meet face to face all those who appear and give evidence at trial." *California* v. *Green*, *supra*, at 175. Simply as a matter of Latin as well, since the word "confront" ultimately derives from the prefix "con-" (from "contra" meaning "against" or "opposed") and the noun "frons" (forehead). Shakespeare was thus describing the root meaning of confrontation when he had Richard the Second say: "Then call them to our presence—face to face, and frowning brow to brow, ourselves will hear the accuser and the accused freely speak . . . ." Richard II, Act 1, sc. 1.

We have never doubted, therefore, that the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact. See *Kentucky* v. *Stincer*, 482 U. S. 730, 748, 749–750 (1987) (MARSHALL, J., dissenting). For example, in *Kirby* v. *United States*, 174 U. S. 47, 55 (1899), which concerned the admissibility of prior convictions of codefendants to prove an element of the of-

fense of receiving stolen Government property, we described the operation of the Clause as follows: "[A] fact which can be primarily established only by witnesses cannot be proved against an accused . . . except by witnesses who confront him at the trial, upon whom he can look while being tried, whom he is entitled to cross-examine, and whose testimony he may impeach in every mode authorized by the established rules governing the trial or conduct of criminal cases." Similarly, in *Dowdell* v. *United States,* 221 U. S. 325, 330 (1911), we described a provision of the Philippine Bill of Rights as substantially the same as the Sixth Amendment, and proceeded to interpret it as intended "to secure the accused the right to be tried, so far as facts provable by witnesses are concerned, by only such witnesses as meet him face to face at the trial, who give their testimony in his presence, and give to the accused an opportunity of cross-examination." More recently, we have described the "literal right to 'confront' the witness at the time of trial" as forming "the core of the values furthered by the Confrontation Clause." *California* v. *Green, supra,* at 157. Last Term, the plurality opinion in *Pennsylvania* v. *Ritchie,* 480 U. S. 39, 51 (1987), stated that "[t]he Confrontation Clause provides two types of protections for a criminal defendant: the right physically to face those who testify against him, and the right to conduct cross-examination."

The Sixth Amendment's guarantee of face-to-face encounter between witness and accused serves ends related both to appearances and to reality. This opinion is embellished with references to and quotations from antiquity in part to convey that there is something deep in human nature that regards face-to-face confrontation between accused and accuser as "essential to a fair trial in a criminal prosecution." *Pointer* v. *Texas,* 380 U. S. 400, 404 (1965). What was true of old is no less true in modern times. President Eisenhower once described face-to-face confrontation as part of the code of his hometown of Abilene, Kansas. In Abilene, he said, it was necessary to "[m]eet anyone face to face with whom you

disagree. You could not sneak up on him from behind, or do any damage to him, without suffering the penalty of an outraged citizenry. . . . In this country, if someone dislikes you, or accuses you, he must come up in front. He cannot hide behind the shadow." Press release of remarks given to the B'nai B'rith Anti-Defamation League, November 23, 1953, quoted in Pollitt, *supra*, at 381. The phrase still persists, "Look me in the eye and say that." Given these human feelings of what is necessary for fairness,[2] the right of con-

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[2] The dissent finds Dean Wigmore more persuasive than President Eisenhower or even William Shakespeare. *Post*, at 1029. Surely that must depend upon the proposition that they are cited for. We have cited the latter two merely to illustrate the meaning of "confrontation," and both the antiquity and currency of the human feeling that a criminal trial is not just unless one can confront his accusers. The dissent cites Wigmore for the proposition that confrontation "was not a part of the common law's view of the confrontation requirement." *Ibid.* To begin with, Wigmore said no such thing. What he said, precisely, was:

"There was never at common law any recognized right to an indispensable thing called confrontation *as distinguished from cross-examination.* There *was* a right to cross-examination as indispensable, and that right was involved in and secured by confrontation; it was the same right under different names." 5 J. Wigmore, Evidence § 1397, p. 158 (J. Chadbourn rev. 1974) (emphasis in original).

He was saying, in other words, not that the right of confrontation (as we are using the term, *i. e.*, in its natural sense) did not exist, but that its purpose was to enable cross-examination. He then continued:

"It follows that, if the accused has had the benefit of cross-examination, he has had the very privilege secured to him by the Constitution." *Ibid.*

Of course, that does not follow at all, any more than it follows that the right to a jury trial can be dispensed with so long as the accused is justly convicted and publicly known to be justly convicted—the purposes of the right to jury trial. Moreover, contrary to what the dissent asserts, Wigmore did mention (inconsistently with his thesis, it would seem), that a secondary purpose of confrontation is to produce "a certain subjective moral effect . . . upon the witness." *Id.*, § 1395, p. 153. Wigmore grudgingly acknowledged that, in what he called "earlier and more emotional periods," this effect "was supposed (more often than it now is) to be able to unstring the nerves of a false witness," *id.*, § 1395, p. 153, n. 2; but he asserted, without support, that this effect "does not arise from the confrontation of

frontation "contributes to the establishment of a system of criminal justice in which the perception as well as the reality of fairness prevails." *Lee* v. *Illinois*, 476 U. S. 530, 540 (1986).

The perception that confrontation is essential to fairness has persisted over the centuries because there is much truth to it. A witness "may feel quite differently when he has to repeat his story looking at the man whom he will harm greatly by distorting or mistaking the facts. He can now understand what sort of human being that man is." Z. Chafee, The Blessings of Liberty 35 (1956), quoted in *Jay* v. *Boyd*, 351 U. S. 345, 375–376 (1956) (Douglas, J., dissenting). It is always more difficult to tell a lie about a person "to his face" than "behind his back." In the former context, even if the lie is told, it will often be told less convincingly. The Confrontation Clause does not, of course, compel the witness to fix his eyes upon the defendant; he may studiously look elsewhere, but the trier of fact will draw its own conclusions. Thus the right to face-to-face confrontation serves much the same purpose as a less explicit component of the Confrontation Clause that we have had more frequent occasion to dis-

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the *opponent* and the witness," but from "the witness' presence before the *tribunal*," *id.*, § 1395, p. 154 (emphasis in original).

We doubt. In any case, Wigmore was not reciting as a fact that there was no right of confrontation at common law, but was setting forth his thesis that the only essential interest preserved by the right was cross-examination—with the purpose, of course, of vindicating against constitutional attack sensible and traditional exceptions to the hearsay rule (which can be otherwise vindicated). The thesis is on its face implausible, if only because the phrase "be confronted with the witnesses against him" is an exceedingly strange way to express a guarantee of nothing more than cross-examination.

As for the dissent's contention that the importance of the confrontation right is "belied by the simple observation" that "blind witnesses [might have] testified against appellant," *post*, at 1030, that seems to us no more true than that the importance of the right to live, oral cross-examination is belied by the possibility that speech- and hearing-impaired witnesses might have testified.

cuss—the right to cross-examine the accuser; both "ensur[e] the integrity of the factfinding process." *Kentucky* v. *Stincer*, 482 U. S., at 736. The State can hardly gainsay the profound effect upon a witness of standing in the presence of the person the witness accuses, since that is the very phenomenon it relies upon to establish the potential "trauma" that allegedly justified the extraordinary procedure in the present case. That face-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult. It is a truism that constitutional protections have costs.

III

The remaining question is whether the right to confrontation was in fact violated in this case. The screen at issue was specifically designed to enable the complaining witnesses to avoid viewing appellant as they gave their testimony, and the record indicates that it was successful in this objective. App. 10–11. It is difficult to imagine a more obvious or damaging violation of the defendant's right to a face-to-face encounter.

The State suggests that the confrontation interest at stake here was outweighed by the necessity of protecting victims of sexual abuse. It is true that we have in the past indicated that rights conferred by the Confrontation Clause are not absolute, and may give way to other important interests. The rights referred to in those cases, however, were not the right narrowly and explicitly set forth in the Clause, but rather rights that are, or were asserted to be, reasonably implicit—namely, the right to cross-examine, see *Chambers* v. *Mississippi*, 410 U. S. 284, 295 (1973); the right to exclude out-of-court statements, see *Ohio* v. *Roberts*, 448 U. S., at 63–65; and the asserted right to face-to-face confrontation at some point in the proceedings other than the trial itself, *Kentucky* v. *Stincer*, *supra*. To hold that our determination of what

implications are reasonable must take into account other important interests is not the same as holding that we can identify exceptions, in light of other important interests, to the irreducible literal meaning of the Clause: "a right to *meet face to face* all those who appear and give evidence *at trial*." *California* v. *Green*, 399 U. S., at 175 (Harlan, J., concurring) (emphasis added). We leave for another day, however, the question whether any exceptions exist. Whatever they may be, they would surely be allowed only when necessary to further an important public policy. Cf. *Ohio* v. *Roberts*, *supra*, at 64; *Chambers* v. *Mississippi*, *supra*, at 295. The State maintains that such necessity is established here by the statute, which creates a legislatively imposed presumption of trauma. Our cases suggest, however, that even as to exceptions from the normal implications of the Confrontation Clause, as opposed to its most literal application, something more than the type of generalized finding underlying such a statute is needed when the exception is not "firmly . . . rooted in our jurisprudence." *Bourjaily* v. *United States*, 483 U. S. 171, 183 (1987) (citing *Dutton* v. *Evans*, 400 U. S. 74 (1970)). The exception created by the Iowa statute, which was passed in 1985, could hardly be viewed as firmly rooted. Since there have been no individualized findings that these particular witnesses needed special protection, the judgment here could not be sustained by any conceivable exception.

The State also briefly suggests that any Confrontation Clause error was harmless beyond a reasonable doubt under the standard of *Chapman* v. *California*, 386 U. S. 18, 24 (1967). We have recognized that other types of violations of the Confrontation Clause are subject to that harmless-error analysis, see *e. g.*, *Delaware* v. *Van Arsdall*, 475 U. S., at 679, 684, and see no reason why denial of face-to-face confrontation should not be treated the same. An assessment of harmlessness cannot include consideration of whether the witness' testimony would have been unchanged, or the

jury's assessment unaltered, had there been confrontation; such an inquiry would obviously involve pure speculation, and harmlessness must therefore be determined on the basis of the remaining evidence. The Iowa Supreme Court had no occasion to address the harmlessness issue, since it found no constitutional violation. In the circumstances of this case, rather than decide whether the error was harmless beyond a reasonable doubt, we leave the issue for the court below.

We find it unnecessary to reach appellant's due process claim. Since his constitutional right to face-to-face confrontation was violated, we reverse the judgment of the Iowa Supreme Court and remand the case 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 JUSTICE WHITE joins, concurring.

I agree with the Court that appellant's rights under the Confrontation Clause were violated in this case. I write separately only to note my view that those rights are not absolute but rather may give way in an appropriate case to other competing interests so as to permit the use of certain procedural devices designed to shield a child witness from the trauma of courtroom testimony.

Child abuse is a problem of disturbing proportions in today's society. Just last Term, we recognized that "[c]hild abuse is one of the most difficult problems to detect and prosecute, in large part because there often are no witnesses except the victim." *Pennsylvania* v. *Ritchie*, 480 U. S. 39, 60 (1987). Once an instance of abuse is identified and prosecution undertaken, new difficulties arise. Many States have determined that a child victim may suffer trauma from exposure to the harsh atmosphere of the typical courtroom and have undertaken to shield the child through a variety of

ameliorative measures. We deal today with the constitutional ramifications of only one such measure, but we do so against a broader backdrop. Iowa appears to be the only State authorizing the type of screen used in this case. See generally App. to Brief for American Bar Association as *Amicus Curiae* 1a–9a (collecting statutes). A full half of the States, however, have authorized the use of one- or two- way closed-circuit television. Statutes sanctioning one-way systems generally permit the child to testify in a separate room in which only the judge, counsel, technicians, and in some cases the defendant, are present. The child's testimony is broadcast into the courtroom for viewing by the jury. Two-way systems permit the child witness to see the courtroom and the defendant over a video monitor. In addition to such closed-circuit television procedures, 33 States (including 19 of the 25 authorizing closed-circuit television) permit the use of videotaped testimony, which typically is taken in the defendant's presence. See generally *id.*, at 9a–18a (collecting statutes).

While I agree with the Court that the Confrontation Clause was violated in this case, I wish to make clear that nothing in today's decision necessarily dooms such efforts by state legislatures to protect child witnesses. Initially, many such procedures may raise no substantial Confrontation Clause problem since they involve testimony in the presence of the defendant. See, *e. g.*, Ala. Code § 15–25–3 (Supp. 1987) (one-way closed-circuit television; defendant must be in same room as witness); Ga. Code Ann. § 17–8–55 (Supp. 1987) (same); N. Y. Crim. Proc. Law §§ 65.00–65.30 (McKinney Supp. 1988) (two-way closed-circuit television); Cal. Penal Code Ann. § 1347 (West Supp. 1988) (same). Indeed, part of the statute involved here seems to fall into this category since in addition to authorizing a screen, Iowa Code § 910A.14 (1987) permits the use of one-way closed-circuit television with "parties" in the same room as the child witness.

Moreover, even if a particular state procedure runs afoul of the Confrontation Clause's general requirements, it may come within an exception that permits its use. There is nothing novel about the proposition that the Clause embodies a general requirement that a witness face the defendant. We have expressly said as much, as long ago as 1899, *Kirby* v. *United States*, 174 U. S. 47, 55, and as recently as last Term, *Pennsylvania* v. *Ritchie*, 480 U. S., at 51. But it is also not novel to recognize that a defendant's "right physically to face those who testify against him," *ibid.*, even if located at the "core" of the Confrontation Clause, is not absolute, and I reject any suggestion to the contrary in the Court's opinion. See *ante*, at 1020–1021. Rather, the Court has time and again stated that the Clause "reflects a *preference* for face-to-face confrontation at trial," and expressly recognized that this preference may be overcome in a particular case if close examination of "competing interests" so warrants. *Ohio* v. *Roberts*, 448 U. S. 56, 63–64 (1980) (emphasis added). See also *Chambers* v. *Mississippi*, 410 U. S. 284, 295 (1973) ("Of course, the right to confront . . . is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process"). That a particular procedure impacts the "irreducible literal meaning of the Clause," *ante*, at 1021, does not alter this conclusion. Indeed, virtually all of our cases approving the use of hearsay evidence have implicated the literal right to "confront" that has always been recognized as forming "the core of the values furthered by the Confrontation Clause," *California* v. *Green*, 399 U. S. 149, 157 (1970), and yet have fallen within an exception to the general requirement of face-to-face confrontation. See, *e. g.*, *Dutton* v. *Evans*, 400 U. S. 74 (1970). Indeed, we expressly recognized in *Bourjaily* v. *United States*, 483 U. S. 171 (1987), that "a literal interpretation of the Confrontation Clause could bar the use of any out-of-court statements when the declarant is unavailable,"

but we also acknowledged that "this Court has rejected that view as 'unintended and too extreme.'" *Id.*, at 182 (quoting *Ohio* v. *Roberts*, *supra*, at 63). In short, our precedents recognize a right to face-to-face confrontation at trial, but have never viewed that right as absolute. I see no reason to do so now and would recognize exceptions here as we have elsewhere.

Thus, I would permit use of a particular trial procedure that called for something other than face-to-face confrontation if that procedure was necessary to futher an important public policy. See *ante*, at 1021 (citing *Ohio* v. *Roberts*, *supra*; *Chambers* v. *Mississippi*, *supra*). The protection of child witnesses is, in my view and in the view of a substantial majority of the States, just such a policy. The primary focus therefore likely will be on the necessity prong. I agree with the Court that more than the type of generalized legislative finding of necessity present here is required. But if a court makes a case-specific finding of necessity, as is required by a number of state statutes, see, *e. g.*, Cal. Penal Code Ann. § 1347(d)(1) (West Supp. 1988); Fla. Stat. § 92.54(4) (1987); Mass. Gen. Laws § 278:16D(b)(1) (1986); N. J. Stat. Ann. § 2A:84A–32.4(b) (Supp. 1988), our cases suggest that the strictures of the Confrontation Clause may give way to the compelling state interest of protecting child witnesses. Because nothing in the Court's opinion conflicts with this approach and this conclusion, I join it.

JUSTICE BLACKMUN, with whom THE CHIEF JUSTICE joins, dissenting.

Appellant was convicted by an Iowa jury on two counts of engaging in lascivious acts with a child. Because, in my view, the procedures employed at appellant's trial did not offend either the Confrontation Clause or the Due Process Clause, I would affirm his conviction. Accordingly, I respectfully dissent.

I

A

The Sixth Amendment provides that a defendant in a criminal trial "shall enjoy the right . . . to be confronted with the witnesses against him." In accordance with that language, this Court just recently has recognized once again that the essence of the right protected is the right to be shown that the accuser is real and the right to probe accuser and accusation in front of the trier of fact:

> "'The primary object of the [Confrontation Clause] was to prevent depositions or *ex parte* affidavits . . . being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.'" *Kentucky* v. *Stincer*, 482 U. S. 703, 736–737 (1987), quoting *Mattox* v. *United States*, 156 U. S. 237, 242–243 (1895).

Two witnesses against appellant in this case were the 13-year-old girls he was accused of sexually assaulting. During their testimony, as permitted by a state statute, a one-way screening device was placed between the girls and appellant, blocking the man accused of sexually assaulting them from the girls' line of vision.[1] This procedure did not interfere

[1] Apparently the girls were unable to identify appellant as their attacker. Their ability to observe their attacker had been limited by the facts that it was dark, that he shined a flashlight in their eyes, and that he told them not to look at him. The attacker also appeared to be wearing a stocking over his head. Thus, the State made no effort to have the girls try to identify appellant at trial, which could not have been done, of course, without moving the screen. Neither did appellant attempt to demonstrate that the girls could not identify him. This case therefore does not present the question of the constitutionality of the restriction on cross-examination

with what this Court previously has recognized as the "purposes of confrontation." *California* v. *Green*, 399 U. S. 149, 158 (1970). Specifically, the girls' testimony was given under oath, was subject to unrestricted cross-examination, and "the jury that [was] to decide the defendant's fate [could] observe the demeanor of the witness[es] in making [their] statement[s], thus aiding the jury in assessing [their] credibility." *Ibid.* See also *Lee* v. *Illinois*, 476 U. S. 530, 540 (1986). In addition, the screen did not prevent appellant from seeing and hearing the girls and conferring with counsel during their testimony, did not prevent the girls from seeing and being seen by the judge and counsel, as well as by the jury, and did not prevent the jury from seeing the demeanor of the defendant while the girls testified. Finally, the girls were informed that appellant could see and hear them while they were on the stand.[2] Thus, appellant's *sole* complaint is the very narrow objection that the girls could not see him while they testified about the sexual assault they endured.

The Court describes appellant's interest in ensuring that the girls could see him while they testified as "the irreducible literal meaning of the Clause." *Ante*, at 1021. Whatever may be the significance of this characterization, in my view it is not borne out by logic or precedent. While I agree with the concurrence that "[t]here is nothing novel" in the proposition that the Confrontation Clause "'reflects a *preference*'" for the witness to be able to see the defendant, *ante*, at 1024, quoting *Ohio* v. *Roberts*, 448 U. S. 56, 63–64 (1980) (emphasis added in concurrence), I find it necessary to dis-

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that would have been imposed by a refusal to allow appellant to show that the girls could not identify him.

[2] Iowa law requires that the court "inform the child that the party can see and hear the child during testimony." Iowa Code § 910A.14(1) (1987). Although the record in this case does not contain a transcript of the court's so advising the girls, the Iowa Supreme Court noted that appellant "makes no assertion [that the] trial court failed to comply with" this or other terms of the statute. 397 N. W. 2d 730, 733 (1986). Appellant concedes this point "[f]or purposes of this appeal." Brief for Appellant 5, n. 9.

cuss my disagreement with the Court as to the place of this "preference" in the constellation of rights provided by the Confrontation Clause for two reasons. First, the minimal extent of the infringement on appellant's Confrontation Clause interests is relevant in considering whether competing public policies justify the procedures employed in this case. Second, I fear that the Court's apparent fascination with the witness' ability to see the defendant will lead the States that are attempting to adopt innovations to facilitate the testimony of child victims of sex abuse to sacrifice other, more central, confrontation interests, such as the right to cross-examination or to have the trier of fact observe the testifying witness.

The weakness of the Court's support for its characterization of appellant's claim as involving "the irreducible literal meaning of the Clause" is reflected in its reliance on literature, anecdote, and dicta from opinions that a majority of this Court did not join. The majority cites only one opinion of the Court that, in my view, possibly could be understood as ascribing substantial weight to a defendant's right to ensure that witnesses against him are able to see him while they are testifying: "Our own decisions seem to have recognized at an early date that it is this literal right to 'confront' the witness at the time of trial that forms the core of the values furthered by the Confrontation Clause." *California* v. *Green*, 399 U. S., at 157. Even that characterization, however, was immediately explained in *Green* by the quotation from *Mattox* v. *United States*, 156 U. S., at 242–243, set forth above in this opinion to the effect that the Confrontation Clause was designed to prevent the use of *ex parte* affidavits, to provide the opportunity for cross-examination, and to compel the defendant "'to stand face to face *with the jury*.'" *California* v. *Green*, 399 U. S., at 158 (emphasis added).

Whether or not "there is something deep in human nature," *ante*, at 1017, that considers critical the ability of a witness to see the defendant while the witness is testifying,

that was not a part of the common law's view of the confrontation requirement. "There never was at common law any recognized right to an indispensable thing called confrontation *as distinguished from cross-examination*" (emphasis in original). 5 J. Wigmore, Evidence § 1397, p. 158 (J. Chadbourn rev. 1974). I find Dean Wigmore's statement infinitely more persuasive than President Eisenhower's recollection of Kansas justice, see *ante*, at 1017–1018, or the words Shakespeare placed in the mouth of his Richard II concerning the best means of ascertaining the truth, see *ante*, at 1016.[3] In fact, Wigmore considered it clear "from the beginning of the hearsay rule [in the early 1700's] to the present day" that the right of confrontation is provided "not for the idle purpose of gazing upon the witness, or *of being gazed upon by him*," but, rather, to allow for cross-examination (emphasis added). 5 Wigmore § 1395, p. 150. See also *Davis* v. *Alaska*, 415 U. S. 308, 316 (1974).

Similarly, in discussing the constitutional confrontation requirement, Wigmore notes that, in addition to cross-examination—"the essential purpose of confrontation"—there is a "secondary and dispensable element[of the right:] . . . the presence of the witness before the tribunal so that his demeanor while testifying may furnish such evidence of his credibility as can be gathered therefrom. . . . [This principle] is satisfied if the *witness*, throughout the material part of his testimony, is *before the tribunal* where his demeanor can be adequately observed." (Emphasis in original.) 5 Wigmore, § 1399, p. 199. The "right" to have the witness view the defendant did not warrant mention even as part of the "sec-

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[3] Interestingly, the precise quotation from Richard II the majority uses to explain the "root meaning of confrontation," *ante*, at 1016, is discussed in 5 J. Wigmore, Evidence § 1395, p. 153, n. 2 (J. Chadbourn rev. 1974). That renowned and accepted authority describes the view of confrontation expressed by the words of Richard II as an "earlier conception, still current in [Shakespeare's] day" which, by the time the Bill of Rights was ratified, had merged "with the principle of cross-examination." *Ibid.*

ondary and dispensable" part of the Confrontation Clause protection.

That the ability of a witness to see the defendant while the witness is testifying does not constitute an essential part of the protections afforded by the Confrontation Clause is also demonstrated by the exceptions to the rule against hearsay, which allow the admission of out-of-court statements against a defendant. For example, in *Dutton* v. *Evans*, 400 U. S. 74 (1970), the Court held that the admission of an out-of-court statement of a co-conspirator did not violate the Confrontation Clause. In reaching that conclusion, the Court did not consider even worthy of mention the fact that the declarant could not see the defendant at the time he made his accusatory statement. Instead, the plurality opinion concentrated on the reliability of the statement and the effect cross-examination might have had. See *id.*, at 88–89. See also *Mattox* v. *United States*, 146 U. S. 140, 151–152 (1892) (dying declarations admissible). In fact, many hearsay statements are made outside the presence of the defendant, and thus implicate the confrontation right asserted here. Yet, as the majority seems to recognize, *ante*, at 1016, this interest has not been the focus of this Court's decisions considering the admissibility of such statements. See, *e. g.*, *California* v. *Green*, 399 U. S., at 158.

Finally, the importance of this interest to the Confrontation Clause is belied by the simple observation that, had blind witnesses testified against appellant, he could raise no serious objection to their testimony, notwithstanding the identity of that restriction on confrontation and the one here presented.[4]

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[4] The Court answers that this is "no more true than that the importance of the right to live, oral cross-examination is belied by the possibility that speech- and hearing-impaired witnesses might have testified." *Ante*, at 1019, n. 2. The Court's comparison obviously is flawed. To begin with, a deaf or mute witness who was physically incapable of being cross-examined presumably also would be unable to offer any direct testimony. More im-

B

While I therefore strongly disagree with the Court's insinuation, *ante*, at 1016, 1019–1020, that the Confrontation Clause difficulties presented by this case are more severe than others this Court has examined, I do find that the use of the screening device at issue here implicates "a preference for face-to-face confrontation at trial," embodied in the Confrontation Clause. *Ohio* v. *Roberts*, 448 U. S., at 63. This "preference," however, like all Confrontation Clause rights, "'must occasionally give way to considerations of public policy and the necessities of the case.'" *Id.*, at 64, quoting *Mattox* v. *United States*, 156 U. S., at 243. See also *Chambers* v. *Mississippi*, 410 U. S. 284, 295 (1973). The limited departure in this case from the type of "confrontation" that would normally be afforded at a criminal trial therefore is proper if it is justified by a sufficiently significant state interest.

Indisputably, the state interests behind the Iowa statute are of considerable importance. Between 1976 and 1985, the number of reported incidents of child maltreatment in the United States rose from 0.67 million to over 1.9 million, with an estimated 11.7 percent of those cases in 1985 involving allegations of sexual abuse. See American Association for Protecting Children, Highlights of Official Child Neglect and Abuse Reporting 1985, pp. 3, 18 (1987). The prosecution of these child sex-abuse cases poses substantial difficulties because of the emotional trauma frequently suffered by child witnesses who must testify about the sexual assaults they have suffered. "[T]o a child who does not understand the reason for confrontation, the anticipation and experience of being in close proximity to the defendant can be overwhelm-

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portantly, if a deaf or mute witness were completely incapable of being cross-examined (as blind witnesses are completely incapable of seeing a defendant about whom they testify), I should think a successful Confrontation Clause challenge might be brought against whatever direct testimony they did offer.

ing." D. Whitcomb, E. Shapiro, & L. Stellwagen, When the Victim is a Child: Issues for Judges and Prosecutors 17–18 (1985). Although research in this area is still in its early stages, studies of children who have testified in court indicate that such testimony is "associated with increased behavioural disturbance in children." G. Goodman et al., The Emotional Effects of Criminal Court Testimony on Child Sexual Assault Victims, in The Child Witness: Do the Courts Abuse Children?, Issues in Criminological and Legal Psychology, No. 13, pp. 46, 52 (British Psychological Society 1988). See also Avery, The Child Abuse Witness: Potential for Secondary Victimization, 7 Crim. Just. J. 1, 3–4 (1983); S. Sgroi, Handbook of Clinical Intervention in Child Sexual Abuse 133–134 (1982).

Thus, the fear and trauma associated with a child's testimony in front of the defendant have two serious identifiable consequences: They may cause psychological injury to the child, and they may so overwhelm the child as to prevent the possibility of effective testimony, thereby undermining the truth-finding function of the trial itself.[5] Because of these effects, I agree with the concurring opinion, *ante*, at 1025, that a State properly may consider the protection of child witnesses to be an important public policy. In my view, this important public policy, embodied in the Iowa statute that authorized the use of the screening device, outweighs the narrow Confrontation Clause right at issue here—the "preference" for having the defendant within the witness' sight while the witness testifies.

Appellant argues, and the Court concludes, *ante*, at 1021, that even if a societal interest can justify a restriction on a

[5] Indeed, some experts and commentators have concluded that the reliability of the testimony of child sex-abuse victims actually is enhanced by the use of protective procedures. See *State* v. *Sheppard*, 197 N. J. Super. 411, 416, 484 A. 2d 1330, 1332 (1984); Note, Parent-Child Incest: Proof at Trial Without Testimony in Court by the Victim, 15 U. Mich. J. L. Ref. 131 (1981).

child witness' ability to see the defendant while the child testifies, the State must show in each case that such a procedure is essential to protect the child's welfare. I disagree. As the many rules allowing the admission of out-of-court statements demonstrate, legislative exceptions to the Confrontation Clause of general applicability are commonplace.[6] I would not impose a different rule here by requiring the State to make a predicate showing in each case.

In concluding that the legislature may not allow a court to authorize the procedure used in this case when a 13-year-old victim of sexual abuse testifies, without first making a specific finding of necessity, the Court relies on the fact that the Iowa procedure is not "'firmly . . . rooted in our jurisprudence.'" *Ante*, at 1021, quoting *Bourjaily* v. *United States*, 483 U. S. 171, 183 (1987). Reliance on the cases employing that rationale is misplaced. The requirement that an exception to the Confrontation Clause be firmly rooted in our jurisprudence has been imposed only when the prosecution seeks to introduce an out-of-court statement, and there is a question as to the statement's *reliability*. In these circumstances, we have held: "Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness." *Ohio* v. *Roberts*, 448 U. S., at 66. See also *Bourjaily* v. *United States*, 483 U. S., at 182–183. Clearly, no such case-by-case inquiry into reliability is needed here. Because the girls testified under oath, in full view of the jury, and were subjected to unrestricted cross-

[6] For example, statements of a co-conspirator, excited utterances, and business records are all generally admissible under the Federal Rules of Evidence without case-specific inquiry into the applicability of the rationale supporting the rule that allows their admission. See Fed. Rules Evid. 801(d)(2), 803(2), 803(6). As to the first of these, and the propriety of their admission under the Confrontation Clause without any special showing, see *United States* v. *Inadi*, 475 U. S. 387 (1986), and *Bourjaily* v. *United States*, 483 U. S. 171, 181–184 (1987).

examination, there can be no argument that their testimony lacked sufficient indicia of reliability.

For these reasons, I do not believe that the procedures used in this case violated appellant's rights under the Confrontation Clause.

II

Appellant also argues that the use of the screening device was "inherently prejudicial" and therefore violated his right to due process of law. The Court does not reach this question, and my discussion of the issue will be correspondingly brief.

Questions of inherent prejudice arise when it is contended that "a procedure employed by the State involves 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). When a courtroom arrangement is challenged as inherently prejudicial, the first question is whether "an unacceptable risk is presented of impermissible factors coming into play," which might erode the presumption of innocence. *Estelle* v. *Williams*, 425 U. S. 501, 505 (1976). If a procedure is found to be inherently prejudicial, a guilty verdict will not be upheld if the procedure was not necessary to further an essential state interest. *Holbrook* v. *Flynn*, 475 U. S. 560, 568–569 (1986).

During the girls' testimony, the screening device was placed in front of the defendant. In order for the device to function properly, it was necessary to dim the normal courtroom lights and focus a panel of bright lights directly on the screen, creating, in the trial judge's words, "sort of a dramatic emphasis" and a potentially "eerie" effect. App. 11, 14. Appellant argues that the use of the device was inherently prejudicial because it indicated to the jury that appellant was guilty. I am unpersuaded by this argument.

Unlike clothing the defendant in prison garb, *Estelle* v. *Williams*, *supra*, or having the defendant shackled and gagged, *Illinois* v. *Allen*, 397 U. S. 337, 344 (1970), using

the screening device did not "brand [appellant] . . . 'with an unmistakable mark of guilt.'" See *Holbrook* v. *Flynn*, 475 U. S. at 571, quoting *Estelle* v. *Williams*, 425 U. S., at 518 (BRENNAN, J., dissenting). A screen is not the sort of trapping that generally is associated with those who have been convicted. It is therefore unlikely that the use of the screen had a subconscious effect on the jury's attitude toward appellant. See 475 U. S., at 570.

In addition, the trial court instructed the jury to draw no inference from the device:

> "It's quite obvious to the jury that there's a screen device in the courtroom. The General Assembly of Iowa recently passed a law which provides for this sort of procedure in cases involving children. Now, I would caution you now and I will caution you later that you are to draw no inference of any kind from the presence of that screen. You know, in the plainest of language, that is not evidence of the defendant's guilt, and it shouldn't be in your mind as an inference as to any guilt on his part. It's very important that you do that intellectual thing." App. 17.

Given this helpful instruction, I doubt that the jury—which we must assume to have been intelligent and capable of following instructions—drew an improper inference from the screen, and I do not see that its use was inherently prejudicial. After all, "every practice tending to single out the accused from everyone else in the courtroom [need not] be struck down." *Holbrook* v. *Flynn*, 475 U. S., at 567 (placement throughout trial of four uniformed state troopers in first row of spectators' section, behind defendant, not inherently prejudicial).

I would affirm the judgment of conviction.

Reporter's Note

The next page is purposely numbered 1201. The numbers between 1035 and 1201 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FROM JUNE 20 THROUGH SEPTEMBER 30, 1988

JUNE 20, 1988

Affirmed on Appeal

No. 87–170. COPLEY ET AL. *v.* HEIL-QUAKER CORP. ET AL. Affirmed on appeal from C. A. 6th Cir. *Bendix Autolite Corp.* v. *Midwesco Enterprises, Inc.*, 486 U. S. 888 (1988). Reported below: 818 F. 2d 866.

Appeals Dismissed

No. 87–1582. FITZGERALD *v.* MONTANA DEPARTMENT OF FAMILY SERVICES ET AL. Appeal from Sup. Ct. Mont. dismissed for want of properly presented federal question. Reported below: 228 Mont. 184, 741 P. 2d 770.

No. 87–1654. CARKULIS *v.* MONTANA ET AL. Appeal from Sup. Ct. Mont. dismissed for want of jurisdiction. Reported below: 229 Mont. 265, 746 P. 2d 604.

No. 87–1802. VETTER *v.* CITY OF BISMARCK. Appeal from Sup. Ct. N. D. dismissed for want of substantial federal question. Reported below: 417 N. W. 2d 186.

No. 87–6335. SIVLEY *v.* TEXAS. 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.

Certiorari Granted—Vacated and Remanded

No. 87–1621. UNITED STATES INTERNAL REVENUE SERVICE ET AL. *v.* LONG ET VIR. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Church of Scientology of California* v. *IRS*, 484 U. S. 9 (1987). JUSTICE KENNEDY took no part in the consideration or decision of this case. Reported below: 825 F. 2d 225.

No. 87–6760. BURR *v.* FLORIDA. Sup. Ct. Fla. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further

consideration in light of *Johnson* v. *Mississippi*, 486 U. S. 578 (1988). Reported below: 518 So. 2d 903.

Miscellaneous Orders

No. A–610. NEVILLE *v.* MOLLEN ET AL. Application for injunction, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. A–789. NEVILLE *v.* MOLLEN ET AL. C. A. 2d Cir. Application for stay and other relief, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. A–895 (87–7083). MARTINEZ *v.* UNITED STATES. C. A. 11th Cir. Application for stay, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. A–928. GRACEY *v.* DAY ET AL. Application for injunction and other relief, addressed to JUSTICE KENNEDY and referred to the Court, denied.

No. D–684. IN RE DISBARMENT OF SCHULTZ. Disbarment entered. [For earlier order herein, see 485 U. S. 973.]

No. D–702. IN RE DISBARMENT OF SIERRA. Disbarment entered. [For earlier order herein, see 485 U. S. 1002.]

No. D–705. IN RE DISBARMENT OF SEAMAN. Roger George Seaman, 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 April 25, 1988 [485 U. S. 1019], is hereby discharged.

No. D–716. IN RE DISBARMENT OF TIRELLI. It is ordered that Louis Anthony Tirelli, of Spring Valley, 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–717. IN RE DISBARMENT OF ALFIERI. It is ordered that Richard Joseph Alfieri, 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–718. IN RE DISBARMENT OF MORALES. It is ordered that Frank C. Morales, of Los Angeles, 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–719. IN RE DISBARMENT OF EZRIN. It is ordered that Herbert Stanley Ezrin, of Potomac, 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. 87–548. TRANS WORLD AIRLINES, INC. *v.* INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS. C. A. 8th Cir. [Certiorari granted, 485 U. S. 958.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 87–984. SHELL OIL CO. *v.* IOWA DEPARTMENT OF REVENUE. Sup. Ct. Iowa. [Probable jurisdiction noted, 484 U. S. 1058.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 87–1245. TEXAS MONTHLY, INC. *v.* BULLOCK, COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS, ET AL. Ct. App. Tex., 3d Dist. [Probable jurisdiction noted, 485 U. S. 958.] Motion of Magazine Publishers of America, Inc., for leave to file a brief as *amicus curiae* granted.

No. 87–1252. H. J. INC. ET AL. *v.* NORTHWESTERN BELL TELEPHONE CO. ET AL. C. A. 8th Cir. [Certiorari granted, 485 U. S. 958.] Motion of petitioners for divided argument denied.

No. 87–1661. ASARCO INC. ET AL. *v.* KADISH ET AL. Sup. Ct. Ariz. 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. 87–6814. IN RE ZUSCHLAG. Petition for writ of mandamus denied.

Certiorari Granted

No. 87–1437. BLANTON ET AL. *v.* CITY OF NORTH LAS VEGAS, NEVADA. Sup. Ct. Nev. Certiorari granted. Reported below: 103 Nev. 623, 748 P. 2d 494.

No. 87–1816. GREEN *v.* BOCK LAUNDRY MACHINE CO. C. A. 3d Cir. Certiorari granted. Reported below: 845 F. 2d 1011.

No. 87–1614. MARTIN ET AL. *v.* WILKS ET AL.;

No. 87–1639. PERSONNEL BOARD OF JEFFERSON COUNTY, ALABAMA, ET AL. *v.* WILKS ET AL.; and

No. 87–1668. ARRINGTON ET AL. *v.* WILKS ET AL. C. A. 11th Cir. Certiorari granted limited to Question 1 presented by each petition, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 833 F. 2d 1492.

No. 87–1622. BRENDALE *v.* CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION ET AL.;

No. 87–1697. WILKINSON *v.* CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION ET AL.; and

No. 87–1711. COUNTY OF YAKIMA ET AL. *v.* CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION ET AL. C. A. 9th Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 828 F. 2d 529.

Certiorari Denied. (See also No. 87–6335, *supra.*)

No. 86–1725. ONE LEAR JET AIRCRAFT, SERIAL NO. 35A–280, REGISTRATION NO. YN–BVO, ET AL. *v.* UNITED STATES; and

No. 87–1608. ONE LEAR JET AIRCRAFT, SERIAL NO. 35A–280, REGISTRATION NO. YN–BVO, ET AL. *v.* UNITED STATES. C. A. 11th Cir. Reported below: No. 86–1725, 808 F. 2d 765; No. 87–1608, 836 F. 2d 1571.

No. 87–171. COPLEY ET AL. *v.* HEIL-QUAKER CORP. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 818 F. 2d 866.

No. 87–706. LEAMAN *v.* OHIO DEPARTMENT OF MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 825 F. 2d 946.

No. 87–843. FERRARI, ADMINISTRATOR OF THE ESTATE OF FERRARI *v.* WOODSIDE RECEIVING HOSPITAL ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 827 F. 2d 769.

No. 87–846. DAVIS ET AL. *v.* OFFICIAL UNSECURED CREDITORS' COMMITTEES FOR KENDAVIS HOLDING CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 830 F. 2d 1128.

No. 87–1180. UNITED STATES *v.* BAKER ET UX. C. A. 9th Cir. Certiorari denied. Reported below: 817 F. 2d 560.

No. 87–1439. REVIE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 834 F. 2d 1198.

No. 87–1525. PACIFIC FRUIT EXPRESS AND UNION PACIFIC FRUIT EXPRESS JOINT PROTECTIVE BOARD, BROTHERHOOD RAILWAY CARMEN DIVISION, TRANSPORTATION COMMUNICATIONS INTERNATIONAL UNION *v.* UNION PACIFIC FRUIT EXPRESS CO. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 826 F. 2d 920.

No. 87–1556. NATES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 831 F. 2d 860.

No. 87–1593. NORMAN'S COUNTRY MARKET, INC., ET AL. *v.* MCLAUGHLIN, SECRETARY OF LABOR. C. A. 11th Cir. Certiorari denied. Reported below: 835 F. 2d 823.

No. 87–1599. CECIL ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 836 F. 2d 1431.

No. 87–1600. PENNINGTON ET AL. *v.* MCLAUGHLIN, SECRETARY OF LABOR. C. A. 5th Cir. Certiorari denied. Reported below: 832 F. 2d 909.

No. 87–1603. ROMANO *v.* MERRILL LYNCH, PIERCE, FENNER & SMITH ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 834 F. 2d 523.

No. 87–1657. MUSSO ET AL., TRUSTEES OF TEAMSTERS LOCAL #641 PENSION FUND *v.* BAKER, SECRETARY OF THE TREASURY, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 834 F. 2d 78.

No. 87–1669. DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS *v.* AGAN. C. A. 11th Cir. Certiorari denied. Reported below: 835 F. 2d 1337.

No. 87–1751. BENNETT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 836 F. 2d 1314.

No. 87–1758. MEYERS INDUSTRIES, INC. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 266 U. S. App. D. C. 385, 835 F. 2d 1481.

No. 87–1768. BREEDEN *v.* MUNCY, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 838 F. 2d 465.

No. 87–1771. RICHARDS *v.* NICHOLSON, PERSONAL REPRESENTATIVE OF THE ESTATE OF RICHARDS. Ct. Sp. App. Md. Certiorari denied. Reported below: 68 Md. App. 737.

No. 87–1772. SCHUYLKILL COUNTY TAX CLAIM BUREAU ET AL. *v.* TREMONT TOWNSHIP ET AL. Pa. Commw. Ct. Certiorari denied. Reported below: 104 Pa. Commw. 338, 522 A. 2d 102.

No. 87–1773. PENDER COUNTY BOARD OF EDUCATION ET AL. *v.* PIVER. C. A. 4th Cir. Certiorari denied. Reported below: 835 F. 2d 1076.

No. 87–1774. METROPOLITAN COUNTY BOARD OF EDUCATION OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, ET AL. *v.* TENNESSEE ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 836 F. 2d 986.

No. 87–1776. PERKINS *v.* EASTERN NEBRASKA HUMAN SERVICES AGENCY. C. A. 8th Cir. Certiorari denied. Reported below: 845 F. 2d 1026.

No. 87–1778. SCKOLNICK *v.* HARLOW ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 836 F. 2d 1340.

No. 87–1787. CITY OF LONG BEACH *v.* SOUTHWEST AIRCRAFT SERVICES, INC. C. A. 9th Cir. Certiorari denied. Reported below: 831 F. 2d 848.

No. 87–1792. GANOE ET AL. *v.* LUMMIS, TEMPORARY ADMINISTRATOR OF THE ESTATE OF HUGHES. C. A. 2d Cir. Certiorari denied. Reported below: 841 F. 2d 1116.

No. 87–1798. EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES *v.* MARSHALL DURBIN FOOD CORP. C. A. 11th Cir. Certiorari denied. Reported below: 834 F. 2d 949.

No. 87–1809. HOFFMAN *v.* GLIDDEN COATINGS & RESINS DIVISION OF SCM CORP. C. A. 6th Cir. Certiorari denied. Reported below: 838 F. 2d 470.

No. 87–1813. GRIFFIN *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 25 M. J. 423.

No. 87–1819. VARANESE *v.* GALL ET AL. Sup. Ct. Ohio. Certiorari denied. Reported below: 35 Ohio St. 3d 78, 518 N. E. 2d 1177.

No. 87–1822. DAVIDSON ET AL. *v.* UNITED STATES DEPARTMENT OF ENERGY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 838 F. 2d 850.

No. 87–1861. GREEN, CITY CLERK, HIGHLAND PARK, MICHIGAN, ET AL. *v.* FRANKLIN ET AL. Sup. Ct. Mich. Certiorari denied. Reported below: 429 Mich. 856.

No. 87–1874. DENSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 838 F. 2d 1212.

No. 87–1878. THORNTON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 842 F. 2d 335.

No. 87–1879. NOEL *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 2d Cir. Certiorari denied. Reported below: 838 F. 2d 1203.

No. 87–1899. QURESHI *v.* NATIONAL SAVINGS & TRUST CO. ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 266 U. S. App. D. C. 120, 833 F. 2d 370.

No. 87–1924. WILMSHURST ET AL. *v.* CHEVROLET MOTOR DIVISION, GENERAL MOTORS CORP. C. A. 9th Cir. Certiorari denied. Reported below: 835 F. 2d 1437.

No. 87–5868. MILLER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 823 F. 2d 555.

No. 87–6238. THORNE *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied.

No. 87–6356. SHABAZZ *v.* THURMAN, SUPERINTENDENT, CALIFORNIA INSTITUTION FOR MEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 833 F. 2d 149.

No. 87–6468. ZIMMERLEE *v.* MAASS, SUPERINTENDENT, OREGON STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied. Reported below: 831 F. 2d 183.

No. 87–6486. LEVERT *v.* ESTELLE, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 835 F. 2d 1435.

No. 87–6588. STEPHANY *v.* WAGNER ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 835 F. 2d 497.

No. 87–6640. BRONSON *v.* DOKNOVITCH ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 835 F. 2d 282.

No. 87–6655. SMALLS *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied.

No. 87–6680. COLLINS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 837 F. 2d 477.

No. 87–6839. KRAMER *v.* SECRETARY, UNITED STATES DEPARTMENT OF THE ARMY, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 827 F. 2d 765.

No. 87–6847. BEHRING *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 841 F. 2d 394.

No. 87–6853. WILLIAMS *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 514 Pa. 124, 522 A. 2d 1095.

No. 87–6857. WILLIAMS *v.* LANE ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 840 F. 2d 920.

No. 87–6860. WALEN *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 87–6864. SPENCER *v.* ILLINOIS. C. A. 7th Cir. Certiorari denied.

No. 87–6870. FISHER *v.* SLATE, JUDGE, MORGAN COUNTY CIRCUIT, ET AL. C. A. 11th Cir. Certiorari denied.

No. 87–6871. GLAVE *v.* KELLOGG FOUNDATION BOARD OF TRUSTEES ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 840 F. 2d 17.

No. 87–6872. BOSHELL *v.* WILSON, JUDGE, WALKER COUNTY, ET AL. C. A. 11th Cir. Certiorari denied.

No. 87–6875. TROTZ *v.* PENNSYLVANIA UNEMPLOYMENT COMPENSATION BOARD OF REVIEW. C. A. 3d Cir. Certiorari denied. Reported below: 845 F. 2d 1016.

No. 87–6876. ROBERTSON *v.* ROHR INDUSTRIES, INC. C. A. 9th Cir. Certiorari denied. Reported below: 838 F. 2d 474.

No. 87–6877. ESPARZA *v.* GLENN ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 841 F. 2d 394.

No. 87–6881. SEALS *v.* ZIMMERMAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AND DIAGNOSTIC AND CLASSIFICATION CENTER AT GRATERFORD, PENNSYLVANIA. C. A. 3d Cir. Certiorari denied. Reported below: 845 F. 2d 1015.

No. 87–6883. FOWLER *v.* NAGLE, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 837 F. 2d 1093.

No. 87–6885. WILLIAMS *v.* DISTRICT OF COLUMBIA DEPARTMENT OF EMPLOYMENT SERVICES. Ct. App. D. C. Certiorari denied.

No. 87–6887. MCFARLAND *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 161 Ill. App. 3d 163, 514 N. E. 2d 72.

No. 87–6892. ROBINSON *v.* ZIMMERMAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AND DIAGNOSTIC AND CLASSIFICATION CENTER AT GRATERFORD, PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 845 F. 2d 1014.

No. 87–6894. DORTCH ET AL. *v.* O'LEARY, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied.

No. 87–6896. ERICKSON *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 48 Wash. App. 1079.

No. 87–6912. WATERS *v.* NEUBERT ET AL. C. A. 3d Cir. Certiorari denied.

No. 87–6923. VILLARRUBIA *v.* UNITED STATES POSTAL OFFICES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 840 F. 2d 13.

No. 87–6936. GOMEZ DESIERRA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 845 F. 2d 1017.

No. 87–6946. FERNANDEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 837 F. 2d 1092.

No. 87–6959. MCGEE *v.* RANDALL DIVISION OF TEXTRON, INC., OF GRENADA, MISSISSIPPI. C. A. 5th Cir. Certiorari denied. Reported below: 837 F. 2d 1365.

No. 87–6966. KING *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 87–6968. FOSTER *v.* WELLS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 87–6969. CLINE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 833 F. 2d 1008.

No. 87–6971. ARCIDIACONO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 838 F. 2d 474.

No. 87–6976. PATTERSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 841 F. 2d 1408.

No. 87–1200. BOARD OF TRUSTEES OF ALABAMA STATE UNIVERSITY ET AL. *v.* AUBURN UNIVERSITY ET AL. C. A. 11th Cir. Motion of respondent Auburn University to strike reply brief denied. Certiorari denied. Reported below: 828 F. 2d 1532.

No. 87–1532. ARMONTROUT, WARDEN *v.* LITTLE. C. A. 8th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 835 F. 2d 1240.

No. 87–1785. MAYO CLINIC ET AL. *v.* HUGHES ET VIR. C. A. 8th Cir. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 834 F. 2d 713.

No. 87–1786. CARPENTERS 46 NORTHERN CALIFORNIA COUNTIES JOINT APPRENTICESHIP AND TRAINING COMMITTEE AND TRAINING BOARD *v.* ELDREDGE. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 833 F. 2d 1334.

No. 87–6393. FARAGA *v.* MISSISSIPPI. Sup. Ct. Miss.;

No. 87–6794. LOCKETT *v.* MISSISSIPPI (two cases). Sup. Ct. Miss.; and

No. 87–6848. LIVINGSTON *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: No. 87–6393, 514 So. 2d 295; No. 87–6794, 517 So. 2d 1317 (first case), 517 So. 2d 1346 (second case); No. 87–6848, 739 S. W. 2d 311.

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. 87–6663. GALLOP *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 838 F. 2d 105.

Rehearing Denied

No. 87–999. MCQUILLEN *v.* WISCONSIN EDUCATION ASSOCIATION COUNCIL ET AL., 485 U. S. 914;

No. 87–1457. HURLEY ET AL. *v.* WEST AMERICAN INSURANCE CO. OF OHIO CASUALTY GROUP ET AL., 485 U. S. 1001;

No. 87–6462. SELTENRICH *v.* TITUS ET AL., 485 U. S. 1022;

No. 87–6522. MESSER *v.* ZANT, WARDEN, 485 U. S. 1029;

No. 87–6523. MARCH *v.* BREWSTER ET AL., 485 U. S. 1023;

No. 87–6679. GOROD *v.* DEMONG ET AL., 485 U. S. 1037; and

No. 87–6692. BECKER *v.* WENCO FOODS/WENDY'S INTERNATIONAL INC., 486 U. S. 1013. Petitions for rehearing denied.

JUNE 23, 1988

Dismissal Under Rule 53

No. 85–1645. LUKENS STEEL CO. *v.* UNITED POLITICAL ACTION COMMITTEE ET AL. C. A. 3d Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 777 F. 2d 113.

JUNE 24, 1988

Dismissals Under Rule 53

No. 104, Orig. NEW JERSEY *v.* NEVADA ET AL. Bill of complaint dismissed under this Court's Rule 53. [For earlier order herein, see, *e. g.*, 484 U. S. 920.]

No. 87–717. FIRST FAMILY MORTGAGE CORPORATION OF FLORIDA *v.* DURHAM ET AL. Sup. Ct. N. J. [Probable jurisdiction noted, 485 U. S. 957.] Appeal dismissed under this Court's Rule 53.

Certiorari Granted. (See No. 86–1970, *ante*, at 369, n. 10.)

JUNE 27, 1988

Appeals Dismissed

No. 87–1412. DAVIDSON *v.* ILLINOIS. Appeal from App. Ct. Ill., 5th Dist., dismissed for want of substantial federal question. Reported below: 160 Ill. App. 3d 99, 514 N. E. 2d 17.

No. 87–1829. PRE-SCHOOL OWNERS ASSOCIATION OF ILLINOIS ET AL. *v.* ILLINOIS DEPARTMENT OF CHILDREN AND FAMILY SERVICES ET AL. Appeal from Sup. Ct. Ill. dismissed for want of substantial federal question. Reported below: 119 Ill. 2d 268, 518 N. E. 2d 1018.

No. 87–1812. PETITIONERS SEEKING TO INCORPORATE LIBERTY LAKES *v.* VILLAGE OF LINDENHURST ET AL. Appeal from Sup. Ct. Ill. dismissed for want of properly presented federal question. Reported below: 119 Ill. 2d 179, 518 N. E. 2d 132.

Certiorari Granted—Vacated and Remanded

No. 86–1813. COOPER ET AL. *v.* KOTARSKI. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Schweiker* v. *Chilicky*, *ante*, p. 412. Reported below: 799 F. 2d 1342.

No. 87–174. TURNER *v.* MCINTOSH ET AL. C. A. 8th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Schweiker* v. *Chilicky*, *ante*, p. 412. JUSTICE BRENNAN and JUSTICE BLACKMUN would deny certiorari. Reported below: 810 F. 2d 1411.

No. 87–382. STATE TAX COMMISSION OF THE STATE OF NEW YORK ET AL. *v.* HERZOG BROTHERS TRUCKING, INC., AKA HERZOG BROTHERS, INC., ET AL. Ct. App. N. Y. Motion of Seneca Nation of Indians for leave to file a brief as *amicus curiae* denied. Certiorari granted, judgment vacated, and case remanded for further consideration in light of proposed regulations formally published for comment by the Commissioner of Taxation and Finance of the State of New York on March 8, 1988. Reported below: 69 N. Y. 2d 536, 508 N. E. 2d 914.

No. 87–477. FERENS ET UX. *v.* DEERE & CO. C. A. 3d Cir. Certiorari granted, judgment vacated, and case remanded for fur-

ther consideration in light of *Sun Oil Co.* v. *Wortman*, 486 U. S. 717 (1988). Reported below: 819 F. 2d 423.

No. 87–682. TECHNOGRAPH LIQUIDATING TRUST *v.* GENERAL MOTORS CORP. C. A. 3d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Christianson* v. *Colt Industries Operating Corp.*, 486 U. S. 800 (1988). Reported below: 822 F. 2d 52.

No. 87–687. SESSIONS TANK LINERS, INC., DBA SOUTHWEST TANK LINERS, INC. *v.* JOOR MANUFACTURING, INC.; and

No. 87–916. JOOR MANUFACTURING, INC. *v.* SESSIONS TANK LINERS, INC., DBA SOUTHWEST TANK LINERS, INC. C. A. 9th Cir. Certiorari granted, judgment vacated, and cases remanded for further consideration in light of *Allied Tube & Conduit Corp.* v. *Indian Head, Inc.*, 486 U. S. 492 (1988). Reported below: 827 F. 2d 458.

No. 87–1522. KOONTZ ET UX., ADMINISTRATORS OF THE ESTATE OF KOONTZ *v.* INTERNATIONAL HARVESTER CO. C. A. 3d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Sun Oil Co.* v. *Wortman*, 486 U. S. 717 (1988). Reported below: 838 F. 2d 461.

No. 87–5690. LOWE *v.* ANCELLOTTI ET AL. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *West* v. *Atkins*, *ante*, p. 42. Reported below: 823 F. 2d 547.

No. 87–6582. FRANKS *v.* BAUER ET AL. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Houston* v. *Lack*, *ante*, p. 266.

Certiorari Dismissed

No. 87–937. ATTORNEY GENERAL OF NEW JERSEY *v.* FIRST FAMILY MORTGAGE CORPORATION OF FLORIDA ET AL. Sup. Ct. N. J. [Certiorari granted, 485 U. S. 957.] Writ of certiorari dismissed as moot.

Miscellaneous Orders

No. — - ——. BURNS *v.* NAVARRO, SHERIFF OF BROWARD COUNTY, FLORIDA, ET AL. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. — — ——. MOLINA *v.* UNITED STATES. Motion to direct the Clerk to file petition for writ of certiorari out of time denied. JUSTICE KENNEDY took no part in the consideration or decision of this motion.

No. — — ——. HARDWICK *v.* FLORIDA. Motion for leave to proceed *in forma pauperis* without an affidavit of indigency executed by petitioner granted.

No. A–922. TIMES MIRROR CO. ET AL. *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO (DOE, REAL PARTY IN INTEREST). Ct. App. Cal., 4th App. Dist. Application for stay, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. D–675. IN RE DISBARMENT OF PRICE. Disbarment entered. [For earlier order herein, see 485 U. S. 952.]

No. D–678. IN RE DISBARMENT OF FLUME. Disbarment entered. [For earlier order herein, see 485 U. S. 952.]

No. D–680. IN RE DISBARMENT OF MALONE. Disbarment entered. [For earlier order herein, see 485 U. S. 952.]

No. D–689. IN RE DISBARMENT OF TRILLING. Disbarment entered. [For earlier order herein, see 485 U. S. 974.]

No. D–694. IN RE DISBARMENT OF SMITH. Disbarment entered. [For earlier order herein, see 485 U. S. 985.]

No. D–698. IN RE DISBARMENT OF MCCOY. Disbarment entered. [For earlier order herein, see 485 U. S. 985.]

No. D–720. IN RE DISBARMENT OF MACGUIRE. It is ordered that William Anthony MacGuire, of Orange, Va., 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–721. IN RE DISBARMENT OF ROMAN. It is ordered that Peter Thomas Roman, of Dunedin, 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. 104, Orig. NEW JERSEY *v.* NEVADA ET AL. Motion of the Special Master for award of compensation and for reimbursement

of expenses granted, and the Special Master is awarded $6,143.65 to be paid one-half by plaintiff and one-half by defendants jointly. This case having been dismissed on stipulation pursuant to Rule 53.1 of the Rules of this Court, it is further ordered that the Special Master is hereby discharged. [For earlier order herein, see, *e. g.*, *ante*, p. 1211.]

No. 106, Orig. ILLINOIS *v.* KENTUCKY. It is ordered that the Honorable Matthew J. Jasen, retired, of Buffalo, N. Y., be appointed Special Master in place of the Honorable Robert Van Pelt, deceased.

The Special Master shall have authority to fix the time and conditions for the filing of additional pleadings and to direct subsequent proceedings, and with authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem it necessary to call for. The Special Master is directed to submit such reports as he may deem appropriate.

The compensation of the Special Master, the allowances to him, the compensation paid to his legal, technical, stenographic, and clerical assistants, the cost of printing his report, and all other proper expenses, including travel expenses, shall be charged against and be borne by the parties in such proportion as the Court may hereafter direct. [For earlier order herein, see, *e. g.*, 486 U. S. 1052.]

No. 113, Orig. MISSISSIPPI *v.* UNITED STATES. It is ordered that the Honorable Walter P. Armstrong, Jr., of Memphis, Tenn., be appointed Special Master.

The Special Master shall have authority to fix the time and conditions for the filing of additional pleadings and to direct subsequent proceedings, and with authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem it necessary to call for. The Special Master is directed to submit such reports as he may deem appropriate.

The compensation of the Special Master, the allowances to him, the compensation paid to his legal, technical, stenographic, and clerical assistants, the cost of printing his report, and all other proper expenses, including travel expenses, shall be charged against and be borne by the parties in such proportion as the Court may hereafter direct.

No. 86–1940. SHEET METAL WORKERS' INTERNATIONAL ASSN. ET AL. *v.* LYNN. C. A. 9th Cir. [Certiorari granted, 485 U. S. 958.] Motion of respondent to dismiss writ of certiorari as im-

providently granted denied. JUSTICE KENNEDY took no part in the consideration or decision of this motion.

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, 485 U. S. 958.] Motions of American Civil Liberties Union Children's Rights Project et al. and Massachusetts Committee for Children and Youth for leave to file briefs as *amici curiae* granted.

No. 87–271. HARBISON-WALKER REFRACTORIES, A DIVISION OF DRESSER INDUSTRIES, INC. *v.* BRIECK. C. A. 3d Cir. [Certiorari granted, 485 U. S. 958.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 87–1469. HORNSBY, ADJUTANT GENERAL OF THE ALABAMA NATIONAL GUARD, ET AL. *v.* STINSON. C. A. 11th Cir.; and

No. 87–1796. MASSINGA ET AL. *v.* L. J. ET AL. C. A. 4th Cir. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 87–7028. MISTRETTA *v.* UNITED STATES; and

No. 87–1904. UNITED STATES *v.* MISTRETTA. C. A. 8th Cir. [Certiorari granted, 486 U. S. 1054.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 87–6958. RUTHERFORD *v.* SECURITIES AND EXCHANGE COMMISSION. Appeal from C. A. 9th Cir. Motion of appellant for leave to proceed *in forma pauperis* denied. Appellant is allowed until July 18, 1988, within which to pay the docketing fee required by Rule 45(a) and to submit a statement as to jurisdiction 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 dismiss the appeal for want of jurisdiction and, treating the papers whereon the appeal was taken as a petition for writ of certiorari, deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 87–1950. IN RE CHEEK. Petition for writ of prohibition denied.

Probable Jurisdiction Noted

No. 87–201. MANSELL *v.* MANSELL. Appeal from Ct. App. Cal., 5th App. Dist. Probable jurisdiction noted.

No. 87–1020. DAVIS *v.* MICHIGAN DEPARTMENT OF THE TREASURY. Appeal from Ct. App. Mich. Probable jurisdiction noted. Reported below: 160 Mich. App. 98, 408 N. W. 2d 433.

No. 87–1821. MODJESKI & MASTERS *v.* CARTER ET AL. Appeal from Sup. Ct. La. Probable jurisdiction noted. Reported below: 519 So. 2d 133.

Certiorari Granted. (See also No. 87–168, *ante*, at 479.)

No. 87–248. BROWER, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF CALDWELL (BROWER), ET AL. *v.* COUNTY OF INYO ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 817 F. 2d 540.

No. 87–1485. BLANCHARD *v.* BERGERON ET AL. C. A. 5th Cir. Certiorari granted. Reported below: 831 F. 2d 563.

No. 87–1905. MIDLAND ASPHALT CORP. ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari granted. Reported below: 840 F. 2d 1040.

No. 87–1703. ROBERTSON, CHIEF OF THE FOREST SERVICE, ET AL. *v.* METHOW VALLEY CITIZENS COUNCIL ET AL.; and

No. 87–1704. MARSH, SECRETARY OF THE ARMY, ET AL. *v.* OREGON NATURAL RESOURCES COUNCIL ET AL. C. A. 9th Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: No. 87–1703, 833 F. 2d 810; No. 87–1704, 832 F. 2d 1489.

No. 87–1815. KENTUCKY DEPARTMENT OF CORRECTIONS ET AL. *v.* THOMPSON ET AL. C. A. 6th Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 833 F. 2d 614.

Certiorari Denied

No. 85–6825. ANDERSON *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 463 So. 2d 276.

No. 87–377. MCINTOSH ET AL. *v.* CARLUCCI, SECRETARY OF DEFENSE, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 810 F. 2d 1411.

No. 87–517. COE ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 826 F. 2d 1166.

No. 87–551. MELGUIZO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 824 F. 2d 370.

No. 87–1068. OKLAHOMA TAX COMMISSION *v.* MUSCOGEE (CREEK) NATION ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 829 F. 2d 967.

No. 87–1152. PUBLIC UTILITIES COMMISSION OF HAWAII ET AL. *v.* HAWAIIAN TELEPHONE CO. C. A. 9th Cir. Certiorari denied. Reported below: 827 F. 2d 1264.

No. 87–1183. CELOTEX CORP. ET AL. *v.* GOAD. C. A. 4th Cir. Certiorari denied. Reported below: 831 F. 2d 508.

No. 87–1509. HODDER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 828 F. 2d 23.

No. 87–1541. MAJOR, ADMINISTRATOR OF THE ESTATE OF SPRADLIN, ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 835 F. 2d 641.

No. 87–1566. GUINAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 836 F. 2d 350.

No. 87–1667. BELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 831 F. 2d 292.

No. 87–1761. AMERICAN PRESIDENT LINES, LTD. *v.* ZACHRY-DILLINGHAM. Ct. App. Tex., 4th Dist. Certiorari denied. Reported below: 739 S. W. 2d 420.

No. 87–1764. ALIMEG, INC. *v.* SHLIM ET AL. Ct. App. Ore. Certiorari denied. Reported below: 87 Ore. App. 178, 742 P. 2d 54.

No. 87–1801. ROBLES *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 510 N. E. 2d 660.

No. 87–1810. WARREN ET AL. *v.* HALSTEAD INDUSTRIES, INC. C. A. 4th Cir. Certiorari denied. Reported below: 835 F. 2d 535.

No. 87–1817. FERREIRA ET AL. *v.* BRUCE'S SPLICING & RIGGING CO., INC. C. A. Fed. Cir. Certiorari denied. Reported below: 837 F. 2d 1097.

No. 87–1823. MEN'S INTERNATIONAL PROFESSIONAL TENNIS COUNCIL ET AL. *v.* VOLVO NORTH AMERICA CORP. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 839 F. 2d 69.

No. 87–1824. SKRIPICK *v.* OHIO. Ct. App. Ohio, Lucas County. Certiorari denied.

No. 87–1825. WASTE MANAGEMENT OF WISCONSIN, INC. *v.* WISCONSIN DEPARTMENT OF NATURAL RESOURCES. Ct. App. Wis. Certiorari denied. Reported below: 142 Wis. 2d 944, 419 N. W. 2d 573.

No. 87–1826. SMITH *v.* ROLEWICK, ADMINISTRATOR, ILLINOIS ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION. Sup. Ct. Ill. Certiorari denied.

No. 87–1828. ANDREWS ET AL. *v.* ADAMS ET AL. Sup. Ct. Ark. Certiorari denied. Reported below: 294 Ark. 160, 741 S. W. 2d 257.

No. 87–1832. DONNELLS *v.* WOODRIDGE POLICE PENSION BOARD ET AL. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 159 Ill. App. 3d 735, 512 N. E. 2d 1082.

No. 87–1833. FLORIDA *v.* SLAPPY. Sup. Ct. Fla. Certiorari denied. Reported below: 522 So. 2d 18.

No. 87–1849. GALLOWAY FARMS, INC. *v.* PHOENIX MUTUAL LIFE INSURANCE CO. Sup. Ct. Iowa. Certiorari denied. Reported below: 415 N. W. 2d 640.

No. 87–1880. KELLY *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 519 So. 2d 1384.

No. 87–1937. CARL MARKS & CO. INC. ET AL. *v.* UNION OF SOVIET SOCIALIST REPUBLICS. C. A. 2d Cir. Certiorari denied. Reported below: 841 F. 2d 26.

No. 87–6584. DAVIS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 835 F. 2d 274.

No. 87–6623. MAKER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 838 F. 2d 463.

No. 87–6638. COOKUS *v.* SALAZAR, ADMINISTRATOR, ARIZONA STATE PRISON COMPLEX AT FLORENCE. C. A. 9th Cir. Certiorari denied. Reported below: 838 F. 2d 473.

No. 87–6811. SMEGO *v.* UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA. C. A. 3d Cir. Certiorari denied.

No. 87–6824. PRINCE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 87–6863. TROTZ, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF TROTZ *v.* LAWRUK ET AL., T/A PENN ALTO HOTEL. C. A. 3d Cir. Certiorari denied. Reported below: 845 F. 2d 1016.

No. 87–6879. ANDERSON *v.* LOVE, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 837 F. 2d 475.

No. 87–6880. NUNEZ *v.* SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 9th Cir. Certiorari denied.

No. 87–6893. SAUNDERS *v.* CASTLE, GOVERNOR OF DELAWARE, ET AL. Sup. Ct. Del. Certiorari denied. Reported below: 540 A. 2d 1089.

No. 87–6900. PERKINS *v.* CLARKE, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 838 F. 2d 294.

No. 87–6903. MARTIN *v.* SHANK ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 838 F. 2d 1210.

No. 87–6909. BATTLE *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 322 N. C. 69, 366 S. E. 2d 454.

No. 87–6910. ABDUL-MATIYN *v.* HENDERSON, SUPERINTENDENT, AUBURN CORRECTIONAL FACILITY, ET AL.; and ABDUL-MATIYN *v.* NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 841 F. 2d 31 (first case); 847 F. 2d 835 (second case).

No. 87–6916. BELT *v.* UTAH. Sup. Ct. Utah. Certiorari denied. Reported below: 748 P. 2d 1091.

No. 87–6917. MARCUS *v.* COUGHLIN, COMMISSIONER, NEW YORK DEPARTMENT OF CORRECTIONAL SERVICES. C. A. 2d Cir. Certiorari denied.

No. 87–6918. BURY *v.* CITY OF LAKELAND, FLORIDA, ET AL. C. A. 11th Cir. Certiorari denied.

No. 87–6919. HARRIS *v.* THIERET, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 87–6920. WELCH *v.* BUTLER, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 835 F. 2d 92.

No. 87–6921. FULLER *v.* HARRIS, GOVERNOR OF GEORGIA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 842 F. 2d 338.

No. 87–6922. AGNES, AKA MARTIN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 838 F. 2d 463.

No. 87–6924. JACKSON *v.* CUYAHOGA COUNTY WELFARE DEPARTMENT ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 843 F. 2d 1393.

No. 87–6928. JOHNSON *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 366 Pa. Super. 639, 526 A. 2d 1233.

No. 87–6930. TERRY *v.* JABE, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 840 F. 2d 18.

No. 87–6932. MABERY *v.* JOHNSON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 842 F. 2d 1291.

No. 87–6933. WILLIAMS *v.* PLANNED PARENTHOOD ASSOCIATION OF THE ATLANTA AREA, INC., ET AL. C. A. 11th Cir. Certiorari denied.

No. 87–6934. ZANOS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 822 F. 2d 54.

No. 87–6938. GILLESPIE, PERSONAL REPRESENTATIVE OF THE ESTATE OF GILLESPIE *v.* CHERRY CREEK NATIONAL BANK. C. A. 10th Cir. Certiorari denied.

No. 87–6944. BRAKKE ET UX. *v.* FEDERAL LAND BANK OF ST. PAUL ET AL. Sup. Ct. N. D. Certiorari denied. Reported below: 417 N. W. 2d 380.

No. 87–6953. MOTTON *v.* THE JACKSON SUN. C. A. 6th Cir. Certiorari denied. Reported below: 840 F. 2d 17.

No. 87–6955. RAINE *v.* HENMAN, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 87–6957. SVEE *v.* DUNN COUNTY, WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 142 Wis. 2d 942, 419 N. W. 2d 360.

No. 87–6963. GRAVES *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 836 F. 2d 1342.

No. 87–6965. CONOVER *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied.

No. 87–6985. BUTLER *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 87–6992. COMAS-BARRAZA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 841 F. 2d 397.

No. 87–7000. PROCTOR *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 838 F. 2d 1210.

No. 87–7008. MCGHEE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 838 F. 2d 1220.

No. 87–7010. MILBURN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 836 F. 2d 419.

No. 87–7014. ALVARADO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 838 F. 2d 311.

No. 87–7015. KESSLER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 87–7019. ALI-KHAN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 835 F. 2d 749.

No. 87–7021. FARBER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 843 F. 2d 735.

No. 87–7022. MUZA *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 87–7029. ROY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 843 F. 2d 305.

No. 87–7037. HEARN *v.* CITY OF HOUSTON. C. A. 5th Cir. Certiorari denied. Reported below: 836 F. 2d 1344.

No. 87–7038. KINSEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 843 F. 2d 383.

No. 87–7040. HUMPHREY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 87–7041. ALLEN *v.* MOORE ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 831 F. 2d 1057.

No. 87–7044. RIVERA-LOPEZ *v.* UNITED STATES; and
No. 87–7074. JIMENEZ-RIVERA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 842 F. 2d 545.

No. 87–7045. GALLO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 812 F. 2d 1409.

No. 87–7080. NORRIS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 837 F. 2d 476.

No. 87–7083. JACOBS ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 839 F. 2d 1461.

No. 87–7087. PARHAM *v.* WILLIAMS. Cir. Ct. Va., Dinwiddie County. Certiorari denied.

No. 86–1442. DOE *v.* WEBSTER, DIRECTOR OF CENTRAL INTELLIGENCE. C. A. D. C. Cir. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant certiorari. Reported below: 254 U. S. App. D. C. 282, 796 F. 2d 1508.

No. 87–348. PHILLIPS PETROLEUM CO. *v.* SHUTTS ET AL. Sup. Ct. Kan. Petition for writ of certiorari and mandamus denied. Reported below: 240 Kan. 764, 732 P. 2d 1286.

No. 87–1481. MORREL ET AL. *v.* TRINITY BROADCASTING CORP. C. A. 10th Cir. Certiorari denied. JUSTICE WHITE and JUSTICE KENNEDY would grant certiorari. Reported below: 827 F. 2d 673.

No. 87–1605. SCHOOL BOARD OF PARISH OF LIVINGSTON, LOUISIANA, ET AL. *v.* LOUISIANA STATE BOARD OF ELEMENTARY AND SECONDARY EDUCATION ET AL. C. A. 5th Cir. Certiorari denied. JUSTICE MARSHALL would grant certiorari. Reported below: 830 F. 2d 563.

No. 87-1643. SPANGLER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 838 F. 2d 85.

JUSTICE WHITE, dissenting.

Petitioner was charged with several counts of extortion. At trial, he testified in his own behalf and presented several witnesses who testified in support of his character and reputation. He requested that the jury be instructed that evidence of good reputation, even standing alone, may be sufficient to create a reasonable doubt about whether the defendant is guilty of the charges. Instead, the jury was instructed to consider such character evidence along with all the other evidence presented in the case to determine whether the prosecution had proved beyond a reasonable doubt that the defendant committed the particular crimes charged. The jury convicted petitioner, and the Third Circuit affirmed, holding that the trial judge did not abuse his discretion by refusing to give the requested instruction. 838 F. 2d 85 (1988).

The decision below adds to the considerable disagreement that has arisen in the Courts of Appeals about whether and when it is proper for the judge to give the "standing alone" instruction to the jury. Some courts have held that such an instruction is never necessary and often, if not always, is improper because it actually misleads the jury. See, *e. g.*, *United States* v. *Burke*, 781 F. 2d 1234, 1238–1242 (CA7 1985); *United States* v. *Winter*, 663 F. 2d 1120, 1146–1149 (CA1 1981); *Black* v. *United States*, 309 F. 2d 331, 343–344 (CA8 1962), cert. denied, 372 U. S. 934 (1963). Other courts have disagreed with this view, stating that at least in certain kinds of cases, if not always, a defendant is entitled to have the jury be instructed that reputation evidence in and of itself can create a reasonable doubt as to guilt. See, *e. g.*, *United States* v. *Lewis*, 157 U. S. App. D. C. 43, 48, 482 F. 2d 632, 637 (1973); *United States* v. *Cramer*, 447 F. 2d 210, 219 (CA2 1971), cert. denied, 404 U. S. 1024 (1972). In addition, many of the pattern jury instructions that have been used by District Courts around the country have included some kind of "standing alone" instruction. See, *e. g.*, *Burke*, *supra*, at 1238; *United States* v. *Callahan*, 588 F. 2d 1078, 1086, n. 1. (CA5 1979). This confusion can be traced directly to statements made by this Court in *Edgington* v. *United States*, 164 U. S. 361, 366 (1896), and in *Michelson* v. *United States*, 335 U. S. 469, 476 (1948). I would

grant certiorari to resolve the longstanding division in the courts on this point.

No. 87–1757. REED *v.* COLLYER, GENERAL COUNSEL, NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. Reported below: 837 F. 2d 1091.

JUSTICE SCALIA, dissenting.

This is a suit against the General Counsel of the National Labor Relations Board, alleging that in dismissing unfair labor practice charges filed by petitioner she violated petitioner's due process and equal protection rights under the Fifth Amendment. The District Court, in an unpublished opinion, dismissed the suit on the ground that the General Counsel's decision to dismiss was not subject to judicial review. The United States Court of Appeals for the Sixth Circuit, also in an unpublished opinion, affirmed. Judgt. order reported at 837 F. 2d 1091 (1988).

While this petition for certiorari was pending, this Court decided *Webster* v. *Doe*, 486 U. S. 592 (1988), applying for the first time the principle that Congress' intent to preclude judicial review of "constitutional claims" must be expressed with greater clarity than its intent to preclude judicial review of other claims. *Id.*, at 603–604. The statute that *Webster* found insufficiently clear for that purpose pertained to the Central Intelligence Agency, and provided that "[n]otwithstanding . . . the provisions of any other law, the Director of Central Intelligence may, in his discretion, terminate the employment of any officer or employee of the Agency whenever he shall deem such termination necessary or advisable in the interests of the United States." 50 U. S. C. § 403(c). The statute at issue in the present case pertains to the NLRB, and provides that the General Counsel "shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 160 of this title, and in respect of the prosecution of such complaints before the Board . . . ." 29 U. S. C. § 153(d). The present case, involving constitutional claims, is unquestionably a prime candidate for application of the new principle we adopted in *Webster*. While the area of administrative activity to which the suit pertains (enforcement discretion) is one in which agencies have traditionally been accorded broad insulation from judicial review, see *Heckler* v. *Chaney*, 470 U. S. 821 (1985), so was the area of managing the Nation's intelligence services at issue in *Webster*. And the

text of the statute in *Webster* was much more suggestive of total unreviewability.

Petitioner has filed a supplemental brief persuasively arguing that *Webster* supports his position. Our denial of his petition is a puzzling departure from our standard practice of *remanding* (without opinion) pending cases whose outcome could well be affected by a decision we have promulgated after the judgment below. See R. Stern, E. Gressman, & S. Shapiro, Supreme Court Practice § 5.12, p. 279 (6th ed. 1986). If we adhere to the rationale of *Webster*, we should certainly grant this petition for certiorari, vacate the judgment of the Sixth Circuit, and remand this case for reconsideration in light of *Webster*. It was my view that the rationale of *Webster* was wrong, because it did not square with the outcome of perfectly commonplace and perfectly correct decisions such as that of the Sixth Circuit here. See 486 U. S., p. 606 (SCALIA, J., dissenting). I would grant certiorari in this case in order to begin the necessary process of limiting *Webster* to its facts.

No. 87–1799. NOBEL SCIENTIFIC INDUSTRIES, INC. *v.* BECKMAN INSTRUMENTS, INC. C. A. 4th Cir. Motion of Competitive Americas Project for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 831 F. 2d 537.

No. 87–6573. LEWIS *v.* MODULAR QUARTERS ET AL. Ct. App. La., 3d Cir. Certiorari denied. Reported below: 508 So. 2d 975.

JUSTICE WHITE, with whom JUSTICE BLACKMUN joins, dissenting.

This case presents the question whether an injured worker who is receiving benefits under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U. S. C. § 901 *et seq.*, may be barred by a state-law immunity available to "statutory employers" from asserting a tort claim against a contractor for whom his immediate employer was performing work at the time of the injury.

Respondent Universal Fabricators, Inc. (Unifab), hired petitioner's employer, 4-D Corrosion Control, to perform painting and sandblasting work at Unifab's shipyard. Petitioner was injured while setting up sandblasting equipment at the shipyard in the course of his employment with 4-D Corrosion Control. Petitioner began receiving LHWCA benefits on account of his injury.

He subsequently filed a tort suit against Unifab and others in Louisiana state court.

The trial court granted summary judgment in favor of Unifab, and the Louisiana Court of Appeal affirmed. 508 So. 2d 975 (1987). The Court of Appeal rejected petitioner's contention that, when a worker who is receiving LHWCA benefits seeks to recover in tort from those allegedly responsible for his injury, the LHWCA pre-empts any "statutory employer" immunity to which the defendants might otherwise be entitled under state law. The court could discern in the language and legislative history of the LHWCA "no intent by Congress to negate the available defenses provided by state law to third-party claims brought pursuant to state law." *Id.*, at 982. Accordingly, because petitioner's suit against Unifab was based on state law rather than federal law, the suit was held to be barred by the "statutory employer" immunity available to Unifab under the Louisiana Worker's Compensation Law, La. Rev. Stat. Ann. §§ 23:1032, 23:1061 (West 1985). The Louisiana Supreme Court, with two justices dissenting, denied discretionary review. 514 So. 2d 127 (1987).

The decision below is consistent with the decision of the Court of Appeals for the Fourth Circuit in *Garvin* v. *Alumax of South Carolina, Inc.*, 787 F. 2d 910, 916–918, cert. denied, 479 U. S. 914 (1986), but inconsistent with the decisions of the Court of Appeals for the Fifth Circuit in *Gates* v. *Shell Oil*, 812 F. 2d 1509, 1513–1514 (1987), and *Martin* v. *Ingalls Shipbuilding*, 746 F. 2d 231 (1984) *(per curiam)*.

Appellate courts having major concern with maritime law are thus in conflict over the pre-emptive scope of the LHWCA. For this reason, I would grant certiorari.

No. 87–6731. MONTOYA *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 744 S. W. 2d 15.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentence in this case.

No. 87–6964. BROOKS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. JUSTICE KENNEDY took no part in the con-

sideration or decision of this case. Reported below: 841 F. 2d 268.

Rehearing Denied

No. 87–1027. REster *v.* TEXAS, 484 U. S. 1052;

No. 87–1250. BICOY *v.* HAWAII, 485 U. S. 962;

No. 87–1503. SHIPPS *v.* STOUGHTON POLICE DEPARTMENT ET AL., 485 U. S. 1017;

No. 87–1526. CHRISTENSEN *v.* UTAH STATE TAX COMMISSION, 485 U. S. 1030;

No. 87–1679. RIVERA *v.* FRANK, POSTMASTER GENERAL OF THE UNITED STATES, ET AL., 486 U. S. 1009;

No. 87–6287. BROWN *v.* LOUISIANA, 486 U. S. 1017;

No. 87–6521. QUALMAN *v.* UNITED STATES ET AL., 486 U. S. 1024;

No. 87–6616. IN RE MARTIN, 486 U. S. 1004;

No. 87–6622. IN RE MARTIN, 486 U. S. 1004; and

No. 87–6648. MAY *v.* WARNER AMEX CABLE COMMUNICATIONS ET AL., 486 U. S. 1011. Petitions for rehearing denied.

JUNE 30, 1988

Appeals Dismissed

No. 87–1750. IRR *v.* KENTUCKY. Appeal from Ct. App. Ky. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 87–1884. KING *v.* KAPLAN 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 1128.

No. 87–1866. EAVES ET AL. *v.* HARRIS, GOVERNOR OF GEORGIA, ET AL. Appeal from Sup. Ct. Ga. dismissed for want of substantial federal question. Reported below: 258 Ga. 1, 364 S. E. 2d 854.

No. 87–6363. CASTILLO *v.* TEXAS. Appeal from Ct. Crim. App. Tex. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 739 S. W. 2d 280.

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.

Certiorari Granted—Vacated and Remanded

No. 85–516. DUBOSE ET AL. *v.* PIERCE, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL. C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Pierce* v. *Underwood*, *ante*, p. 552. Reported below: 761 F. 2d 913.

No. 86–1055. PRICE ET AL. *v.* INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, ET AL. C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Communications Workers* v. *Beck*, *ante*, p. 735. Reported below: 795 F. 2d 1128.

No. 86–1343. TAFOYA *v.* NEW MEXICO. Ct. App. N. M. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Coy* v. *Iowa*, *ante*, p. 1012. JUSTICE BLACKMUN would deny the petition. Reported below: 105 N. M. 117, 729 P. 2d 1371.

No. 86–1661. BATTLES FARM CO. ET AL. *v.* PIERCE, SECRETARY OF HOUSING AND URBAN DEVELOPMENT. C. A. D. C. Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Pierce* v. *Underwood*, *ante*, p. 552. Reported below: 257 U. S. App. D. C. 6, 806 F. 2d 1098.

No. 87–251. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* RUSSELL. C. A. 3d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Pierce* v. *Underwood*, *ante*, p. 552. Reported below: 814 F. 2d 148.

No. 87–893. EMANUEL *v.* MARSH, SECRETARY OF THE ARMY, ET AL. C. A. 8th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Watson* v. *Fort Worth Bank & Trust*, *ante*, p. 977. Reported below: 828 F. 2d 438.

No. 87–6129. JONES *v.* MISSISSIPPI. Sup. Ct. Miss. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Thompson* v. *Oklahoma*, *ante*, p. 815, and *Maynard* v. *Cartwright*, 486 U. S. 356 (1988). Reported below: 517 So. 2d 1295.

No. 87–6135. POWELL *v.* TEXAS. Ct. Crim. App. Tex. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Satterwhite* v. *Texas*, 486 U. S. 249 (1988). Reported below: 742 S. W. 2d 353.

No. 87–6190. CONLEY *v.* WISCONSIN. Ct. App. Wis. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Coy* v. *Iowa*, *ante*, p. 1012. Reported below: 141 Wis. 2d 384, 416 N. W. 2d 69.

No. 87–6639. BOWIE *v.* CALIFORNIA. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Houston* v. *Lack*, *ante*, p. 266.

Miscellaneous Orders

No. — – ——. MINCEY *v.* SUPERINTENDENT, ARIZONA STATE PRISON. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. A–900. WINSLOW ET AL. *v.* WILLIAMS ET AL. Application for injunction and other relief, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. A–930. MCDONALD *v.* METROPOLITAN GOVERNMENT, ACTING BY AND THROUGH THE TAXICAB AND WRECKER LICENSING BOARD. Chan. Ct., Davidson County, Tenn. Application for stay and other relief, addressed to JUSTICE KENNEDY and referred to the Court, denied.

No. A–974. DETROIT FREE PRESS ET AL. *v.* WAYNE CIRCUIT JUDGE. Application for injunction and other relief, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. D–704. IN RE DISBARMENT OF PACIONE. Disbarment entered. [For earlier order herein, see 485 U. S. 1019.]

No. D–706. IN RE DISBARMENT OF PURVIS. Disbarment entered. [For earlier order herein, see 485 U. S. 1033.]

No. 108, Orig. NEBRASKA *v.* WYOMING ET AL. Motion of the Special Master for award of interim compensation and for reimbursement of expenses granted, and the Special Master is awarded $101,129.97 to be paid one-half by Nebraska and one-half by Wyoming. [For earlier order herein, see, *e. g.*, 485 U. S. 931.]

No. 112, Orig. WYOMING *v.* OKLAHOMA. Motions of Wyoming Mining Association and Alabama Power Co. for leave to file briefs as *amici curiae* granted. Motion for leave to file bill of complaint granted. Defendant is allowed 60 days within which to file an answer.

No. 87–107. PATTERSON *v.* McLEAN CREDIT UNION. C. A. 4th Cir. [Certiorari granted, 484 U. S. 814.] Motion of American Jewish Congress et al. for leave to file a brief as *amici curiae* out of time granted.

No. 87–796. CITIES SERVICE GAS CO. ET AL. *v.* MOBIL OIL CORP. ET AL. C. A. 10th Cir. Motion of the parties to defer consideration of the petition for writ of certiorari granted.

No. 87–1346. BONITO BOATS, INC. *v.* THUNDER CRAFT BOATS, INC. Sup. Ct. Fla. [Certiorari granted, 486 U. S. 1004.] Charles Lipsey, Esq., of Washington, D. C., is invited to brief and argue this case in support of the judgment below as *amicus curiae*.

No. 87–1589. PITTSBURGH & LAKE ERIE RAILROAD CO. *v.* RAILWAY LABOR EXECUTIVES' ASSN. ET AL. C. A. 3d Cir.; and

No. 87–1888. PITTSBURGH & LAKE ERIE RAILROAD CO. *v.* RAILWAY LABOR EXECUTIVES' ASSN. ET AL. C. A. 3d Cir. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 87–7028. MISTRETTA *v.* UNITED STATES; and

No. 87–1904. UNITED STATES *v.* MISTRETTA. C. A. 8th Cir. [Certiorari granted, 486 U. S. 1054.] Motion of the Solicitor General for divided argument to permit the United States Sentencing Commission to participate in oral argument as *amicus curiae* and for additional time for oral argument granted, and 20 additional

minutes are allotted for that purpose to be divided as follows: Mistretta, 40 minutes; the Solicitor General, 25 minutes; and the United States Sentencing Commission, 15 minutes.

No. 87–1911. RAILWAY LABOR EXECUTIVES' ASSN. ET AL. *v.* GUILFORD TRANSPORTATION INDUSTRIES, INC., ET AL. C. A. 1st Cir. Motion of petitioners to expedite consideration of the petition for writ of certiorari denied.

No. 87–2049. RAILWAY LABOR EXECUTIVES' ASSN. ET AL. *v.* CHICAGO & NORTH WESTERN TRANSPORTATION CO. ET AL. C. A. 8th Cir. Motion of petitioners to expedite consideration of the petition for writ of certiorari denied.

No. 87–6980. VENTURI *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until July 21, 1988, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 87–7128. IN RE MAHDI. Petition for writ of habeas corpus denied.

Probable Jurisdiction Noted

No. 87–1224. ORING *v.* STATE BAR OF CALIFORNIA. Appeal from Sup. Ct. Cal. Probable jurisdiction noted.

Certiorari Granted

No. 87–1939. BARNARD, CHAIRMAN OF THE COMMITTEE OF BAR EXAMINERS OF THE VIRGIN ISLANDS *v.* THORSTENN ET AL.; and

No. 87–2008. VIRGIN ISLANDS BAR ASSN. *v.* THORSTENN ET AL. C. A. 3d Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 842 F. 2d 1393.

No. 87–1387. WARDS COVE PACKING CO., INC., ET AL. *v.* ATONIO ET AL. C. A. 9th Cir. Certiorari granted limited to

Questions 1, 2, and 3 presented by the petition. Reported below: 827 F. 2d 439.

No. 87–5666. HIGH *v.* ZANT, WARDEN. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Question 1 presented by the petition and case set for oral argument in tandem with No. 87–6026, *Wilkins* v. *Missouri*, immediately *infra*. Reported below: 819 F. 2d 988.

No. 87–6026. WILKINS *v.* MISSOURI. Sup. Ct. Mo. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Question 1 presented by the petition and case set for oral argument in tandem with No. 87–5666, *High* v. *Zant, Warden*, immediately *supra*. Reported below: 736 S. W. 2d 409.

No. 87–6177. PENRY *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Questions 1 and 2 presented by the petition. Reported below: 832 F. 2d 915.

Certiorari Denied. (See also Nos. 87–1750, 87–1884, and 87–6363, *supra*.)

No. 85–1529. GRUMMAN AEROSPACE CORP. *v.* SHAW. C. A. 11th Cir. Certiorari denied. Reported below: 778 F. 2d 736.

No. 86–379. DOWD ET AL. *v.* TEXTRON, INC., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 792 F. 2d 409.

No. 86–674. TOZER ET AL. *v.* LTV CORP. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 792 F. 2d 403.

No. 86–678. SILVESTRI *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 787 F. 2d 736.

No. 86–966. BECK ET AL. *v.* COMMUNICATIONS WORKERS OF AMERICA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 776 F. 2d 1187 and 800 F. 2d 1280.

No. 86–1386. SALGADO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 807 F. 2d 603.

No. 86–1573. CONNER AIR LINES, INC. *v.* FEDERAL AVIATION ADMINISTRATION. C. A. 11th Cir. Certiorari denied.

No. 86–2013. WHITEHORN, AKA MORRISON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 813 F. 2d 646.

No. 86–6712. VAN ORSOW *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 811 F. 2d 1509.

No. 86–7065. TACKETT *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 150 Ill. App. 3d 406, 501 N. E. 2d 891.

No. 87–372. AMOCO PRODUCTION CO. *v.* HODEL, SECRETARY OF THE INTERIOR, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 815 F. 2d 352.

No. 87–436. LOMBARDI ET AL. *v.* DOW CHEMICAL CO. ET AL.; and

No. 87–620. KRUPKIN ET AL. *v.* DOW CHEMICAL CO. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: No. 87–436, 818 F. 2d 187; No. 87–620, 818 F. 2d 179.

No. 87–593. MAINE *v.* EVENTS INTERNATIONAL, INC., ET AL. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 528 A. 2d 458.

No. 87–1124. BYRD *v.* OHIO. Ct. App. Ohio, Warren County. Certiorari denied.

No. 87–1498. ROBBINS ET AL. *v.* EASTER ENTERPRISES, INC., DBA ACE LINES, INC. C. A. 8th Cir. Certiorari denied. Reported below: 828 F. 2d 1348.

No. 87–1499. ANDERSON ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 829 F. 2d 1121.

No. 87–1505. FLAVEL *v.* OREGON. Ct. App. Ore. Certiorari denied. Reported below: 84 Ore. App. 742, 735 P. 2d 380.

No. 87–1516. FRANK, POSTMASTER GENERAL OF THE UNITED STATES POSTAL SERVICE *v.* SHIDAKER. C. A. 7th Cir. Certiorari denied. Reported below: 833 F. 2d 627.

No. 87–1547. CALIFORNIA TEAMSTERS PUBLIC, PROFESSIONAL & MEDICAL EMPLOYEES UNION LOCAL 911, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA *v.* GHEBRESELASSIE. C. A. 9th Cir. Certiorari denied. Reported below: 829 F. 2d 892.

No. 87–1569. PIMENTEL ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 841 F. 2d 1117.

No. 87–1607. SILVERSTEIN ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 835 F. 2d 1439.

No. 87–1609. GRIFFIN & BRAND OF MCALLEN, INC., ET AL. *v.* REYES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 814 F. 2d 168.

No. 87–1642. CABLEVISION CO. *v.* MOTION PICTURE ASSOCIATION OF AMERICA, INC., ET AL.; and

No. 87–1814. NATIONAL CABLE TELEVISION ASSN., INC. *v.* COLUMBIA PICTURES INDUSTRIES, INC., ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 266 U. S. App. D. C. 435, 836 F. 2d 599.

No. 87–1676. SAUL ET AL., CO-EXECUTORS OF THE ESTATE OF SAUL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 835 F. 2d 1439.

No. 87–1685. SHELL OIL CO. *v.* CITY OF SANTA MONICA; and

No. 87–1841. CITY OF SANTA MONICA *v.* SHELL OIL CO. C. A. 9th Cir. Certiorari denied. Reported below: 830 F. 2d 1052.

No. 87–1715. HALE *v.* MCLAUGHLIN, SECRETARY OF LABOR, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 830 F. 2d 196.

No. 87–1733. SAMPSON ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. Reported below: 829 F. 2d 39.

No. 87–1735. FISHMAN ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied. Reported below: 837 F. 2d 309.

No. 87–1795. RAINBOW TOURS, INC., DBA RAINBOW COACHES *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. Reported below: 835 F. 2d 1436.

No. 87–1803. UNITED STATES FIDELITY & GUARANTY CO. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 837 F. 2d 116.

No. 87–1834. PEARSON *v.* LOUISIANA. Ct. App. La., 2d Cir. Certiorari denied. Reported below: 513 So. 2d 459.

No. 87–1843. KOLENBERG *v.* BOARD OF EDUCATION OF STAMFORD, CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 206 Conn. 113, 536 A. 2d 577.

No. 87–1846. LAMBERT GRAVEL CO., INC. *v.* J. A. JONES CONSTRUCTION CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 835 F. 2d 1105.

No. 87–1851. DAVIS PACIFIC CORP. *v.* VENTURA COUNTY FLOOD CONTROL DISTRICT. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 87–1856. RAMSEY ASSOCIATES, INC., ET AL. *v.* COTY ET AL. Sup. Ct. Vt. Certiorari denied. Reported below: 149 Vt. 451, 546 A. 2d 196.

No. 87–1857. DRUMMER *v.* NOEL ET AL. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 520 So. 2d 587.

No. 87–1859. AIR TRANSPORT ASSOCIATION OF AMERICA ET AL. *v.* PUBLIC UTILITIES COMMISSION OF CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 833 F. 2d 200.

No. 87–1863. COMPLIANCE MARINE, INC. *v.* CAMPBELL, TRUSTEE. C. A. 4th Cir. Certiorari denied. Reported below: 839 F. 2d 203.

No. 87–1871. CAVE *v.* PITTSBURGH CORNING CORP. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 843 F. 2d 1386.

No. 87–1872. ROSENSTEIN ET AL. *v.* UNITED STATES;
No. 87–6673. NIGO-MARTINEZ ET AL. *v.* UNITED STATES; and
No. 87–6808. WILSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 841 F. 2d 1300.

No. 87–1875. LEE *v.* ALBEMARLE COUNTY, VIRGINIA, SCHOOL BOARD ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 829 F. 2d 1120.

No. 87–1881. WICKSTROM, BY WICKSTROM ET AL., CONSERVATORS OF THE PERSON AND ESTATE OF WICKSTROM *v.* MAPLEWOOD TOYOTA, INC., ET AL. Ct. App. Minn. Certiorari denied. Reported below: 416 N. W. 2d 838.

No. 87–1887. SHELLEY *v.* CITY OF LOS ANGELES. C. A. 9th Cir. Certiorari denied. Reported below: 835 F. 2d 1436.

No. 87–1913. RESHARD *v.* BURNLEY, SECRETARY, UNITED STATES DEPARTMENT OF TRANSPORTATION. C. A. D. C. Cir. Certiorari denied.

No. 87–1952. VANLANDINGHAM *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. Reported below: 836 F. 2d 1343.

No. 87–1982. AVERY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 837 F. 2d 482.

No. 87–1993. ROBINSON *v.* VIRGINIA STATE BAR EX REL. THIRD DISTRICT COMMITTEE. Sup. Ct. Va. Certiorari denied.

No. 87–1996. AYARS ET UX. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 845 F. 2d 1009.

No. 87–1998. FERNANDEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 841 F. 2d 1546.

No. 87–1999. PFLUGER ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied. Reported below: 840 F. 2d 1379.

No. 87–2005. HENRY *v.* MROSAK ET UX. Ct. App. Minn. Certiorari denied. Reported below: 415 N. W. 2d 98.

No. 87–5940. WHITEHORN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 829 F. 2d 1225.

No. 87–6615. RILEY *v.* SMITH. C. A. 6th Cir. Certiorari denied. Reported below: 836 F. 2d 550.

No. 87–6625. TRACY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 87–6651. REID *v.* MISSOURI. Ct. App. Mo., Western Dist. Certiorari denied. Reported below: 741 S. W. 2d 716.

No. 87–6667. LEACH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 833 F. 2d 1017.

No. 87–6754. ALLEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 831 F. 2d 1487.

No. 87–6837. SPENCER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 839 F. 2d 1341.

No. 87–6850. GREENE *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 266 U. S. App. D. C. 220, 834 F. 2d 1067.

No. 87–6861. RUSH *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 840 F. 2d 574.

No. 87–6884. FELTON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 845 F. 2d 1028.

No. 87–6890. REIDT *v.* UNITED STATES; and
No. 87–6945. GEURIN *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied.

No. 87–6898. JUSTICE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 835 F. 2d 1310.

No. 87–6937. ROBINSON *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied. Reported below: 835 F. 2d 1271.

No. 87–6951. RACHALS *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 258 Ga. 48, 364 S. E. 2d 867.

No. 87–6960. RAUSER *v.* FREEMAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AND DIAGNOSTIC AND CLASSIFICATION CENTER AT CAMP HILL, PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari denied.

No. 87–6961. STRICKLAND *v.* LANE, DIRECTOR, ILLINOIS DEPARTMENT OF CORRECTIONS. C. A. 7th Cir. Certiorari denied.

No. 87–6967. CORTEZ *v.* HOKE, SUPERINTENDENT, EASTERN NEW YORK CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 841 F. 2d 1116.

No. 87–6970. JACKSON *v.* CLEVELAND STATE UNIVERSITY. C. A. 6th Cir. Certiorari denied. Reported below: 841 F. 2d 1127.

No. 87–6972. HICKS *v.* LOFFREDO ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 842 F. 2d 1287.

No. 87–6973. DANIELS *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 71 Md. App. 729.

No. 87–6975. SEBASTIAN-ANDRES *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 87–6988. CLOYD, AKA FRANCIS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 840 F. 2d 574.

No. 87–6990. GORMAN *v.* JONES, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 87–6991. FINCH *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 842 F. 2d 201.

No. 87–6999. BEALS *v.* BENNETT, SHERIFF, ET AL. C. A. 10th Cir. Certiorari denied.

No. 87–7007. MAY *v.* BERTELSMAN; and MAY *v.* COURT OF APPEALS, FIRST APPELLATE DISTRICT OF OHIO, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 848 F. 2d 192.

No. 87–7017. FLORES ET AL. *v.* MUNICIPALITY OF CAROLINA. Super. Ct. P. R. Certiorari denied.

No. 87–7030. MOBLEY *v.* WHITFIELD. C. A. D. C. Cir. Certiorari denied.

No. 87–7032. COLON *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 71 N. Y. 2d 410, 521 N. E. 2d 1075.

No. 87–7046. SCHROEDER *v.* OREGON ET AL. Ct. App. Ore. Certiorari denied. Reported below: 87 Ore. App. 210, 741 P. 2d 937.

No. 87–7064. DAVIS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 845 F. 2d 1028.

No. 87–7073. BROWN *v.* MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 838 F. 2d 465.

No. 87–7090. ARRINGTON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 87–7091. CADAVID-GOMEZ *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 845 F. 2d 1017.

No. 87–7104. SANCHEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 847 F. 2d 836.

No. 87–7106. TOWNS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 842 F. 2d 740.

No. 87–7113. GITTLEMAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 845 F. 2d 1017.

No. 87–7130. TURNER *v.* SULLIVAN, WARDEN. C. A. 2d Cir. Certiorari denied. Reported below: 842 F. 2d 1288.

No. 87–7133. THORNBERG *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 844 F. 2d 573.

No. 87–7155. MATHEWS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 87–1302. GUSHIKEN ET AL. *v.* FUJIKAWA. C. A. 9th Cir. Certiorari denied. JUSTICE WHITE and JUSTICE O'CONNOR would grant certiorari. Reported below: 823 F. 2d 1341.

No. 87–1497. EASTER ENTERPRISES, INC., DBA ACE LINES, INC. *v.* ROBBINS ET AL. C. A. 8th Cir. Certiorari denied. JUSTICE BRENNAN, JUSTICE WHITE, and JUSTICE KENNEDY would grant certiorari. Reported below: 828 F. 2d 1348.

No. 87–1693. KNIES *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 837 F. 2d 1404.

No. 87–1712. DOE ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 836 F. 2d 1468.

No. 87–1701. DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS *v.* FOSTER. Sup. Ct. Fla. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 518 So. 2d 901.

No. 87–1756. SUNDQUIST *v.* CHASTAIN. C. A. D. C. Cir. Certiorari denied. JUSTICE WHITE, JUSTICE BLACKMUN, and JUSTICE O'CONNOR would grant certiorari. Reported below: 266 U. S. App. D. C. 61, 833 F. 2d 311.

No. 87–5418. HOUSEL *v.* GEORGIA. Sup. Ct. Ga.;
No. 87–5876. CORDOVA *v.* TEXAS. Ct. Crim. App. Tex.;

No. 87–6137. FOSTER *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir.;

No. 87–6381. BARRIENTES *v.* TEXAS. Ct. Crim. App. Tex.;

No. 87–6436. KING *v.* FLORIDA. Sup. Ct. Fla.;

No. 87–6873. ARANDA *v.* TEXAS. Ct. Crim. App. Tex.;

No. 87–6886. JACKSON *v.* TEXAS. Ct. Crim. App. Tex.; and

No. 87–7255. ROSALES *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: No. 87–5418, 257 Ga. 115, 355 S. E. 2d 651; No. 87–5876, 733 S. W. 2d 175; No. 87–6137, 823 F. 2d 402; No. 87–6381, 752 S. W. 2d 524; No. 87–6436, 514 So. 2d 354; No. 87–6873, 736 S. W. 2d 702; No. 87–6886, 745 S. W. 2d 4; No. 87–7255, 748 S. W. 2d 451.

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. 87–6437. BAKER *v.* PIGGOTT. C. A. 11th Cir. Certiorari denied. JUSTICE BLACKMUN would grant certiorari. Reported below: 833 F. 2d 1539.

No. 87–6977. NICKS *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 521 So. 2d 1035.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

I continue to believe 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). But even if I did not hold this view, I would grant the petition for writ of certiorari and vacate the death sentence in this case, because the sentence was secured in flagrant violation of our decision in *Caldwell* v. *Mississippi*, 472 U. S. 320 (1985).

In *Caldwell* we vacated a sentence of death because the prosecutor "sought to minimize the jury's sense of the importance of its role" by stressing to the jury that its verdict would be subject to appellate review. *Id.*, at 325. The prosecutor told the jury during the sentencing phase that "your decision is not the final de-

cision. . . . Your job is reviewable." *Ibid.* We held that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Id.*, at 328–329.

Petitioner's sentence of death cannot be squared with our decision in *Caldwell*. The prosecutor in this case made the following argument to the jury at the penalty phase of petitioner's trial:

> "The opinion, which you will come to a conclusion when you go back and deliberate—Let me say this, it will be only an advisory opinion. The law provides for you to present this to the Court for their consideration. The ultimate decisions *[sic]* rests with Judge Reynolds. He will be the one to take whatever ruling that you send out and decide whether it will be life without parole or death by electrocution in the electric chair." Pet. for Cert. 3.

This argument, perhaps even more baldly than the statements in *Caldwell*, sought to minimize the jury's sense of its awesome responsibility to determine whether petitioner would live or die by encouraging the jury to view its verdict as merely "advisory." This shifting of the jury's sense of responsibility to another decisionmaker, as we explained at length in *Caldwell*, undermines the reliability of the jury's decision and conditions the jury to return the death penalty. See 472 U. S., at 330–333.

That the prosecutor in this case told the jury that the trial judge would make the ultimate decision, whereas the prosecutor in *Caldwell* identified the appellate court as the ultimate decisionmaker, is a distinction without a difference. *Caldwell* makes plain that a death penalty cannot stand where the jury is led to believe that the defendant's life rests in some other hands. The constitutional infirmity here is thus no different from that in *Caldwell*, and the sentence of death no less intolerable. I therefore would grant the petition and reverse the judgment of the Supreme Court of Alabama to the extent it sustains the imposition of the death penalty.

No. 87–7185. BYRNE *v.* BUTLER, WARDEN. C. A. 5th Cir. Certiorari denied. JUSTICE BRENNAN and JUSTICE BLACKMUN would dismiss the petition for writ of certiorari as moot. Reported below: 845 F. 2d 501.

Rehearing Denied

No. 87–4. WHEAT *v.* UNITED STATES, 486 U. S. 153;

No. 87–1692. MAROTTA *v.* UNITED STATES, 486 U. S. 1009;

No. 87–5946. JOHNSON *v.* ARTIM TRANSPORTATION SYSTEM, INC., ET AL., 486 U. S. 1023;

No. 87–6189. ERICKSON *v.* ILLINOIS, 486 U. S. 1017;

No. 87–6331. FINNEY *v.* TEXAS, 486 U. S. 1010;

No. 87–6490. FABBRI *v.* SHERATON PLAZA LA REINA HOTEL, 486 U. S. 1024;

No. 87–6491. PAVLICO *v.* UNITED STATES, 486 U. S. 1034;

No. 87–6598. PHILLIPPE *v.* SHAPELL INDUSTRIES, INC., 486 U. S. 1011;

No. 87–6612. WILLIAMS *v.* YORK STEAK HOUSE ET AL., 486 U. S. 1044;

No. 87–6613. SWIFT *v.* LEWIS, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, 486 U. S. 1029;

No. 87–6621. BILDER *v.* CITY OF AKRON, OHIO, 486 U. S. 1011;

No. 87–6627. FRAZIER *v.* GEORGIA, 486 U. S. 1017;

No. 87–6650. WATSON *v.* JARVIS, SHERIFF, DEKALB COUNTY, GEORGIA, 486 U. S. 1034;

No. 87–6659. VAN STRATEN *v.* KEENE ET AL., 486 U. S. 1012;

No. 87–6715. SELTZER *v.* OFFICE OF PERSONNEL MANAGEMENT, 486 U. S. 1024;

No. 87–6776. MCGOVERN *v.* UNITED STATES, 486 U. S. 1014;

No. 87–6790. IN RE MARTIN, 486 U. S. 1041;

No. 87–6834. FIELDS *v.* STEINBRENNER ET AL., 486 U. S. 1058; and

No. 87–6843. JOHNSON *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, 486 U. S. 1045. Petitions for rehearing denied.

No. 86–1145. PATRICK *v.* BURGET ET AL., 486 U. S. 94. Petition for rehearing denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition.

No. 87–391. CHASER SHIPPING CORP. ET AL. *v.* UNITED STATES, 484 U. S. 1004. Motion for leave to file petition for rehearing denied. JUSTICE KENNEDY took no part in the consideration or decision of this motion.

No. 87–1202. HUTTER NORTHERN TRUST ET AL. *v.* CITY OF CHICAGO ET AL., 485 U. S. 936. Motion for leave to file petition for rehearing denied.

JULY 11, 1988

Dismissal Under Rule 53

No. 87–1957. ALLEN-SHERMAN-HOFF CO., INC., ET AL. *v.* HARDY. C. A. 3d Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 841 F. 2d 1118.

JULY 28, 1988

Certiorari Denied

No. 88–5174 (A–84). MESSER *v.* ZANT, WARDEN. 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 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, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231–241 (1976) (MARSHALL, J., dissenting), I would grant the application for stay and the petition for writ of certiorari and would vacate the death sentence in this case.

But even if I did not hold these views, I would grant the stay and vacate petitioner's death sentence for the reasons I expressed in *Messer* v. *Kemp*, 474 U. S. 1088 (1986) (dissent from denial of certiorari). Petitioner has clearly met the standard that this Court set in *Strickland* v. *Washington*, 466 U. S. 668 (1984), for establishing ineffective assistance of counsel during the sentencing phase of his trial.

AUGUST 2, 1988

Dismissal Under Rule 53

No. 87–2095. CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD CO. *v.* WILSON. C. A. 7th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 841 F. 2d 1347.

AUGUST 3, 1988

Miscellaneous Order

No. 87–796. CITIES SERVICE GAS CO. ET AL. *v.* MOBIL OIL CORP. ET AL. C. A. 10th Cir. Joint application to vacate the stay entered on June 13, 1988 [486 U. S. 1051], presented to JUSTICE WHITE, and by him referred to the Court, granted only to the limited extent that this Court's order of June 13, 1988, granting the motion for recall and stay of the mandate of the United States Court of Appeals for the Tenth Circuit in this case pending this Court's action on the petition for certiorari, shall be modified in the following respect: The United States Court of Appeals for the Tenth Circuit is authorized to remand the case to the United States District Court for the District of Kansas for the sole purpose of determining whether the settlement should be approved. The District Court is authorized only to carry out the necessary proceedings to determine whether the settlement should be approved, and either to disapprove the settlement or to enter the appropriate orders disposing of the case if the settlement is approved. If the settlement is disapproved, then this Court's order of June 13, 1988, remains in effect without further modification. This Court's order of June 30, 1988 [*ante*, p. 1231], granting the motion to defer consideration of the petition for certiorari in this case, remains in effect without modification.

AUGUST 4, 1988

Rehearing Denied

No. — – ——. MOLINA *v.* UNITED STATES, *ante*, p. 1214;

No. 87–1122. CROWLEY MARITIME CORP. ET AL. *v.* ZIPFEL ET AL., 486 U. S. 1054;

No. 87–1391. HALLIBURTON CO. ET AL. *v.* ZIPFEL ET AL., 486 U. S. 1054;

No. 87–1251. IN RE SOWELL, 484 U. S. 1057;

No. 87–1492. SPIEGEL *v.* CONTINENTAL ILLINOIS NATIONAL BANK & TRUST COMPANY OF CHICAGO ET AL., 485 U. S. 1009;

No. 87–1523. MORRIS *v.* COMPAGNIE MARITIME DES CHARGEURS REUNIS, S. A., ET AL., 485 U. S. 1022;

No. 87–1582. FITZGERALD *v.* MONTANA DEPARTMENT OF FAMILY SERVICES ET AL., *ante*, p. 1201;

No. 87–1601. BELL, INDIVIDUALLY AND DBA WES OUTDOOR ADVERTISING CO. *v.* NEW JERSEY ET AL., 486 U. S. 1001;

No. 87–1694. ROSE *v.* TEXAS, 486 U. S. 1055;

No. 87–1820. HYSLEP ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE, 486 U. S. 1044;

No. 87–5425. ROBERTS *v.* ROBERTS, 485 U. S. 963;

No. 87–6008. FISHER *v.* OKLAHOMA, 486 U. S. 1061;

No. 87–6096. KYLES *v.* LOUISIANA, 486 U. S. 1027;

No. 87–6196. GARDNER *v.* NORTH CAROLINA, 486 U. S. 1061;

No. 87–6365. KNOX *v.* TEXAS, 486 U. S. 1061;

No. 87–6486. LEVERT *v.* ESTELLE, WARDEN, ET AL., *ante*, p. 1207;

No. 87–6746. MIRANDA *v.* CALIFORNIA, 486 U. S. 1038;

No. 87–6816. MAY *v.* PRO-GUARD, INC., 486 U. S. 1045;

No. 87–6817. WILLIAMS *v.* PLANNED PARENTHOOD FEDERATION OF AMERICA ET AL., 486 U. S. 1047;

No. 87–6863. TROTZ, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF TROTZ *v.* LAWRUK ET AL., T/A PENN ALTO HOTEL, *ante*, p. 1220;

No. 87–6864. SPENCER *v.* ILLINOIS, *ante*, p. 1208;

No. 87–6875. TROTZ *v.* PENNSYLVANIA UNEMPLOYMENT COMPENSATION BOARD OF REVIEW, *ante*, p. 1208;

No. 87–6905. FOSTER *v.* ILLINOIS, 486 U. S. 1047;

No. 87–6912. WATERS *v.* NEUBERT ET AL., *ante*, p. 1209;

No. 87–6926. JOHNSON *v.* ILLINOIS, 486 U. S. 1047;

No. 87–6959. MCGEE *v.* RANDALL DIVISION OF TEXTRON, INC., OF GRENADA, MISSISSIPPI, *ante*, p. 1209; and

No. 87–7017. FLORES ET AL. *v.* MUNICIPALITY OF CAROLINA, *ante*, p. 1239. Petitions for rehearing denied.

No. 87–1520. WILEY *v.* MISSISSIPPI, 486 U. S. 1036. Motion of petitioner for leave to proceed further herein *in forma pauperis* granted. Petition for rehearing denied.

No. 87–1780. BURT *v.* JUSTICES OF THE SUPREME COURT OF IDAHO ET AL., 486 U. S. 1061. Petition for rehearing denied. JUSTICE KENNEDY took no part in the consideration or decision of this petition.

No. 87–6447. THACKER *v.* BUMGARNER, SUPERINTENDENT, NORTH CAROLINA SOUTHERN CORRECTIONAL CENTER, 485 U. S. 1011. Motion for leave to file petition for rehearing denied.

No. 87–6752. GAUNCE *v.* UNITED STATES; GAUNCE *v.* DEVINCENTIS ET AL.; and GAUNCE *v.* NATIONAL TRANSPORTATION

SAFETY BOARD ET AL., 486 U. S. 1039. Motion for leave to file petition for rehearing denied. JUSTICE KENNEDY took no part in the consideration or decision of this motion.

AUGUST 9, 1988

Dismissal Under Rule 53

No. 87–1790. AMERICAN MANAGEMENT & AMUSEMENT, INC. *v.* BARONA GROUP OF THE CAPITAN GRANDE BAND OF MISSION INDIANS. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 840 F. 2d 1394.

AUGUST 23, 1988

Certiorari Denied

No. 88–236 (A–120). MONROE *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. Certiorari denied. Reported below: 853 F. 2d 924.

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 application for stay and the petition for writ of certiorari and would 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, *Gregg* v. *Georgia*, 428 U. S. 153, 231–241 (1976) (MARSHALL, J., dissenting), I would grant the application for stay and the petition for writ of certiorari and would vacate the death sentence in this case.

But even if I did not hold these views, I would grant the stay and vacate petitioner's death sentence for the reasons I expressed in *Monroe* v. *Butler*, 485 U. S. 1024, 1024–1028 (1988) (dissent from denial of certiorari). After petitioner was convicted, state officials became aware of, but suppressed, information strongly suggesting that petitioner did not commit the crime for which he was found guilty. Petitioner has, however, neither been released

nor received a new trial. Because petitioner has received woefully inadequate relief to vindicate the State's violation of his constitutional rights under *Brady* v. *Maryland*, 373 U. S. 83 (1963), I would stay his death sentence.

AUGUST 25, 1988

Miscellaneous Orders

No. D–677. IN RE DISBARMENT OF BELMONT. Disbarment entered. [For earlier order herein, see 485 U. S. 952.]

No. D–701. IN RE DISBARMENT OF MEROS. Disbarment entered. [For earlier order herein, see 485 U. S. 1002.]

No. D–703. IN RE DISBARMENT OF GUSSOW. Disbarment entered. [For earlier order herein, see 485 U. S. 1019.]

No. D–707. IN RE DISBARMENT OF BLECHER. Disbarment entered. [For earlier order herein, see 486 U. S. 1003.]

No. D–708. IN RE DISBARMENT OF LEWIS. Disbarment entered. [For earlier order herein, see 486 U. S. 1003.]

No. D–709. IN RE DISBARMENT OF KANTOR. Disbarment entered. [For earlier order herein, see 486 U. S. 1030.]

No. D–713. IN RE DISBARMENT OF FOOTE. Disbarment entered. [For earlier order herein, see 486 U. S. 1041.]

No. D–716. IN RE DISBARMENT OF TIRELLI. Disbarment entered. [For earlier order herein, see *ante*, p. 1202.]

No. D–722. IN RE DISBARMENT OF DOHERTY. It is ordered that Jerome J. Doherty, of Seattle, Wash., 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–723. IN RE DISBARMENT OF STARK. It is ordered that William C. Stark, of Chicago, Ill., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–724. IN RE DISBARMENT OF STORTS. It is ordered that Brick P. Storts III, of Tucson, Ariz., be suspended from the

practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–725. IN RE DISBARMENT OF PAUL. It is ordered that Jerome Paul, 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–726. IN RE DISBARMENT OF CHOWANIEC. It is ordered that Chester L. Chowaniec, of Oak Lawn, 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–727. IN RE DISBARMENT OF BLUMTHAL. It is ordered that William J. Blumthal, of Libertyville, 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–728. IN RE DISBARMENT OF LORENZ. It is ordered that Gary Richard Lorenz, of Louisville, Ky., 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–729. IN RE DISBARMENT OF BONGIORNO. It is ordered that Peter T. Bongiorno, of Paterson, 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–730. IN RE DISBARMENT OF SWOFFORD. It is ordered that Herbert Reginald Swofford, of Orlando, 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–731. IN RE DISBARMENT OF CLAYTON. It is ordered that William Norris Clayton, of Houston, 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.

Rehearing Denied

No. 85–1529. GRUMMAN AEROSPACE CORP. *v.* SHAW, *ante*, p. 1233;

No. 86–379. DOWD ET AL. *v.* TEXTRON, INC., ET AL., *ante*, p. 1233;

No. 86–5309. ROSS *v.* OKLAHOMA, *ante*, p. 81;

No. 87–171. COPLEY ET AL. *v.* HEIL-QUAKER CORP. ET AL., *ante*, p. 1204;

No. 87–377. MCINTOSH ET AL. *v.* CARLUCCI, SECRETARY OF DEFENSE, ET AL., *ante*, p. 1217;

No. 87–1509. HODDER *v.* UNITED STATES, *ante*, p. 1218;

No. 87–1563. MATT *v.* LAROCCA, COMMISSIONER, NEW YORK STATE DEPARTMENT OF TRANSPORTATION, 486 U. S. 1007;

No. 87–1826. SMITH *v.* ROLEWICK, ADMINISTRATOR, ILLINOIS ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION, *ante*, p. 1219;

No. 87–1913. RESHARD *v.* BURNLEY, SECRETARY, UNITED STATES DEPARTMENT OF TRANSPORTATION, *ante*, p. 1237;

No. 87–1993. ROBINSON *v.* VIRGINIA STATE BAR EX REL. THIRD DISTRICT COMMITTEE, *ante*, p. 1237;

No. 87–1996. AYARS ET UX. *v.* UNITED STATES, *ante*, p. 1237;

No. 87–5418. HOUSEL *v.* GEORGIA, *ante*, p. 1240;

No. 87–6573. LEWIS *v.* MODULAR QUARTERS ET AL., *ante*, p. 1226;

No. 87–6760. BURR *v.* FLORIDA, *ante*, p. 1201;

No. 87–6794. LOCKETT *v.* MISSISSIPPI (two cases), *ante*, p. 1210;

No. 87–6922. AGNES, AKA MARTIN *v.* UNITED STATES, *ante*, p. 1221;

No. 87–6975. SEBASTIAN-ANDRES *v.* UNITED STATES, *ante*, p. 1239; and

No. 87–7022. MUZA *v.* UNITED STATES, *ante*, p. 1222. Petitions for rehearing denied.

No. 87–1792. GANOE ET AL. *v.* LUMMIS, TEMPORARY ADMINISTRATOR OF THE ESTATE OF HUGHES, *ante*, p. 1206; and

No. 87–6527. JONES *v.* ST. LOUIS-SAN FRANCISCO RAILWAY, 486 U. S. 1010. Motions for leave to file petitions for rehearing denied.

AUGUST 26, 1988

Dismissal Under Rule 53

No. 87–7346. VASQUEZ *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari dismissed under this Court's Rule 53.

SEPTEMBER 1, 1988

Miscellaneous Order

No. A–172. SPALLONE *v.* UNITED STATES ET AL.;
No. A–173. LONGO ET AL. *v.* UNITED STATES ET AL.;
No. A–174. CHEMA *v.* UNITED STATES ET AL.; and
No. A–175. CITY OF YONKERS *v.* UNITED STATES ET AL. C. A. 2d Cir. Applications for stay of Henry G. Spallone, Nicholas Longo, Edward Fagan, and Peter Chema, presented to JUSTICE MARSHALL, and by him referred to the Court, granted pending the timely filing and disposition by this Court of petitions for writs of certiorari. Application for stay of city of Yonkers, presented to JUSTICE MARSHALL, and by him referred to the Court, denied.

JUSTICE MARSHALL, joined by JUSTICE BRENNAN, concurring in the denial of stay in No. A–175, and dissenting from the grant of stay in Nos. A–172, A–173, and A–174.

On August 26, 1988, the Court of Appeals for the Second Circuit upheld both the District Court's determination that the city of Yonkers and four members of its city council were in contempt of court and its imposition of sanctions for their failure to abide by a consent decree committing the city to implement a housing desegregation plan. 856 F. 2d 444. The Court of Appeals stayed issuance of its mandate until September 2, to permit application for a stay of the contempt sanctions pending filing and consideration of petitions for writs of certiorari. The city of Yonkers and the four councilmembers have sought such a stay. Today the Court denies a stay as to the city but grants it as to the four councilmembers. I believe that the Court should deny the stay as to the councilmembers as well.

I

In 1980, the United States filed suit against the city of Yonkers, claiming it had intentionally perpetuated and aggravated residential racial segregation in violation of the Constitution and Title

VIII of the Civil Rights Act of 1968, 82 Stat. 81, 42 U. S. C. §§ 3601–3619, and had intentionally segregated its schools in violation of the Constitution. The National Association for the Advancement of Colored People (NAACP) was accorded plaintiff-intervenor status. In 1985, the District Court held the city liable for intentional housing and school segregation, *United States* v. *Yonkers Board of Education*, 624 F. Supp. 1276 (SDNY 1985), finding, *inter alia*, that the city had deliberately concentrated virtually all of its public and subsidized housing in southwest Yonkers in order to maintain residential segregation. The District Court issued a Housing Remedy Order which directed the city to establish a fair housing policy, to construct 200 units of public housing, and to plan additional units of subsidized housing. The Court of Appeals for the Second Circuit affirmed both the liability and remedy rulings, *United States* v. *Yonkers Board of Education*, 837 F. 2d 1181 (1987), and the Court denied the city's petition for a writ of certiorari. 486 U. S. 1055 (1988).

On November 15, 1986, the city informed the District Court that it would not comply with the Housing Remedy Order. The United States and the NAACP moved for an adjudication of civil contempt and the imposition of coercive sanctions, but the District Court instead sought voluntary compliance with its earlier order. After negotiations, the city council—the city's sole governing authority—agreed to appoint an outside housing adviser to identify sites for the 200 units of public housing and to draft a long-term plan for subsidized housing. Over a year passed. On January 28, 1988, the parties entered into a consent decree, approved by the District Court, which set a new timetable for the construction of the 200 public housing units. The city pledged that it would not seek further review of the Housing Remedy Order or any subsequently entered decree relating to these 200 units. In addition, the city agreed that the construction of 800 units of subsidized housing was an appropriate remedy and pledged to make good-faith efforts to build the additional 600 units within the next three years. Section 17 of the consent decree obligated the city "to adopt . . . legislation" necessary to meet the goal of 800 units, including tax abatements, zoning changes, and, within 90 days, a package of incentives for local development. Section 18 provided for further negotiations and the submission of a draft of a second consent decree setting forth long-range plans for subsidized hous-

ing by February 15, 1988. The council approved the consent decree by a vote of 5 to 2.

Within two months, the city demonstrated its unwillingness to comply with the consent decree by moving unsuccessfully to delete the provision in which it promised not to seek further review of its obligation to build the 200 units, and by offering to return approximately $30 million in federal funds in the event this Court set aside the public housing provisions of the Housing Remedy Order. On April 12, 1988, the city announced that it was "not interested" in completing negotiations on the long-term plan for subsidized housing as required by § 18 of the consent decree. Following a hearing on June 13, the District Court entered a Long Term Plan Order outlining the legislation that the city had committed itself to adopt in § 17 of the consent decree. The order was based on a draft prepared by the city's lawyers during earlier negotiations and accommodated most of the city's objections.

The next day, June 14, 1988, the council adopted a resolution declaring a moratorium on all public housing construction in Yonkers. A week later, on June 21, the city announced that it had retained a consulting firm to draft housing legislation, and that the next council meeting was tentatively scheduled for August. The District Court, expressing concern about delay, asked the council to pass a resolution adopting the provisions of the Long Term Plan Order. On June 28, the council voted down a resolution indicating its commitment to implementing the Housing Remedy Order, the consent decree, and the Long Term Plan Order. The following day, the District Court directed the plaintiffs to submit an order requiring the city to take "specific implementing action" under a prescribed timetable on penalty of a contempt adjudication and imposition of fines. At a hearing held to consider the proposed order, the city stated that it would not voluntarily comply with the Long Term Plan Order and urged the court to enter an order adopting the necessary legislation. The city also objected to the creation of an Affordable Housing Commission to exercise the council's responsibilities for implementing the District Court's orders and the consent decree. The city argued that such a commission would impermissibly interfere with the council's "core legislative as well as executive functions."

On July 26, 1988, the District Court ordered the city to enact by August 1 "the legislative package relating to the long-term plan as described in Section 17 of the [consent decree] and the Long Term

Plan Order." This "legislative package" was set forth in a detailed Affordable Housing Ordinance drafted by the city's consultants. The July 26 order warned that if the legislation were not adopted by August 1, the city and the councilmembers would face contempt adjudication and the following fines: on the city, a fine starting at $100 on August 1 and doubling every day until the legislation was passed, so that the cumulative total of the fines would exceed $10,000 by day 7, $1 million by day 14, $200 million by day 21, and $26 billion by day 28; on the councilmembers, a fine of $500 per day on each member who voted against the legislative package, with the additional threat of incarceration on August 10 if the package were not adopted by the council by that time. To accommodate the city's expressed concern that it could not adopt legislation by August 1 without running afoul of state notice and hearing requirements, the District Court specified that its July 26 order would be "satisfied if the City Council, on or before August 1st, adopts a resolution committing itself to enact the Affordable Housing Ordinance within the minimum time prescribed for notice pursuant to state law." On August 1, the council rejected such a resolution by a vote of 4 to 3.

As contemplated by the July 26 order, the District Court held a hearing on August 2 to afford the city and councilmembers an opportunity to show cause why they should not be adjudicated in civil contempt. As for the city, the District Court "reject[ed] [its] contention that a dichotomy can be drawn between the city and the city council." Further, the District Court declined to adopt the Affordable Housing Ordinance for the city, as requested by the city, noting that the city should directly meet its responsibilities under the Constitution and the consent decree. As for the four councilmembers who had voted against the resolution of intent to adopt the Affordable Housing Ordinance, the District Court rejected their request for a continuance, observing that they had been on notice since July 26 of the prospect of contempt and the need for counsel, and that they had rejected the court's offer of an immediate evidentiary hearing. The District Court agreed nonetheless that it would permit argument at a later date on any theory or circumstance not then available to counsel. The District Court held the city and the councilmembers in contempt and imposed the sanctions set forth in the July 26 order.

On August 9, the Court of Appeals stayed the District Court's contempt sanctions against the city and the four councilmembers

pending appeal. On August 26, the Court of Appeals, in a unanimous opinion by Judge Newman, affirmed the District Court's contempt orders and the imposition of coercive monetary sanctions, with one modification in the city's sanctions. 856 F. 2d 444. First addressing the claims of the councilmembers, the Court of Appeals found that the procedural due process requirements attendant to the contempt adjudications were, with one exception, fully observed. The July 26 order provided sufficient notice to councilmembers of the consequences of noncompliance. Each member appeared with counsel and had an opportunity to present evidence and legal argument. Although the Court of Appeals found that it would have been preferable to have accorded counsel a few days to prepare, it declined to remand the matter given the absence of factual disputes and its decision on the merits. The Court of Appeals also rejected the councilmembers' First Amendment argument, stating that the public interest in obtaining compliance with federal-court judgments that remedy constitutional violations justifies whatever burden there may have been on the councilmembers' free expression rights.

As for the argument that the councilmembers were entitled to some form of legislative immunity, the Court of Appeals noted that, even if such immunity extends to individuals performing legislative functions at the purely local level, it would not bar district court orders requiring compliance with decrees redressing constitutional violations. The Court of Appeals stressed, however, that it was not necessary to answer the broad question whether a district court could order local legislators to vote in favor of a particular ordinance to redress a constitutional violation, because the council had approved, and the city had signed, a consent decree requiring the enactment of legislation necessary to implement the District Court's earlier order. The Court of Appeals found that all councilmembers, including those who had voted against the consent decree, were obligated to enforce it, and that their failure to do so made appropriate contempt adjudications and the imposition of sanctions.

Along these same lines, the Court of Appeals also decided that the District Court did not abuse its discretion in directing the council to adopt the Affordable Housing Ordinance, and in imposing coercive contempt sanctions to compel compliance, given that the city had agreed in the consent decree to adopt necessary implementing legislation. As for the claim that the July 26 order

compelled the council to violate state notice and hearing requirements, the Court of Appeals stressed the supremacy of federal court orders in implementing remedies for constitutional violations. The Court of Appeals added that, in any event, the council could have satisfied the July 26 order by passing a resolution committing itself to enact the legislation in accordance with state-law procedures. As for the city's claims, the Court of Appeals rejected the defense of impossibility, noting that the city had not done everything it could under city law to obtain compliance with the orders of the District Court. In particular, the city had not tried to coerce councilmembers into compliance by applying to the Emergency Financial Control Board to take action with respect to the city's financial affairs, or by requesting the Governor of New York to remove the recalcitrant councilmembers for misconduct. In any event, the Court of Appeals concluded, "[f]or purposes of taking official governmental action, the City of Yonkers is the City Council and vice versa." 856 F. 2d, at 458. The Court of Appeals noted in this regard that the city has no separate executive authority in that its mayor merely serves on the council, and that the city manager serves at the pleasure of the council.

Finally, as to the amount of the coercive fines, the Court of Appeals found that the Excessive Fines Clause of the Eighth Amendment does not apply to civil contempt sanctions imposed to obtain compliance with court orders. Although the court noted that the Due Process Clause of the Fifth Amendment arguably provides a limit, it relied on an abuse-of-discretion standard to review the amount of the fines. The Court of Appeals held that the District Court acted within its discretion in imposing cumulative fines and in starting the fine schedule at $100 a day, but it modified the schedule so that the fine would be $1 million on day 15 and $1 million for every subsequent day of noncompliance. Given the city's annual budget of $337 million, the Court of Appeals found that a $1 million a day fine was within "reasonable limits." 856 F. 2d, at 460.

II

The city argues that the fines imposed by the District Court violate the Excessive Fines Clause of the Eighth Amendment and the Due Process Clause of the Fifth Amendment; that the Court of Appeals erred in affirming the contempt adjudication because the District Court did not adopt less restrictive alternatives; that the city had a valid impossibility defense; and that the order

violated state law. Councilmembers Spallone and Chema claim legislative immunity. Chema also argues that the contempt sanction violates the First Amendment and his procedural due process rights. Councilmembers Longo and Fagan claim generally that the sanction was an abuse of discretion and unconstitutional.

A. *The City*

The city's first contention is that the Excessive Fines Clause of the Eighth Amendment is applicable to contempt sanctions and that the particular sanctions imposed here were constitutionally excessive. The city accurately observes in this regard that the Court has indicated that the applicability of this Clause to punitive damages in civil cases is "a question of some moment and difficulty." *Bankers Life & Casualty Co.* v. *Crenshaw*, 486 U. S. 71, 79 (1988). But, even if the Clause applies to punitive damages, the city offers no compelling reason why we should extend its reach to civil contempt sanctions. Indeed, it appears settled that the Cruel and Unusual Punishments Clause does not apply to civil contempt sanctions. See *Ingraham* v. *Wright*, 430 U. S. 651, 668 (1977). This is not surprising since the Cruel and Unusual Punishments Clause, like the Excessive Fines Clause, applies to punishments for past conduct, while civil contempt sanctions are designed to secure future compliance with judicial decrees. See *ibid.*; *Uphaus* v. *Wyman*, 360 U. S. 72, 81 (1959). In any event, even assuming that the size of monetary contempt sanctions is limited by the Excessive Fines Clause or even the Due Process Clause, I do not think that the fines against the city, as modified by the Court of Appeals, are unreasonable. The city of Yonkers has an annual budget of $337 million. At one point, it offered to forfeit $30 million in federal funds to avoid compliance with the consent decree. Under these circumstances, a fine schedule which imposes $1 million a day only after noncompliance for 15 consecutive days can hardly be deemed unreasonable.

The city's second contention is that the contempt adjudication itself was improper because the District Court should have adopted less restrictive alternatives such as direct enactment of the legislation or appointment of an Affordable Housing Commission, and because the city had a valid impossibility defense. Neither contention has merit. First, the District Court had no need to resort to its equitable authority, codified in Federal Rule of Civil Procedure 70, to deem the legislation enacted, as the city had committed

itself to adopting that legislation in a court-approved consent order. Surely it is both less disruptive and more effective to order compliance with that order than to usurp completely the council's legislative authority and enact the legislation directly. Second, having previously objected to the creation of an Affordable Housing Commission, the city cannot now claim that the District Court should have created such an entity. The city also contends the District Court erred by rejecting its impossibility defense. It claims that it does not have the ability to compel the councilmembers to enact the legislation or to remove recalcitrant members. The city's attempt to divorce itself from the actions of its councilmembers is disingenuous. As the city repeatedly points out in its application, "Yonkers is relatively unique in that most of the governmental power in the city is centralized in the legislative branch." For this reason, the city *is* the council. Indeed, because the council sets municipal policy, see *Pembaur* v. *Cincinnati*, 475 U. S. 469, 481 (1986), it is reasonable to attribute to the city the acts of its elected policymakers.

B. *The Councilmembers*

The councilmembers' primary argument is that a federal court lacks authority to order an individual local legislator, as opposed to the body in which he serves, to enact specific legislation. In the councilmembers' view, a federal court, by entering such an order, runs roughshod over what they see as the local legislator's right to be absolutely free from such restraints. While this issue arguably is of substantial interest, this case is not a proper vehicle for addressing it. In the first place, the broad question raised by the councilmembers is not presented by these facts. As the Court of Appeals stressed below, this is not a case where a federal court enjoined local legislators to vote in favor of a particular bill in order to remedy a constitutional violation. Far from that, this case presents the much more narrow question whether a federal court may order local officials to abide by an explicit obligation—here, a promise to enact legislation—contained in a consent decree that the officials voted to adopt and that the District Court agreed to accept. In short, this case is about a District Court's ability to enforce its consent decrees. In no way did the Court of Appeals even hint that federal courts possess the broad powers over local legislators that the councilmembers claim that the Court of Appeals arrogated to itself and the District Court.

In any event, it is not at all clear that federal courts lack authority in all circumstances to enter orders affecting a local legislator's performance of his legislative duties. In *Milliken* v. *Bradley*, 433 U. S. 267 (1977), the Court held that a District Court could order local school authorities to implement certain programs designed to ameliorate the effects of prior segregation policies. As a practical matter, the import of the Court's decision was that the individual members of the local school authority were required to vote a certain way for specific remedial programs. This necessary effect of a remedial order is highlighted by the Court's earlier decision in *Griffin* v. *Prince Edward County School Board*, 377 U. S. 218 (1964). There, the Court noted that a District Court possessed authority to order county supervisors "to exercise the power that is theirs to levy taxes" in order to reopen public schools that had been closed in an attempt to avoid a prior desegregation order. *Id.*, at 233. As in this case, the individual local officials in *Griffin* openly flouted clear commands of a District Court.

Although cases like *Milliken* and *Griffin* may stand for the proposition that the district courts may enjoin local legislators to take certain affirmative steps in order to remedy constitutional violations, the Court has never squarely addressed the question whether these local legislators are entitled to some form of legislative immunity. In *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency*, 440 U. S. 391, 404, n. 26 (1979), the Court specifically left open the question whether local legislators are entitled to any immunity. (Earlier, in *Tenney* v. *Brandhove*, 341 U. S. 367, 376 (1951), state legislators were afforded absolute immunity for activities within "the sphere of legislative activity"; *Lake Country* extended such immunity to "regional legislators," 440 U. S., at 405.) Since *Lake Country* issued, seven Courts of Appeals have held that local legislators are entitled to absolute legislative immunity. None of these cases, however, involved situations where the District Court sought to compel certain behavior to redress constitutional violations, let alone situations where the District Court merely sought to enforce a consent decree. Instead, the cases typically involved private-party damages actions against individual members of local governing boards. It would seem sensible to allow the lower courts to be the first to resolve the question whether legislative immunity protects local officials against the imposition of contempt sanctions for noncompliance with a consent decree imposing legislative obligations.

Even assuming that this question warrants the Court's immediate attention, the instant case contains a factual peculiarity that makes it unsuitable for review. The city stresses its "extraordinary" system of governance, in which the council exercises both legislative *and* executive powers. This necessarily complicates any legislative immunity analysis, particularly if one believes that the council exercised its *executive* prerogatives by not complying with the consent decree, and by not abiding by the July 26, 1988, order. Before the Court takes up the issue of local legislative immunity, it should wait for a case in which the legislative body is exercising *only* legislative powers.

Finally, the First Amendment and procedural due process claims strike me as totally meritless for the reasons articulated in the Court of Appeals' opinion. In any event, they involve the application of settled law to a particular set of facts.

III

In my view, the claims presented by the city and the four councilmembers do not merit review by the Court. I therefore vote to deny the applications for stay.

SEPTEMBER 8, 1988

Dismissals Under Rule 53

No. 88–5098. BROWN ET UX. *v.* FIRST NATIONAL BANK IN LENOX. C. A. 8th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 844 F. 2d 580.

No. 87–1985. JOYNES, LEGAL REPRESENTATIVE OF THE FUTURE TORT CLAIMANTS OF A. H. ROBINS CO., INC. *v.* A. H. ROBINS CO., INC., ET AL. C. A. 4th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 839 F. 2d 198.

No. 87–2038. HONDA MOTOR CO., LTD. *v.* SALZMAN. Sup. Ct. Alaska. Certiorari dismissed under this Court's Rule 53. Reported below: 751 P. 2d 489.

SEPTEMBER 14, 1988

Miscellaneous Order

No. A–215. BRIDGE *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. Application for stay of execution of sentence of death, presented to JUSTICE WHITE, and by him referred

to the Court, granted pending the timely filing and disposition by this Court of a 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.

SEPTEMBER 15, 1988

Miscellaneous Orders

No. A–45. LAUPOT *v.* BERLEY ET AL. Application for stay and other relief, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. A–106. ALEXANDER *v.* UNITED STATES. Application for immediate release or reinstatement of bond, addressed to JUSTICE WHITE and referred to the Court, denied.

No. D–697. IN RE DISBARMENT OF REDDAN. Disbarment entered. [For earlier order herein, see 485 U. S. 985.]

No. D–700. IN RE DISBARMENT OF CULMER. Disbarment entered. [For earlier order herein, see 485 U. S. 1002.]

No. D–721. IN RE DISBARMENT OF ROMAN. Disbarment entered. [For earlier order herein, see *ante*, p. 1214.]

No. D–732. IN RE DISBARMENT OF ANTON. It is ordered that Donald C. Anton, of St. Louis, Mo., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 87–107. PATTERSON *v.* MCLEAN CREDIT UNION. C. A. 4th Cir. [Certiorari granted, 484 U. S. 814.] Motion of American Bar Association for leave to file a brief as *amicus curiae* granted. Motion of Members of the United States Senate et al. for leave to add 27 Members of the United States House of Representatives to the *amici curiae* brief granted.

No. 87–201. MANSELL *v.* MANSELL. Ct. App. Cal., 5th App. Dist. [Probable jurisdiction noted, *ante*, p. 1217.] Motion of the parties to dispense with printing the joint appendix granted.

No. 87–821. PITTSTON COAL GROUP ET AL. *v.* SEBBEN ET AL. C. A. 8th Cir. [Certiorari granted, 484 U. S. 1058];

No. 87–827. McLAUGHLIN, SECRETARY OF LABOR, ET AL. *v.* SEBBEN ET AL. C. A. 8th Cir. [Certiorari granted, 484 U. S. 1058]; and

No. 87–1095. DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR *v.* BROYLES ET AL. C. A. 4th Cir. [Certiorari granted, 485 U. S. 987.] Motion of the Solicitor General for divided argument granted.

No. 87–826. GOLDBERG ET AL. *v.* SWEET, DIRECTOR, ILLINOIS DEPARTMENT OF REVENUE, ET AL.; and

No. 87–1101. GTE SPRINT COMMUNICATIONS CORP. *v.* SWEET, DIRECTOR, ILLINOIS DEPARTMENT OF REVENUE, ET AL. Sup. Ct. Ill. [Probable jurisdiction noted, 484 U. S. 1057.] Motion of MCI Telecommunications Corp. for leave to file a brief as *amicus curiae* granted.

No. 87–980. MISSISSIPPI BAND OF CHOCTAW INDIANS *v.* HOLYFIELD ET AL. Sup. Ct. Miss. [Probable jurisdiction postponed, 486 U. S. 1021.] Motions of Navajo Nation, Menominee Indian Tribe of Wisconsin, and Association on American Indian Affairs, Inc., et al. for leave to file briefs as *amici curiae* granted.

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, 485 U. S. 933.] Motion of Federal Home Loan Bank of Dallas et al. for leave to file a brief as *amici curiae* granted.

No. 87–1055. CHAN ET AL. *v.* KOREAN AIR LINES, LTD. C. A. D. C. Cir. [Certiorari granted, 485 U. S. 986.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 87–1327. COTTON PETROLEUM CORP. ET AL. *v.* NEW MEXICO ET AL. Ct. App. N. M. [Probable jurisdiction noted, 485 U. S. 1005.] Motion of Jicarilla Apache Tribe for leave to file a brief as *amicus curiae* granted.

No. 87–1372. ARGENTINE REPUBLIC *v.* AMERADA HESS SHIPPING CORP. ET AL. C. A. 2d Cir. [Certiorari granted, 485 U. S. 1005.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 87–1485. BLANCHARD *v.* BERGERON ET AL. C. A. 5th Cir. [Certiorari granted, *ante*, p. 1217.] Motion of petitioner to dispense with printing the joint appendix granted.

No. 87–1651. MASSACHUSETTS *v.* OAKES. Sup. Jud. Ct. Mass. [Certiorari granted, 486 U. S. 1022.] Motions of Massachusetts Society for Prevention of Cruelty to Children et al. and Covenant House et al. for leave to file briefs as *amici curiae* granted.

No. 87–1905. MIDLAND ASPHALT CORP. ET AL. *v.* UNITED STATES. C. A. 2d Cir. [Certiorari granted, *ante*, p. 1217.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 87–5840. MCNAMARA *v.* COUNTY OF SAN DIEGO DEPARTMENT OF SOCIAL SERVICES. Ct. App. Cal., 4th App. Dist. [Probable jurisdiction postponed, 485 U. S. 1005.] Motion of American Civil Liberties Union et al. for leave to file a brief as *amici curiae* granted.

Rehearing Denied

No. 86–1386. SALGADO *v.* UNITED STATES, *ante*, p. 1233;

No. 86–1685. FLORIDA ET AL. *v.* LONG ET AL., *ante*, p. 223;

No. 87–1799. NOBEL SCIENTIFIC INDUSTRIES, INC. *v.* BECKMAN INSTRUMENTS, INC., *ante*, p. 1226;

No. 87–5546. FRANKLIN *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, *ante*, p. 164;

No. 87–6393. FARAGA *v.* MISSISSIPPI, *ante*, p. 1210;

No. 87–6460. RUPE *v.* WASHINGTON, 486 U. S. 1061;

No. 87–6811. SMEGO *v.* UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA, *ante*, p. 1220;

No. 87–6814. IN RE ZUSCHLAG, *ante*, p. 1203;

No. 87–6839. KRAMER *v.* SECRETARY, UNITED STATES DEPARTMENT OF THE ARMY, ET AL., *ante*, p. 1208;

No. 87–6860. WALEN *v.* MICHIGAN, *ante*, p. 1208;

No. 87–6870. FISHER *v.* SLATE, JUDGE, MORGAN COUNTY CIRCUIT, ET AL., *ante*, p. 1208;

No. 87–6903. MARTIN *v.* SHANK ET AL., *ante*, p. 1220;

No. 87–6918. BURY *v.* CITY OF LAKELAND, FLORIDA, ET AL., *ante*, p. 1220; and

No. 87–6977. NICKS *v.* ALABAMA, *ante*, p. 1241. Petitions for rehearing denied.

No. 86–1992. IMMIGRATION AND NATURALIZATION SERVICE *v.* PANGILINAN ET AL.; and

No. 86–2019. IMMIGRATION AND NATURALIZATION SERVICE *v.* MANZANO, 486 U. S. 875. Petition of respondent Litonjua for rehearing denied. JUSTICE KENNEDY took no part in the consideration or decision of this petition.

No. 87–1388. ATONIO ET AL. *v.* WARDS COVE PACKING CO., INC., ET AL., 485 U. S. 989. Motion for leave to file petition for rehearing denied.

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 October 3, 1988, to June 9, 1989, 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.

SEPTEMBER 19, 1988

Dismissal Under Rule 53

No. 87–1916. ZANT, WARDEN *v.* GODFREY. C. A. 11th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 836 F. 2d 1557.

Certiorari Denied

No. 88–5328 (A–142). ALLEN *v.* CALIFORNIA. Sup. Ct. Cal. Application for stay of execution of sentence of death, presented to JUSTICE O'CONNOR, and by her referred to the Court, denied. Certiorari denied.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

I dissent and would grant the stay and the petition for certiorari.

This Court's denials today of certiorari and of the stay of execution, of course, have no effect on the current proceedings in the United States District Court for the Eastern District of California. While Allen's applications were pending here, he sought and obtained from the District Court a stay of execution pending disposition of his petition for habeas corpus, and that stay continues undisturbed.

SEPTEMBER 20, 1988

Dismissal Under Rule 53

No. 88–322. AMBICO, INC., ET AL. *v.* DIAMOND SCIENTIFIC CO. C. A. Fed. Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 848 F. 2d 1220.

SEPTEMBER 23, 1988

Dismissal Under Rule 53

No. 87–796. CITIES SERVICE GAS CO. ET AL. *v.* MOBIL OIL CORP. ET AL. C. A. 10th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 818 F. 2d 730.

Miscellaneous Order

No. A–216. PRESTON *v.* FLORIDA. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, granted pending the timely filing and disposition by this Court of a 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.

SEPTEMBER 26, 1988

Miscellaneous Orders

No. A–240. MEYERS, GUARDIAN AD LITEM *v.* LEWIS. Ct. App. Mich. Application for stay, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Motion of petitioner to dispense with printing the petition for writ of certiorari denied.

No. A–244. LEWIS *v.* LEWIS. Ct. App. Mich. Application for stay, presented to JUSTICE SCALIA, and by him referred to the Court, denied.

SEPTEMBER 27, 1988

Dismissal Under Rule 53

No. 87–1782. GORDON *v.* UNITED STATES. C. A. 11th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 817 F. 2d 1538 and 836 F. 2d 1312.

Miscellaneous Order

No. A–198. CLARK ET AL. *v.* ROEMER, GOVERNOR OF LOUISIANA, ET AL. Application to vacate a stay entered by the United States Court of Appeals for the Fifth Circuit, presented to JUSTICE MARSHALL, and by him referred to the Court, denied.

SEPTEMBER 29, 1988

Dismissal Under Rule 53

No. 88–297. CNA CASUALTY OF CALIFORNIA *v.* ROUHE. Ct. App. Cal., 4th App. Dist. Certiorari dismissed under this Court's Rule 53.

SEPTEMBER 30, 1988

Dismissal Under Rule 53

No. 88–110. BRADY *v.* UNITED STATES. C. A. 11th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 844 F. 2d 795.

STATEMENT SHOWING THE NUMBER OF CASES FILED, DISPOSED OF AND REMAINING ON DOCKETS AT CONCLUSION OF OCTOBER TERMS, 1985, 1986 AND 1987

	ORIGINAL			PAID			IN FORMA PAUPERIS			TOTALS		
	1985	1986	1987	1985	1986	1987	1985	1986	1987	1985	1986	1987
Number of cases on dockets	10	12	16	2,571	2,547	2,577	2,577	2,575	2,675	5,158	5,134	5,268
Number of disposed of during term	2	1	5	2,095	2,105	2,131	2,178	2,254	2,251	4,275	4,360	4,387
Number remaining on dockets	8	11	11	476	442	446	399	321	424	883	774	881

	TERMS		
	1985	1986	1987
Cases argued during term	171	175	167
Number disposed of by full opinions	161	164	151
Number disposed of by per curiam opinions	10	10	9
Number set for reargument	1	1	7
Cases granted review this term	187	167	180
Cases reviewed and decided without oral argument	103	113	95
Total cases to be available for argument at outset of following term	101	91	105

JUNE 30, 1988

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ADOLESCENT FAMILY LIFE ACT. See **Constitutional Law,** VI.

APPEALS.

1. *Notices of appeal—Specification of parties.*—Failure to file a notice of appeal in accordance with Federal Rule of Appellate Procedure 3(c)'s requirement that notice "specify the party or parties taking the appeal" presents a jurisdictional bar to appeal. Torres v. Oakland Scavenger Co., p. 312.

2. *Notices of appeal—Timeliness of prisoners' filings.*—Under Federal Rule of Appellate Procedure 4(a)(1), *pro se* prisoners' notices of appeal are "filed" at moment of delivery to prison authorities for forwarding to district court. Houston v. Lack, p. 266.

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CIVIL RIGHTS ACT OF 1871. See also **Constitutional Law,** XVI, 1.

State-action requirement—Physician treating state prison inmates.—A physician who is under contract with a State to provide medical services on a part-time basis to inmates at a state-prison hospital acts "under color of state law," within meaning of 42 U. S. C. § 1983, when he treats an inmate. West v. Atkins, p. 42.

CIVIL RIGHTS ACT OF 1964.

1. *Sex discrimination—Effective date of liability for unequal pension fund benefits payments.—Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans* v. *Norris,* 463 U. S. 1073—which extended principle of *Los Angeles Dept. of Water and Power* v. *Manhart,* 435 U. S. 702, that unequal pension plan contributions for male and female employees based on actuarial tables reflecting women's greater life spans violated Title VII, to unequal benefits payments—establishes appropriate date for commencing liability for employer-operated pension plans that offered discriminatory payment options, and liability may not be imposed for pre-*Norris* conduct; District Court's awards of both prejudgment and postjudgment benefits adjustments are impermissible retroactive relief. Florida v. Long, p. 223.

2. *Subjective employment selection system—Disparate impact analysis.*—Disparate impact analysis may be applied to claims of discrimination caused by a subjective or discretionary selection process such as the one used by respondent in a case where a black employee seeking promotion to supervisory positions was rejected in favor of white applicants. Watson v. Fort Worth Bank & Trust, p. 977.

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CONSTITUTIONAL LAW. See also **Civil Rights Act of 1871; Criminal Law,** 1; **Jurisdiction,** 4; **Social Security Act; Standing to Sue.**

I. Appointments Clause.

Ethics in Government Act of 1978—Appointment of independent counsel.—It does not violate Appointments Clause for Congress to vest appointment of independent counsel in Special Division, a special court created by Act. Morrison v. Olson, p. 654.

CONSTITUTIONAL LAW—Continued.

II. Article III Judges.

Ethics in Government Act of 1978—Special Division's powers.—Powers relating to appointment of independent counsel vested in Special Division—a special court created by Act—do not violate Article III, under which executive or administrative duties of a nonjudicial nature may not be imposed on Article III judges. Morrison v. Olson, p. 654.

III. Confrontation of Witnesses.

Sexual assault charge—Use of screen to separate witnesses from defendant.—Defendant's right to "confront," face-to-face, witnesses giving evidence against him at trial was violated when screen was placed between him and child sexual abuse victims during their testimony, which screen blocked him from their sight but allowed him to see them dimly and hear them; however, case is remanded for State Supreme Court to determine whether such error was harmless beyond a reasonable doubt. Coy v. Iowa, p. 1012.

IV. Cruel and Unusual Punishment.

1. *Death sentence—Conviction of 15-year-old.*—Judgment affirming conviction of, and death sentence given to, petitioner, who was 15 years old at time he committed murder, is vacated. Thompson v. Oklahoma, p. 815.

2. *Death sentence—Instructions on mitigating evidence.*—In a habeas corpus action, Court of Appeals' judgment that a jury's consideration of mitigating evidence was not limited in violation of Eighth Amendment by Texas trial court's failure to give certain jury instructions requested by petitioner in sentencing phase of his capital trial, is affirmed. Franklin v. Lynaugh, p. 164.

V. Equal Protection of the Laws.

1. *Charges for schoolbus services.*—Appellant mother and daughter were not estopped from challenging North Dakota law allowing certain school districts to charge for schoolbus service by fact that mother had signed bus service contracts, and such signing did not render case moot; however, law does not violate Equal Protection Clause. Kadrmas v. Dickinson Public Schools, p. 450.

2. *Exemption from local discrimination law for "distinctly private" clubs.*—Exemption for benevolent orders and religious corporations, deemed to be "distinctly private," from coverage under New York City law forbidding discrimination in certain private clubs does not violate Equal Protection Clause, since city council could have reasonably believed that exempted organizations are different in kind from appellant association's members. New York State Club Assn., Inc. v. New York City, p. 1.

CONSTITUTIONAL LAW—Continued.

VI. Establishment of Religion.

Adolescent Family Life Act.—Act—which authorizes federal grants to certain organizations for services as to, and research on, premarital adolescent sexual relations and pregnancy if, *inter alia*, grantee furnishes certain specified services, involves religious organizations in program, and does not use funds for family planning services or promotion of abortion—does not, on its face, violate Establishment Clause; however, case is remanded for further consideration whether Act, as applied, violates Clause. Bowen v. Kendrick, p. 589.

VII. Freedom of Association.

Private clubs and associations—Facial attack on local antidiscrimination law.—Appellant association's facial First Amendment attack on New York City law forbidding discrimination by certain private clubs fails insofar as it is based on a claim that law is invalid in all of its applications and insofar as it is based on a claim that law is overbroad in that it applies to "distinctly private" clubs. New York State Club Assn., Inc. v. New York City, p. 1.

VIII. Freedom of Speech.

1. *Ban on picketing before private residence.*—Local ordinance making it "unlawful for any person to engage in picketing before or about" an individual's residence is not facially invalid under First Amendment, since it is content neutral, leaves open ample alternative channels of communication, and serves significant government interest of protecting residential privacy. Frisby v. Schultz, p. 474.

2. *State Charitable Solicitations Act—Legality of fees—Disclosure and licensing requirements.*—Act is unconstitutional insofar as it uses percentages to determine legality of professional fundraisers' fees, requires that such fundraisers disclose to potential donors gross percentage of revenues retained in prior charitable solicitations, and requires that such fundraisers be licensed before engaging in solicitation. Riley v. National Federation of Blind of North Carolina, p. 781.

IX. Privilege Against Self-Incrimination.

1. *Motion to quash subpoena—Production of corporate records.*—Where federal grand jury issued a subpoena to petitioner as corporations' president to produce corporate records, he could not resist subpoena on ground that act of production would incriminate him in violation of Fifth Amendment. Braswell v. United States, p. 99.

2. *Requiring target of investigation to authorize disclosure of bank records.*—A District Court order compelling a grand jury investigation target to sign a consent directive authorizing foreign banks to disclose records

CONSTITUTIONAL LAW—Continued.
of his accounts, without identifying those documents or acknowledging their existence, did not violate target's Fifth Amendment privilege against self-incrimination, since such a directive is not testimonial in nature. Doe v. United States, p. 201.

X. Privileges and Immunities Clause.

Residency requirement for admission to Virginia's Bar.—Virginia's residency requirement for admission to State's bar without examination violates Privileges and Immunities Clause. Supreme Court of Virginia v. Friedman, p. 59.

XI. Right to Counsel.

Postindictment questioning.—Petitioner's interrogation following his indictment did not violate his Sixth Amendment right to counsel, since he did not seek to have counsel present; since State, by admonishing him with *Miranda* warnings, met its burden of showing that his waiver was "knowing and intelligent"; and since right to counsel is not "superior" to, or "more difficult" to waive, than its Fifth Amendment counterpart. Patterson v. Illinois, p. 285.

XII. Right to Impartial Jury.

Capital case—Removal of juror for cause.—In a capital case, trial court's error in failing to remove for cause prospective juror who had declared that he would vote to impose death automatically if jury found petitioner guilty did not abridge petitioner's Sixth and Fourteenth Amendment right to an impartial jury, since petitioner's peremptory challenge removed him as effectively as if trial court had done so, and did not abridge petitioner's Fourteenth Amendment due process rights by arbitrarily depriving him of his full complement of peremptory challenges. Ross v. Oklahoma, p. 81.

XIII. Right to Jury Trial.

Necessity for remand for trial on defense formulated by Court of Appeals.—Although defense formulated by Court of Appeals differed from instructions given by District Court to jury at trial, Seventh Amendment guarantee of jury trial does not require that case be remanded for trial on new theory if evidence presented in first trial would not suffice, as a matter of law, to support a jury verdict under properly formulated defense. Boyle v. United Technologies Corp., p. 500.

XIV. Searches and Seizures.

Evidence initially discovered during an illegal entry.—Fourth Amendment does not require suppression of evidence initially discovered during police officers' illegal entry of private premises, if that evidence is also dis-

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covered during a later search pursuant to a valid warrant that is wholly independent of initial illegal entry. Murray v. United States, p. 533.

XV. Separation of Powers.

Ethics in Government Act of 1978—Interference with Executive Branch functions.—Independent counsel provisions of Act do not violate separation-of-powers principles by impermissibly interfering with Executive Branch functions, such as removal of executive officials. Morrison v. Olson, p. 654.

XVI. Supremacy Clause.

1. *Civil Rights Act of 1871—Pre-emption of state law.*—Because Wisconsin notice-of-claim statute—which requires that certain notice provisions be met before suit can be brought in state court against a state or local government entity—conflicts in both its purpose and effects with 42 U. S. C. § 1983's remedial objectives, and because its enforcement in state-court actions will frequently and predictably produce different outcomes in § 1983 litigation based solely on whether a claim is asserted in state or federal court, it is pre-empted pursuant to Supremacy Clause when a § 1983 action is brought in a state court. Felder v. Casey, p. 131.

2. *Federal Energy Regulatory Commission (FERC) proceedings—Pre-emption of state proceedings.*—FERC proceedings resulting in an order allocating costs of a nuclear powerplant among specified state utilities pre-empted State Public Service Commission from conducting prudence inquiry before approving rate increase to pay for FERC-mandated power. Mississippi Power & Light Co. v. Mississippi *ex rel.* Moore, p. 354.

3. *Uniquely federal interests—Pre-emption of state tort law.*—Even in absence of federal legislation specifically immunizing Government contractors, federal law can shield contractors from liability for design defects in military equipment, since procurement of equipment by United States is an area of "uniquely federal interest" in which state law is pre-empted and replaced, where necessary, by federal law of a content prescribed (without a specific statutory directive) by courts. Boyle v. United Technologies Corp., p. 500.

CONTEMPT JUDGMENTS. See **Jurisdiction**, 4.

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CRIMINAL LAW. See also **Constitutional Law,** III, IV, XI, XII, XIV; **Speedy Trial Act of 1974.**

1. *Enforcement of Thirteenth Amendment—Meaning of "involuntary servitude."*—For purposes of criminal prosecutions under federal laws prohibiting individuals from conspiring to prevent persons from exercising their Thirteenth Amendment right to be free from involuntary servitude and from knowingly holding them in involuntary servitude, "involuntary servitude" means a condition of servitude in which victim is forced to work for defendant by use or threat of physical restraint or physical injury or by use or threat of coercion through law or legal process. United States v. Kozminski, p. 931.

2. *Prosecutorial misconduct—Dismissal of indictment.*—Where record does not support conclusion that defendants were prejudiced by prosecutorial misconduct before grand jury, District Court lacked authority to invoke its supervisory authority to dismiss indictment. Bank of Nova Scotia v. United States, p. 250.

CRUEL AND UNUSUAL PUNISHMENT. See **Constitutional Law,** IV.

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DEATH PENALTY. See **Constitutional Law,** IV, XII.

DEFECTS IN MILITARY EQUIPMENT. See **Constitutional Law,** XVI, 3.

DISABILITY BENEFITS. See **Social Security Act.**

DISCRETIONARY EMPLOYMENT SELECTION PROCESSES. See **Civil Rights Act of 1964,** 2.

DISCRIMINATION ON BASIS OF RACE. See **Civil Rights Act of 1964,** 2.

DISCRIMINATION ON BASIS OF SEX. See **Civil Rights Act of 1964,** 1.

DISMISSAL OF INDICTMENTS. See **Criminal Law,** 2; **Speedy Trial Act of 1974.**

DISPARATE IMPACT ANALYSIS OF EMPLOYMENT DISCRIMINATION CLAIMS. See **Civil Rights Act of 1964,** 2.

DISTRICT COURTS. See **Criminal Law,** 2; **Equal Access to Justice Act; Jurisdiction,** 2–4; **Speedy Trial Act of 1974.**

DIVERSITY JURISDICTION. See **Venue.**

DUE PROCESS. See **Constitutional Law,** XII; **Social Security Act.**

DUTY OF FAIR REPRESENTATION. See **Jurisdiction,** 1.

EFFECTIVE DATE OF LIABILITY FOR DISCRIMINATORY EMPLOYER-OPERATED PENSION PLANS. See **Civil Rights Act of 1964,** 1.

EIGHTH AMENDMENT. See **Constitutional Law,** IV.

ELECTRIC POWER RATES. See **Constitutional Law,** XVI, 2.

EMPLOYER AND EMPLOYEES. See **Civil Rights Act of 1964.**

EMPLOYMENT DISCRIMINATION. See **Civil Rights Act of 1964.**

EQUAL ACCESS TO JUSTICE ACT.

Standard of review—Meaning of substantial justification—"Special factors" used to increase reimbursement rate.—In an action arising out of Secretary of Housing and Urban Development's decision not to implement a subsidy program authorized by statute, Court of Appeals correctly applied an abuse-of-discretion standard in reviewing District Court's determination that Secretary's decision was not "substantially justified" under Act; statutory phrase "substantially justified" means justified in substance or in the main—that is, justified to a degree that could satisfy a reasonable person; while District Court did not abuse its discretion in finding that Government's position was not substantially justified, it did abuse its discretion in fixing amount of attorney's fees, since none of reasons court relied on to increase reimbursement rate above statutory maximum was a "special factor" within Act's meaning. Pierce v. Underwood, p. 552.

EQUAL PROTECTION OF THE LAWS. See **Constitutional Law,** V.

ESTABLISHMENT OF RELIGION. See **Constitutional Law,** VI.

ESTOPPEL. See **Constitutional Law,** V, 1.

ETHICS IN GOVERNMENT ACT OF 1978. See **Constitutional Law,** I, II, XV.

EVIDENCE. See **Constitutional Law,** XIII, XIV.

EXECUTIVE BRANCH. See **Constitutional Law,** XV.

FAMILY PLANNING. See **Constitutional Law,** VI.

FEDERAL COURTS. See **Jurisdiction,** 1.

FEDERAL ENERGY REGULATORY COMMISSION. See **Constitutional Law,** XVI, 2.

FEDERAL GRAND JURIES. See **Constitutional Law,** IX.

FEDERAL RULES OF APPELLATE PROCEDURE. See **Appeals.**

FEDERAL-STATE RELATIONS. See **Constitutional Law,** XVI.

FEDERAL TORT CLAIMS ACT.

Intentional tort exception—Negligence of Government employees in failing to prevent intentional assault.—Where petitioners' lawsuit under Act was based on alleged negligence of Government employees who failed to stop an intoxicated off-duty serviceman from firing rifle at petitioners rather than on fact that serviceman himself was a Government employee at time he committed intentional assault, petitioners' claim was not barred by Act's intentional tort exception. Sheridan v. United States, p. 392.

FIFTH AMENDMENT. See **Constitutional Law**, IX, XI.

FIRST AMENDMENT. See **Constitutional Law**, VI–VIII; **Jurisdiction**, 1.

FORUM SELECTION. See **Venue.**

FOURTEENTH AMENDMENT. See **Constitutional Law**, IV, V, XII.

FOURTH AMENDMENT. See **Constitutional Law**, XIV.

FREEDOM OF ASSOCIATION. See **Constitutional Law**, VII.

FREEDOM OF SPEECH. See **Constitutional Law**, VIII.

FUNDRAISERS. See **Constitutional Law**, VIII, 2.

GOVERNMENT CONTRACTORS. See **Constitutional Law**, XVI, 3.

GOVERNMENT EMPLOYEES. See **Federal Tort Claims Act; Social Security Act.**

GRAND JURIES. See **Constitutional Law**, IX; **Criminal Law**, 2.

HARMLESS-ERROR DOCTRINE. See **Constitutional Law**, III.

ILLEGAL SEARCHES AND SEIZURES. See **Constitutional Law**, XIV.

IMMUNIZATION OF GOVERNMENT CONTRACTORS FROM LIABILITY. See **Constitutional Law**, XVI, 3.

IMPARTIAL JURIES. See **Constitutional Law**, XII.

INDEPENDENT COUNSEL. See **Constitutional Law**, I, II; **Jurisdiction**, 4.

INDICTMENTS. See **Criminal Law**, 2; **Speedy Trial Act of 1974.**

INTENTIONAL TORTS. See **Federal Tort Claims Act.**

INTERROGATION OF PRISONERS. See **Constitutional Law**, XI.

INVOLUNTARY SERVITUDE. See **Criminal Law**, 1.

JURISDICTION. See also **Appeals; Standing to Sue.**

1. *Federal courts—Unfair labor practice charge.*—In an action by bargaining-unit employees, who were not members of petitioner union,

JURISDICTION—Continued.
alleging that union's use of their agency fees, which were paid in lieu of union dues, for purposes other than collective-bargaining activities violated duty of fair representation, employees' First Amendment rights, and National Labor Relations Act provision permitting a collective-bargaining agreement to require all employees in bargaining unit to pay union dues whether or not they are union members, courts below had jurisdiction over former two claims; although National Labor Relations Board had primary jurisdiction over third claim, courts were not precluded from deciding its merits insofar as such a decision was necessary to disposition of fair representation claim. Communications Workers v. Beck, p. 735.

2. *Federal district courts—Medicaid reimbursement claim.*—Federal district courts, rather than Claims Court, have jurisdiction to review a final Department of Health and Human Services order refusing to reimburse a State for a category of expenditures under its Medicaid program; Court of Appeals erred in not affirming District Court's judgments in their entirety. Bowen v. Massachusetts, p. 879.

3. *Federal district courts—Nonparty witness—Defense against civil contempt adjudication.*—A nonparty witness may defend against a civil contempt adjudication for refusing to comply with subpoenas by challenging a district court's subject-matter jurisdiction and is not limited to contention that court lacked even colorable jurisdiction to hear suit. United States Catholic Conference v. Abortion Rights Mobilization, Inc., p. 72.

4. *Supreme Court—Failure to object to consideration of claims' merits.*—On an appeal from a contempt judgment, Supreme Court declines to hear appellant's claim that Court of Appeals lacked authority to consider appellees' constitutional claims, where appellant had failed to object to District Court's consideration of those claims' merits. Morrison v. Olson, p. 654.

JURY INSTRUCTIONS. See **Constitutional Law**, IV, 2.

JURY SELECTION. See **Constitutional Law**, XII.

JURY TRIALS. See **Constitutional Law**, XII.

JUVENILES CONVICTED OF CAPITAL CRIMES. See **Constitutional Law**, IV, 1.

LAWYERS. See **Constitutional Law**, X.

LICENSING OF CHARITABLE FUNDRAISERS. See **Constitutional Law**, VIII, 2.

MEDICAID. See **Jurisdiction**, 2.

MILITARY EQUIPMENT. See **Constitutional Law**, XVI, 3.

MINORS CONVICTED OF CAPITAL CRIMES. See **Constitutional Law**, IV, 1.

MISCONDUCT BY PROSECUTOR. See **Criminal Law**, 2.

MITIGATING EVIDENCE AT CAPITAL SENTENCING HEARING. See **Constitutional Law**, IV, 2.

MOOTNESS. See **Constitutional Law**, V, 1.

MURDER. See **Constitutional Law**, IV, XII.

NATIONAL LABOR RELATIONS BOARD. See **Jurisdiction**, 1.

NEGLIGENCE BY GOVERNMENT EMPLOYEES. See **Federal Tort Claims Act.**

NEW YORK CITY. See **Constitutional Law**, V, 2; VII.

NONPARTY WITNESSES. See **Jurisdiction**, 3.

NORTH CAROLINA. See **Constitutional Law**, VIII, 2.

NORTH DAKOTA. See **Constitutional Law**, V, 1.

NOTICE-OF-CLAIM STATUTES. See **Constitutional Law**, XVI, 1.

NOTICES OF APPEAL. See **Appeals.**

NUCLEAR POWERPLANTS. See **Constitutional Law**, XVI, 2.

PARTIES. See **Appeals**, 1.

PENSION PLANS. See **Civil Rights Act of 1964**, 1.

PEREMPTORY CHALLENGES TO PROSPECTIVE JURORS. See **Constitutional Law**, XII.

PHYSICIANS TREATING PRISON INMATES AS ACTING UNDER COLOR OF STATE LAW. See **Civil Rights Act of 1871.**

PICKETING BANS. See **Constitutional Law**, VIII, 1.

POSTINDICTMENT QUESTIONING. See **Constitutional Law**, XI.

POWERPLANTS. See **Constitutional Law**, XVI, 2.

PRE-EMPTION OF STATE LAW BY FEDERAL LAW. See **Constitutional Law**, XVI.

PREGNANCY. See **Constitutional Law**, VI.

PRISONERS. See **Appeals**, 2; **Civil Rights Act of 1871.**

PRIVACY RIGHTS. See **Constitutional Law**, VIII, 1.

PRIVATE CLUBS. See **Constitutional Law**, V, 2; VII; **Standing to Sue.**

PRIVILEGE AGAINST SELF-INCRIMINATION. See **Constitutional Law**, IX.

PRIVILEGES AND IMMUNITIES CLAUSE. See **Constitutional Law**, X.

PROCUREMENT OF EQUIPMENT BY UNITED STATES. See **Constitutional Law**, XVI, 3.

PRODUCTION OF CORPORATE RECORDS. See **Constitutional Law**, IX, 1.

PROFESSIONAL FUNDRAISERS. See **Constitutional Law**, VIII, 2.

PROMOTIONS. See **Civil Rights Act of 1964**, 2.

PROSECUTORIAL MISCONDUCT. See **Criminal Law**, 2.

PRUDENCE INQUIRY BY STATE PUBLIC UTILITY COMMISSION. See **Constitutional Law**, XVI, 2.

PUBLIC UTILITIES. See **Constitutional Law**, XVI, 2.

RACIAL DISCRIMINATION. See **Civil Rights Act of 1964**, 2.

RECORDS PRODUCTION. See **Constitutional Law**, IX, 1.

REIMBURSEMENT FOR ATTORNEY'S FEES. See **Equal Access to Justice Act.**

RELIGIOUS CORPORATIONS. See **Constitutional Law**, V, 2.

REMOVAL OF PROSPECTIVE JURORS. See **Constitutional Law**, XII.

RESIDENCY REQUIREMENT FOR ADMISSION TO STATE BAR. See **Constitutional Law**, X.

RESIDENTIAL PROPERTY PRIVACY. See **Constitutional Law**, VIII, 1.

RETROACTIVITY OF SUPREME COURT'S JUDGMENTS. See **Civil Rights Act of 1964**, 1.

RIGHT TO COUNSEL. See **Constitutional Law**, XI.

RIGHT TO IMPARTIAL JURY. See **Constitutional Law**, XII.

RIGHT TO JURY TRIAL. See **Constitutional Law**, XIII.

RIGHT TO PRIVACY. See **Constitutional Law**, VIII, 1.

RIGHT TO SUE. See **Standing to Sue.**

SCHOOLS. See **Constitutional Law**, V, 1.

SCREENING WITNESSES' VIEW OF ACCUSED. See **Constitutional Law**, III.

SEARCHES AND SEIZURES. See **Constitutional Law,** XIV.

SECTION 1983. See **Civil Rights Act of 1871; Constitutional Law,** XVI, 1.

SEPARATION OF POWERS. See **Constitutional Law,** XV.

SERVITUDE. See **Criminal Law,** 1.

SEVENTH AMENDMENT. See **Constitutional Law,** XIII.

SEX DISCRIMINATION. See **Civil Rights Act of 1964,** 1.

SEXUAL ABUSE OF MINORS. See **Constitutional Law,** III.

SIXTH AMENDMENT. See **Constitutional Law,** III, XI, XII.

SOCIAL SECURITY ACT. See also **Jurisdiction,** 2.

Denial of disability benefits—Constitutional tort.—Improper denial of Social Security disability benefits, allegedly resulting from due process violations by government officials who administered Federal Social Security program, cannot give rise to a *Bivens* cause of action for money damages against those officials. Schweiker v. Chilicky, p. 412.

SOLICITATION OF CHARITABLE CONTRIBUTIONS. See **Constitutional Law,** VIII, 2.

SPECIAL DIVISION. See **Constitutional Law,** I, II.

"SPECIAL FACTOR" UNDER EQUAL ACCESS TO JUSTICE ACT. See **Equal Access to Justice Act.**

SPEEDY TRIAL ACT OF 1974.

District courts—Dismissal of indictments—Abuse of discretion.—Act—which requires that an indictment be dismissed if defendant is not brought to trial within a 70-day period—establishes framework which guides district court determinations whether to dismiss with or without prejudice and appellate review of such determinations; analyzing record within such framework, District Court abused its discretion in deciding to bar respondent's reprosecution and Court of Appeals erred in holding otherwise. United States v. Taylor, p. 326.

STANDARD OF REVIEW. See **Equal Access to Justice Act.**

STANDING TO SUE.

Consortium of private clubs and associations.—A nonprofit association consisting of a consortium of private clubs and associations has standing to challenge, on behalf of its members, constitutionality of a New York City law forbidding discrimination by certain private clubs, since those members would otherwise have standing to sue in their own right. New York State Club Assn., Inc. v. New York City, p. 1.

STATE ACTION. See **Civil Rights Act of 1871.**

STATE BAR ADMISSIONS. See **Constitutional Law, X.**

SUBJECTIVE EMPLOYMENT SELECTION PROCESSES. See **Civil Rights Act of 1964, 2.**

SUBJECT-MATTER JURISDICTION. See **Jurisdiction, 3.**

SUBPOENAS. See **Constitutional Law, IX, 1; Jurisdiction, 3.**

"SUBSTANTIALLY JUSTIFIED" UNDER EQUAL ACCESS TO JUSTICE ACT. See **Equal Access to Justice Act.**

SUPPRESSION OF EVIDENCE. See **Constitutional Law, XIV.**

SUPREMACY CLAUSE. See **Constitutional Law, XVI.**

SUPREME COURT. See **Civil Rights Act of 1964, 1; Jurisdiction, 4.**

THIRTEENTH AMENDMENT. See **Criminal Law, 1.**

TIMELINESS OF APPEAL. See **Appeals, 2.**

TITLE VII OF CIVIL RIGHTS ACT OF 1964. See **Civil Rights Act of 1964.**

TORTS. See **Constitutional Law, XVI, 3; Federal Tort Claims Act; Social Security Act.**

TRANSFER OF CIVIL ACTIONS. See **Venue.**

TRIAL BY JURY. See **Constitutional Law, XIII.**

UNFAIR LABOR PRACTICE CHARGES. See **Jurisdiction, 1.**

UNIONS. See **Jurisdiction, 1.**

UNIQUELY FEDERAL INTERESTS. See **Constitutional Law, XVI, 3.**

UTILITIES. See **Constitutional Law, XVI, 2.**

VENUE.

Diversity jurisdiction—Contractual forum-selection clause—Application of state or federal law.—In a diversity action, 28 U. S. C. § 1404(a)—under which motions to transfer civil actions are adjudicated—rather than state law governs decision whether to give effect to parties' contractual forum-selection clause and transfer case according to terms of agreement. Stewart Organization, Inc. v. Ricoh Corp., p. 22.

VIRGINIA. See **Constitutional Law, X.**

WISCONSIN. See **Constitutional Law, XVI, 1.**

WITNESSES. See **Constitutional Law, III; Jurisdiction, 3.**

WORDS AND PHRASES.

1. *"Involuntary servitude."* 18 U. S. C. §§ 241, 1584. United States v. Kozminski, p. 931.

2. *"Special factor."* Equal Access to Justice Act, 28 U. S. C. § 2412(d)(2)(A)(ii). Pierce v. Underwood, p. 552.

3. *"Substantially justified."* Equal Access to Justice Act, 28 U. S. C. § 2412(d)(1)(A). Pierce v. Underwood, p. 552.